



Chapter 2

United States v. Oliver L. North

Oliver L. North, a Marine lieutenant colonel assigned to the National Security Council staff beginning in 1981 until he was fired on November 25, 1986, was the White House official most directly involved in secretly aiding the contras, selling arms to Iran, and diverting Iran arms sales proceeds to the contras.

North, who was deputy director of political-military affairs, reported many of his activities to his superiors, National Security Adviser Robert C. McFarlane and later John M. Poindexter. He claimed to have taken much of his direction from Central Intelligence Agency Director William Casey.¹

¹ See Casey chapter.

More significantly, North testified repeatedly that he believed President Reagan was aware and approving of his activities. North was unable to offer direct proof of presidential knowledge and authorization. Both McFarlane and Poindexter, who were North's channel to the President, have either claimed ignorance of certain of North's activities or said they deliberately shielded the President from such details. President Reagan in written interrogatory answers to Independent Counsel also denied knowledge of North's illegal conduct. Although the Office of Independent Counsel could not prove that President Reagan directly approved North's criminal actions, there is no doubt that he and his national security advisers allowed North to operate with unprecedented latitude in furtherance of Administration policies.

North was indicted in March 1988 on 16 Iran/contra charges, along with Poindexter, retired U.S. Air Force Maj. Gen. Richard V. Secord and Albert Hakim in a 23-count indictment. After the cases were severed and the central conspiracy charges were dropped due to classified-information problems, North stood trial beginning in February 1989 on 12 counts. On May 4, 1989, he was found guilty of three counts, including aiding and abetting obstruction of Congress, shredding and altering official documents, and accepting an illegal gratuity from Secord. North's convictions were vacated on July 20, 1990, after the appeals court found that witnesses in his trial might have been impermissibly affected by his immunized congressional testimony.

The Decision to Prosecute

It is no exaggeration to say that the North case was central to the investigation into the entire Iran/contra matter. This may be difficult to understand in view of North's middle-level position on the NSC staff. It gave him no statutory power to command and control activities within the NSC, much less other areas of the vast government bureaucracy such as the departments of State and Defense and the CIA. Despite these limiting factors, it was clear from the earliest stages of OIC's investigation that North had working control of the Secord-Hakim covert-action Enterprise.

North amassed the authority to carry out his role through a combination of factors, including:

(1) President Reagan's directive to McFarlane to keep the contra forces together "body and soul," despite the Boland Amendment funding cut-off,² and the President's determination to pursue the release of American hostages at whatever cost.

² McFarlane, North Trial Testimony, 3/10/89, p. 3946.

(2) An extraordinary delegation of authority to North by McFarlane and Poindexter in executing the contra and Iran operations.

(3) The decision by President Reagan, Casey and others to run covert operations out of the NSC, where there was no institutional framework for conducting such operations and no system of accountability or oversight.

(4) The designation of North as the secret point man for contra support after CIA assistance was cut off by the Boland prohibition.

(5) The perception, promoted by North and his operational partners, that their activities were known to and authorized by the President, making others more willing to support and less eager to question them.

(6) North's powerful, can-do persona, his enthusiastic commitment to both operations, and his ruthlessness to make them succeed.

Independent Counsel viewed the prosecution or cooperation of North as the key to the secrets behind the Iran/contra affair. When North refused to enter into plea negotiations leading to a cooperation agreement, it left no alternative but to proceed with prosecution, even though it presented unusual difficulties.

The most serious obstacle to North's prosecution was the immunity grant extended him by the Select Committees that in 1987 investigated the Iran/contra matter. North's nationally televised testimony under that grant of use immunity, which guaranteed that nothing he told Congress could be used against him in a criminal proceeding, greatly complicated Independent Counsel's investigation and raised serious questions as to whether North could ever be tried. A second and equally formidable challenge was whether North would try to "graymail" his prosecution by claiming the need for classified information that could not be declassified for trial.

Pre-Trial Proceedings

The Grand Jury on March 16, 1988, returned a 23-count indictment charging North, Poindexter, Secord and Hakim with conspiracy to defraud the Government, theft of Government property and wire fraud. North was charged also with obstruction of congressional investigations and false statements to a congressional committee and the attorney general, shredding and altering official documents, acceptance of an illegal gratuity from Secord in the form of a home-security system, conversion of traveler's checks and tax-fraud conspiracy.

The four-defendant case, *U.S. v. Poindexter*, was assigned to Judge Gerhard A. Gesell of the U. S. District Court for the District of Columbia. The battle to bring the case to trial was fought on a number of fronts, with the defense filing over 100 pre-trial motions. The principal issues were the validity of the indictment itself; the application of *Kastigar v. United States*,³ the ruling which set the standard for the protection of immunized witnesses from prosecution and which would govern the rules to keep the trial free of the immunized congressional testimony given by North, Poindexter and Hakim; the application of the Classified Information Procedures Act (CIPA), which governs the disclosure of classified information in trials; and immense discovery demands, which required the prosecution to turn over hundreds of thousands of documents to the defendants.

³ 406 U.S. 441 (1972).

The defendants' first successful challenge to the March 1988 indictment was a motion for severance of the four cases. They successfully argued that their intention to use the immunized testimony of their co-defendants in their own defenses prevented a joint trial.⁴

4 North also contended that evidence which would be admissible against his co-defendants would not be admissible against him, a factor which weighed in favor of severance. North attempted to use the immunized testimony of Poindexter at trial, but Judge Gesell upheld the Government's objection to such use.

The severance of the four trials on June 8, 1988, was a major setback for Independent Counsel.⁵ He elected to try North first. Because North was tried alone, without his superior and co-conspirators, he was better able to present himself as a fall guy and blame others for his misdeeds. But the worst impact of severance was the delay it imposed on Independent Counsel's investigative and trial schedule. This put off for a year the completion of the Poindexter, Secord and Hakim cases and the opportunity to question them, which was essential to the investigation.

5 Judge Gesell ruled from the bench to sever the trials, after hearing oral arguments on the matter.

North's challenges to the indictment were virtually all rejected by the court. One count was dismissed with the Government's consent. One count was dismissed on the court's own motion to avoid confusion at trial.

The most significant ruling by Judge Gesell was his upholding as a crime Count One of the indictment, which described the Iran/contra conspiracy in detail. Count One charged a conspiracy to defraud the United States by deceitfully conducting a covert action in violation of executive orders and statutory restraints. Trial on this count, which was dismissed later because the Administration refused to declassify information material to North's defense, would have disclosed the Government-wide activities that supported the Iran and contra operations.⁶

6 See The Operational Conspiracy: A Legal Analysis chapter.

Judge Gesell also ruled that:

-- Briefings by Executive officials of congressional committees, even though informal and unsworn, may be "proceedings" under the obstruction statute.

-- The federal statute prohibiting false statements covers false and deceitful statements in official correspondence from Executive Branch officials responding to congressional committees.

Kastigar: The Problem of the Congressional Immunity Grants

Prior to severance, the immunized defendants requested a pre-trial hearing to preview the Government's case witness-by-witness to see whether it could be tried without the improper use of their immunized testimony. Independent Counsel urged that this review be deferred until after trial when the actual trial record would be available for analysis. He argued that immunity was a bar to conviction, not to trial. The District Court granted a limited pre-trial hearing. It agreed to inquire into (a) Independent Counsel's procedures for insulating his staff from immunized testimony, (b) the extent to which the Grand Jury heard evidence affected by that testimony, and (c) the independent leads to proposed witnesses and other evidence. After two days of evidentiary hearings, Judge Gesell reviewed Independent Counsel's investigative leads, the Grand Jury proceedings, and the internal files of OIC that documented its efforts to insulate itself from immunized testimony. He permitted extensive examination of Independent Counsel in sworn testimony regarding insulation procedures adopted to protect OIC from being "tainted" by exposure to immunized testimony.

In the end the court held that (1) the Office of Independent Counsel effectively protected itself from undue exposure to immunized testimony, (2) there was no direct use of immunized testimony in the Grand Jury, (3) Independent Counsel's instructions to the grand jurors and Grand Jury witnesses to avoid using immunized testimony were effective, (4) Independent Counsel had untainted leads to

each of its witnesses, and (5) immunized testimony did not enhance the focus of Independent Counsel's investigation.⁷

7 U.S. v. Poindexter, 698 F.Supp. 300, 305-09, 314-16 (D.D.C. 1988). The court later refused to reconsider either its legal view of "use" under Kastigar or the preliminary decisions which shaped the factual record upon which the court based its ultimate conclusions. See Motion for Reconsideration . . . , North, (D.D.C. June 28, 1988); Order, North (July 13, 1988).

The three immunized defendants immediately appealed the court's ruling. They also petitioned the Court of Appeals for a writ of mandamus to compel a more extensive, pre-trial Kastigar hearing. Independent Counsel successfully opposed the appeal on grounds that the question could be reviewed after judgment and that interlocutory review was not warranted. The Court of Appeals ruled that Judge Gesell had "a considerable degree of discretion to fashion the procedure most conducive to resolving fully and fairly all issues regarding the use of immunized testimony at trial."⁸

8 See Petition of Defendants . . . for a Writ of Mandamus, In re Poindexter, No. 88-3097 (D.C. Cir. July 20, 1988); U.S. v. Poindexter, 859 F.2d 216, 222 (D.C. Cir. 1988).

Following severance, Kastigar requirements continued to hamper the orderly trial of the case. During 10 days of jury selection, North succeeded in having all prospective jurors who had any recollection or impression of his immunized testimony excused for cause.⁹ The court rejected North's pretrial motion to suppress the testimony of prosecution witnesses on the grounds that all of them had been exposed to immunized testimony. The court also denied his requests at trial for hearings before the testimony of each prosecution witness. The court instead decided to warn each witness prior to testimony to testify only from his or her personal knowledge, and not to testify to any matter learned or derived from North's immunized appearance before Congress. During trial, Judge Gesell dismissed one prospective witness who said he was unable to comply with this instruction.

9 The court's careful method of excusing jurors who admitted exposure to North's immunized testimony drew fire from North both during trial and on appeal. The Court of Appeals nevertheless concluded that Judge Gesell's method of screening the jurors was proper. See Defendant's Motion to Stay the Proceedings . . . Pending the Selection of a Jury in Conformity With the Jury Selection and Service Act . . . , North (D.D.C. Feb. 7, 1989); Order, North (D.D.C. Feb. 9, 1989) (motion denied), *aff'd*, U.S. v. North, 910 F.2d 843, 909-10 (per curiam), modified in other respects on petition for reh'g, 920 F.2d 940 (D.C. Cir. 1990) (per curiam).

Classified Information and Discovery Problems

In addition to Kastigar problems, Judge Gesell had to confront the problems posed by the likely use of classified information at trial. Using steps prescribed by CIPA, Judge Gesell began carefully sifting North's requests to disclose in his defense certain classified information; if the Government refused to allow material evidence to be disclosed, or if it failed to provide adequate substitutions, charges could be dismissed. Before and during the trial, CIPA problems dominated and very nearly overwhelmed the case.

First, Judge Gesell ordered the construction of a secure facility operated at Government expense to house the classified documents for use of the defendants. After a large, downtown office was remodeled to provide adequate security, Independent Counsel produced to the defense in pretrial discovery more than 100,000 pages of classified and almost 200,000 pages of unclassified documents. This represented only a fraction of what the defendants would ultimately receive.

North and his co-defendants demanded in discovery a search throughout the Government for any and all documents touching on Iran/contra and also on other highly sensitive activities which they

claimed were analogous in some respects. Once located, all documents had to be reviewed, redacted, and annotated as to classification. At the same time, North claimed that he himself had no countervailing responsibility to indicate which classified materials were truly relevant to his defense. In the first challenge to CIPA's requirements, North raised numerous arguments, ranging from complaints that the statute unconstitutionally forced him to disclose defense strategies, to the charge that those responsible for reviewing the materials were too slow and arbitrary in their work.

On July 5, 1988, Independent Counsel presented to the court a 151-page summary of 395 documents that the Government intended to use in its case-in-chief against North. An Interagency Review Group (IRG) -- made up of representatives from the departments of State, Defense and Justice, the CIA, NSC and National Security Agency, and which was responsible for protecting classified information -- required numerous redactions, or omissions, in many documents.

Meanwhile, Judge Gesell, with the consent of Independent Counsel, met privately with North and heard a presentation of his defense in order to better judge the materiality of the classified documents he planned to introduce at trial. As a result of that presentation, the details of which were never disclosed to the prosecution, Judge Gesell afforded North wider discovery, set three deadlines for North to file notices of the classified information that North expected to disclose, and set trial for September 20, 1988.

It soon became clear that neither the intelligence agencies nor North could meet Judge Gesell's schedule. In July 1988 alone, the Government produced 350,000 pages of documents in response to the court's expanded discovery order. Independent Counsel reported that full production would require additional months of work. North, meanwhile, sought a continuance in order to absorb the documents already produced.

The court suggested the feasibility of avoiding the mounting discovery and CIPA problems by dropping the first three counts of the indictment. In hopes of saving these crucial counts, Independent Counsel moved that Counts One through Three be severed from the rest of the case and tried later. North followed up with an 85-page CIPA notice objecting to most of the deletions of classified information proposed by the Government for its case-in-chief documents, and he tendered an unspecific 265-page description of the classified documents he intended to disclose in his defense.

In response to North's motion for a delay necessary for his trial preparation, Judge Gesell cancelled the September trial date. He gave the Government until October 10, 1988, to comply with discovery orders. He denied the motion to sever the first three counts as moot. He struck North's CIPA notices, extended the deadline for filing new notices to November 14, 1988, and directed North to make his notices complete and specific. The Government met the discovery deadline. North's November CIPA notices again contested virtually all of the deletions in the Government's case-in-chief documents and contained a two-inch-thick list of classified documents he intended to submit for his defense, again without spelling out their relevance.¹⁰

¹⁰ North attempted by these broad notices to refrain from disclosing certain classified materials that allegedly were most critical to his defense, and thus central to his claim that the CIPA process violated his constitutional rights. While allowing North to preserve his constitutional objections, the court directed North to submit a final CIPA notice ex parte and in camera by December 19, 1988, or face preclusion of the evidence.

Judge Gesell conducted seven days of closed hearings, beginning November 30, 1988, to hear arguments regarding the appropriateness of the redactions on the classified documents in the Government's case-in-chief.¹¹ To speed the proceedings and minimize confrontations over classification issues during these hearings, Independent Counsel withdrew 100 of its proposed exhibits, and North withdrew 10,000 pages of his documents.

11 Independent Counsel's presentations on CIPA issues were directed by Associate Counsel Christian J. Mixter.

Judge Gesell on December 12, 1988, made several critical CIPA decisions. He wrote that a "fully open, public trial [was] essential" to obtaining justice for North. In the Government's case-in-chief documents, he approved redactions designed to protect the identities of CIA personnel and cooperating foreign nationals, the locations of overseas CIA stations, and intelligence sources and methods. But he also ruled that if the Government introduced all of its proposed evidence, it would have to disclose the identities of certain countries and foreign leaders. These subjects appeared on the Interagency Review Group's list of items that could not be disclosed under any circumstance, even if it meant dismissal of the case -- these items became known in Judge Gesell's courtroom as the "drop-dead" list. Also, Gesell held that certain intelligence reports could only be used in verbatim form, even if that disclosed an intelligence source which the intelligence agencies claimed to be secret. Although Independent Counsel would have proceeded without these reports, North claimed they were also material to his defense.

As for North's claimed need for classified information for his defense, Judge Gesell observed that North had again failed to comply with CIPA in his notices of classified information he intended to disclose. Judge Gesell stated that North's CIPA notices reflected "deliberate disregard" of the court's orders regarding specificity and materiality. In response, Judge Gesell sanctioned North by permitting him to introduce only 300 classified documents. Over North's objections, the court turned over to the intelligence agencies and to Independent Counsel North's third CIPA notice, which included a 162-page narrative of proposed testimony by North and/or other unidentified defense witnesses. Judge Gesell set the trial date at January 31, 1989.

As a result of Judge Gesell's December 12, 1988 CIPA rulings, the heads of the intelligence agencies met with President Reagan's national security adviser to determine whether to permit the disclosure of the information so the trial could proceed, or to ask Attorney General Richard Thornburgh to file a CIPA affidavit refusing to do so, thus forcing dismissal of the case. At that time, no attorney general had ever taken such a step.

The classified information at issue included the names of Latin American countries and officials referred to in certain documents, even though the country identities and the facts spelled out in the documents were publicly known. The intelligence agency heads also refused to permit the disclosure of the nature of intelligence reports circulated to Defense Secretary Caspar W. Weinberger, Casey, Deputy CIA Director Robert M. Gates and others, which exposed the U.S. arms sales and Iranian claims of being overcharged.¹² Judge Gesell ruled that the nature of the intelligence enhanced its credibility and thus would be material to the defense.

12 See Classified Appendix.

In advance of the meeting of the intelligence heads, Independent Counsel on December 20, 1988, filed a brief with Attorney General Richard Thornburgh stressing the importance of the North prosecution. Independent Counsel made clear that the refusal to declassify the information at issue would result in dismissal of central counts against North. Independent Counsel's brief included an extensive collection of press reports, including a book, to demonstrate that the information was not in fact secret. Independent Counsel offered to meet with the group to present his argument, but Thornburgh did not acknowledge the offer.

The meeting went forward in the White House Situation Room on December 21 without Independent Counsel. Associate Counsel to the President William Landers informed Independent Counsel that evening that the agencies would refuse to permit the use of the classified information at North's trial and that Thornburgh would file a CIPA affidavit forcing dismissal of the case if necessary to prevent the information's disclosure. That message was confirmed in subsequent letters from Assistant Attorney General Edward S.G. Dennis, Jr., and CIA Director William H. Webster.

The Reagan Administration's position made it clear that important counts against North were in jeopardy. Independent Counsel unsuccessfully moved for reconsideration of Judge Gesell's order. An appeal of Judge Gesell's rulings as to what was material to the defense was not promising. A trial judge, particularly one as diligent as Judge Gesell, is allowed wide discretion on such matters. Moreover, an appeal would have made an immediate trial impossible, even if the appeal were expedited.

More promising was an effort by Independent Counsel to reach agreement with the intelligence agencies by offering to drop two major counts of the indictment: the conspiracy and theft charges associated with the diversion.¹³ These were the counts to which the intelligence reports at issue were relevant. They were also the counts the Administration most feared.¹⁴ In return for dismissal of Counts One and Two, Independent Counsel obtained tacit agreement from the departments of Justice and State not to block the disclosure of the identities of certain Latin American countries which, if withheld, would have forced the dismissal of many of the remaining counts.

¹³ These were Counts One and Two. In late November 1988, the court had dismissed another major count, wire fraud, on the grounds that it essentially duplicated Count Two.

¹⁴ In an earlier effort to dismiss Count One, the conspiracy count, Thornburgh had filed an amicus brief against Independent Counsel in support of defendant North.

After obtaining this assurance of support, Independent Counsel informed Thornburgh on January 4, 1989, that he would move for the dismissal of the conspiracy and theft counts. The motion was made the following day. After the attorney general filed his affidavit confirming the need to withhold the information, Counts One and Two were dismissed on January 13, 1989.

The dismissal of the conspiracy and theft counts did not end the conflict over classified information in North. The court conducted two more days of hearings on North's additional CIPA notices, which laid out 300 proposed defense trial documents. On January 19, 1989, the court did not rule in advance on each item. The court defined categories of classified information that could or could not be exposed. The court permitted North to use classified information in accordance with those categories relevant to seven specific purposes and for the purpose of impeaching witnesses.¹⁵

¹⁵ North could use the information to show that (1) the chronologies charged in the indictment were correct, (2) his answers to Attorney General Meese were true in November 1986, (3) his answers to various congressional inquiries were also true, (4) he was directed to testify falsely, (5) he did not destroy documents, (6) money donated to the contras were for legitimate, tax-deductible purposes, and (7) he lacked intent to violate the law.

The intelligence agencies were outraged. Judge Gesell's order did not literally comply with the precise pre-trial procedures of CIPA by giving the Government in advance of trial the opportunity to challenge each specific intended use of classified information, one document at a time. However, as Judge Gesell pointed out, CIPA never contemplated such an extensive use of classified information, and there were limits to the court's ability to resolve all questions of materiality before the trial developed.

As the jury was being selected, the intelligence agencies pressed Independent Counsel to get the court to agree to a system whereby the Government would be given 24-hour's advance notice from North of his intent to use classified information in his documents. Independent Counsel offered two proposals, but Judge Gesell rejected both. At the same time, OIC attorneys worked continuously with the intelligence agencies to draft acceptable substitutions for key pieces of the most sensitive classified information in the North documents.

On February 8, 1989, the day before the jury was to be sworn and opening statements were to be delivered, the attorney general attempted to intervene in the case. He filed a motion to compel literal

adherence to CIPA procedures, seeking to stay the trial until the issue was litigated. Independent Counsel opposed the attorney general's motion. Judge Gesell denied the attorney general's request. In response, the attorney general, over the opposition of Independent Counsel, filed an appeal. Judge Gesell excused the jury to await action by the Court of Appeals.

The Court of Appeals denied two motions by the attorney general for a stay of North's trial, agreeing with Judge Gesell and Independent Counsel that the attorney general had no standing to appeal. Although the attorney general obtained a stay from the Supreme Court, during a weekend of negotiations Independent Counsel and the Department of Justice agreed on procedures satisfactory to Judge Gesell. The stay was lifted. Independent Counsel and the attorney general proposed to Judge Gesell a list of nine categories of information requiring prior notice to Independent Counsel by North, so that Independent Counsel could give the Government the opportunity to weigh the impact of public disclosure. The court approved most of the proposal, but stated that Independent Counsel, not the attorney general, bore sole responsibility for the prosecution and would be the Government's sole representative in court.

North was unsuccessful in graymailing the Government into dropping additional charges on grounds of classification. Only one intelligence agency persisted in abusing its classification powers during the trial by stubbornly refusing to consider declassifying even the most mundane and widely known "secrets" under its jurisdiction. But the attorney general declined to support that agency in its extreme positions.¹⁶

16 See Classified Appendix.

Little classified information was divulged during the trial without the Government having had an opportunity to approve its release. Hardly a day went by, however, without controversy. Evenings and weekends were spent in lengthy negotiations between Independent Counsel and the intelligence agencies in an effort to resolve disputes and head off problems. A major achievement was the negotiation of a 42-page Government admission of facts surrounding "quid pro quo" arrangements between the United States and Central American countries for the benefit of the contras, introduced in lieu of the disclosure of classified documents.

Confrontations over CIPA prompted Judge Gesell to observe later that the statute "was ill-suited to a case of this type and amendments are needed to recognize practical difficulties." ¹⁷ After trial, the only challenge North raised on appeal to Judge Gesell's CIPA rulings was his decision to allow the Independent Counsel and the intelligence agencies to review the 162-page summary of anticipated defense testimony. The Court of Appeals agreed with North that Judge Gesell "did not move straightforwardly down the procedural path" of CIPA, and that he erroneously failed to order the Government to notify North of the classified information with which the Government expected to rebut North's information. However, the appeals court refused to reverse convictions on CIPA grounds, holding that North failed to demonstrate any surprise or prejudice as a result of trial errors: "In the absence of any showing by North of actual injury, we find no constitutional violation arising out of the application of CIPA in this case." ¹⁸

17 See Transcript, North (D.D.C. Apr. 6, 1989); U.S. v. North, 713 F. Supp. 1452 (D.D.C. 1989).

18 North, 910 F.2d at 898-903.

The North Trial

Public interest in the North case remained high, despite months of pre-trial proceedings and three weeks of jury selection. After the jury was finally sworn in on February 21, 1989, there were long lines of spectators vying for the 14 or 15 public seats available in Judge Gesell's courtroom. Outside the courthouse, North's arrivals and departures were recorded by waiting camera crews throughout the eight-week trial.

With the dismissal of the central conspiracy and theft charges against North, the prosecution trial team 19 faced the difficult job of proving beyond a reasonable doubt a case consisting of 12 individual charges without the central charges to which they had been appended. They included obstructing a congressional investigation, shredding documents, accepting a bribe and tax-fraud conspiracy.

19 The North case was tried by Associate Counsel John W. Kecker, Michael R. Bromwich and David M. Zornow.

In summary, the charges, renumbered, were:

Count One: Obstruction of Congress in September and October 1985, when congressional committees sought information on press reports alleging that North was engaged in a variety of contra-support activities, in violation of the Boland prohibition on U.S. aid. The indictment charged that North and McFarlane obstructed Congress by falsely denying in three letters North's contra-assistance efforts. The first letter was sent September 5, 1985, to the House Permanent Select Committee on Intelligence (HPSCI); the second, on September 12 to a House Foreign Affairs subcommittee; and the third, on October 7 to HPSCI, responding to additional questions.

Counts Two, Three, and Four: False statements to Congress, charging specific misrepresentations in the three letters described in Count One. These included statements that North had not solicited funds or other support for the contras, had not provided military advice to them, and had not used his influence to facilitate the movement of supplies to the contras.

Count Five: Obstruction of Congress in August 1986, charging that in a presentation to HPSCI members and staff, North falsely denied press accounts that he: (1) had given military advice to the contras; (2) had knowledge of specific military actions conducted by the contras; (3) had contact with retired Maj. Gen. John K. Singlaub within the previous 20 months; (4) raised funds in support of the contras; (5) advised and guided Robert W. Owen with respect to the contras; and (6) had frequent contact with Owen.

Count Six: Obstruction and aiding and abetting in the obstruction of congressional investigations in November 1986, charging that North helped draft a false chronology of the Iran arms sales and altered and destroyed documents in response to congressional inquiries into the Iran initiative.

Count Seven: Obstruction of a presidential inquiry conducted by Attorney General Edwin Meese III from November 21-23, 1986. The indictment charged that North made false statements to Meese on November 23, including that: (1) the NSC had no involvement in the diversion of Iran arms sales proceeds to the contras; (2) the Israelis determined how much of the proceeds from the arms sales were diverted to the contras; and (3) North had advised contra leader Adolfo Calero to open bank accounts in Switzerland to receive the diverted funds. The indictment also charged that North obstructed the Meese inquiry by altering, destroying, concealing and removing relevant official documents.

Count Eight: False statements on November 23, 1986, charging the specific misrepresentations North made to Meese as described in Count Seven.

Count Nine: Concealing, removing, mutilating, obliterating, falsifying and destroying official NSC documents relevant to the Iran/contra matter from November 21-25, 1986.

Count Ten: Receipt of an illegal gratuity, charging North with accepting a home-security system paid for by Secord, in exchange for official acts performed by North.

Count Eleven: Conversion of traveler's checks, charging that North from April 1985 to July 1986 personally used \$4,300 in traveler's checks from approximately \$90,000 in checks given to him by

Calero for hostage-release and contra-related expenses.

Count Twelve: Conspiracy to defraud the United States, the Department of the Treasury and the Internal Revenue Service. The indictment charged that beginning in the spring or summer of 1985, North and others conspired to defraud the United States by illegally using a tax-exempt organization, the National Endowment for the Preservation of Liberty (NEPL), to solicit money for weapons for the contras and other unlawful purposes.²⁰

²⁰ Private fund-raisers Carl R. Channell and Richard R. Miller pleaded guilty to identical charges in 1987, naming North as a co-conspirator in the tax-fraud scheme.

Although the North trial was hard fought, with few exceptions the underlying facts were not truly in dispute. The principal issue was whether North acted with criminal intent. The prosecution presented more than 30 witnesses and hundreds of trial exhibits demonstrating that North did, in fact, perform the acts charged in the indictment. Instead of disproving the facts, North's defense centered on his claims that all his actions were known to and approved by his superiors, that although he knew certain of his actions were wrong, they were justifiable in light of the need for covert action in a dangerous world, and that he never believed any of his actions were unlawful.

At issue, then, was North's intent in performing these acts. The jury had to decide whether North's motives were criminal, or whether he acted out of good intentions in difficult circumstances -- whether he was, as he claimed, a "pawn in a chess game being played by giants." ²¹

²¹ North, North Trial Testimony, 4/7/89, p. 6928.

It was clear that North's job at the NSC was to implement two of the President's most important policy goals: the sustenance of the contras despite the Boland prohibition on U.S. aid, and the release of American hostages being held by pro-Iranian terrorists in Beirut. It was also clear that North worked tirelessly in pursuit of these goals.

To prosecute North successfully, the Government was required to distinguish for the jury North's illegal actions from those that were legitimate, and it had to prove those crimes beyond a reasonable doubt.

The Government's task was complicated by the fact that most of its key witnesses were hostile to the prosecution of North. These witnesses reluctantly described their knowledge of the criminal acts of which North was accused, but at every opportunity sought to help the defendant:

-- McFarlane, who testified about the false letters sent to Congress and other efforts to conceal North's contra-assistance activities, said: "I believe that I am at fault, not him." ²² After testifying on direct examination that North informed him on the weekend of November 21-23, 1986, that there would be a "shredding party," McFarlane asserted on cross-examination that he believed North intended to destroy documents only to protect McFarlane: "I took it not as an act of malice, but just a statement to me that he was going to make sure that I wasn't hurt. And I took it as a statement of a subordinate trying to be loyal . . ." ²³

²² McFarlane, North Trial Testimony, 3/13/89, p. 4146.

²³ Ibid., 3/14/89, p. 4287.

-- Meese, whose testimony was central to proving two of the charges against North, likened his fact-finding interview with North on November 23, 1986, to a "chat among colleagues," although he had previously testified that discovery of the diversion -- the subject of his interview with North -- had caused him to fear the possible impeachment of the President.

-- North's secretary Fawn Hall testified extensively about helping North alter, shred and remove from the White House official NSC documents. She also testified about the blank traveler's checks North kept in his office to distribute to contra leaders. On cross-examination, she described North as a "tireless" and "inspirational" boss, who was "never lazy or self-serving." 24 Hall suggested that repeated questioning by Congress and the OIC caused her to testify that she recalled certain things more clearly than she actually did, including incriminating evidence she provided against North.²⁵

24 Hall, North Trial Testimony, 3/22/89, p. 5419.

25 Ibid., 3/23/89, p. 5423.

-- Calero gave detailed testimony for the prosecution about North's role in supplying weapons and other support to the contras during the Boland cut-off period. On cross-examination, he described North as a "savior," for whom the Nicaraguans should "erect a monument for . . . once we free Nicaragua." 26

26 Calero, North Trial Testimony, 2/23/89, pp. 2054-2055.

-- Colorado beer magnate Joseph Coors, after testifying about his \$65,000 payment to NEPL which was unlawfully solicited as a tax-deductible contribution, stepped down from the witness chair and shook hands with North in full view of the jury.

-- Gen. Singlaub, who testified about his contacts with North in soliciting contributions for the contras from foreign countries, saluted North following his testimony, also in full view of the jury.

On April 6, 1989, North took the stand in his own defense. For six days, North admitted to having assisted the contras during the Boland prohibition on U.S. aid, to having shredded and removed from the White House official documents, to having converted traveler's checks for his personal use, to having participated in the creation of false chronologies of the U.S. arms sales, to having lied to Congress and to having accepted a home security-system from Secord and then fabricating letters regarding payment for the system. But, North testified, "I don't believe I ever did anything that was criminal." 27

27 North, North Trial Testimony, 4/10/89, p. 7134.

North described how, in 1984, he was directed by McFarlane and Casey to sustain the contras during the Boland funding cut-off of U.S. aid. "I understood it [the assignment] very clearly to be that I would be the one to replace the CIA for each of these activities," North said, referring to the efforts he was about to undertake to assist the contras.²⁸ North also testified that "I was told not to tell other people, not to talk about it, to keep my operational role very, very secret, that it should not be something that others came to know about." 29

28 Ibid., 4/6/89, p. 6782.

29 Ibid.

North described how he and Secord, in order to replace the CIA in assisting the contras, in their covert-action Enterprise created a "mirror image outside the government of what the CIA had done." 30 He claimed he never made a single trip or contact "without the permission, express permission, of either Mr. McFarlane or Admiral Poindexter, and usually, when I could, with the concurrence of Director Casey . . ." 31

30 Ibid., p. 6817.

31 Ibid., p. 6829.

North defended himself against the charges that he helped McFarlane and Poindexter obstruct and make false statements to Congress in 1985 and 1986 by characterizing these actions as part of a political dispute that had nothing to do with law-breaking. On direct examination by his attorneys, North cast himself as a victim of circumstances when he lied repeatedly about his contra-assistance efforts to HPSCI members and staff who were pursuing a resolution of inquiry into those activities at an August 6, 1986, meeting at the White House:

Q: How did you feel about being put in that position? You knew that Mr. McFarlane had denied them the information in 1985 in three letters. You knew that Mr. McFarlane had denied them the information twice on Capitol Hill in 1985. You knew that there was a letter from Admiral Poindexter referring back to these letters saying to answer the question. How did you feel about being told by your boss to go into a meeting on August 6th, 1986?

A: I felt like a pawn in a chess game being played by giants. It was a situation where I had been sent to do a lot of things, almost everything that was in that Resolution of Inquiry, by the direction of the President of the United States, I had been told by Admiral Poindexter and by Mr. McFarlane countless times; that I had given the commitment of the United States in the name of the President to the resistance [contra] leadership, to the people in those other countries, the people in foreign governments all over 18 or 19 countries, and that those were things I was told could not, should not and will not be revealed, and yet there was a very strong likelihood that they would be asked, and they were; that the things I had done with the resistance itself in delivering everything from medicine for jungle leprosy to ammunition, to the bases we built for deliveries for the resistance, the arrangements I had made with foreign governments to deliver surface-to-air missiles and ammunition, all of those things I had been told to give the commitment of the United States that it wouldn't be revealed.

I had been told specifically that the Saudi aid that the President had gotten and that Mr. McFarlane had gotten will never be revealed. And by this time we were also using monies from the sale of arms to the Nicaraguan resistance -- to the Iranians to help the Nicaraguan resistance, and that would never be revealed.

And I was put in this situation where having been raised to know what the Ten Commandments are, that it would be wrong to do that, but I never perceived that it would be unlawful.³²

³² Ibid., 4/7/89, pp. 6928-29.

In November 1986, after the Iran arms sales became public, North said he went along with what appeared to be a top-level agreement not to reveal information regarding the 1985 arms sales, including the fact that the President retroactively authorized in a covert-action Finding the November 1985 shipment of HAWK missiles to Iran. "That 1985 shipment, particularly the HAWK shipment in November of 1985, had been a disaster. And we had, throughout, denied that we were involved in it, even though we were. And the reason we denied that is because the Iranians themselves were so upset about it," North said.³³

³³ Ibid., 4/10/89, p. 7079.

North said on cross-examination that on November 20, 1986, during preparation of congressional testimony for Casey and Poindexter, an entire roomful of individuals knew that false assertions were being drafted when North suggested that they say no one in the U.S. Government knew the true cargo of the November 1985 HAWK missile shipment to Iran. North said he knew it was false, Poindexter knew it was false, NSC counsel Paul Thompson knew it was false, Casey knew it was false, and North said he assumed Meese, Assistant Attorney General Charles Cooper, and Deputy CIA Director Gates knew it was false.³⁴

³⁴ Ibid., 4/12/89, pp. 7624-7632.

On November 21, 22 or 24, 1986, North said he witnessed Poindexter destroy what may have been the only signed copy of a presidential covert-action Finding that sought to authorize retroactively CIA participation in the November 1985 HAWK missile shipment to Iran. North said the Finding was destroyed because its language made clear that it was a swap of arms-for-hostages, and because public revelation of the fact that the United States had been involved in the ill-fated shipment would jeopardize the lives of Americans still being held hostage in the Middle East.³⁵ Asked whether he felt he was part of a "den of thieves," North answered he felt he was among honorable men. He said:

35 Ibid., pp. 7601-17.

We sat and tried to formulate and put the very best possible face on what was a diplomatic disaster and a political catastrophe in this country, but I did not regard it to be a criminal act. Nor did I regard the place in which I worked to be a den of thieves.³⁶

36 Ibid., pp. 7620-21.

North denied that he gave false information to Meese in Meese's fact-finding interview of November 23, 1986.³⁷ He disputed the accuracy of notes taken during the interview.³⁸

37 Ibid., 4/10/89, pp. 7091-97.

38 Ibid., 4/13/89, p. 7684.

North testified that he was shocked to hear Meese in a press conference on November 25, 1986, refer to the possibility of criminal action in connection with the Iran/contra diversion. North said he was also surprised to hear Meese suggest that the President did not know about the November 1985 shipment until months later. North said Meese's assertion "was not only contrary to my knowledge and my participation, it was contrary to what I had said the very day before, or on Sunday. It was contrary to what I believed the President had authorized. It was contrary to what I believed all of the other people I had worked with up the chain in the Cabinet knew to be the truth." ³⁹

39 Ibid., 4/10/89, pp. 7104-07.

North blamed his decision to remove classified NSC documents from his office on November 25, 1986, on Washington, D.C., attorney Thomas C. Green. According to North, Green asked him in the wake of his public firing, "Do you have anybody or anything to protect yourself?" As a result, North said, "I gathered up a number of documents that I believed would indicate or show that I had had the authority to do what I had done over the course of those two operations. I put them in my briefcase, along with my notebooks, and left the Executive Office Building with him [Green]." ⁴⁰

40 Ibid., pp. 7109-10. North's attorney Brendan V. Sullivan, Jr., in early December 1986 returned to NSC counsel Paul B. Thompson 168 pages of documents North took with him from the White House. Included were copies of the undated memo in which North described the diversion of Iranian arms sales proceeds to the contras.

After North left the White House and went with Green and Secord to a hotel in Northern Virginia, he received a call from President Reagan. North testified:

The President came on the line and he said, I want to thank you for all your work. I am sorry that it happened the way that it did. He said, "You are an American hero." He asked me to understand that it was -- he just hadn't known or didn't know, words to that effect. I thanked him for the phone call and told him that I was sorry that this had created so much difficulty for him, for the country.⁴¹

41 Ibid., p. 7111.

North had difficulty on cross-examination explaining why he destroyed some NSC records, as he claimed, to protect the lives of individuals involved in the Iran and contra operations, but had taken with him from the White House more than a dozen notebooks containing 2,000 pages of names and details on operations, including some highly classified information.⁴²

⁴² Ibid., pp. 7159-60.

North also had difficulty on cross-examination explaining why he was told by Casey to keep careful track of the payments he made to contra leaders out of an "operational fund" in his office, and why he was subsequently told by Casey in October 1986, following the shootdown of a contra-resupply plane in Nicaragua, to destroy the ledger in which he kept track of those disbursements.⁴³ North testified that \$4,300 in traveler's checks given to him by Calero for the operational fund, and which North spent at grocery stores, gas stations and other retail outlets, were to reimburse himself for operational expenses he paid from his own pocket.⁴⁴ He said he was not nervous about destroying the only record he kept of the operational fund disbursements because he never believed he would ever be accused of doing anything dishonest with the money.⁴⁵

⁴³ Ibid.

⁴⁴ Ibid., pp. 7141-45.

⁴⁵ Ibid., pp. 7196-97.

North testified that he had \$15,000 in cash in a metal box bolted to a closet floor in his home, saved from pocket change and a decades-old insurance settlement.⁴⁶ This, North said, was the source of funds for a car he bought in October 1985. North could not explain why he paid for the car in two cash payments -- the second after North had visited Secord. He said he could not recall the October 1985 payment.⁴⁷

⁴⁶ Ibid., pp. 7145-49.

⁴⁷ Ibid., pp. 7145-53.

North claimed no awareness of a \$200,000 investment account that Secord's business partner Albert Hakim set up for North in Switzerland, although he did admit that he sent his wife Betsy to Philadelphia in March 1986 to meet with Willard I. Zucker, the Secord-Hakim Enterprise's financial manager. North said he believed the purpose of Betsy North's trip to Philadelphia was for her to identify herself to Zucker in case North didn't return from a dangerous trip to Iran. North said he assumed that in the event of his death, something would be done "that was proper and honorable and nothing wrong in any way," denying that the investment account was a bribery attempt by Hakim.⁴⁸

⁴⁸ Ibid., pp. 7184-98. Hakim pleaded guilty in November 1989 to attempting to supplement the salary of North, based partly on the establishment of the \$200,000 investment account. See Hakim chapter.

North was unable to blame others for his acceptance of a home security-system from Secord, except to explain that he accepted the system in response to reported terrorist threats on his life. North admitted that after the Iran/contra affair became public, he exchanged false back-dated letters with Glenn Robinette, a former CIA officer who worked for Secord in installing the system, suggesting payment arrangements. "[I]t was a fairly stupid thing to do," North said.⁴⁹

⁴⁹ Ibid., pp. 7203-10.

North was insistent that many of the activities charged in the indictment were authorized and concealed to protect foreign nationals and others involved in his covert operations. North also

reasserted his belief through most of 1986 that President Reagan had approved even the diversion of Iran arms sales proceeds to the contras:

Q: You understood that you had the approval of the President to use those monies to undertake operations?

A: I'm absolutely certain of the fact that I believed throughout from early February [1986] when we began the concept or putting in place the concept of using Iranian arms sale monies to aid the Nicaraguan resistance and to do those other things, that I deeply believed that I had the authority of the President to do it.⁵⁰

⁵⁰ Ibid., 4/12/89, pp. 7564-65.

North said on November 21 or 22, 1986, he showed Poindexter a copy of the diversion memo and assured him incorrectly that all copies had been destroyed. He asked Poindexter "at that point if the President knew and he told me the President did not know. . . ." ⁵¹

⁵¹ Ibid., p. 7566.

Important Evidence Emerging at Trial

A total of 49 witnesses testified during the eight-week trial: 17 for the defense (including North) and 32 for the Government.⁵² Hundreds of exhibits were admitted into evidence, many of them previously classified Top Secret and beyond, dealing with secret communications and operations over a several-year period, and covering events in the Middle East, Europe, Africa, Central and South America and Asia.

⁵² One of Independent Counsel's witnesses, Thomas Claggett, a businessman who contributed to the contras, was excused by Judge Gesell after he indicated that he could not fully comply with the judge's Kastigar instructions.

Poindexter's Destruction of the Finding

For the prosecution, which had been shielded from immunized congressional testimony, one of the most important items of new evidence to emerge from the trial was North's eyewitness description of Poindexter's destruction of the presidential covert-action Finding authorizing the November 1985 HAWK shipment. Although Poindexter had testified to that destruction in the congressional hearings, Independent Counsel had not heard his immunized testimony. In two-and-a-half years of investigation, no other witness -- including NSC counsel Paul Thompson, whom North said also witnessed the event -- had provided Independent Counsel with this information.⁵³

⁵³ See Thompson chapter.

North subsequently testified about the destruction of the Finding in the Poindexter trial. Although it was not one of the charges against Poindexter because Independent Counsel had no evidence of the destruction when the indictment was returned, it provided important corroborating evidence of his obstruction of and false statements to Congress in November 1986 about the November 1985 arms shipment. The information also caused Independent Counsel to re-question Thompson and to consider bringing charges against him based on this information.⁵⁴

⁵⁴ Ibid.

The Quid Pro Quo Admission

In lieu of the disclosure of classified information deemed relevant by Judge Gesell to North's defense, the Government for trial purposes only admitted to a 42-page statement of facts describing

an elaborate series of secret Reagan Administration contacts with foreign countries in efforts to assist the contras, primarily during the prohibition on U.S. aid. This document, which became known as the "Quid Pro Quo" admission, among other things described these alleged activities:

- The delivery of Israeli-seized PLO weapons to the contras; in exchange, the Department of Defense assured Israel that the United States would be flexible in its approach to Israeli military and economic needs.
- Various forms of assistance to the contras from El Salvador, Guatemala, Honduras and other countries in Central and South America; in exchange, the United States provided increased economic and other aid.
- Approaches for funding to Saudi Arabia, Taiwan, China, South Korea and Brunei, and approaches to other countries for special weapons purchases.
- Discussions with Panamanian dictator Manuel Noriega about committing acts of sabotage against the Nicaragua Sandinista government in exchange for U.S. help in rehabilitating Noriega's public image.
- Secret contacts by President Reagan and other top-ranking officials with foreign leaders about assisting the contras, and similar approaches by U.S. ambassadors abroad.

The "Heads of State" Documents

North entered into evidence seven documents indicating greater knowledge and involvement by President Reagan in contra-assistance efforts than had previously been made public.⁵⁵ Six of the documents described White House approaches to Honduras regarding contra aid in February and March of 1985, outlining incentives to be provided to the Hondurans for their continued support to the contras. The seventh document indicated that in October 1985, National Security Adviser McFarlane sought President Reagan's approval of U.S. reconnaissance overflights of Nicaragua, and notations suggested that the President was informed about the illegal air-drop of recoilless rifles to the contras.

⁵⁵ The documents were: a February 19, 1985 memo to President Reagan from McFarlane concerning a proposed letter to President Suazo of Honduras, which President Reagan approved; a February 20, 1985 memo to McFarlane from North and Raymond F. Burghardt of the NSC staff, and a notation from Poindexter; a October 30, 1985 memo to McFarlane from North with a notation by Poindexter indicating President Reagan's approval of reconnaissance overflights of Nicaragua, with attachments concerning the air-drop of recoilless rifles to the contras; a February 22, 1985 memo to McFarlane from Burghardt seeking authorization to carry a presidential letter to U.S. Ambassador John Negroponte in Honduras to be transmitted to President Suazo; a February 11, 1985 memo to McFarlane from North and Burghardt regarding a special emissary to Honduras to brief President Suazo on "conditions" for expedited assistance, with a handwritten notation from Poindexter to McFarlane regarding who the emissary should be, and attaching a memo to Secretary of State George P. Schultz, Weinberger, Casey and Joint Chiefs of Staff Chairman Gen. John W. Vessey describing an agreement for expedited aid to Honduras "as an incentive to the Hondurans for their continued support to those in jeopardy along the border;" and an April 25, 1985 memo from McFarlane recommending that President Reagan call President Suazo, bearing President Reagan's handwritten notations of the call.

Most of these documents were obtained by Independent Counsel in 1988 in response to discovery requests by North, which resulted in the production of 15,000 pages of White House materials not previously produced to OIC despite comprehensive requests. Of the seven defense documents regarding Honduras and the recoilless rifle drop, OIC had received in response to its original White House document request only that document about the rifle drop.

Following the trial, Independent Counsel pursued the question of why documents had not been produced to the criminal investigation until North's discovery request. The House and Senate intelligence committees also sought to determine why Congress had not received the documents in 1987.⁵⁶ The reasons for non-production were not clear. Three of the original documents were found to have been segregated from NSC institutional files and kept in a special "heads of state" file, which apparently was not searched in response to earlier document requests.

⁵⁶ At least four of the seven North trial documents apparently had never been provided by the White House to the Select Committees in 1987. Two had been provided in a different form, without the questionable notations or without certain attachments. The status of one document's production to Congress was never clearly determined. (HPSCI report to Rep. Lee Hamilton, 6/28/89.)

Independent Counsel in June 1989 sought through the National Archives "prompt access" to all documents relevant to Iran/contra matters contained in the heads-of-state file, which had been shipped to the Reagan Presidential Library in California.⁵⁷ In December 1989, several documents were returned from California in response to Independent Counsel's request.⁵⁸ These documents did not contain significant new information.

⁵⁷ Letter from Christian J. Mixter to John P. Fawcett, National Archives, 6/27/89.

⁵⁸ Letter from Patricia Aronsson to Christian J. Mixter, 12/14/89.

North's Notebooks

When North took the witness stand, Judge Gesell granted Independent Counsel's long-standing request for access to North's daily, detailed working notes, filling 2,617 pages from January 1, 1984 to November 25, 1986.⁵⁹ Earlier OIC efforts to subpoena the spiral-bound notebooks, which North removed from the White House when he was fired in November 1986, failed because North successfully argued that their production would violate his Fifth Amendment protection against self-incrimination.⁶⁰

⁵⁹ Independent Counsel only received copies, however; North retained the original notebooks at the secure facility that had been created for his defense facility in 1988.

⁶⁰ The Select Iran/contra Committees obtained redacted copies of the North notebooks in 1987, under the terms of North's immunity agreement. The Senate Foreign Relations Committee in April 1988 sought to subpoena unedited copies of the notebooks, finding the Select Committees' versions unusable because North's lawyers had blacked out large portions of text.

The notebooks were not immediately made public at the North Trial because they contained highly classified information. They included names, phone conversations, meetings and lists of action items North recorded diligently throughout the day. Although the prosecution team quickly reviewed the notebooks in preparation for cross examining North, their cryptic contents, level of great detail and sheer volume made digesting them for use at trial nearly impossible. But they provided invaluable leads and information for further investigation.⁶¹

⁶¹ In view of the enormous amount of highly classified, compartmented information in the North notebooks, Independent Counsel is at a loss to explain why attorneys general Meese and Thornburgh declined to recover the notebooks from North, who removed them from the NSC after he was fired November 25, 1986. The Government did not recover North's original notebooks until Independent Counsel obtained them pursuant to a Grand Jury subpoena, and after additional litigation by North in 1991.

When the Senate Foreign Relations Committee in June 1989 asked OIC for copies of the notebooks, Independent Counsel responded that he had no objection to their release but that the NSC, as the

agency from which the notes originated, would have to approve their release. At that point, to assist the Senate committee, Independent Counsel attempted to return copies of the notebooks to the NSC. The NSC refused to accept them when an OIC courier tried to deliver them to the Old Executive Office Building. In October 1989, the Department of Justice informed OIC that the NSC was concerned about its "legal right to receive this material without judicial authorization and notice to the defendant. . . ." (Letter from Edward S.G. Dennis to Walsh, 10/2/89.)

Only after OIC was sued under the Freedom of Information Act by two public interest groups -- the National Security Archive and Public Citizen -- for access to the notebooks did the Justice Department finally accept custody of copies of North's notes. In May 1990, approximately 2,000 pages of notes were declassified and made public. Independent Counsel subsequently sent copies of the declassified notebooks to the Senate Foreign Affairs Committee and a classified, uncensored version to the Senate Select Committee on Intelligence.

Presidential Authorization

North's attorneys effectively employed a higher-authorization defense, repeatedly eliciting testimony and exhibiting documents showing that North executed many of his secret activities with the knowledge and approval of his superiors. Important elements of this defense were the quid-pro-quo admission of facts and the seven documents indicating presidential awareness of certain contra-assistance efforts described above. Although North testified that he believed he had his immediate superiors' and even presidential approval for all he did, he offered no hard proof of presidential awareness of any of his criminal acts.

In mounting his higher-authorization defense, North attempted to subpoena President Reagan and President Bush to testify. Judge Gesell on January 30, 1989, quashed the Bush subpoena, ruling that the defendant had "made no showing that President Bush has any specific information relevant and material to the charges of the indictment which makes it necessary or appropriate to require his appearance." At the same time, the court ordered that President Reagan would "remain subject to call" and additional consideration would be given the matter if the defense could support a claim that he "ordered, directed, required or, with advance knowledge, condoned" any of the criminal actions of which North stood accused.⁶²

⁶² North, Order Re: Motion of the President and the President-Elect to Quash the Defendant's Subpoenas. Government's Motion to Quash Defendant's Subpoenas Duces Tecum to the President and the Custodian of Records of the Executive Office of the President, 1/30/89.

On March 31, 1989, Judge Gesell quashed North's subpoena of President Reagan. His memorandum and order stated:

. . . Whether or not authorization is a defense, authorization is not established by atmosphere, surmise or inference. The written record has been exhausted in this regard. The trial record presently contains no proof that defendant North ever received any authorization from President Reagan to engage in the illegal conduct alleged, either directly or indirectly, orally or in writing. No such authorization to any obstruction or false statement count has been identified in materials submitted to the Court by the defense either in CIPA proceedings or on the public record. Additionally, the Court has examined President Reagan's responses to extensive interrogatories furnished by him under oath to the grand jury as well as references (filed herewith under seal) to portions of Mr. Reagan's personal diary developed by Independent Counsel during the investigatory stages of this matter. Nothing there even remotely supports an authorization claim.

According, the Court holds that neither defendant North nor his counsel has presented any basis which warrants the Court to exercise its discretion by enforcing the ad testificandum [for testifying] subpoena served on President Reagan. There has been no showing that President Reagan's appearance is necessary to assure Lt. Col. North a fair trial. . . .⁶³

63 North, Memorandum and Order, 3/31/89. Following his convictions on three charges, North appealed on several grounds, including the fact that he was unable to call President Reagan to testify. In a dissenting opinion issued July 20, 1990, (pp. 44-45), U.S. Appeals Court Judge Laurence Silberman agreed with North's argument, writing:

Presidents, even ex-Presidents, may not be called to testify capriciously or needlessly. But this is not such a case. North worked in the White House, only one step removed from the President himself, with what appears to have been enormous responsibility. He has been convicted of violating criminal statutes (never before employed as here) and his defense is that he was lawfully doing the President's bidding, and doing so with regard to a substantive area of national security policy, which, whatever one's view of those policies, would have been thought at the core of the Chief Executive's constitutional responsibility. His immediate superior, Admiral Poindexter, was unavailable as a defense witness. Under these circumstances, for the trial judge to have refused to compel Reagan's testimony, was to deprive North of a fair trial.

The Jury's Verdict

The jury was sequestered and began deliberating April 22, 1989. After deliberating for 64 hours over a 12-day period, the jury on May 6, 1989, returned a verdict of guilty on three counts and not guilty on nine. North was found guilty of:

- Aiding and abetting an obstruction of congressional inquiries in November 1986 (Count Six).
- Destroying and falsifying official NSC documents (Count Nine).
- Receiving an illegal gratuity (Count Ten).

The Sentence

Judge Gesell on July 5, 1989, sentenced North to two years probation, \$150,000 in fines and 1,200 hours community service. He told North that a jail sentence would "only harden your misconceptions" about public service and how he had tarnished it.⁶⁴ Stating that North's notoriety had caused him problems but also made him wealthy, Gesell ordered North to serve in an inner-city youth-counseling program as an administrator.⁶⁵

⁶⁴ Gesell, North Sentencing Hearing, 7/5/89, p. 36.

⁶⁵ Subsequently, it is Independent Counsel's understanding that North fulfilled his community-service requirement, but payment of the fine was suspended pending the outcome of his appeal.

The fact that North was not given a jail sentence, as Independent Counsel had recommended, gave North little incentive for cooperating with the ongoing criminal investigation. Indeed, North litigated against the Independent Counsel for months in an attempt to escape giving testimony to the Grand Jury. The court's decision not to impose jail time on North was a contributing factor also in lighter sentences imposed in subsequent Iran/contra cases.

In imposing sentence, Judge Gesell expressed his views of the case this way:

The indictment involves your participation in particular covert events. I do not think that in this area you were a leader at all, but really a low-ranking subordinate working to carry out initiatives of a few cynical superiors. You came to be the point man in a very complex power play developed by higher-ups. Whether it was because of the excitement and the challenge or because of conviction, you responded certainly willingly and sometimes even excessively to their requirements. And along the way you came to accept, it seems to me, the mistaken view that Congress couldn't be trusted and that the fate of the country was better left to a small inside group, not elected by the people, who were free to act as they chose while publicly professing to act differently. Thus you became and by a

series of circumstances in fact and I believe in your mind part of a scheme that reflected a total distrust in some constitutional values.

Now, a trial is a very extraordinary thing. As you stand there now you're not the fall guy for this tragic breach of the public trust. The jury composed of everyday citizens your supporters mocked and mocked throughout the trial understood what was taking place.[66] Observing that many others involved in the events were escaping without censure or with prosecutorial promises of leniency or immunities they used their common sense. And they gave you the benefit of a reasonable doubt.

66 Judge Gesell was referring to media opinion pieces and public statements by North supporters expressing the view that the jury was too ill-informed about current affairs to pass judgment on North. They argued this based on the fact that none of the jurors claimed to be knowledgeable of or interested in North or the Iran/contra matter before being sworn in. It was North's attorneys, however, who insisted on selecting a jury virtually unaware of their client's widely publicized congressional testimony.

In pre-trial hearings regarding jury selection and possible problems stemming from the publicity that had surrounded the Iran/contra matter, Judge Gesell said it was his experience in presiding over high-profile cases, including some of the Watergate cases, that ordinary citizens pay little attention to the national news events occurring around them in Washington. Because of this, he said, it was possible to pick a fair-minded jury even in the most publicized cases.

You're here now because of your own conduct when the truth was coming out. Apparently you could not face disclosure and decided to protect yourself and others. You destroyed evidence, altered and removed official documents, created false papers after the events to keep Congress and others from finding out what was happening.

Now, I believe that you knew this was morally wrong. It was against your bringing up. It was against your faith. It was against all of your training. Under the stress of the moment it was easier to choose the role of a martyr but that wasn't a heroic, patriotic act nor was it in the public interest.⁶⁷

67 Gesell, North Sentencing Hearing, 7/5/89, pp. 35-36.

The North Appeal

North appealed his convictions on all three counts on a variety of grounds. North's most serious appeals issues related to Judge Gesell's application of the Kastigar decision in keeping North's trial free of taint from his immunized congressional testimony and the application of the Classified Information Procedures Act during the trial.

The appeals were argued at the United States Court of Appeals for the District of Columbia Circuit on February 6, 1990. The court ruled on July 20, 1990.

By a 2-1 vote, the Appeals Court set aside North's convictions. The divided court ruled that Judge Gesell erred in failing to hold a full hearing as required by Kastigar to ensure that the prosecution witnesses made no use of North's immunized congressional testimony.

The Court of Appeals disagreed sharply with the Independent Counsel and Judge Gesell's definition of "use" under the federal use-immunity statute. The Court of Appeals determined that the statute, as interpreted in Kastigar, prevented "evidentiary" uses of immunized testimony including "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements. . . ." The court observed that Judge Gesell never inquired into these uses of immunized testimony, and it held that warnings to witnesses not to testify to anything they did not know or recall first-hand did not insure against such uses.⁶⁸

68 North, 910 F.2d at 856.

The Court of Appeals did not reject Judge Gesell's Kastigar rulings in their entirety. The court upheld his determination that Independent Counsel did not present any of North's immunized testimony to the Grand Jury or trial jury. The court also affirmed the District Court's holdings that Independent Counsel did not use the immunized testimony to guide its prosecutorial or trial decisions, and that Independent Counsel had proven untainted leads to all of its witnesses.

Nevertheless, the court remanded all three convictions to the District Court for a "witness-by-witness [and,] if necessary . . . line-by-line and item by item" inquiry into the content as well as the sources of grand jury and trial witness testimony.⁶⁹

69 Ibid., 910 F.2d at 872.

On September 4, 1990, Independent Counsel petitioned for rehearing by the panel and suggested a rehearing by the en banc (full) Court of Appeals. The panel granted the petition in part on November 27, 1990, and released a lengthy opinion, but it did not modify its judgment. Over two dissents, the full court denied the request for rehearing en banc.⁷⁰

70 North, 920 F.2d at 940.

On May 28, 1991, the Supreme Court denied Independent Counsel's petition for certiorari.⁷¹ At that point, Independent Counsel decided to return for additional Kastigar hearings in Judge Gesell's court, as prescribed by the Court of Appeals. In two days of remand hearings, McFarlane testified that his trial testimony was "colored" by, and that he was deeply affected by, North's immunized congressional testimony. Independent Counsel then consented to dismiss the remaining counts of the indictment.⁷²

71 North, 111 S. Ct. 2235.

72 Order, North (D.D.C. Sept. 16, 1991) (dismissing Counts Six, Nine, and Ten of Indictment, with prejudice).

Conclusion

Despite the dismissal of North's convictions, the prosecution of the case showed that even individuals entrenched in national security matters can be held accountable for crimes committed in the course of their official duties. It was not classified information, after all, that caused North to prevail on appeal. It was Congress's political decision to grant immunity to North, despite the danger it posed to prosecution.

Obtaining the convictions against North put CIPA and Kastigar to extreme tests.

It exposed structural problems in the CIPA law when central conspiracy counts had to be dismissed because of the Reagan Administration's refusal to declassify information deemed necessary to a fair trial of the case. This raised serious questions about whether the Reagan Administration -- which in the Iran/contra matter had sought the appointment of Independent Counsel to investigate and prosecute possible crimes because of an appearance of conflict of interest -- in fact had the final say in determining what crimes could be tried.⁷³

⁷³ This question was posed again in Independent Counsel's case against former CIA Costa Rican Station Chief Joseph F. Fernandez, whose trial was stayed in 1989 and whose case was dismissed in 1990 after the Bush Administration refused to declassify information deemed relevant to his defense. See Fernandez chapter.

In North, the Court of Appeals extended the protections afforded to defendants who receive limited immunity. Not only must prosecutors fully shield themselves from immunized testimony -- as the court determined Independent Counsel had done -- but now all prosecution witnesses must essentially prove that they were not influenced in any way by the defendant's immunized testimony. As Chief Judge Patricia M. Wald in her dissenting opinion wrote: The procedural regime set forth in the majority ruling ``makes a subsequent trial of any congressionally immunized witness virtually impossible." 74 This is particularly true where, as in the North case, many prosecution witnesses are hostile to the Government and favorable to the defense.

74 North, 910 F.2d at 924.

Not since the Watergate prosecutions of the 1970s had a case been tried against a more politically charged backdrop. Although Independent Counsel has been criticized for pursuing the prosecution of North after he had been granted immunity by Congress, the congressional hearings did nothing to hold North or others responsible for the crimes they committed. This, Congress said, was the role of Independent Counsel.