



## Chapter 3

### United States v. John M. Poindexter

Navy Vice Adm. John M. Poindexter was appointed as President Reagan's national security adviser on December 4, 1985, succeeding Robert C. McFarlane, whom Poindexter had served under as deputy for two years. Poindexter's White House career ended November 25, 1986, when he was forced to resign in the wake of the public disclosure of the Iran/contra diversion.

Poindexter, Lt. Col. Oliver North and McFarlane were the three individuals Attorney General Edwin Meese III identified on November 25, 1986, as knowledgeable of the diversion. Poindexter's supervision of North and his own participation in the Iran and contra operations were early focuses of Independent Counsel's investigation.

As in the case against North, criminal evidence against Poindexter had to be gathered quickly before he was compelled to testify on Capitol Hill in the summer of 1987 under a grant of limited immunity. Otherwise, the prosecution of Poindexter was likely to be challenged on the grounds that it was derived from or in some way influenced by his immunized congressional testimony.

On March 16, 1988, Poindexter was indicted on seven felony charges arising from his involvement in the Iran/contra affair, as part of a 23-count multi-defendant indictment. He was named with North, retired Air Force Maj. Gen. Richard V. Secord and Albert Hakim as a member of the conspiracy to defraud the United States Government by effecting the Iran/contra diversion and other acts.

After the cases were severed and two of the original charges dismissed, Poindexter was tried and convicted in April 1990 of five felonies, including: one count of conspiring to obstruct official inquiries and proceedings, two counts of obstructing Congress, and two counts of false statements to Congress.<sup>1</sup> U.S. District Judge Harold H. Greene sentenced him to a six-month prison term. In November 1991, Poindexter's convictions were overturned on appeal. In December 1992, the U.S. Supreme Court declined to review the case.

<sup>1</sup> The Poindexter case was tried by Associate Counsel Dan K. Webb, Christian J. Mixter, Howard M. Pearl, and Louise R. Radin.

Poindexter joined the National Security Council staff in June 1981, following a distinguished naval career that included battleship command and high-ranking Pentagon posts. In October 1983 he became deputy to National Security Adviser McFarlane; among his subordinates was North. During Poindexter's one-year tenure as national security adviser, which began in December 1985, he oversaw the Iran/contra operations in which North was directly involved.

In November 1986, as the secret operations were becoming publicly exposed, Poindexter became the senior Administration official responsible for briefing the President's other top advisers about the Iran arms sales. In a series of White House meetings with other officials and members of Congress throughout the month, he repeatedly laid out a false version of the transactions that distanced President Reagan from the legally questionable 1985 arms shipments made through Israel, particularly the November 1985 HAWK-missile transaction.

Although Poindexter was the spokesman, he was not alone responsible for knowing the facts. Virtually every other senior official, including President Reagan, who heard his version of the arms sales in briefings throughout November 1986 had reason to believe it was wrong. Yet no one, according to contemporaneous notes of those briefings, spoke up to correct Poindexter.

Poindexter along with North and others in November 1986 attempted to shred and alter the paper trail reflecting their Iran/contra activities. Among other things, Poindexter destroyed the only existing signed presidential covert-action Finding that was intended to authorize retroactively CIA involvement in the November 1985 HAWKS shipment.

Poindexter and North were less successful in eradicating the computer-message trail of their Iran/contra activities. Poindexter and North often communicated through a special channel that Poindexter, a computer expert, had set up on the NSC computer system. This channel, known as "Private Blank Check," allowed Poindexter and North to relay messages to each other without their being routed through channels in which others on the NSC staff could screen them.

Between November 22 to 29, 1986, North deleted from his computer file 736 messages, and Poindexter deleted 5,012 messages during the same period.<sup>2</sup> Despite these deletions, the White House routinely saved back-up tapes containing all data in the system for two weeks to protect against inadvertent loss. When the Iran/contra affair was exposed in late November 1986, the White House Communications Agency, which manages the NSC computer system, retained the back-up tapes dating from November 15. Investigators, therefore, were able to retrieve copies of all messages that were in the Poindexter-North computer files in mid-November 1986 before most of the deletions occurred. These computer messages became important evidence in both the Poindexter and North trials.

2 Williams, Poindexter Trial Testimony, 3/15/90, pp. 1752-65.

Poindexter admitted to many of his activities before the Select Committees in July 1987 under a grant of testimonial immunity, which prevented his admissions from being used against him in any criminal proceeding. Because President Reagan did not testify in that forum, Poindexter was called to answer the question that dominated the hearings: Did the President know about and approve the diversion of the Iran arms sales proceeds to the contras? Poindexter answered no, "the buck stops here with me." <sup>3</sup> He said he deliberately withheld the information from President Reagan because "I wanted the President to have some deniability so that he would be protected. . . ." <sup>4</sup>

3 Poindexter, Select Committees Testimony, 7/15/87, p. 95.

4 Ibid., p. 101.

Facing a criminal trial, Poindexter confronted a different dilemma: It was no longer a question of protecting the President but defending himself against five felony charges. Before Congress, Poindexter's most significant testimony corroborated President Reagan's repeated denials of awareness of the Iran/contra diversion. In the courtroom, Poindexter mounted a higher-authorization defense, attempting to convince the jury that the President had approved his actions, including those that resulted in criminal charges. Instead of taking the stand in his own defense, however, he called President Reagan to testify.

#### Pre-Trial Proceedings

U.S. District Judge Gerhard A. Gesell in June 1988 ordered that the multi-defendant case against Poindexter, North, Secord and Hakim be severed.<sup>5</sup> Following severance, Poindexter's case was transferred to Chief Judge Aubrey E. Robinson, Jr., and then to Judge Greene, who presided over further proceedings.

5 For a more detailed description of the severance of the multi-defendant case, see North chapter.

All of Poindexter's substantive challenges to the validity of the indictment were dismissed before trial. The remaining important issues concerned: (1) the preservation of the conspiracy charge; (2) the resolution of classified-information disputes; (3) the resolution of issues related to Poindexter's

immunized congressional testimony, under the ruling known as Kastigar; and (4) the defendant's successful effort to secure trial testimony from former President Reagan.

### Preserving and Narrowing the Conspiracy Charge

Problems with classified information led to the dismissal of the central conspiracy charges before the North trial, and similar problems were expected to arise in the case against Poindexter. On June 20, 1989, Independent Counsel moved to eliminate the original broad conspiracy charges based upon the supply of the contras and the diversion and to substantially narrow the charge of conspiracy to violate other substantive criminal statutes, forbidding false statements and obstruction. After filings and oral argument, the court granted the Government's motion.

The charge was refocused on the illegal act of conspiring with North and Secord to conceal activities from Congress. Independent Counsel argued successfully that this narrowing of the conspiracy charge would minimize the classified-information problems that plagued the North prosecution.

### Classified Information Issues

The Classified Information Procedures Act (CIPA) allowed the trial court effectively to resolve issues involving the use of classified documents and testimony in Poindexter. Judge Greene's supervision of the CIPA process and fruitful negotiations between counsel for the Government and Poindexter resolved most disputes with a minimum of delay.

In contrast to North, there was no prolonged or significant litigation concerning the form or scope of Poindexter's CIPA notices to the court to disclose classified information at trial. Between November 27, 1989, and March 13, 1990, Poindexter served 11 such notices, including eight that listed classified documents he wanted to use at trial, two describing possible classified testimony, and one focused solely on information he wanted to elicit at the deposition of President Reagan.

Judge Greene ordered that all differences over classified information be negotiated between the parties before being brought before the court. Judge Greene held six closed CIPA hearings before the trial began and supplemented those with several shorter hearings during trial. Most of his rulings on the relevance and admissibility of classified information, and on the adequacy of substitutions proposed by the Government, were made from the bench.

Taken together, Poindexter's CIPA notices listed approximately 1,200 documents, only a small fraction of which were ultimately introduced at trial. Most classified information was covered by Government stipulations to certain facts and other unclassified substitutions. This allowed the trial to proceed smoothly, without the conflicts that complicated North or the case against former CIA station chief Joseph F. Fernandez, which was dismissed due to classified-information problems.<sup>6</sup>

<sup>6</sup> See Fernandez chapter.

### Kastigar Proceedings

Poindexter was compelled under a grant of use immunity to testify in 1987 before the Select Committees investigating Iran/contra. As did the other Iran/contra defendants who gave immunized testimony before Congress, Poindexter moved to dismiss the indictment on the theory that it violated the standards enunciated in *Kastigar v. United States*,<sup>7</sup> arguing that his immunized testimony was used against him in the Grand Jury and at trial. This argument proved unsuccessful on the trial level but ultimately prevailed in the Court of Appeals.

<sup>7</sup> 406 U.S. 411 (1972).

Before their trials were severed, Poindexter moved jointly with North and Hakim, who also had received immunity to testify before Congress, to have the charges against them dismissed on the

ground that the evidence against them was tainted by their immunized testimony. Judge Gesell denied that motion. However, in deference to defense claims that they would use one another's possibly exculpatory immunized testimony, Judge Gesell in June 1988 severed the trials.

Poindexter renewed his Kastigar motion before Judge Greene in August 1989. After briefing and argument,<sup>8</sup> the court ordered that two evidentiary hearings be held. At the first, the court heard testimony from Associate Counsel Dan K. Webb and Howard M. Pearl concerning their exposure to Poindexter's immunized testimony before joining the Office of Independent Counsel. Webb and Pearl joined the OIC staff in 1989 and had not, before their appointments, been subject to OIC's procedures to insulate itself from Poindexter's immunized testimony. Judge Greene found their exposure to Poindexter's testimony to be insignificant and allowed both attorneys to participate in the trial.

<sup>8</sup> The Poindexter case was tried before the Court of Appeals ruled in North that witness hearings were necessary to permit the trial of an immunized defendant.

The second set of court hearings concerned trial witnesses, whose testimony may have been tainted by Poindexter's immunized testimony. Judge Greene accepted Judge Gesell's earlier review of Grand Jury witnesses and declined to re-examine his findings. He also refused to dismiss the indictment on the basis of potential grand juror exposure to the immunized testimony.

Regarding trial witnesses, the court took extensive measures to ensure that Poindexter's immunized statements were not used against him. The court ordered the Government to make an ex parte submission (later disclosed to Poindexter) of all statements made by potential trial witnesses before Poindexter gave his immunized testimony before Congress in July 1987. The court found that all of the proposed testimony of most of the potential witnesses had been memorialized before Poindexter appeared publicly on July 15, 1987, and therefore was not tainted.

As for those witnesses whose expected trial testimony would not be limited to the evidence OIC had sealed with the court prior to Poindexter's immunized testimony, Judge Greene required additional information. He concluded that the Government had failed to establish that five of its potential witnesses were free of taint and ordered them to appear at a pre-trial hearing. Two of the three witnesses who ultimately appeared at trial credibly affirmed that their anticipated testimony would not be influenced in any way by Poindexter's immunized testimony; the third, North, refused to do so.

North stated at the pre-trial hearing that he was unable, with respect to any subject, to distinguish what he had personally done, observed or experienced from what he had learned from watching Poindexter's immunized testimony.<sup>9</sup> As for Poindexter's destruction of the December 1985 presidential covert-action Finding -- important evidence in the obstruction of Congress -- North acknowledged that he had seen Poindexter destroy a piece of paper but insisted that he did not know it was a Finding until Poindexter stated that fact in his immunized testimony before Congress.

<sup>9</sup> North Testimony, Poindexter Pre-trial Hearing, 12/13/89, pp. 374-77.

The court rejected North's pre-trial testimony as not believable. North, the court found, "appears to have been embarked at that time [at the hearing] upon the calculated course of attempting to assist his former colleague and co-defendant . . . by prevaricating on various issues . . ." <sup>10</sup>

<sup>10</sup> Opinion, Poindexter, 3/8/90, p. 9.

In a separate post-trial ruling, the court added that as far as the destruction of the Finding was concerned, North's testimony at his own trial about the event was inconsistent with his claim that he could not remember it independent of Poindexter's immunized testimony. The court found it "inherently incredible" that North did not remember "his participation in an event he witnessed first

hand and that was as dramatic, indeed historic, as the tearing up of an extremely rare Presidential Finding." 11

11 Ibid., 5/29/90, pp. 32-40.

### The Reagan Subpoena

One of the most notable aspects of the Poindexter case was the defendant's successful attempt to call former President Reagan to testify at his trial by videotaped deposition.

Poindexter first sought presidential and vice presidential notes from OIC as part of his pre-trial discovery requests. In a pre-trial hearing on September 6, 1989, Poindexter's attorneys told the court that presidential notes would reflect that Poindexter informed the President of his denials to Congress in 1986 of NSC activity in support of the contras, and that the notes would "show what the President was told about what was being done to support the contras in Central America, and the President's consent and ratification and approval of that activity." 12 In seeking vice presidential notes, Poindexter's attorneys told the court that "anytime he [Bush] missed a meeting, Admiral Poindexter briefed him on it afterwards." 13

12 Robinson, Poindexter Pre-trial Hearing, 9/6/89, p. 18.

13 Ibid., p. 19.

The court, before making a decision on whether to compel OIC to produce these documents, on September 11, 1989, directed Poindexter to file an ex parte memo explaining precisely how these documents would assist his defense.<sup>14</sup> It required from Independent Counsel a legal memorandum concerning its responsibility to produce presidential and vice presidential documents not in OIC's possession.

14 Opinion, Poindexter, 9/11/89, p. 22.

Independent Counsel in a filing on September 18, 1989, told the court that the office did not have in its possession presidential notes, but rather had been granted access to notes and allowed to copy only a portion of them with special permission. As far as President Reagan's diary was concerned, Independent Counsel had been allowed to review typed extracts of portions deemed relevant by White House counsel, but the President had retained custody of his diary, which both he and the national archivist regarded as personal records, making them inaccessible under the Presidential Records Act unless their production were compelled by subpoena.<sup>15</sup>

15 Government's Memorandum Concerning Presidential and Vice Presidential Documents that Are Not in the Possession of Independent Counsel, 9/18/89.

Attached to Independent Counsel's filing was a declaration by John Fawcett, assistant archivist for the Office of Presidential Libraries of the National Archives and Records Administration. Fawcett stated that President Bush's vice presidential records were transferred to the archives at the end of the Reagan Administration, but, "No personal diary of former Vice President Bush has been specifically identified as being included in the Vice Presidential records. However, these Vice Presidential records have not yet been processed." 16

16 Ibid., Exhibit A. President Bush in December 1992 for the first time informed Independent Counsel that he had kept a diary as vice president from 1986 to 1988. See Bush chapter.

On September 25, 1989, Poindexter's attorneys informed the court that "the defendant is willing to seek access to the personal diaries and notes of former President Reagan and former Vice President Bush pursuant to a . . . subpoena." 17 After reviewing Poindexter's ex parte submission on the materiality of presidential and vice presidential documents, the court on October 24, 1989, ruled that

there was sufficient likelihood that President Reagan's documents would be material to the defense. Judge Greene differentiated between Reagan and Bush documents, however, because "the Vice President had no operational authority with respect to Poindexter," because the information contained in vice presidential papers may be largely cumulative, and because of deference to the sitting President Bush.<sup>18</sup>

17 Defendant's Response to Government's Memorandum Concerning Presidential and Vice President Documents That Are Not in the Possession of Independent Counsel, 9/25/89, p. 2.

18 U.S. v. Poindexter, 725 F. Supp. 13, 28-31 (D.D.C. 1989). Judge Greene added that with respect to Bush documents, he would reevaluate the matter if Poindexter at a later date showed a more pressing need for them.

On November 3, 1989, Poindexter filed with the court a classified petition for leave to serve subpoenas on former President Reagan and the National Archives, seeking materials and testimony relevant to Iran/contra activities in 67 categories. On November 16, Judge Greene granted Poindexter's petition. Both President Reagan and the National Archives moved to quash the subpoena for documents.

In a pre-trial hearing December 4 the court stated that its order covered only documents, and not the President's possible trial testimony. On December 18 Poindexter sought the court's leave to subpoena President Reagan to testify at trial. In deciding whether Poindexter could subpoena President Reagan's testimony, Judge Greene asked Poindexter to submit a list of specific questions he intended to ask. Poindexter submitted a list of 183 questions, which were not made available to Independent Counsel.<sup>19</sup> The court ruled that the questions directly related to the charges in the indictment and to Poindexter's anticipated defense.

19 In 1993, during preparation of this report, Independent Counsel obtained copies of these questions and other ex parte submissions from Poindexter's case.

In his February 5, 1990, ruling upholding the testimonial subpoena of Reagan, Judge Greene described Poindexter's proposed questions as falling into 12 categories. These included: (1) the frequency and occasions on which President Reagan and Poindexter met; (2) the President's view of the Boland Amendment and how it applied to contra support; (3) whether the President authorized Poindexter to seek foreign support for the contras; (4) what instructions the President gave Poindexter regarding meetings with Central American officials, and what information Poindexter subsequently relayed back to the President; (5) presidential discussions with Central American leaders concerning contra support; (6) presidential discussions with Poindexter regarding actions to be taken if Congress did not renew contra aid; (7) presidential knowledge of North's relationship to Iran/contra figures; (8) Poindexter's briefings of the President regarding a congressional inquiry in 1986 into North's activities; (9) Poindexter's communications with Congress at the direction of the President; (10) whether Poindexter informed the President about Secord's status; (11) discussions Poindexter had with the President regarding a chronology of the Iran arms sales prepared in November 1986; and (12) the President's knowledge of the arms shipments to Iran.

In his opinion explaining his decision to uphold Poindexter's subpoena of President Reagan, Judge Greene concluded:

Former President Ronald Reagan is claimed by Admiral Poindexter to have direct and important knowledge that will help to exonerate him from the criminal charges lodged against him. In view of the prior professional relationship between the two men, and defendant's showing discussed above, that claim cannot be dismissed as fanciful or frivolous. That being so, it would be inconceivable -- in a Republic that subscribes neither to the ancient doctrine of the divine right of kings nor to the more modern conceit of dictators that they are not accountable to the people whom they claim to represent or to their courts of law -- to exempt Mr. Reagan from the duty of every citizen to give evidence that

will permit the reaching of a just outcome of this criminal prosecution. Defendant has shown that the evidence of the former President is needed to protect his right to a fair trial, and he will be given the opportunity to secure that evidence.<sup>20</sup>

20 U.S. v. Poindexter, 732 F. Supp. 142, 159-60 (D.D.C. 1990)

President Reagan did not claim executive privilege once he was ordered to testify.

The seven-hour videotaped deposition of the former President was taken February 16 and 17, 1990, in the Los Angeles federal courthouse, near his residence. The public and the press were not allowed to attend the deposition. Transcripts and the opportunity to view the videotape were made available to members of the press before the trial.

As for Poindexter's subpoena for documents from the former President, Judge Greene ordered President Reagan to make diary entries available for the court's in camera review. After its review, the court ordered President Reagan to produce the relevant diary entries to Poindexter in the absence of a claim of executive privilege. President Reagan, joined by the Bush Administration, claimed executive privilege as to the diary entries on February 5, 1990. On March 21, the court granted the Reagan-Bush motions to quash the subpoena for the diary entries, concluding that Poindexter's defense would be adequately served by the President's testimony.

### The Poindexter Trial

The month-long Poindexter trial, which resulted in a five-count conviction on April 7, 1990, centered largely on the testimony of two witnesses: Oliver North for the prosecution and former President Reagan for the defense.

Both men attempted to help the defendant in their appearances on the witness stand, but each had given prior testimony harmful to Poindexter, and they could not deviate from that under threat of perjury charges.<sup>21</sup> North could not abandon his earlier defense stance that he dutifully reported his activities -- including those found to be crimes -- to his superior, Poindexter. President Reagan was compelled at trial to state, as he had previously, that he repeatedly told his aides to obey the law and that he was unaware of their criminal acts.

<sup>21</sup> Before taking the witness stand in Poindexter, North had testified before the Select Committees in July 1987, at his own trial in 1989, and at a Poindexter pre-trial hearing in 1990.

President Reagan was questioned by his Tower Commission on two occasions in early 1987. More significantly, the President in November 1987 answered 53 written interrogatories from Independent Counsel, which were submitted as sworn testimony to the federal Grand Jury investigating the Iran/contra affair.

Poindexter chose not to testify at his trial.

Although Poindexter and North had destroyed and altered official papers and computer messages, the prosecution offered convincing documentary evidence that Poindexter was kept apprised of North's efforts to provide military aid to the Nicaraguan contras while it was outlawed from October 1984-October 1986 by the Boland Amendment; that Poindexter adopted false statements McFarlane and North made to Congress; and that Poindexter had been fully aware of the ill-fated November 1985 HAWK missile shipment to Iran, which he subsequently tried to conceal from Congress.

### The Trial Testimony of Oliver L. North

The testimony of North, named as a co-conspirator in the case, was important to proving each of the five charges against Poindexter:

-- Count One, that Poindexter conspired with North and Secord to obstruct congressional inquiries of Iran- and contra-related matters, to make false statements to Congress, and to falsify, remove and destroy official documents.

-- Count Two, that Poindexter obstructed Congress in 1986 when it was investigating media allegations that North was raising funds and providing military aid to the contras. In letters to three committees, Poindexter answered questions by repeating denials McFarlane made before Congress in 1985 of North's involvement in contra-support activities, even though Poindexter knew the denials to be false. He set up a meeting with the House Intelligence Committee in August 1986 in which he knew North would have to give false testimony, and afterward congratulated North on his performance.

-- Count Three, that Poindexter obstructed Congress in November 1986 by participating with North in the preparation of false chronologies of the secret U.S. arms sales to Iran and by making false statements to the House and Senate intelligence committees. Specifically, Poindexter falsely asserted that no U.S. official knew before January 1986 that HAWK missiles had been shipped to Iran in November 1985. The indictment stated that North as early as November 20, 1985, told Poindexter about the shipment in advance and advised him of it again after the fact in late 1985.

-- Counts Four and Five, that Poindexter made false statements about the HAWK shipment to the House and Senate intelligence committees on November 21, 1986. As in Count Three, the false statement charges were based on North's informing Poindexter about the shipment in 1985.

In four days of trial testimony, North reluctantly recounted his central operational role in the Iran/contra affair. He described the extensive contra-resupply network he ran with Secord and Hakim,<sup>22</sup> his contra fund-raising efforts, and the military advice he gave the contras. He testified that he kept his bosses McFarlane and Poindexter fully informed of his activities and that he acted only with their approval.<sup>23</sup>

<sup>22</sup> North objected to the prosecutor's use of the word "Enterprise" to describe the profit-making web of contra- and Iran-related operations he undertook with Secord and Hakim. He also objected to the use of the word "testimony" in reference to the false statements he made before the House Permanent Select Committee on Intelligence in August 1986, and the word "diversion" to describe the scheme in which he, Poindexter and others diverted Iran arms sales proceeds to the contras.

<sup>23</sup> North, Poindexter Trial Testimony, 3/12/90, pp. 1275-76.

North, who was forced to testify for the prosecution under a grant of immunity, frequently claimed that he could not recall many of the incidents in question, some of which had occurred several years before. North admitted a wide range of contra-support and Iran-related actions only when confronted with prior testimony in which he had provided extensive details.

North admitted that he lied in August 1986 when he told the House Permanent Select Committee on Intelligence (HPSCI) he was not engaged in raising funds or providing military support to the Nicaraguan contras.<sup>24</sup> North described exchanges with Poindexter before and after the meeting that directly implicated Poindexter in a scheme to frustrate the congressional investigation.<sup>25</sup>

<sup>24</sup> Ibid., 3/9/90, pp. 1042-43.

<sup>25</sup> Ibid., 3/12/90, p. 1083.

HPSCI was one of three congressional committees pursuing a House inquiry into reports of North's contra-aid activities. North testified that prior to appearing before the committee in the White House Situation Room, he told Poindexter he would be asked about "things that I had been told never to

reveal." 26 In response, Poindexter told him, "You can handle it, you can take care of it," according to North.<sup>27</sup>

26 Ibid., 3/9/90, p. 1033.

27 Ibid.

After receiving reports of North's statements to HPSCI, which Poindexter knew were false, Poindexter by way of his computer sent North a terse congratulatory message: "Well done." 28

28 PROFs Note from Poindexter to North, 8/11/86, AKW 018921.

Based on the statements of North and Poindexter, HPSCI Chairman Lee Hamilton informed other members of Congress that the media allegations about North could not be proven. North's false testimony, in combination with Poindexter's perpetuation of McFarlane's previous lies, successfully frustrated the congressional oversight process. It was not until Nicaraguan soldiers on October 5, 1986, shot down a contra-resupply plane carrying American Eugene Hasenfus that Congress renewed its investigation into North's activities.

North testified that he kept Poindexter apprised of his involvement in the covert sales of U.S. arms to Iran in 1985 and 1986, including the operation's most secret aspect: the Iran/contra diversion. He sent Poindexter five or six memos stating that overcharges to the Iranian buyers would generate millions of dollars for diversion to the contras.<sup>29</sup> North said Poindexter told him the diversion should never be revealed.<sup>30</sup> North said he reported the diversion plan to Poindexter because he thought that projects funded by it "ought to have the authority of the President behind them." 31

29 North, Poindexter Trial Testimony, 3/12/90, pp. 1107-11.

30 Ibid., pp. 1103-05.

31 Ibid., p. 1111.

North testified that in November 1985, he became directly involved in an Israeli shipment of U.S. HAWK missiles to Iran at McFarlane's behest.<sup>32</sup> North said he got permission from both McFarlane, who was then the national security adviser, and Poindexter, then deputy national security adviser, to enlist Secord's help in resolving logistical problems surrounding the shipment.<sup>33</sup> He also got McFarlane and Poindexter's permission to supply the Israelis with the name of a CIA-connected airline to assist.<sup>34</sup> North outlined the details of the planned HAWK shipment in a computer note to Poindexter on November 20, 1985.<sup>35</sup> By memoranda on December 4 and on December 9, 1985, North informed Poindexter that the Iranians were unhappy with the shipment and wanted the missiles to be retrieved.<sup>36</sup>

32 Ibid., pp. 1118-20.

33 Ibid., pp. 1121-22.

34 Ibid., pp. 1122-27.

35 PROFs Note from North to Poindexter, 11/20/85, AKW 002066.

36 PROFs Note from North to Poindexter, 12/4/85, AKW 002070-73; Memorandum from North to McFarlane and Poindexter, 12/9/85, AKW 002088-91.

When CIA officials insisted after the HAWK shipment that the President should retroactively authorize the agency's participation in the operation, CIA Director William J. Casey on November 26, 1985, gave Poindexter a covert-action Finding for President Reagan's signature.<sup>37</sup> North

testified that he saw the signed Finding either in Poindexter's office safe or in the safe of NSC counsel Paul Thompson.<sup>38</sup>

37 Memorandum from Casey to Poindexter, 11/26/85, AMY 000651-52.

38 North, Poindexter Trial Testimony, 3/12/90, p. 1245.

After public exposure of the Iran arms sales in November 1986, North -- at Poindexter's request -- prepared a chronology of U.S. involvement in the Iran arms sales, which underwent a series of re-writes. North testified that McFarlane removed from the chronology North's factual account of the November 1985 HAWKS shipment and substituted a cover story: that although the CIA became involved in the November 1985 shipment after Israel encountered logistical difficulties, U.S. officials at the time believed the cargo to be oil-drilling parts and did not learn until January 1986 that the true cargo was weapons.<sup>39</sup>

39 Ibid., pp. 1188-98.

Asked whether the McFarlane revision was part of a plan to "cover up" the existence of the November 1985 Finding, North answered: "I don't know that cover up is the right word. I listened to the President's press conferences, I listened to statements being made by people and they just didn't talk about it." 40 North said McFarlane told him the cover story should be incorporated into the chronology because the 1985 Finding authorizing the weapons shipment described too directly an arms-for-hostages swap, which, if exposed, would politically embarrass the President.<sup>41</sup>

40 Ibid., p. 1191.

41 Ibid., pp. 1190-91.

The same oil-drilling-parts cover story was part of a CIA-prepared chronology that Casey and his deputy, Robert Gates, brought to a White House meeting on November 20, 1986, with Poindexter, North, Meese, Cooper and Thompson. The purpose of the meeting was to prepare Casey and Poindexter for their congressional testimony the following day. North was asked at trial:

Q: . . . did it become clear to you by the time McFarlane tells you that [the finding was too close to an arms-for-hostage swap] and by the time you see the CIA show up with this phony chronology, then at least did it appear to you that there was some effort or plan going on to cover up with U.S. involvement because of that finding?

A: Well, there is no doubt in my mind that I came to realize that finding was a disaster, and I understood that.<sup>42</sup>

42 Ibid., pp. 1208-09.

North testified that he altered and destroyed numerous documents in October and November 1986 that would have revealed details of the Iran and contra operations. He said he assured Poindexter that he had "taken care of" the documents that reflected his activities.<sup>43</sup> He said he told Poindexter all the documents describing the Iran/contra diversion were destroyed, after learning from Poindexter on November 21, 1986, that Attorney General Meese would be conducting a weekend investigation into the Iran arms sales.<sup>44</sup> North also testified that he altered other original NSC documents, after receiving Poindexter's permission to retrieve them from the NSC document-archiving system.<sup>45</sup>

43 Ibid., p. 1218.

44 Ibid., pp. 1120-21.

45 Ibid., pp. 1224-27.

More important, North reluctantly testified that he saw Poindexter destroy the only known copy of the signed presidential Finding that sought to authorize retroactively the November 1985 shipment of HAWK missiles to Iran.<sup>46</sup> North's eyewitness account of the destruction of the Finding provided significant proof of Poindexter's intent to conceal facts about the HAWK missile shipment from Congress in November 1986.<sup>47</sup>

46 Ibid., 1252-54.

<sup>47</sup> The destruction of the 1985 Finding was not charged as a separate crime in the indictment of Poindexter because Independent Counsel did not learn of it until North testified about it at his own trial in April 1989. Poindexter had told the Select Committees in 1987 that he destroyed the only signed copy of the 1985 presidential Finding. Independent Counsel did not learn of this statement at the time, however, because the OIC had taken measures to insulate itself from all immunized testimony. Even if Independent Counsel had been aware of the Poindexter testimony, OIC could not have used it in any criminal proceeding against Poindexter under the terms of immunity grant.

North's wide-ranging testimony enabled the prosecution to streamline its witness list to only nine other individuals, many of whom supplemented the central details provided by North.

#### The Trial Testimony of President Reagan

Before the trial of Poindexter, President Reagan had not testified publicly about Iran/contra. On February 16 and 17, 1990, he gave a seven-hour videotaped deposition as a defense witness. No classified matters were discussed and executive privilege was not invoked in response to any question. The videotaped deposition was shown in full, therefore, to the Poindexter jury during the trial on March 21 and 22, 1990.<sup>48</sup>

<sup>48</sup> Immediately after each tape was shown to the jury, a copy was given to the television networks, allowing the public to see President Reagan's only courtroom testimony on the Iran/contra affair.

In direct examination, defense counsel sought to show presidential knowledge and approval of Poindexter's activities. But President Reagan frequently claimed memory lapses when questioned about specific exchanges he may have had with Poindexter and about his knowledge of individuals and details involved in the Iran and contra operations.

Although President Reagan exhibited virtually no detailed knowledge of the Iran/contra matter, he made clear to the jury that it had his imprimatur, calling it "a covert action that was taken at my behest." <sup>49</sup> President Reagan said North was the only person he remembered being involved in the arms initiative.<sup>50</sup> He could not recall being briefed by Poindexter on the May 1986 trip by McFarlane and North to Tehran, but he said he did recall signing a Bible for Iranians.<sup>51</sup> President Reagan testified that the amount of weapons sold to Iran totaled \$12.2 million.<sup>52</sup>

<sup>49</sup> Reagan, Poindexter Trial Deposition, 2/16/90, p. 9.

<sup>50</sup> Ibid., p. 21.

<sup>51</sup> Ibid., p. 24.

<sup>52</sup> Ibid., pp. 154-55.

Asked specifically about the November 1985 HAWK shipment to Iran, President Reagan said he recalled a plan in which the Israelis would turn their plane around in mid-delivery of the weapons if no hostages were released.<sup>53</sup> He did not recall when he became aware of the November 1985

HAWK shipment; 54 he did not recall Poindexter telling him in November 1986 that others in the White House were having trouble remembering when they learned of it.<sup>55</sup>

53 Ibid., pp. 24-25.

54 Ibid., pp. 33-36.

55 Ibid., pp. 38-39.

President Reagan also claimed virtually no memory of the November 1986 period in which his top advisers were scrambling to limit public exposure of the Iran arms sales. He only generally recalled telling members of Congress about the arms sales on November 12, 1986.<sup>56</sup> He could not remember receiving any information from Poindexter for any of his presentations on the matter in that time.<sup>57</sup> The former President could not remember asking Poindexter to assemble the facts on the arms sales.<sup>58</sup> He could not recall that Poindexter briefed the House and Senate intelligence committees on November 21, 1986.<sup>59</sup>

56 Ibid., pp. 37-38.

57 Ibid., p. 30.

58 Ibid., p. 28.

59 Ibid., pp. 44-45.

Defense counsel's questions suggested that their client had significant exchanges with the President during the arms-sale period and its aftermath. But Reagan's lack of recollection, and lack of specificity when he did remember events or individuals, left those questions unresolved.

President Reagan provided more helpful testimony for the defense on the subject of contra-support operations. Calling the Boland prohibition on contra funding a "disaster," <sup>60</sup> Reagan testified that he urged his aides to do what they could to support the contras, while staying "within the law." <sup>61</sup> Reagan recalled that Saudi Arabia's King Fahd pledged millions of dollars for the contras.<sup>62</sup> He said he told his aides not to solicit contributions for the contras directly but to tell people how they could contribute if they wanted to help.<sup>63</sup>

60 Ibid., p. 69.

61 Ibid., pp. 53-54.

62 Ibid., pp. 74-75.

63 Ibid., pp. 53-54.

Asked whether Poindexter briefed him on the contras, President Reagan said: "Oh yes, I depended on him for that." <sup>64</sup> He said he had no reason to believe that Poindexter was not keeping him fully informed.

64 Ibid., p. 116.

Asked to describe what he knew about North's responsibilities in the White House, President Reagan said:

Well, he was mainly performing tasks, as I understand it, for the NSC, but he -- his background and record had been one of being decorated for heroism and so forth in the Vietnamese conflict, and that he had been a very bold and brave soldier -- Marine.

And -- so, he was -- it was my impression, not from any specific reports or anything, that in through all of this that he was communicating back and forth between on the need for the support of the Contras and so forth.<sup>65</sup>

<sup>65</sup> Ibid., p. 131.

In addition to professing a benign view of North and his activities, President Reagan indicated general knowledge of and support for the contra-resupply operation in Central America:

Q: Do you recall any discussions that he [Poindexter] may have had with you about the construction of an airstrip down there in Central America?

A: Well, I did hear -- we had learned that there was a rather primitive lane in there in the jungle near the border of Costa Rican [sic], and that was then being put into better shape as a usable airstrip.

Q: Did you have any -- do you recall any discussion about who was constructing the airstrip?

A: Well, no. I assume it was the Costa Rican government.

Q: And do you know what that airstrip was going to be used for?

A: Well, I know that -- I hoped that it would be used in the delivery of when once again we could supply, keep the Contras supplied, that it could be involved in the -- used there, if there was need for a refueling or anything of that kind of a plane.<sup>66</sup>

<sup>66</sup> Ibid., p. 121.

President Reagan was then asked whether he knew who would be using the Costa Rican airstrip for contra resupply. His answer reflected knowledge of the operation supposedly being funded and run by private citizens -- the so-called "private benefactors" -- that was in fact being run by Secord at North's direction:

Q: Do you know who it was that was going to be using the airstrip? It was going to be used for supplying the Contras, but do you know who it was that was actually going to be doing the supplying and using the airstrip?

A: No, I do not on that. I don't think -- I don't think I ever considered that it would be military planes of ours. So, possibly some of those that weren't officially planes of ours that had been helping in the past in deliveries to the Contras and so forth.

Q: Earlier this morning or earlier today, I should say, you mentioned General Secord. That you knew that he was involved in the Contra supply effort.

Was it part of his operation you thought that he might be using the airstrip?

A: I can't say that I actually recall that, but it seems to me logical that he would have been involved in that.<sup>67</sup>

<sup>67</sup> Ibid., p. 122.

President Reagan, who winked and smiled at Poindexter from the witness stand, did not hide his contempt toward congressional inquiries into NSC staff contra-support activities. Shown misleading letters written by Poindexter in July 1986 to the committees of Congress that were investigating allegations of North's contra efforts, Reagan said: "I am in total agreement. If I had written it myself, I might have used a little profanity." <sup>68</sup>

68 Ibid., pp. 146-47.

In cross-examination, the prosecution was able to impeach much of President Reagan's testimony. This was possible because Reagan late in 1987 had answered, under oath, 53 written interrogatories for Independent Counsel and the Grand Jury investigating the Iran/contra matter.

The July 21, 1986, letters -- in which Poindexter embraced and perpetuated the lies McFarlane had told Congress about North's contra-support activities a year earlier -- were a key element in the obstruction charges against the defendant. Under cross-examination by the prosecution, President Reagan was asked whether he was aware that the Poindexter letters repeated McFarlane's previous lies. The former President equivocated:

Well, I simply -- no, I did not have this information, but I have a great deal of confidence in the man who was quoted as sending these letters, McFarlane. And I have never -- I have never caught him or seen him doing anything that was in any way out of line or dishonest. And so, I was perfectly willing to accept his defense.<sup>69</sup>

69 Ibid., p. 151.

President Reagan said he did not know that McFarlane had pleaded guilty to withholding information from Congress in connection with the false letters.<sup>70</sup>

70 Ibid., pp. 220-21.

Asked whether he approved either the McFarlane or Poindexter letters to Congress, the former President said he had no recollection of doing so, adding that his memory could be faulty.<sup>71</sup> Asked directly whether he would approve of sending false information to Congress, President Reagan conceded that he would not.<sup>72</sup> Would he have authorized Poindexter to make false statements to Congress? President Reagan again attempted to assist his former aide: "No. And I don't think any false statements were made." <sup>73</sup>

71 Ibid., pp. 150-51.

72 Ibid., pp. 151-52.

73 Ibid., p. 158.

President Reagan also testified that he did not approve the destruction of Iran/contra documents by Poindexter, and that he was not told about their destruction.<sup>74</sup> But the former President, in response to subsequent questioning, described the dilemma in which he placed his aides in November 1986 by instructing them that certain information could not be revealed because "it will bring to risk and danger to people that are held and with the people that we were negotiating with." <sup>75</sup>

74 Ibid., p. 160.

75 Ibid., p. 252.

Asked again whether he approved the destruction or alteration of any Iran/contra records, President Reagan said: "And this, I cannot answer. I cannot recall because it is the possibility that there were such papers that would violate the secrecy that was protecting those individuals' lives." <sup>76</sup> President Reagan had denied in response to the earlier written interrogatories that he approved the destruction and alteration of documents; when confronted with his previous testimony he stated that it was truthful.

76 Ibid., p. 255.

On the issue of the contras, President Reagan said he ``never had any inkling" that North was guiding their military strategy.<sup>77</sup> But Reagan muddled the issue in a later statement about North:

<sup>77</sup> Ibid., p. 170.

I know that he [North] was very active, and that was certainly with my approval, because I yesterday made plain how seriously I felt about the Contra situation and what it meant to all of us here in the Americas. And, so, obviously, there were many things that were being done. But, again, as I say, I was convinced that they were all being done within the law.<sup>78</sup>

<sup>78</sup> Ibid., p. 189.

In questioning about the Iran/contra diversion, President Reagan surprisingly asserted that he had no proof that a diversion had occurred:

And to this day, I still with all of the investigations that have been made, I still have never been given one iota of evidence as to who collected the price, who delivered the final delivery of the weapons, or what was -- whether there was ever more money in that Swiss account that had been diverted someplace else. I am still waiting to find those things out and have never found them out.<sup>79</sup>

<sup>79</sup> Ibid., p. 155.

Asked whether he had approved a diversion, Reagan again stated:

May I simply point out that I had no knowledge then or now that there had been a diversion, and I never used the term. And all I knew was that there was some money that came from some place in another account, and that the appearance was that it might have been a part of the negotiated sale. And to this day, I don't have any information or knowledge that that wasn't the total amount that -- or that there was a diversion.<sup>80</sup>

<sup>80</sup> Ibid., p. 156.

Asked again whether he would have approved a diversion, President Reagan said he would not. But, he added, ``No one has proven to me that there was a diversion." <sup>81</sup>

<sup>81</sup> Ibid., p. 157.

President Reagan said he did not recall that the Tower Commission concluded in March 1987 that, in fact, a diversion had occurred. ``I, to this day, do not recall ever hearing that there was a diversion," he said.<sup>82</sup> Shown that portion of the Tower Commission report describing the diversion, Reagan said: ``This report -- this is the first time that I have ever seen a reference that actually specified there was a diversion." <sup>83</sup>

<sup>82</sup> Ibid., p. 240.

<sup>83</sup> Ibid., p. 243.

Asked whether Poindexter should have told him about an Iran/contra diversion, Reagan said: ``Yes. Unless maybe he thought he was protecting me from something." <sup>84</sup>

<sup>84</sup> Ibid., pp. 243-44.

### The Verdict and Sentencing

After six days of deliberation, the jury on April 7, 1990, found Poindexter guilty of each of the five felony charges against him. Judge Greene on June 11, 1990, sentenced Poindexter to six months

imprisonment on each of the five counts, to be served concurrently.

In imposing the sentence, Judge Greene noted complaints by Poindexter's supporters that the most he was guilty of was having become embroiled in a political quarrel between the White House and Congress. Judge Greene stated:

Whatever may have been the nature of the original dispute, what the defendant and his associates did was emphatically not a part of the normal political process.

. . . When Admiral Poindexter and his associates obstructed the Congress, what were they seeking to accomplish? In a word, it was to nullify the decision that body had made on the issue of supplies to the Contras. . . .

President Reagan did not, or for parliamentary reasons he could not, veto the bill [which contained the Boland prohibition on contra aid]. He did not attempt to assert his own constitutional powers or take the issue to the people, and at the conclusion of the political process the Boland Amendment thus became law.

No problem. What the president was unwilling or unable to do -- to defeat this law -- Admiral Poindexter, together with Oliver North and others, did on their own. They decided that the policy embodied in the Boland Amendment was wrong, and they went about to violate it on a large scale and for a lengthy period, and then to lie about their activities to prevent the Congress and the public from finding out. . . .

With all due respect to the distinguished military records of Admiral Poindexter, Colonel North, General Secord, and the others, they have no standing in a democratic society to invalidate the decisions made by elected officials . . . As I said several times during the trial, it is immaterial to this criminal case who was right and who was wrong about the wisdom of the Contra policy. That is not what this trial was about. The jury and this court were not competent to decide for this nation whether resistance forces in Nicaragua should or should not have been supplied with weapons.

But more importantly for present purposes, neither was Admiral Poindexter. When he and his associates took it upon themselves to make that decision anyway, to implement it on a broad scale, and to work actively to keep what they were doing from the Congress and the public, they not only violated various statutes. They were also in violation of a principle fundamental to this constitutional Republic -- that those elected by and responsible to the people shall make the important policy decisions, and that their decisions may not be nullified by appointed officials who happen to be in positions that give them the ability to operate programs prohibited by law. It is unfortunate that, whatever may be his view of his own purposes and actions, the defendant still gives no evidence of recognizing that principle and the seriousness of its violation.

Given the nature of the offenses, the sentencing principle that is primarily applicable here is that of deterrence, and as a practical matter, deterrence means meaningful penalties. If the court were not to impose such a penalty here, when the defendant before it was the decision-making head of the Iran-contra operation, its action would be tantamount to a statement that a scheme to lie to and obstruct Congress is of no great moment, and that even if the perpetrators are found out, the courts will treat their criminal acts as no more than minor infractions.

A message of that kind could not help but encourage others in positions of authority and secrecy to frustrate laws that fail to accord with their notions of what is best for this country, and to carry out their own private policies in the name of the United States. . . .85

85 Judge Greene, Poindexter Transcript of Sentencing, 6/11/90, pp. 18-22

The Appeal

A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit in a 2-1 decision on November 15, 1991, reversed Poindexter's convictions on the grounds that his trial was impermissibly tainted by his immunized congressional testimony. The Poindexter ruling was based on the appeals court decision in the North case, which extended the protections of the use immunity statute to prohibit use of any witness whose testimony has been refreshed or shaped in any way by the defendant's immunized testimony. In his dissenting opinion, Chief Judge Abner Mikva noted that the majority ruling "tells future defendants that all they need to evade responsibility [to testify at trial] is a well timed case of amnesia." 86

86 U.S. v. Poindexter, 951 F.2d 369, 390 (D.C. Cir. 1991).

The Poindexter appeals panel also overturned the two obstruction convictions on the grounds that the statute was "unconstitutionally vague" in its proscription of "corruptly" endeavoring to impede a congressional inquiry. The appeals panel ruled that a defendant's lying to Congress does not constitute obstruction unless the defendant corruptly influences someone else to do so. Again, Chief Judge Mikva dissented, finding it "obvious . . . that Poindexter 'corruptly' obstructed the congressional investigation when he lied to Congress." 87

87 Ibid.

In October 1992, Independent Counsel petitioned the U.S. Supreme Court to review the Poindexter case. Independent Counsel said the appeals court ruling that the obstruction statute was unconstitutional "leaves a large gap in the criminal law, while endorsing a method of analyzing constitutional vagueness challenges that could prove enormously destructive to a substantial body of federal legislation." 88 The petition noted that at least 17 other laws besides the obstruction statute at issue use the word "corruptly" to define an element of the offense.<sup>89</sup>

88 U.S. v. Poindexter, Crim. No. 88-0080-01, Petition for Writ of Certiorari by United States of America, at 9 (October 1992).

89 Ibid., p. 10.

On immunized testimony, Independent Counsel in its petition to the Supreme Court said the appeals ruling in Poindexter would

make almost impossible the prosecution of any case involving public immunized statements that requires testimony by persons sympathetic to the accused, such as co-conspirators or other associates. And the dangers of abuse and manipulation are magnified by the court of appeals' view, expressed in North, that a witness inclined to assist the defense may become disqualified from testifying at trial by the simple expedient of soaking himself in the defendant's immunized statements. 90

90 Ibid., p. 22.

Independent Counsel also noted that the appeals ruling

. . . will have its most profound impact on cases involving public immunized testimony before Congress -- cases that, by definition, involve issues of the most fundamental import. If the court of appeals has erred, this Court should right that error before significant further damage is done to the legislative oversight function. 91

91 Ibid., p. 29.

The U.S. Supreme Court in December 1992 declined, without comment, to review the Poindexter case.

## Conclusion

Poindexter was responsible for providing President Reagan with advice on national-security matters of highest importance. What his conviction showed was that a jury of ordinary citizens can sort and weigh complex evidence and agree that obstructing and lying to Congress is a serious act worthy of felony conviction.

The Poindexter trial served the public interest in another sense. Poindexter's determination to call President Reagan as a witness allowed the public the rare opportunity to see him testify for seven hours about the Iran/contra matter.

The completion of the Poindexter trial in April 1990, two years after the original indictment was returned, necessitated the re-activation of the criminal investigation into Iran/contra. For the first time, Poindexter and North were available for questioning by Independent Counsel. Although this decision was questioned by some, Independent Counsel determined that his Iran/contra investigative mandate could not be fulfilled until the central operational figures were interrogated to find out whether other high-ranking officials helped support and cover up their activities.