



Chapter 20

United States v. Joseph F. Fernandez

The beginning and end of the case against Joseph F. Fernandez were unprecedented. The indictment of Fernandez represented the first time that a CIA chief of station had been charged with crimes committed in the course of his duties as a CIA officer. The dismissal of Fernandez derived from the first and only invocation by the attorney general of his power to prohibit the introduction of classified information at trial. As a result, Independent Counsel was deprived of the opportunity to demonstrate at trial the crucial role Fernandez played in the contra resupply operation run by Lt. Col. Oliver L. North and retired U.S. Air Force Major General Richard V. Secord, as well as the extent to which Fernandez tried to obstruct the inquiries of official investigative bodies attempting to learn the facts of the Iran/contra matter.

The Fernandez Indictments

Fernandez was originally charged in a five-count indictment returned on June 20, 1988, by a federal Grand Jury sitting in the District of Columbia. Fernandez was accused of conspiring with North, Secord and others to defraud the United States, obstructing an investigation by the Tower Commission, and making false statements. The indictment alleged that the conspirators deprived Congress of its ability to oversee the operation of covert actions pertaining to Nicaragua by establishing and running a military support enterprise which was unaccountable to the CIA and, in turn, to Congress. By operating outside of prescribed channels, Fernandez prevented those with oversight authority from monitoring activities that were at the heart of congressional concern regarding Central American policy.¹

1 Indictment, U.S. v. Fernandez, No. 88-0236 (D.D.C. June 20, 1988).

The activities undertaken by Fernandez -- most at a time when the CIA was forbidden from "participation in the planning or execution of military operations" or "participat[ion] in logistics activities integral to such operations" -- included: (1) participation in the planning and construction of an airstrip in Costa Rica to serve the contra resupply operation; (2) mobilization of a contra fighting force on the southern front through inducements of lethal resupply; and (3) coordination of the southern front resupply effort. When questioned about these activities in early 1987 by investigators working separately for the Tower Commission and the CIA's inspector general, Fernandez made false statements regarding his relationship with North and Secord, the origin of the Costa Rican airstrip, and his involvement in and knowledge of the resupply operation.

The indictment alleged that the conspiracy took place within the District of Columbia and elsewhere, and that the obstruction and false statements occurred in the Eastern District of Virginia where Fernandez had been questioned. Independent Counsel properly presented the combined charges to a Grand Jury sitting in the District of Columbia, and following return of the indictment, Fernandez spent several months making various motions to dismiss it. It was only after litigating for three months that Fernandez moved to dismiss four of the counts on grounds of improper venue. In response, Independent Counsel moved to dismiss the entire indictment without prejudice, in order to avoid separate indictments in two separate districts for crimes that were entirely connected. Independent Counsel's motion was granted on October 19, 1988.

On April 24, 1989, as the North trial was ending, Fernandez was indicted by a Grand Jury sitting in the Eastern District of Virginia.² In an effort to avoid the issues under the Classified Information Procedures Act that had plagued North, Independent Counsel did not seek the return of the

conspiracy charge contained in the District of Columbia indictment. This was consistent with Independent Counsel's decision on January 13, 1989, to dismiss similar conspiracy charges in North.

2 Pre-trial and trial proceedings in Fernandez were supervised by Associate Counsel Laurence S. Shtasel, Geoffrey S. Stewart, and Geoffrey S. Berman.

The four-count Virginia indictment charged that during a three-week period in January 1987, Fernandez made false and misleading statements to two official investigative bodies -- the CIA's Office of Inspector General and the Tower Commission -- that were examining the facts surrounding the Iran/contra affair. These statements created a distorted picture of Fernandez's activities in support of the contras during the time of the Boland Amendment prohibitions on U.S. aid. More specifically, the indictment alleged that Fernandez made these false statements:

1. That the airstrip was a Costa Rican initiative, rather than an initiative of Fernandez, North, Secord and others;
2. That the airstrip was designed to help defend Costa Rica from a Nicaraguan invasion, rather than to support the resupply of the contras;
3. That Fernandez's contacts with Rafael Quintero, a member of the North-Secord "private benefactor" network, were limited to the occasions of the resupply flights, rather than including their work together on the airstrip and other projects;
4. That Fernandez did not know that North was involved in the resupply operation, when in fact the two worked closely together on this project; and
5. That Fernandez did not know that the supplies he had assisted in delivering to the contras in September 1986 contained weapons and ammunition, when in fact Fernandez knew that they were.³

3 Indictment, U.S. v. Fernandez, No. CR89-0150-A (E.D.Va. Apr. 24, 1988).

Independent Counsel further sought to prove that Fernandez endeavored to obstruct these investigations by making these and 25 other misleading statements (13 to the Inspector General and 12 to the Tower Commission) pertaining to:

1. His involvement with the airstrip;
2. His dealings with the resupply operation;
3. His relationship with North; and
4. His contacts with Felix Rodriguez, a representative of North and Secord in El Salvador.

Summary of the Evidence

From mid-1985 through October 1986, while the Boland Amendment prohibited the CIA from supporting military and paramilitary operations in Nicaragua by the contras, Fernandez played a crucial role in an effort spearheaded by North and Secord to provide lethal support to the contras. Fernandez's activities for the North-Secord operation centered largely on two interconnected activities. Both of these projects focused on developing a contra "southern front" along the Costa Rica/Nicaragua border that would complement contra forces arrayed to the north along the Honduras/Nicaragua border.⁴

4 Fernandez admitted to the Tower Commission that opening a southern front was his "one mission" received from the newly appointed U.S. ambassador to Costa Rica, Lewis Tambs, in July 1985. (Fernandez, Tower Commission Testimony, 1/28/87, pp. 8-12.) Tambs was knowledgeable of many

of Fernandez's activities set forth in this chapter, especially those concerning the airstrip at Santa Elena, discussed later in this section. (See also Classified Investigation A, set forth in the Classified Appendix to this Report, which describes Tambs' involvement in a possibly illegal quid pro quo to Costa Rican President Luis Monge to induce the Costa Ricans to permit construction of the airstrip.)

Independent Counsel concluded in November 1987 to go forward with a case against Fernandez in hopes of eventually using Fernandez as a witness. The demise of Boland conspiracy charges in North in January 1989 and Independent Counsel's subsequent decision not to seek conspiracy charges in the second indictment of Fernandez ended Independent Counsel's plans to prosecute other conspirators. Tambs later voluntarily testified in Independent Counsel's investigation. See History of Investigation chapter.

First, beginning in August 1985, Fernandez assisted North, Secord and others in building a refueling airstrip at Santa Elena in remote northwest Costa Rica that was designed to facilitate aerial resupply of the contras. Second, throughout the first nine months of 1986, Fernandez worked closely with Rafael Quintero, North and Secord's representative in Central America, both in building the airstrip and in coordinating the actual resupply flights that delivered weapons, ammunition and supplies to contra troops along the Southern Front.

Both of these efforts were designed to encourage the contras in northern Costa Rica to move back inside Nicaragua and resume fighting the Sandinistas. Fernandez urged contra leaders, directly and through CIA field personnel, to take up this struggle and induced them by promising lethal and non-lethal supplies. In the words of one CIA paramilitary officer, Fernandez authorized provision to the contras of everything from "beans to bullets" if they would re-infiltrate Nicaragua and provide a military counterpoint to the contras to the north.⁵ Having made these assurances, Fernandez worked closely with Quintero and North to follow through with their plans to construct an airstrip and resupply contra forces in the south.

5 [Classified Identity Withheld], Grand Jury, 6/5/87, pp. 21-25. See also [Classified Identity Withheld], OIC Deposition, 5/28/87, pp. 41-46, 49-51; [Classified Identity Withheld], Grand Jury, 4/13/88, pp. 14-18.

The Airstrip

In August 1985, Fernandez began assisting efforts to construct an airstrip to be used as an emergency landing strip and refueling point for contra-supply aircraft making the long round trip from Ilopango, El Salvador, to the southern front. Because the aircraft could not fly over Nicaragua, they flew off-shore along the Pacific coast to the Costa Rican border, then along the border to drop sites just inside Nicaragua.⁶

6 Fernandez, Tower Commission Testimony, 1/28/87, pp. 9, 12-14; SAN JOSE Cable, 8/8/85, DO 181545-41; SAN JOSE Cable, 8/13/85, DO 189740-38; SAN JOSE Cable, 8/14/85, DO 101720-19.

Fernandez sent two CIA paramilitary officers to northwest Costa Rica to locate an appropriate site for the strip. The officers surveyed a potential location at Santa Elena and reported to Fernandez that it was a feasible site.⁷ During the fall of 1985, Fernandez also consulted with Robert Owen, a representative of North, both to design an overall strategy for the southern front and to obtain permission from Costa Rican officials to construct the airstrip.⁸

7 [Classified Identity Withheld], OIC Deposition, 5/28/87, pp. 25-26, 52-54; [Classified Identity Withheld], FBI 302, 10/13/87, p. 3.

8 Fernandez, Tower Commission Testimony, 1/28/87, pp. 14-15; Owen, Grand Jury, 11/13/87, pp. 52-58; Owen, North Trial Testimony, 2/27/89, pp. 2446-47 and 3/1/89, pp. 2705-07; Memorandum

from TC [Owen] to BG [North], 8/25/85; [Classified Identity Withheld], OIC Deposition, 5/28/87, pp. 23-24, 29.

Also during the fall of 1985, Fernandez worked with William Haskell, an associate of North and Secord, who ultimately purchased land for the airstrip on behalf of Udall Corporation, a company established by Secord. Fernandez traveled to the airstrip site with Haskell and provided assistance to Haskell's efforts.⁹ In January 1986, Haskell introduced Fernandez to Quintero, who took over the coordination of the airstrip project at Secord's request.¹⁰

⁹ Fernandez, Tower Commission Testimony, 1/28/87, pp. 16-17; Quintero, FBI 302, 11/13/87, p. 10; [Classified Identity Withheld], OIC Deposition, 5/28/87, pp. 24-25; Haskell, FBI 302, 7/6-7/87, pp. 4-6.

¹⁰ Fernandez, Tower Commission Testimony, 1/28/87, pp. 16-17; Quintero, FBI 302, 11/13/87, p. 10; Quintero, FBI 302, 11/23/87, p. 4; Quintero, North Trial Testimony, 3/2/89, pp. 2916-17.

In January 1986, Quintero and Fernandez traveled to inspect the site for the airstrip; after this trip, Fernandez modified the layout of the airstrip to accommodate the swampy terrain.¹¹ During the next three months, Quintero made numerous trips to Costa Rica to oversee construction of the airstrip. Fernandez explained to Quintero that Congress was expected to reverse its prior prohibition on CIA military support for the contras and the airstrip was, therefore, being built in anticipation of renewed funding for CIA contra-support efforts. Fernandez stated that the object was to have the airstrip ready by the time Congress changed its course.¹² Some months later, in the spring of 1986, Quintero learned that Congress had rejected renewed funding for the contras. When Quintero raised this issue, Fernandez announced that the airstrip project and the contra-resupply operation would continue nonetheless.¹³

¹¹ Ibid.

¹² Quintero, Grand Jury, 1/6/88, p. 95. In his November 1987 interviews, Quintero attributed this explanation for the airstrip to Secord. (Quintero, FBI 302, 11/13/87, pp. 10-11; Quintero, FBI 302, 11/23/87, p. 4.)

¹³ Quintero, Grand Jury, 1/6/88, p. 96. See also KL-43 Message from Secord to North, 6/6/86, ALU 003835 (asking North to "light a fire" under Fernandez to get increased guard protection for the airstrip).

The airstrip was completed, although it proved to be less significant in the resupply operation than was originally expected. The landing strip would get muddy after a rain, and on one occasion a plane got stuck there.¹⁴ While Fernandez would later assert that the purpose of the airstrip was to provide defensive support to Costa Rica in the event of an invasion by Nicaragua, this purported objective was a cover story. An airstrip built for these reasons would have been redundant, since the U.S. Army's Southern Command maintained its own airport, with a paved airstrip, only one hour's drive from Santa Elena. In fact, Fernandez told U.S. Army Lt. Col. John Taylor, head of the U.S. Military Group in Costa Rica and a man who had unwittingly discovered the airstrip, that it was Fernandez's project.¹⁵

¹⁴ Quintero, FBI 302, 11/13/87, pp. 12-13; Quintero, FBI 302, 11/23/87, pp. 15-16; Fernandez, Tower Commission Testimony, 1/28/87, pp. 25-26.

¹⁵ Taylor, FBI 302, 1/30/89, p. 5. See also KL-43 Message from Secord to Dutton, 7/29/86, 0360-61 (proposing that Dutton negotiate with Fernandez "re future use" for airstrip); Galvin, FBI 302, 6/13/87, pp. 3-4 (Southern Command unaware of purpose for airstrip).

The Resupply Operation

During the first nine months of 1986, Fernandez spent considerable time coordinating the resupply of weapons and ammunition to the contras along the southern front. Through the use of a KL-43 -- a National Security Agency communication device supplied to Fernandez by North -- Fernandez was able to send encoded messages over the telephone to Quintero and North about the supply needs of the contras, flight path information, coordinates for specific air drops, and the overall plan for the enhancement of the southern front.¹⁶

¹⁶ Fernandez, Tower Commission Testimony, 1/28/87, pp. 52-56; Quintero, FBI 302, 11/13/87, p. 14; Quintero, FBI 302, 11/23/87, pp. 5-6; KL-43 Message from Fernandez to North, 3/3/86, AKW 004421; KL-43 Message from Secord to North, 4/9/86, AKW 004416; KL-43 Message from Fernandez to North, 4/12/86, AKW 004410; KL-43 Message from North to Fernandez, 4/15/86, AKW 004409. See also messages cited in n.16 below.

From January through September 1986, Fernandez communicated with those overseeing the North-Secord operation. Telephone records reveal hundreds of calls between Fernandez and North and Quintero. During calls with Quintero, Fernandez would provide material requirements of the contras (including weapons lists) and would dictate locations for air drops. On a number of occasions, Fernandez postponed or cancelled scheduled drops.¹⁷

¹⁷ Fernandez, Tower Commission Testimony, 1/28/87, pp. 33-34; Quintero, FBI 302, 11/13/87, pp. 13-14. See also these KL-43 messages, all of which involve Fernandez or which report on conversations with Fernandez: Secord to North, 3/24/86, AKW 004419 & 004424; Secord to North, 4/9/86, ALU 003840; Secord to North, 4/16/86, AKW 004408; Secord to North, 4/23/86, AKW 004403; Quintero to Secord, 4/23/86; Secord to North, 5/2/86, AKW 004401; Secord to North, 5/12/86, ALU 003834; Secord to North, 6/2/86, AKW 004393; Secord to North, 7/11/86, 00371; Quintero to Secord, 7/16/86, 00367; Steele to Earl, 8/18/86, 00342; Fernandez to Quintero, 9/2/86, 00308-09; Dutton to Quintero, 9/9/86, 00413; Quintero to Dutton, 9/10/86, 00410; Fernandez to Quintero, 9/10/86, 00414; Dutton to North, 9/17/86, 00423; Fernandez to Quintero, 9/17/86.

To improve the efficiency of the resupply operation, Fernandez used CIA field personnel. Beginning in August 1986, Fernandez relied on a CIA paramilitary officer to "get the job done." ¹⁸ Fernandez would tell the officer to determine coordinates for a drop on a designated date. The officer would then evaluate the best site for the drop, then give the drop coordinates, call signals and bonfire configurations to Fernandez, who would pass this information to Quintero.¹⁹

¹⁸ [Classified Identity Withheld], Grand Jury, 1/20/88, pp. 27-28, 40-41.

¹⁹ Ibid., pp. 29-40; SAN JOSE Cable, 12/7/86, DO 166532. On one occasion, Fernandez had the paramilitary officer bring a map bearing drop site coordinates to his home to show to Quintero. ([Classified Identity Withheld], Grand Jury, 1/20/88, pp. 48-50, 58; Quintero, FBI 302, 11/13/87, p. 15.)

Despite Fernandez's later statements that he was a mere conduit for information,²⁰ Fernandez clearly played an important role in shaping the strategy for the southern front. Fernandez's principal goal was to link the southern front forces with contra troops to the north. Fernandez indicated that he wanted to use systematic placement of air drops to create northward movement of the southern front units.²¹ Following the first successful lethal air drop in April 1986, Fernandez sent a KL-43 message to North that stated in part:

²⁰ See, for example, SAN JOSE Cable, 12/7/86, DO 166532; Inspector General Notes, 1/11/87, ER 8820; "Ex-CIA Agent is Bitter Over Iran Affair," The New York Times, 11/27/89, p. A31.

²¹ [Classified Identity Withheld], Grand Jury, 4/13/88, pp. 8-19.

Our plans during next 2-3 weeks includes [sic] air drop at sea for UNO/KISAN [contra] indigenous force area Monkey Point, maritime deliveries NHAO [humanitarian] supplies to same, NHAO air drop to UNO South, but w/ certified air worthy aircraft, lethal drop to UNO South, Negro [Chamorro] visit to UNO South Force with photogs, UNO newspapers, caps and shirts, and transfer of 80 UNO/FARN recruits now in Costa Rica carrying all remaining cached lethal materiel to join UNO South Force. My objective is creation of 2,500 man force which can strike northwest and link-up with quiche to form solid southern force. Likewise, envisage formidable opposition on Atlantic Coast resupplied at or by sea. Realize this may be overly ambitious planning but with your help, believe we can pull it off.²²

22 KL-43 Message from Fernandez to North, 4/12/86, AKW 004410.

The need for secrecy regarding Fernandez and North's roles in the resupply operation was emphasized in a KL-43 message from North to Fernandez in June 1986:

We are committed to commencing drops to FDN [contras] by C-7 tomorrow night but can delay for one night to do your drop if we can get the necessary info for the pilots. To facilitate, have asked Ralph [Quintero] to proceed immediately to your location. I do not think we ought to contemplate these operations without him being on scene. Too many things go wrong that then directly involve you and me in what should be deniable for both of us.²³

23 KL-43 Message from North to Fernandez, 6/16/86, AKW 004389.

As a result of Fernandez's efforts, resupply operations had improved greatly by September 1986. During that month alone, six successful lethal air drops were made along the southern front.²⁴ The resupply operation came to an abrupt halt in early October 1986, however, when a private benefactor plane carrying, among others, Eugene Hasenfus, was shot down over Nicaragua.

24 SAN JOSE Cable, 9/10/86, DO 72985; SAN JOSE Cable, 9/15/86, DO 73134; SAN JOSE Cable, 9/30/86, DO 77565.

Investigation and Obstruction

In the aftermath of the downing of the Hasenfus aircraft, Fernandez took steps to erase records of his relationship with North and Quintero. In the Fall of 1986, Fernandez approached Eva Groening, a State Department employee working at the U.S. Embassy in San Jose, and instructed her to remove from the general files all records of his telephone calls. Groening isolated Fernandez's telephone records -- which documented the hundreds of calls to North and Quintero -- and placed them in a personal safe. When Groening completed her tour in Costa Rica, she did not take these records with her.²⁵

25 Groening, FBI 302, 1/6/89, pp. 1-3.

Some months after Fernandez arranged to have his telephone records removed from their proper place of storage, Independent Counsel requested these records from the Embassy. They could not be located. The Costa Rican telephone company provided the records to Independent Counsel in August 1988. At trial, these records would have demonstrated that there was frequent contact between Fernandez and North, and Fernandez and Quintero -- particularly at the times of attempted resupply flights.

The downing of the Hasenfus airplane and the exposure of secret sales of arms to Iran sparked two official investigations, both of which sought in part to examine the role of the CIA in these operations. One investigation was made by the CIA's inspector general; the other was by the President's Special Review Board, the Tower Commission.

In January and February 1987, Fernandez was interviewed on several occasions by both of these bodies.²⁶ During these interviews, Fernandez gave false and misleading answers on matters at the core of the investigations. Fernandez provided inaccurate information about his involvement with the airstrip, insisting that it was a Costa Rican initiative to help defend against a Nicaraguan invasion. Fernandez stated that he dealt with Quintero only on the occasions of resupply flights, failing to mention his numerous contacts with Quintero in connection with the construction of the airstrip. Fernandez claimed that he did not know that North had been involved in the resupply network, despite the fact that he had worked with North closely on this very project for nine months. Fernandez also asserted that he did not know that the supplies that he had assisted in delivering to the contras in September 1986 were lethal. Fernandez further denied having ever communicated with Secord -- even though he had met with Secord, Quintero and Costa Rican Security Minister Benjamin Piza in March 1986 to discuss the airstrip -- or Felix Rodriguez, even though Fernandez had several conversations with him about the resupply operation.²⁷

²⁶ Fernandez was interviewed by Tower Commission staff on January 21, 1987. Fernandez testified to the Commission on January 28, 1987. Fernandez was interviewed by the CIA's Office of Inspector General on January 11, January 24, and February 2, 1987.

²⁷ Inspector General Notes, 1/11/87, ER 8820-25; Inspector General Notes, 1/24/86, ER 8826-36; Inspector General Notes, 2/2/86, ER 8792-98; Black, Grand Jury, 5/13/88, pp. 9-11, 13-24; Fernandez, Tower Interview, 1/21/87, ALU 3818-20.

At the time Fernandez was initially questioned by CIA and Tower Commission investigators, neither Fernandez nor the investigators knew that on some occasions, messages transmitted by the KL-43 machine were printed and retained. Fernandez thus believed that no permanent record of his extensive, ongoing relationship with North and Quintero existed that would disprove his denials of involvement with either the airstrip or the resupply operation. When some of the KL-43 messages were discovered by Tower Commission investigators, Fernandez was forced to concede that he had been untruthful in his responses. On January 28, 1987, Fernandez admitted to the Tower Commission that he had been "less than candid or even misleading" in his answers.²⁸ Fernandez told the Commission he was "stunned" when he was shown written copies of his KL-43 messages.²⁹ That led to this exchange:

²⁸ Fernandez, Tower Commission Testimony, 1/28/87, p. 5.

²⁹ Ibid., pp. 3-4. See also Fernandez, Tower Interview, 1/21/87, ALU 3821-26; Bruh, FBI 302, 10/2/87, p. 2 (Fernandez admitted, "You have me and my career is ruined!").

General Scowcroft: That stunned you in what way? That they existed?

Mr. Fernandez: Yes, that they existed -- not in the sense that I was -- in the way that the communications between Colonel North and I and Mr. Quintero and I, who was Colonel North's I guess representative, although never defined in that way, were things that were written on this machine. It was all in digital. There were no hard copies -- see hard copies -- of things. It was sort of startling because, up until that time, I had been recalling everything I had said from memory.³⁰

³⁰ Fernandez, Tower Commission Testimony, 1/28/87, p. 4.

Pretrial Proceedings

In both the District of Columbia and Virginia proceedings, Fernandez made a number of motions to dismiss the indictments. All of the motions that Fernandez directed at the legal sufficiency of the charges that were adjudicated were denied.

As in North, the most significant legal issues raised by Fernandez concerned immunity granted him by Congress in return for his testimony and the protective requirements of *Kastigar v. United States*, 406 U.S. 441, 458 (1972), and his demands for classified information. While the court had little difficulty disposing of Fernandez's *Kastigar* challenge, Fernandez's CIPA claims ultimately resulted in dismissal of the case.

Kastigar

Fernandez argued from the start that his prosecution was barred by *Kastigar* because he had provided testimony to Congress under a grant of immunity. Judge Claude M. Hilton of the Eastern District of Virginia adopted procedures proposed originally by the District of Columbia court and ordered the Government to submit in camera and ex parte an explanation of Independent Counsel's measures to insulate the Fernandez case from Fernandez's immunized congressional testimony.³¹ After reviewing the Government's papers, Judge Hilton concluded that there had been no violation of *Kastigar*.³²

³¹ Ibid., pp. 22-23; Memorandum Opinion and Order, Fernandez, slip. op. at 4-5 (E.D. Va. June 15, 1989).

³² Order, Fernandez (E.D. Va. June 15, 1989); Memorandum Opinion and Order, Fernandez (E.D. Va. July 10, 1989). Unlike North and Poindexter, Fernandez did not give his immunized congressional testimony in open, nationally televised hearings, but in executive session. Thus, dissemination of his immunized testimony was much more limited and therefore posed less of a problem for the trial judge. (Ibid., pp. 5-6.)

Classified Information (CIPA)

Relevancy Hearing

Fernandez filed notices under the Classified Information Procedures Act (CIPA) on May 24, June 23, July 3, and July 7, 1989, that identified the classified information he proposed to disclose at trial. The district court conducted hearings on the notices on July 10, 13, and 14, 1989. On the first day of hearings, over the Government's objection, the district court ruled orally and without written opinion that two broad categories of classified information were material to Fernandez's defense: the operational details of three highly sensitive projects in Costa Rica, none of which was described or implicated by the indictment or was in any way a part of the Government's case-in-chief; and the identity of three CIA stations or facilities in Central America.

Fernandez argued that he had to introduce documents showing highly classified operational details of the three projects in order to demonstrate the fear of the Costa Rican government of the military threat posed by Nicaragua.³³ Fernandez contended that Costa Rica's concern about Nicaragua, in turn, supported the truth of his statement to the CIA's inspector general that the Santa Elena airstrip - an entirely separate project -- too was a Costa Rican initiative to protect itself. The court ruled that evidence establishing the origin, purpose, development and magnitude of these programs was admissible.³⁴

³³ Defendant's Second Notice Pursuant to Section 5 of CIPA, Fernandez (E.D. Va. July 3, 1989).

³⁴ Transcript, Closed CIPA Hearing, Fernandez, 7/10/89, pp. 48-50.

The second category of classified information deemed relevant to Fernandez's defense involved the identity of three specific CIA facilities and stations, all of which remain classified. Fernandez argued it was critical that he show the understanding of CIA headquarters and high-ranking CIA officials of the activities of the North-Secord contra-resupply operation. Fernandez argued that the knowledge of CIA officials about these activities made it less probable that he would have lied intentionally

about these subjects. The district court determined that Fernandez could identify these stations and facilities.³⁵

³⁵ Ibid., pp. 34-40.

Rejection of Substitutions

On July 12, 1989, Independent Counsel moved under CIPA for substitutions for the classified information deemed relevant to Fernandez's defense by the trial court. Along with its motion, Independent Counsel filed affidavits by Assistant Attorney General Edward S.G. Dennis, Jr., and two intelligence officials, which stated that the three projects could not be disclosed without serious injury to national security. They similarly stated that official acknowledgement of the existence of the three disputed CIA facilities would adversely affect national security.³⁶

³⁶ Affidavit of Assistant Attorney General Edward S.G. Dennis, Jr., Fernandez (E.D. Va. July 12, 1989); Declaration of Deputy Director for Operations of the Central Intelligence Agency, Fernandez (E.D. Va. July 12, 1989); Declaration of [Classified Identity of Agency Director Withheld], Fernandez (E.D. Va. July 12, 1989).

The Government's first proposed substitutions addressed Fernandez's evidence of the three projects in Costa Rica. The court rejected the Government's initial proposal on July 13, 1989 -- the day after it was offered. The court acknowledged that "[w]e are not talking about details. We are not talking about trying these programs." Nevertheless, the court insisted that Fernandez could "introduce into evidence the fact that they did have other serious ongoing programs." ³⁷ In the court's view, "hard core programs that really shows [sic] that America is doing something other than talking" went directly to Fernandez's defense that the Costa Ricans wanted American involvement with the airstrip. The court suggested that an adequate substitution would show "that there were three or four other specific, substantial programs going on at the same time" as the airstrip.³⁸

³⁷ Transcript, Closed CIPA Hearing, Fernandez, 7/13/89 p. 74.

³⁸ Ibid., p. 76.

The Government broadened its proposal on July 14, 1989. The text of the Government's revised substitution is set forth in the Classified Appendix to this Report. The revised substitution conceded, that "Fernandez, as well as other United States Government officials, provided support for these specific projects," and that "[a] substantial amount of Fernandez's time during his tenure as Chief of Station" was spent working on them. The Government was also prepared to concede that the projects

were all fully discussed in cables and in face to face meetings between . . . Fernandez and CIA Headquarters. Once it was determined that . . . Fernandez, as well as other CIA personnel, would participate in these projects, there was ongoing communication between the Costa Rica Station and Headquarters regarding the implementation, functioning and success of these projects. During the period 1984 through 1986, over forty cables -- providing background, operational details, mutual concerns and the results of these important projects -- were exchanged between Fernandez and senior CIA officers at Langley, Virginia.

* * *

During the period late-1984 through 1986, CIA Headquarters at all times was informed of, and approved, Fernandez's role in these projects. Fernandez's immediate superior was consulted extensively about his work, and senior officers were also familiar with Fernandez's work on these projects.

The day that the Government offered the revised substitution, the district court rejected it. The court ruled that it did not adequately disclose the instigation and magnitude of the programs; that, having been charged with lying about the airstrip operation, Fernandez would be permitted to show "there were three operations that were set up which . . . were set up in the same kind of way, that shows how they were done, the purpose for doing them, who instigated them, and for what purposes. And also the magnitude of them." To do this, Fernandez would be permitted to prove "any and all circumstances of these operations, subject only to my rulings on relevancy of how much detail he needs to go into." 39 In the court's view, Fernandez could "get on the stand and testify to whatever he knows about these three operations, subject only to the relevancy of the amount of detail that I will let him put in. . . . I am ruling that it is all relevant. It is all relevant evidence." 40 Accordingly, the court did not review individual documents, adding:

39 Transcript, Closed CIPA Hearings, Fernandez, 7/14/89, pp. 5-6.

40 Ibid., pp. 7-8.

I suppose every prosecutor would like the proposition of being able to put on their live witnesses and then have a defendant get on the stand and tell his story and only be able to corroborate it with a brief stipulation. . . . I don't believe that the prosecutors should be permitted to do that. I think the defendant ought to have leeway, in order to have a fair trial, to put on that evidence which is relevant to corroborate his defense, and would so rule.⁴¹

41 Ibid., pp. 9-10, 14.

On July 24, 1989, the district court rejected the Government's offer to narrow the indictment to eliminate the charges relating to the airstrip. Judge Hilton stated:

While we did discuss at the previous hearing, reference was made as an example concerning the statement about the airstrip, it really goes broader than that in terms of some allegations as to other meetings and the fact that there may have been or at least the defendant alleges that these programs were overlapping or intertwined.

So, your proposal I don't believe is really any different than before. If it is, that would not be acceptable.⁴²

42 Trial Transcript, Fernandez, 7/24/89, p. 8.

On the separate issue of CIA stations, on July 12, 1989, the Government was prepared to concede this about the stations and facilities in Central America:

1. The CIA maintains a presence in various foreign countries in furtherance of its intelligence collection activities and certain covert operations. The offices the CIA maintains in foreign countries generally are referred to as "stations." In addition, the CIA has other facilities abroad from which it collects intelligence or manages covert operations. These other facilities sometimes are referred to as "facilities" or "bases."

2. In 1984 through 1986, the CIA had stations and facilities in various countries in Latin America.

3. Throughout the period from 1984 to 1986, the CIA had officers and employees working in the countries of [Classified Country Names Withheld].⁴³ Certain of these officers and employees worked on matters involving the contras. CIA officers and employees also collected intelligence concerning (a) the activities of the Sandinista regime in Nicaragua, (b) Nicaraguan military activities, (c) the activities of the political leadership of the contras, (d) the contras' military activities, (e) the contras' logistical requirements, (f) the contras' receipt of arms, food, clothing and

other materiel, and (g) certain activities of private benefactors who were supplying the contras with lethal and non-lethal aid.

43 While the names of these countries have been withheld here, the Government would have admitted them at trial had the trial court approved the Government's July 12, 1989, submission.

The Government also agreed that Fernandez could refer to "a CIA employee located in [Country Name Withheld]" 44 or "a CIA employee located in [Country Name Withheld]," 45 and that these employees could be described as being familiar with matters such as the operations at [Location Withheld] 46 or the operations of the contras in [Country Name Withheld].⁴⁷ The Government also agreed that a chief of station could be identified as "a senior CIA officer."

44 See note 43 above.

45 See note 43 above.

46 See note 43 above.

47 See note 43 above.

On July 13, 1989, the district court rejected the Government's proposed substitution concerning CIA facilities and personnel in Central America. The court insisted that Fernandez was entitled to "divulge the identity of those . . . particular two stations." 48 It held that the substitution would be acceptable, however, if it identified only two CIA stations in Central America.⁴⁹

48 Transcript, Closed CIPA Hearing, Fernandez, 7/13/89, p. 65.

49 Ibid., p. 66.

On July 24, 1989, the Government offered a new proposal on CIA facilities. It agreed that Fernandez could identify the two Central American stations and the CIA facility by means of a key card given to each juror. Witnesses would refer to the stations and the facility by number, but the jurors would know the real location.⁵⁰ In this way, while the Government would avoid publicly acknowledging the facilities, the jury would be able to follow in complete detail Fernandez's evidence about them. The district court rejected this proposal without explanation, except to say that it regarded it as a "repeat of what I ruled on better than a week ago." ⁵¹

50 Trial Transcript, Fernandez, 7/24/89, p. 5.

51 Ibid., p. 8.

The Attorney General's Intervention & Affidavit

After the district court rejected the Government's proposals to eliminate CIPA problems from Fernandez, the Department of Justice moved over the objection of Independent Counsel to intervene, stay the proceedings, and appeal the district court's rulings. The district court summarily rejected the Department's move.⁵² The Department then obtained a stay from the U.S. Court of Appeals for the Fourth Circuit, pending appeal. After full briefing and argument, the Fourth Circuit dismissed the Department's appeal on grounds of lack of jurisdiction and lifted its stay.⁵³ The case was returned to the district court. On November 22, 1989, for the first time in history, Attorney General Richard Thornburgh filed an affidavit under CIPA 6(e) that barred disclosure at trial of information pertaining either to the three programs or the CIA's disputed stations and facilities.⁵⁴

52 Ibid., p. 13.

53 U.S. v. Fernandez, 887 F.2d 465 (4th Cir. 1989).

54 Although the existence of the disputed facilities had from time to time been publicly reported, the intelligence agencies and the Attorney General concluded that it would be detrimental to national security if the U.S. Government acknowledged their presence through Government documents or Government witnesses. Independent Counsel attempted to persuade the Attorney General to release the information because of its prior exposure. Independent Counsel was unsuccessful. The Attorney General's decision in Fernandez to preclude, pursuant to CIPA 6(e), the introduction of classified information at trial was not subject to judicial review.

Facing the prospect of dismissal of the case, Independent Counsel proposed to the district court less severe responses to the Attorney General's affidavit, including a narrowing of the charges to avoid the need for testimony regarding the three CIA programs, and certain findings of fact against the Government. On November 24, 1989, the district court rejected these proposals and entered a dismissal order. The court repeated its view that narrowing the charges would not satisfy the court's ruling that the evidence in question was "essential to this defendant to enable him to defend himself against the charges in this case . . ." 55 The court described the Government's proposals for alternative sanctions as a request "essentially for a rehearing of the rulings previously made in regard to the admissibility and the necessity of the defendant to divulge this information." 56

55 Hearing on Motions, Fernandez Transcript, 11/24/89, p. 10.

56 Ibid.

Fourth Circuit Appeal

On September 6, 1990, the Fourth Circuit affirmed Judge Hilton's CIPA rulings and his decision to dismiss with prejudice the indictment against Fernandez. The three-judge appeals panel ruled that Judge Hilton did not abuse his discretion in holding that Fernandez needed to disclose classified information to demonstrate that CIA headquarters was provided "with detailed information about the resupply program, and that CIA headquarters urged . . . encouragement and assistance to the lethal aid resupply network." 57 The court observed:

57 U.S. v. Fernandez, Top Secret Opinion, p. 29 (4th Cir. 1990).

All of the charges against Joseph Fernandez concern what he was doing as the CIA station chief in Costa Rica in the mid-1980's, including the nature of his assignments, the persons with whom he worked, and the context in which he carried out certain acts. Because his trial was essentially going to be about the truth of his version of these activities, he must be allowed to tell the jury exactly what he was doing as the CIA's station chief in Costa Rica. The nature of the charges against him demand that he be able to place his job before the jury in a concrete, palpable context, and that he be able to explain his understanding of the world in which he worked. Only against such a background could the jury realistically and fairly evaluate his allegedly false statements.⁵⁸

58 Ibid., pp. 42-43.

Following the Fourth Circuit's decision, Independent Counsel invited the Attorney General to reconsider his decision. The Attorney General declined, informing Judge Hilton that there would be "potentially serious damage to national security" from disclosure of the two categories of classified information deemed relevant to Fernandez's defense.⁵⁹

59 Fernandez Notice of Lodging (E.D. Va. Oct. 12, 1990) (filing Letter from James S. Reynolds to Hon. Claude M. Hilton, 10/12/90).

The Public Nature of the Classified Information

Independent Counsel did not challenge the need to protect the three CIA programs. He was willing to drop the charges to which the programs had been held to pertain. The critical information that would have permitted trial of the other charges was the location of two well-known CIA stations. Each had been identified in North. They were regularly mentioned in the press -- even in the obituary of a former station chief. The intelligence agencies' submissions to the Attorney General were not specific enough to rebut this fact. They were general reiterations of the need to preserve "deniability" of well-known facts.

Conclusion

The Attorney General's actions in Fernandez were an unprecedented and unwarranted intrusion into the prosecution of a case conducted by an Independent Counsel. It is clear that the Attorney General's refusal to hear Independent Counsel on the need for continued secrecy, and his decision not to release limited classified information, stemmed solely from his uninformed assessment of the merits of the prosecution, and not from an informed balance of competing policy interests. In a report to Congress dated October 24, 1990, a representative of the Attorney General explained that the Attorney General blocked disclosure of classified information in Fernandez because

those who are familiar with the case assess it as a relatively weak one which would not have been brought had Fernandez been willing to cooperate with the investigation. While a criminal conviction might assist the Independent Counsel in gaining Fernandez's cooperation, other mechanisms are available in the Federal criminal justice system to elicit that cooperation.⁶⁰

⁶⁰ Letter from W. Lee Rawls to Anthony C. Beilenson, 10/24/90, p. 5.

In Fernandez or any other case prosecuted by an Independent Counsel, it is not up to the Attorney General to assess its merits or its investigative purpose. In fact, although Fernandez's testimony to Congress was immunized and could not have been used against him, the Attorney General must have known that Fernandez admitted to the Select Committees that he had lied to both the Tower Commission and the CIA's Inspector General. Further, in a newspaper interview following Judge Hilton's dismissal of the case, Fernandez stated that he would have incriminated higher-ups in the CIA and other Administration officials had the case gone to trial.⁶¹ It should have been Independent Counsel's decision -- not the Attorney General's -- whether this evidentiary information should have been developed at trial or by some other means.

⁶¹ "Ex-Agent is Bitter Over Iran Affair," The New York Times, 11/27/89, p. A31.