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MEMORANDUM

TO: Judge Walsh
Mr. Barrett
Mr. Bever
Mr. Blaney
Mr. Foster
Mr. Francis
Mr. Gillen
Mr. Mark ✓
Mr. Treanor
Mr. Vhay
Ms. Belcher

FROM: C. J. Mixter CJM

DATE: March 21, 1991

RE: Memoranda on Criminal Liability of Former President Reagan and of President Bush

I have attached copies of the final versions of my memoranda on the criminal liability of former President Reagan and of President Bush.

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MEMORANDUM

TO: Judge Walsh

FROM: C. J. Mixter CJM

DATE: March 21, 1991

RE: Criminal Liability of Former President Reagan

You have asked me to analyze the criminal liability, if any, of former President Reagan for matters within your mandate as Independent Counsel under the Ethics in Government Act. In carrying out this assignment, I have considered the information developed by this Office's investigation and that of the Congressional Iran/Contra Select Committees, including the immunized Congressional testimony of Admiral Poindexter and Colonel North, as well as [redacted] (b)(3) GJ This memorandum reflects that analysis.

For ease of comprehension, I have broken the conceivable areas of Presidential exposure into four major groups, each of which begins with a summary of the relevant facts:

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This memorandum does not deal with such non-criminal matters as the appropriateness of the policies followed by the Reagan Administration with respect to Iran, the Contras, or consultation with the Congress. Nor, except as a byproduct of Section IV(B) below (discussing whether the White House withheld any material facts from the Iran/Contra Select Committees), does it touch upon the House of Representatives' decision not to bring articles of impeachment against the former President as a result of the Iran/Contra disclosures.

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I. Arms Sales to Iran, 1985-1986

Summary of the Facts

In an effort to convince elements in Iran to use their influence to obtain the release of U.S. hostages in Lebanon, and in hopes of creating a better political and intelligence relationship between Iran and the United States, the President and his advisors engaged in an opening to Iran. The principal currency of this Iran Initiative was U.S.-manufactured weapons. The Initiative had two somewhat distinct phases: first, a period beginning in mid-1985, during which the President was informed of, and approved in advance, an Israeli shipment of approximately 500 Israeli-owned TOW antitank missiles to Iran and a later shipment of Israeli-owned Hawk antiaircraft missiles;[1/] and a second phase in which the United States itself transferred weapons to Iran through the Secord/Hakim "Enterprise". This second phase included the shipment of 1,000 TOW missiles sent to Iran in February 1986 and over 200 spare parts for Hawk missile systems sent to Iran in May and August, 1986. In May 1986, the United States also sent approximately 500 TOW missiles to Israel to replenish Israeli stocks depleted by

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[1/] The November 1985 shipment was originally supposed to comprise 120 Hawk missiles (80 to be delivered before the hostages were released, and 40 thereafter). The transaction was aborted after eighteen missiles had arrived in Iran; seventeen of the eighteen Hawks were returned to Israel in February 1986 on the backhaul from the first U.S. TOW shipment.

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the August/September 1985 transfer. Finally, in October 1986 the Enterprise obtained a second group of 500 TOW missiles from the United States and delivered them to Israel, and the TOWs that Israel had received in May were shipped to an Iranian "Second Channel".[2/]

The United States was reimbursed for the price of each of the weapons that were taken from U.S. stocks pursuant to Section 601 of the Economy Act, 31 U.S.C. § 1535. As will be discussed more fully in Part II below, during 1986 there was a substantial difference, aggregating roughly $16 million, between the amounts received by the Enterprise for the weapons and the Enterprise's costs, including the price paid to the United States agencies who released the weapons. The cost of the 500 TOW missiles transferred to Israel was paid partially by $1.5 million in Israeli funds, and partially from the excess funds paid by Iran to Secord and Hakim for the Hawk spare parts.

The record is quite clear that President Reagan was briefed, in advance, on each group of weapons sold to Iran. With respect to the November 1985 Hawk shipment in particular, the President also was told what happened to it (see [redacted] see also Poindexter notes of November 25, 1985 National Security Briefing. [redacted] (b)(3) GJ

2/ [redacted]

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[redacted] and in December, 1985, the President signed a covert action finding that retroactively covered the CIA's involvement in that shipment.[3/] In January 1986 the President signed two covert action findings that authorized the CIA's role in the 1986 arms sales. There is also no question that throughout the Iran Initiative, the President specifically ordered that the Congress should not be advised of any aspect of the United States' activities, including the three covert action findings, and that no briefing of

---

[3/] There is little reason to doubt that the President in fact signed the 1985 Iran Finding, and that he did so during early December, just as Poindexter's replacement of McFarlane as National Security Advisor, announced on December 4 [redacted] was taking place. The task of determining the precise day on which the President signed this document has of course been complicated by Poindexter's destruction of the Finding in November 1986. (b)(3) GJ [redacted] Poindexter has consistently identified December 5 as the date when the Finding was signed (see May 2, 1987 Poindexter Cong. Dep. 105-107; July 15, 1987 Poindexter Cong. Tr. 43-44; [redacted] Interestingly, Presidential meeting records that we recently received from the Archivist (see ALU0135169) identify Mr. McFarlane as having been present at the December 5, 1985 National Security Briefing; McFarlane, though, claims to have no recollection whatsoever of the 1985 Finding (see July 2, 1987 McFarlane Cong. Dep. 49-50). Donald Regan, the other person present at the December 5 briefing, also claims no recollection of the President signing the 1985 Iran Finding (see July 30, 1987 Regan Cong. Tr. 243; July 31, 1987 Regan Cong. Tr. 15). [redacted] In any event, because no alternative date to that supplied by Poindexter is suggested by the records, this memorandum will refer to the retroactive Finding as having been signed on December 5, or simply in December, 1985.

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Congress actually took place until November 1986, when news of the Initiative leaked into the press.

The President definitely knew that Col. North was involved in meetings with Iranians (see, e.g., February 16, 1990 Reagan Dep. 133), both on his own and in the company of former National Security Advisor McFarlane during the May 1986 Tehran trip. Although the January 17, 1986 Iran Finding makes specific reference to the use of "third parties" in the transactions (see AKW001921), the President has stated that he recalls no reference to any operational role by Secord or Hakim in the Iran Initiative ([redacted] see also February 16, 1990 Reagan Dep. 21). Poindexter, on the other hand, believes that the President was told that Secord was involved in the Iran matter (see May 2, 1987 Poindexter Cong. Dep. 66; June 17, 1987 Poindexter Cong. Dep. 320). As discussed more fully in Section II below, there is no evidence that President Reagan was aware of, or in any way authorized, the differential in price that reaped $16 million for the Enterprise [redacted]

(b)(3) GJ

On these facts, two legal issues emerge with respect to President Reagan: (a) did the President violate any criminal law with respect to the Iran Findings, or by ordering that the Iran arms sales not be reported to Congress; (b) did the arms sales themselves, as authorized by the President, violate any criminal statute. As discussed

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more fully below, the answer to each of these questions is "No."

A. Presidential Findings and Covert Action Reporting Requirements

A number of federal statutes[4/] govern the authorization and reporting of covert activities. They are set out in pertinent part below.

Section 662 of the Foreign Assistance Act, 22 U.S.C. § 2422, provides that

> No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of Title 50.

Section 501 of the National Security Act of 1947, as amended, 50 U.S.C. § 413, provides:

> (a) Reports to Congressional Committees of current and proposed activities
>
> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified

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[4/] Unless specifically noted, all references to statutory and administrative provisions describe those provisions as they were in force during 1984-1986.

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information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all department, agencies, and other entities of the United States involved in intelligence activities shall --

(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned

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> to be taken in connection with such illegal activity or failure.
>
> (b) Failure to inform; reasons
>
> The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

The Fiscal Year 1986 Intelligence Authorization Act, Pub. L. No. 99-169, contained a new provision, Section 502(b), that explicitly linked the transfer of United States weapons and defense services with the covert action notification process. This statute, which was made permanent in October 1986 by Section 602 of the Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, is now codified at 50 U.S.C. § 415. It states that

> (a)(1) The transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity for the purpose of section 413 of this title.
>
> (2) Paragraph (1) does not apply if --
> (A) the transfer is being made to a department, agency, or other entity of the United States (so long as there will not be a subsequent retransfer of the defense articles or defense services outside the United States Government in conjunction with an intelligence or intelligence-related activity); or
> (B) the transfer --
> (i) is being made pursuant to authorities contained in part II of the Foreign Assistance Act of 1961 [22

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U.S.C.A. § 2301 et seq.], the Arms Export Control Act [22 U.S.C.A. § 2751 et seq.], Title 10 (including a law enacted pursuant to section 7307(b)(1) of that Title), or the Federal Property and Administrative Services Act of 1949 [40 U.S.C.A § 471 et seq.], and

(ii) is not being made in conjunction with an intelligence or intelligence-related activity.

(3) An intelligence agency may not transfer any defense articles or defense services outside the agency in conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress.

(b) As used in this section --

(1) the term "intelligence agency" means any department, agency, or other entity of the United States involved in intelligence or intelligence-related activities;

(2) the terms "defense articles" and "defense services" mean the items on the United States Munitions List pursuant to section 38 of the Arms Export Control Act [22 U.S.C.A. § 2778] (22 CFR part 121);

(3) the term "transfer" means --

(A) in the case of defense articles, the transfer of possession of those articles; and

(B) in the case of defense services, the provision of those services; and

(4) the term "value" means --

(A) in the case of defense articles, the greater of --

(i) the original acquisition cost to the United States Government, plus the cost of improvements or other

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> modifications made by or on behalf of the Government; or
> (ii) the replacement cost; and
> (B) in the case of defense services, the full cost to the Government of providing the services.

During 1985 and 1986, these statutes were supplemented by two administrative provisions. Executive Order 12333, effective December 4, 1981, contains four sections that bear upon the Iran Initiative. First, Part 1.2 defines the National Security Council, whose staff was heavily involved in the conduct of the Initiative, as

> [T]he highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and special activities, and attendant policies and programs.

Part 3.4(h) defines "Special Activities" as

> activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.

Part 1.8(e) states that the Central Intelligence Agency shall

> Conduct special activities approved by the President. No agency except the CIA (or the Armed Forces of the United States in time of war declared by

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> Congress or during any period covered by a report from the President of the Congress under the War Powers Resolution (87 Stat. 855)) may conduct any special activity unless the President determines that another agency is more likely to achieve a particular objective . . . .

Finally, Part 3.1 provides that

> The duties and responsibilities of the Director of Central Intelligence and the heads of other departments, agencies, and entities engaged in intelligence activities to cooperate with the Congress in the conduct of its responsibilities for oversight of intelligence activities shall be as provided in Title 50, United States Code, section 413. The requirements of section 662 of the Foreign Assistance Act of 1961, as amended, and section 501 of the National Security Act, as amended (50 U.S.C. § 413), shall apply to all special activities as defined in this Order.

The second relevant administrative provision was National Security Decision Directive 159, signed by President Reagan on January 18, 1985. NSDD 159 confirms and implements Executive Order 12333; in particular, pages 2-3 require that the President specifically approve by a written finding all covert actions undertaken by any United States Government agency or entity.

All of the above-described statutes and administrative provisions are civil in nature; there is no criminal statute that directly punishes the conduct of a covert action without a Presidential finding, or governs the reporting of "covert activities" or "special activities" to Congress. However, our Office has taken the position that a

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charge under 18 U.S.C. § 371[5/] may be premised upon a conspiracy, through deceitful and dishonest means, to violate a federal civil law or to prevent the government from conducting its operations and implementing its policies honestly and faithfully.[6/] Accordingly, I will discuss below whether President Reagan, acting in concert with others,

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[5/] 18 U.S.C. § 371 provides that

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[6/] See Government's October 25, 1988 Memorandum of Points and Authorities in Opposition to Defendant's Motions to Dismiss or Limit Count One in United States v. North, at 7-15. Both in the framing of the March 16, 1988 Indictment to charge only the diversion and obstruction/false statement aspects of the Iran Initiative as a crime, and in our subsequent descriptions of the charges, the Office has previously suggested that the Iran Initiative, as approved by the President, was not criminal. (See, e.g., Government's June 3, 1988 Memorandum of Points and Authorities in Opposition to Defendants' Motions to Compel Discovery in United States v. Poindexter, et al., at 31-32; Government's December 5, 1988 Memorandum Concerning Criminal Activity Arising in the Context of the Iran Initiative in United States v. North, at 2 ("the critical element of North's behavior that makes it criminal is his deceitful acquisition of control over funds generated by the Iran initiative").

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violated applicable provisions in a manner that might have become a federal crime through the operation of Section 371.

To begin with the most obvious part of the statutory and administrative framework discussed above, 22 U.S.C. § 2422 is the only statute (as distinct from administrative provisions such as E.O. 12333 or NSDD 159) governing when a finding is required. Section 2422 mandates that there shall be such a finding if the CIA is to undertake a non-intelligence-gathering activity outside the United States. It does not speak to covert actions conducted by any other agency.[7] Based upon my review of the facts, there is no evidence that President Reagan had any reason to believe that Section 2422 had been triggered before December 1985, for the simple reason that he apparently was not told until that time that CIA was playing any role in the Iran Initiative apart from gathering intelligence. (See March 6, 1991 Regan 302 at 6; [redacted] (b)(3) GJ

[7] A proposed overhaul of the covert action statutes, pocket-vetoed by President Bush on November 30, 1990 (see "Bush Kills Budget for Spy Agencies," New York Times, December 1, 1990, at A-11), would have enacted into statute a requirement that the President make a written determination if any component of the government is to undertake a covert action, and would also have placed general responsibility for Congressional notification upon the President. See Intelligence Authorization Act, Fiscal Year 1991, S. 2834, 101st Cong., 2d Sess., § 602.

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The December 1985 and January 1986 covert action findings signed by the President represented an effort to comply with Section 2422 after it became apparent that CIA had been, and would be, active in the Iran Initiative. The December 1985 Finding is peculiar in that it was not signed until after the CIA had completed its activities in support of the November 1985 Hawk missile shipment, and explicitly seeks to "ratify" actions taken by CIA before the finding was signed. The December 1985 Finding was prepared by CIA's General Counsel, Mr. Sporkin, to deal with the fact that CIA became involved in the November 1985 Hawk transfer as problems developed with the Israelis' execution of it.[8/]

[8/] Even though there is some support for the notion that a Section 2422 finding need not be in writing (see page 41 below), the fact that the President apparently had no advance knowledge of CIA's role in the 1985 Hawk shipment renders it impossible to characterize the 1985 Iran Finding as the simple recordation of an earlier "oral" or "mental" determination by the President. Thus, the efficacy of that Finding under civil law turns entirely on whether a President may, after the fact, "ratify" CIA activity that he knew nothing about. The "unless and until" language of Section 2422, as well as that section's equation of CIA covert actions with "significant anticipated intelligence activities", make it doubtful that anything other than a forward-looking finding would be permissible under the statute. Mr. Sporkin has admitted that he had no knowledge that the President had been told before the fact of the CIA's actions in support of the November 1985 shipment (see June 24, 1987 Sporkin Cong. Tr. 134), but has testified that the concept of ratification is only inconsistent with the intent of the statute "if it were abused. I don't believe that this was, in this case, was abusive, and I believe it was the correct thing to do." (Id. at 22. See also id. at 221-222.) Attorney General Meese, who was not consulted concerning the 1985 Iran Finding, told the Iran/Contra Select Committees that in his opinion a finding that sought to ratify already-conducted covert activity would have no effect. (See July

(continued...)

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There is no indication that anyone questioned with the President whether a retroactive finding would be appropriate, or otherwise gave the President any reason to doubt the implicit representation by his advisors that such an instrument was permissible under the law. Accordingly, I do not believe that there is any evidence that President Reagan committed an intentional violation of 22 U.S.C. § 2422 in his execution of the Iran Initiative.

There is no question that the President did not follow Executive Order 12333 and NSDD 159 with respect to the Iran Initiative. Despite Mr. Reagan's knowledge that the NSC staff, primarily in the person of Colonel North, were heavily engaged in the implementation of the arms sales to Iran, at no point did the President execute a written determination that authorized that involvement. However, neither the Executive Order nor the NSDD is a federal statute; a Presidential "violation" of either would not be an offense against the United States, and could not be reached by Section 371, unless it were part of a conspiracy through deceitful and dishonest means to interfere with governmental functions. With respect to President Reagan, the element of deceit and dishonesty is wholly lacking with respect to this issue. Simply put, there was no higher Executive official

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8/ (...continued)
29, 1987 Meese Cong. Tr. 267-68.) The January 1986 findings predated any of the 1986 arms transfers, so that they do not present the retroactivity issue.

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for the President to deceive, and it is implausible that a President could be found criminally liable for impeding the functions of the government by failing to inform a subordinate about the existence of a government operation. As will be seen below, there was also no criminally-cognizable deception of Congress because the statute governing Congressional notification of covert actions allows on its face for situations in which the Congress will not be informed in advance of such activities, whether conducted by the NSC or anyone else.

Section 501 of the National Security Act, 50 U.S.C. § 413, provides generally that the Director of Central Intelligence and the heads of all departments, agencies and entities involved in intelligence activities shall inform the Congressional intelligence committees of covert actions. However, the statute contains two major caveats. The first limitation is the most obvious: the entire reporting scheme of Section 413(a) is preceded by the phrase "To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government . . . ." This language amounts to an explicit recognition of the Executive Branch's traditional view that it has implied Constitutional power, not susceptible to Congressional regulation, to conduct foreign policy. See S. Rep. No. 96-730 at 4-6 (1980); id. at 6 ("Subsection (a) does not

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prescribe hard and fast requirements for what may be a gray area resulting from the overlap between the constitutional authorities and duties of the branches"); H.R. Conf. Rep. No. 96-1350 at 15-16 (1980).[9/] The recognition of this "gray area" on the face of the statute itself makes it most unlikely that a criminal prosecution could be premised on a Section 371 conspiracy, involving the President himself, to violate 50 U.S.C. § 413 by failing to inform Congress of a covert action.

The second apparent limitation on the Congressional notice requirement relates to the timing of the notice. 50 U.S.C. § 413(a) contemplates that prior notice of covert actions will be given to the intelligence committees or, "if the President determines it essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States", to "the chairman of ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate" (this group is sometimes referred to colloquially as the "Gang of Eight"). However, the very next section, 50 U.S.C § 413(b), states that

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[9/] Relevant portions of both these reports are reprinted in 1980 U.S. Code Cong. Adm. News 4182 et seq. Additional legislative quotations on this issue appear in a November 18, 1986 memorandum from minority HPSCI staff member Tom Smeeton to the Republican members of HPSCI, which we obtained from CIA as document ER 46,262-66.

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> The President shall fully inform the intelligence committees in a timely fashion of [covert actions] for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

The relevant Presidential advisors -- including Attorney General Meese, who was first consulted on the Iran matter in early January, 1986 -- have testified that Section 413(b) recognizes that no prior notice will be provided in some circumstances (see, e.g., July 28, 1987 Meese Cong. Tr. 27-29). In their view, particularly when Section 413(b) is read together Section 413(a)'s reference to the Constitutional rights of the Executive, what emerges is at most a requirement that "timely" notice shall be provided to Congress, with the definition of "timely" to be supplied by the Executive. (See July 29, 1987 Meese Cong. Tr. 234-236; June 24, 1987 Sporkin Cong. Tr. 163, 198-204, 205-210.) Thus, they maintain that while it was intended all along that the President would advise Congress of the Iran Initiative at some point (and probably sooner than the eleven months after the fact that eventuated), the President was under no obligation to provide Congress with prior or contemporaneous notice of it (see July 28, 1987 Meese Cong. Tr. 6, 26, 30-31; July 29, 1987 Meese Cong. Tr. 46-47, 119-121, 162-164; June 24, 1987 Sporkin Cong. Tr. 87, 164). Based upon my reading

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of the relevant statutes, this position is legally supportable.[10/]

The first Iran Finding, drafted by Mr. Sporkin and signed by the President on December 5, 1985, contained a prohibition on prior notice that is cast in explicitly Constitutional terms:

> Because of the extreme sensitivity of these operations, in the exercise of the President's constitutional authorities, I direct the Director of Central Intelligence not to brief the Congress of the United States, as provided for in Section 501 of the National Security Act of 1947, as amended, until such time as I may direct otherwise. (ER 10,148.)

[10/] Several CIA legal memoranda, written both before and after the Iran Initiative, come to the same conclusion. See March 8, 1985 memorandum for the Deputy Director, Office of Legislative Liaison, from Stanley Sporkin, "Requirements for Notifying Congress Regarding Special Activities", ER 7507-15; November 18, 1986 memorandum for the Director from the General Counsel, "Your Request of 16 November for an Analysis of the Law on Disclosure to Congress", ER 7483-88, ER 46,106-114 and ER 46,251-60; November 19, 1986 memorandum from Kathleen M. Watson to George W. Clarke, Associate Deputy Counsel, "Legality of DCI's Withholding Prior Notice of Agency's Expenditure of Funds for Transportation and Travel Costs Related to the Transfer of Military Equipment to Iran", ER 46,675-79, ER 6135-43. See also December 17, 1986 Memorandum from DOJ's Office of Legal Counsel for the Attorney General, "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act", Cong. Ex. EM-70. Indeed, even Congress' most recent effort to overhaul the covert action statutes, while "categorically reject[ing]" the December 17, 1986 OLC memorandum, would still have permitted the President, on "rare occasions", to delay reporting covert actions to Congress and subsequently report "in a timely fashion". See H.R. Conf. Rep. 101-928, 101st Cong., 2d Sess., at 26-27 (1990). This legislation was pocket-vetoed when President Bush failed to sign it by November 30, 1990. See "Bush Kills Budget for Spy Agencies", New York Times, December 1, 1990, at A-11.

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It appears that by January 7, 1986, Attorney General Meese and CIA Director Casey, speaking for both himself and Mr. Sporkin, had orally provided President Reagan with at least the conclusion of the statutory argument presented above (see, e.g., July 28, 1987 Meese Cong. Tr. 6, 26; July 29, 1987 Meese Cong. Tr. 45-46).

The same conclusion by the Attorney General -- that withholding notice to Congress lay within the President's powers -- unquestionably was put before Mr. Reagan on January 17, 1986. The memorandum that accompanied the January 17, 1986 Iran Finding, from which Admiral Poindexter briefed the President, identified the Attorney General as one of the advisors who recommended that the President approve the finding, and concludes with the following statement:

> Because of the extreme sensitivity of this project, it is recommended that you exercise your statutory prerogative to withhold notification of the Finding to the Congressional oversight committees until such time that you deem it to be appropriate. (AKW001920.)

The January 17 Iran finding signed by the President contains language commanding that prior notice to Congress not be given:

> due to [the operation's] extreme sensitivity and security risks, I determine it is essential to limit prior notice, and direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress as provided in Section 501 of the National

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Security Act of 1947, as amended, until I otherwise direct. (AKW001921.)[11/]

Thus, by the middle of the Iran Initiative, and before the direct sale of weapons from U.S. stocks began, the President was advised by his Attorney General that he could legally withhold notification of Congress concerning the Initiative. Whether the Attorney General's advice, even though supportable, was appropriate as a matter of interbranch relations under civil law lies outside the scope of this memorandum. See, e.g., Associate Counsel Treanor's November 12, 1987 memorandum to you re "Questions Concerning Permissibility of Iranian Arms Sales and Concerning the Legality of Secord's Role and of his Level of Profit" at 24-28 (concluding that failure to notify Congress of Iranian arms sales until November 1986 violated 22 U.S.C. § 2422 and 50 U.S.C. § 413). It is clear, however, that on these facts there would be no basis to find the President guilty of a Section 371 conspiracy to violate 50 U.S.C. § 413, or deceitfully to impede governmental functions by failing to provide Congress with prior notification of the Iran arms sales or of the relevant findings.[12/]

[11/] The identical language appears in the Iran Finding that the President signed on January 6, 1986 (see AKW002065).

[12/] The President also was aware of, and failed to notify Congress concerning, the NSC/DEA operation to ransom the hostages during 1985-1986. Except for the origin of some of the funds used for this covert action (an aspect of the operation that the President does not appear to have known about, see [redacted] July 15, 1987 Regan Cong. Dep. 88-90), this activity does not relate either to the provision of military arms, materiel, or funds to Iran, or to (continued...)

(b)(3) GJ

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B. The Legality of the Arms Sales

The second legal issue that arises from the Iran Initiative as authorized by the President is whether the arms sales themselves either were intrinsically unlawful, or triggered Congressional reporting requirements that were not fulfilled. Although (and, perhaps, because) this subject involves a number of close legal calls under a fairly complex group of statutes, I conclude that the Iran arms sales, as authorized by President Reagan, did not violate the criminal law.

The basic legal limitations upon the transfer of U.S.-owned and U.S.-manufactured weapons to third parties are found in the Arms Export Control Act ("AECA"), codified principally at 22 U.S. § 2751 et seq., and the Foreign Assistance Act, 22 U.S.C. § 2301 et seq.[13/] Throughout 1985

[12/] (...continued)
assistance to the Contras. (See December 19, 1986 Order of the Division for the Purpose of Appointing Independent Counsels, D.C. Cir., at 2.) I note in passing, however, that the discussion of 50 U.S.C. § 413 provided above would apply to the failure to notify Congress of the DEA operation as well.

[13/] Broadly speaking, the AECA covers sales of arms for value, and the Foreign Assistance Act governs U.S. government grants of military aid to foreign governments. Because the United States was compensated for all of the weapons that it sent to Iran and Israel pursuant to the Iran Initiative, the AECA is the more important of the two statutes. The government lawyers who evaluated the Iran Initiative in late 1985 and 1986 apparently considered the Foreign Assistance Act possibly applicable because they were not sure whether Israel's inventories of TOW and Hawk missiles were furnished to Israel under that Act or the AECA. The 1987 Report of the Congressional Committees Investigating the Iran-Contra Affair (hereinafter "Iran/Contra Select Committee Report") concludes at page 418 that "All the Hawks and TOWs that Israel
(continued...)

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and 1986, both the Foreign Assistance Act and the AECA provided that a country (such as Israel) that had received U.S.-manufactured defense articles could not retransfer those articles to a third country (such as Iran) without the consent of the President. See 22 U.S.C. §§ 2314(a), 2753(a)(2). The President could not consent to such a retransfer unless the U.S. itself could make the transfer directly to the third country, see 22 U.S.C. § 2314(e), 2753(a), and in the case of items on the Munitions List, unless the recipient country certified that it would not further transfer the weapons without obtaining Presidential consent, see id. The AECA went on to require reports to the Speaker of the House and the Senate Foreign Relations Committee concerning the implementation of re-transfer agreements pursuant to that Act, see 22 U.S.C. § 2753(a). Both the AECA and the Foreign Assistance Act contained limitations upon the types of countries who may receive direct transfers of U.S. arms. See, e.g., 22 U.S.C. §§ 2304(a)(2), 2371, 2753, 2754. The AECA also required that the President provide the Speaker of the House and the Senate Foreign Relations Committee with unclassified certifications identifying the foreign countries involved in any transfer or

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13/ (...continued)
transferred to Iran in 1985 had earlier been obtained from the United States under the AECA." Since, as will be seen below, both statutes contain roughly similar substantive provisions governing a recipient country's ability to retransfer U.S.-supplied weapons to a third country, they will often be discussed in tandem in this memorandum.

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re-transfer of "major defense equipment" valued at $14 million or more; these certifications must be submitted 30 days before the transfer becomes effective, although the 30-day waiting period can be waived for a direct transfer by the United States if the President finds that an emergency exists. See 22 U.S.C. § 2753(d). Finally, in 22 U.S.C. 2776(a) the AECA required that 30 days after the end of each quarter, the President must notify Congress of all offers and acceptances of $1 million or more of major defense equipment.

In two significant respects, the legal landscape surrounding foreign arms transfers changed during 1985-1986. First, in November 1985 Congress passed a statute, later codified at 50 U.S.C. § 415 and quoted in full at pages 9-11 above, which brought all transfers of defense articles exceeding $1,000,000 except those undertaken pursuant to the Foreign Assistance Act, the AECA, and the surplus property statute (not applicable here), within the definition of "significant anticipated intelligence activities", and thus within the Congressional notification scheme of the National Security Act, 50 U.S.C. § 413. This new law appears to have resulted from a 1984 exchange of correspondence between Chairman Boland of HPSCI and Director of Central Intelligence Casey, in which Chairman Boland complained of, and Director Casey insisted upon, a National Security Council position that the National Security Act permitted the President to conduct covert transfers of military equipment to foreign nations without regard to the substantive and reporting

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requirements of the Foreign Assistance Act and the AECA. See October 22, 1984 letter from Chairman Boland to Director Casey, ER 46,225; December 12, 1984 letter from Director Casey to Chairman Boland, ER 46,217; December 21, 1984 letter from Chairman Boland to Director Casey, ER 46,216; see generally H.R. Rep. No. 99-106 at 9-12 (1986), reprinted in 1986 U.S. Code Cong. & Adm. News at 954-58. The significance of this new law will be discussed in more detail below.

The second relevant change in the arms export laws was the enactment, effective August 27, 1986, of Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, now codified (with considerable revisions dating from 1989) at 22 U.S.C. § 2780.[14/] As it was in force in late 1986, this statute provided:

> (a) Prohibition. -- Except as provided in subsection (b), items on the United States Munitions List may not be exported to any country which the Secretary of State has determined, for purposes of section 6(j)(1)(a) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), has repeatedly provided support for acts of international terrorism.
>
> (b) Waiver. -- The President may waive the prohibition contained in subsection (a) in the case of a particular export if the President determines that the export is important to the national interests of the United States and submits to the Congress a report justifying that determination and

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[14/] Among other changes, the 1989 revisions to 22 U.S.C. § 2780 added criminal penalties for violation of the section, see 22 U.S.C. § 2780(j), and also added a subsection (h) stating that

> The prohibitions contained in this section do not apply with respect to any transaction subject to reporting requirements under Title V of the National Security Act of 1947.

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> describing the proposed export. Any such waiver shall expire at the end of 90 days after it is granted unless the Congress enacts a law extending the waiver.

Since 1984, Iran has been classified by the Secretary of State as a country that has repeatedly provided support for international terrorism. See 49 Fed. Reg. 2836 (1984); see also id. at 38,224; 15 C.F.R. § 385.4(d).

For the reasons that are exhaustively discussed at pages 3-14 of Mr. Treanor's November 12, 1987 memorandum to you addressing "Questions Concerning Permissibility of Iranian Arms Sales and Concerning the Legality of Secord's Role and of his Level of Profit", there is essentially no legal way to square the 1986 transfers of U.S.-owned arms to Iran with the provisions of the AECA. As will be seen below, no later than early 1986, President Reagan's advisors had reached the same conclusion. They recommended to the President that the Iran arms sales be conducted under the aegis of a Presidential Finding pursuant to the National Security Act, and the President followed that recommendation. Accordingly, the balance of this section will focus upon three issues: (1) did the President's determination to dispense with the AECA's Congressional notification requirements, and pursue the Iran Initiative under the National Security Act, amount to a scheme deceitfully to prevent the government from conducting its operations and

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implementing its policies honestly and faithfully?;[15/] (2) does any criminal liability flow from the President's authorization (well before the January 17, 1986 Finding) of the 1985 Israeli shipments to Iran, as well as the related sale of 500 replacement TOW missiles to Israel in 1986?; (3) what was the impact, if any, of the August 27, 1986 statute forbidding exportation of arms to terrorist countries?

1. Using the National Security Act to Supplant the Arms Export Statutes

The Administration's position that the President may legally sell arms to a foreign country without complying with the Foreign Assistance Act or the AECA is commonly traced back at least as far as a now-famous October 5, 1981 opinion by Attorney General William French Smith. Because this opinion (which took the form of a letter to CIA Director Casey on a still-classified transaction) is quite brief, it is worth quoting verbatim:

[15/] The arms-related portions of the Foreign Assistance Act imposed no criminal penalties for violation of their requirements. Likewise, although the AECA prescribed duties for both United States government officials and private parties, during 1985 and 1986 only the latter were exposed directly to criminal penalties. See 22 U.S.C. § 2778 (creating a regime of "Presidential control of exports and imports of defense articles and services . . . issuance of export licenses; conditions for export . . . " and, in subsection (c), prescribing criminal penalties for violation of that regime or making false statements in registrations, license applications, or required reports). As discussed in Section I (A) above, the family of laws governing the authorization and reporting of covert actions, including 50 U.S.C. § 415, also lacks any criminal enforcement mechanism. Thus, the analysis of Presidential criminal liability set forth below will once again focus primarily upon 18 U.S.C. § 371.

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> We have been advised by the State Department's Legal Adviser that the Foreign Assistance Act and the Arms Export Control Act were not intended, and have not been applied, by Congress to be the exclusive means for sales of U.S. weapons to foreign countries and that the President may approve a transfer outside the context of those statutes. Accordingly, I believe the [transaction in question] may be legally completed, based upon a determination by the President that these Acts cannot be used and that the authorities of the Economy Act and National Security Act may be utilized to achieve a significant intelligence objective. In order to satisfy the Congressional reporting requirements imposed on the Secretary of Defense under DoD Appropriations Authorization Acts (10 U.S.C. 133, Note) and on you by the Intelligence Oversight Act of 1980 (50 U.S.C. 413), the House and Senate Intelligence Committees should be informed of this proposal and the President's determinations. (AKW000014.)

At least as early as 1984, Congress was aware of, and had expressed displeasure with, the Executive's view that the broad-scale reporting required by the AECA could be curtailed by use of the National Security Act, which only encompasses reports to the Intelligence Committees. See Boland-Casey correspondence cited at pages 25-26 above. Congress' apparent response to this situation -- the November 1985 addition to the 1985 Intelligence Authorization Act that explicitly brought covert transfers of arms valued at more than $1 million within the reporting provisions reflected in 50 U.S.C. § 403 (see pages 9-11, 25-26 above) -- also had the effect of embedding into statute the Administration's position that the Foreign Assistance Act and the AECA were not the exclusive means by which weapons transfers could be accomplished.

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The relationship between the Iran Initiative and the AECA was explicitly discussed in front of the President no later than December 7, 1985,[16/] when Secretaries Weinberger and Shultz advanced it as their legal argument against the Initiative. In response to these AECA-based objections, both CIA legal personnel and, later, the Attorney General were consulted. By December 9, 1985, CIA General Counsel Sporkin and his staff began working with Colonel North to examine the various ways in which arms transfers to Iran might take place (see June 24, 1987 Sporkin Cong. Tr. 35). This process resulted in the production of several draft Presidential Findings which ultimately evolved into the January 6 and

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[16/] Robert McFarlane has testified that the existence of the AECA as a potential roadblock, and the view that the National Security Act provided the appropriate detour, was discussed among the President and his Cabinet advisors before the November 1985 Hawk shipment took place (see July 2, 1987 McFarlane Cong. Dep. 34-37). Because there were no known Cabinet-level meetings about Iran between August, 1985 and December 7, such a discussion would have had to have taken place in the summer of 1985, when no one else seems to remember debates about the legality, as opposed to the policy wisdom, of selling arms to Iran. [redacted] (b)(3) GJ Some corroboration for McFarlane's dating is provided by the Israeli official Kimche, who recalls that McFarlane raised "American arms exportation laws" as a possible impediment to U.S. replenishment of the TOWs that Israel was about to send Iran in August 1985 (see Government of Israel Historical Chronology at 22-23). In addition, North's notes reflect that on November 17, 1985, McFarlane told him to take care of Israel's need to replenish its stocks of Hawk missiles and "See buying agent in N.Y. to keep orders under $14M" (AMX001865) -- an unmistakable reference to the reporting requirements of the AECA. A similar discussion occurs in a paper prepared by Dr. Gaffney of the Department of Defense around November 19, 1985 (see ALZ012546.)

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January 17, 1986 documents signed by the President (see id. at 39-77). On January 7, 1986, Associate General Counsel George Clarke wrote a memorandum to Mr. Sporkin that attached and described the William French Smith opinion, a 1983 CIA memorandum indicating that CIA could ship weapons to Iran, and legal memoranda which concluded that neither the Trading with the Enemy Act nor the Neutrality Act barred Presidentially-authorized actions (ER 46,027-28). The final paragraphs of Mr. Clarke's memorandum discuss the AECA and the National Security Act:

> 3. One problem could arise, however, if the equipment to be transferred constitutes articles the U.S. has provided to a second country through the Foreign Assistance/Arms Export Control Acts. The memo at Tab D indicates a country may use material it has received through such U.S. Foreign aid only for self defense and may retransfer it only in certain limited circumstances that require U.S. consent, notice to Congress, and the eligibility of the third country recipient for U.S. Aid. Terrorist activities, among other things, can disqualify a potential recipient.
>
> 4. Finally, as you know, Congress recently passed the Intelligence Authorization Act to require reports of weapons transfers valued in excess of 1 million dollars as significant anticipated intelligence activities "for the purpose of" and, therefore, in accordance with, section 501 of the National Security Act. A copy of the relevant language is at Tab E.

At the 0930 National Security Briefing held on January 7, 1986, Admiral Poindexter re-acquainted President Reagan with the Weinberger/Shultz objections to the Iran Initiative. A decision was made to convene the NSC principals later that day, and on this occasion Attorney General Meese was invited to attend. At the January 7

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meeting Secretaries Weinberger and Shultz restated their legal and policy objections to going forward. Mr. Meese has testified that he concluded, on the basis of the William French Smith opinion, that the arms sales could proceed under the National Security Act (see July 28, 1987 Meese Cong. Tr. 5-6, 34-35; July 29, 1987 Meese Cong. Tr. 40-41, 45-46). Either then (see July 28, 1987 Meese Cong. Tr. 35), or at a January 16 meeting held outside the President's presence (see June 24, 1987 Sporkin Cong. Tr. 90), Secretary Weinberger stated that he wished to have his General Counsel check that conclusion. On January 16 Admiral Poindexter, Secretary Weinberger, Attorney General Meese, Director Casey, and Mr. Sporkin again discussed the William French Smith opinion, the appropriateness of the National Security Act avenue, and the issue of Congressional notification. (See July 28, 1987 Meese Cong. Tr. 35; June 24, 1987 Sporkin Cong. Tr. 88-90.) At or about January 16, Attorney General Meese recalls being told either directly by Secretary Weinberger, or indirectly through Admiral Poindexter, that DoD's General Counsel concurred that the National Security Act could be used (see July 28, 1987 Meese Cong. Tr. 35). Mr. Sporkin recalls

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hearing of DoD's concurrence through Director Casey on January 17 (see June 24, 1987 Sporkin Cong. Tr. 90).[17/]

On January 17, 1986 the conclusion that the provisions of the AECA could be overridden by a Presidential finding was formally conveyed to President Reagan. The January 17 memorandum from which Admiral Poindexter briefed the President outlines a January 2, 1986 Israeli proposal that they sell military materiel to Iran with the "assurance that they will be allowed to purchase U.S. replenishments for the stocks that they sell to Iran" (AKW001918). The memo goes on to say

> We have researched the legal problems of Israel's selling U.S. manufactured arms to Iran. Because of the requirement in U.S. law for recipients of U.S. arms to notify the U.S. government of transfers to third countries, I do not recommend that you agree with the specific details of the Israeli plan. However, there is another possibility. Some time ago Attorney General William French Smith determined that under an appropriate finding you could authorize the CIA to sell arms to countries outside of the provisions of these laws and reporting requirements for foreign military sales. The objectives of the Israeli plan could be met if the CIA, using an authorized agent as necessary, purchased arms from the Department of Defense under the Economy Act and then transferred them to Iran directly after receiving appropriate payment from Iran.
>
> The Covert Action Finding attached at Tab A provides the latitude for the transactions indicated above to proceed.

[17/] Secretary Weinberger remembers generally that "I had some legal work going on and was pointing out that -- all the objections . . . my advice was that we could sell to a government agency, the CIA, that we did covert operations this way" (June 17, 1987 Weinberger Cong. Dep. 53), although Weinberger continued to be "very unhappy" with the operation (id. at 56).

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Thus, by January 17, 1986 the President knew, or was in a position to know, that legal advice on the applicability of the AECA had been sought, and that the legal issue had been resolved in favor of proceeding under the National Security Act.

In my judgment, the 1981 Smith opinion, the 1984 letter debate between Chairman Boland and DCI Casey, and the fall 1985 addition to the Intelligence Appropriation Act supply ample ground to support the narrow conclusion that the National Security Act could be used to authorize covert arms sales without regard to the substantive and reporting requirements of the AECA. Where the Meese/Sporkin analysis broke new ground was in combining this conclusion with their previous determination, discussed in Section I(A) above, that the National Security Act notification provisions could also be deferred -- thereby steering the entire Congressional notification process into a blind alley.[18/] In this respect, their advice was considerably more aggressive than any of the

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[18/] When his attention was drawn to this result of his advice, Mr. Sporkin's response was to stress that he never recommended that no notice, as opposed to deferred notice, would be given of the Iran arms sales (see June 24, 1987 Sporkin Cong. Tr. 86-87, 204), and that the decision on deferral should only be made after consultation among the relevant Cabinet officials (see id. at 86-87, 196). Mr. Sporkin, of course, left CIA for a seat on the federal bench on February 7, 1986 (see id. at 97-98), and thus was in no position to influence the fact that the "deferral" stretched into eleven months. For his part, Attorney General Meese has testified that notification of Congress "was a separate issue" from the use of a finding to override the AECA, and that "everybody there was in agreement" that the President should delay notification of Congress (July 29, 1987 Meese Cong. Tr. 45-46).

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authorities that support it. The Smith opinion, quoted in full at page 28 above, ends with the statement that "In order to satisfy the Congressional reporting requirements imposed on [the Director of Central Intelligence] by the Intelligence Oversight Act of 1980 (50 U.S.C. 413), the House and Senate Intelligence Committees should be informed of this proposal and the President's determinations." At least on its face, the Boland-Casey correspondence also does not contemplate a situation in which no Congressional reporting will take place; rather, the entire debate concerns whether the broad reporting mandated by the AECA, or the more restricted reporting to the Congressional intelligence committees that is described in 50 U.S.C. § 413, would be used for certain arms transfers. Finally, it is rather obvious that the 1985 addition to the Intelligence Authorization Act was intended to ensure that at least the intelligence committees would receive prior notice of covert arms transactions, and not to enshrine a mechanism by which no one in Congress would learn of such a transfer until well after it was completed. See H.R. Rep. No. 99-106 at 9-12 (1985), reprinted in 1985 U.S. Code Cong. & Adm. News at 954-57.

However aggressive the Administration's position may have been, from the President's perspective the three salient facts are that by January 1986, apparently-competent legal authorities had been consulted, that their advice had been received, and that their views on the appropriate legal structure of the Iran Initiative would not have appeared

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patently frivolous to a layman. Except for the continual "stretching out" of the deferral of Congressional notification through 1986, there is no indication that the President was alerted before November to any facts that would have led him to believe that the Iran Initiative had diverged materially from the legal structure that he and his advisors had approved in January. Accordingly, I see no basis on which President Reagan could be found liable for a conspiracy deceitfully to impede or impair government functions by electing to pursue the 1986 Iran arms sales without complying with the arms export statutes.

2. The 1985 Israeli Shipments and the Replenishment of Israeli Stocks

As should be obvious from the foregoing, the very legal advice that supported the President's authorization of the 1986 arms sales to Iran tends to cast doubt upon the legality of his approval of the 1985 Israeli shipments of U.S.-manufactured TOW and Hawk missiles to Iran. Indeed, Admiral Poindexter's January 17, 1986 memorandum for the President specifically recites that there are "legal problems" associated with "Israel's selling U.S. manufactured arms to Iran" (AKW001918). Yet that is precisely how the Iran Initiative was structured during much of 1985 -- with no consultation with legal counsel, no written Finding, and an unwritten Presidential determination that Congress would not be notified (see [redacted] July 2, 1987 McFarlane Cong. Dep. 34-37). (b)(3) GJ

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In addition to approving the Israeli sales themselves, during 1985 the President approved a commitment by the United States to allow Israel to purchase replacements for the 500 TOW missiles that Israel had sent to Iran in September.[19/] The retroactive Iran Finding signed on December 5, 1985 says nothing about either the 1985 TOW shipment or the related replenishment of Israeli stocks.[20/] While the

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19/ [redacted] (b)(3) GJ

20/ The 1985 Finding purported to authorize the following:

> The provision of assistance by the Central Intelligence Agency to private parties in their attempt to obtain the release of Americans held hostage in the Middle East. Such assistance is to include the provision of transportation, communications, and other necessary support. As part of these efforts certain foreign materiel and munitions may be provided to the Government of Iran which is taking steps to facilitate the release of the American hostages.
>
> All prior actions taken by U.S. Government officials in furtherance of this effort are hereby ratified. (ER 10,148.)

Mr. Sporkin, who was responsible for the preparation of the 1985 Iran Finding, has testified that he was not aware of the August/September 1985 Israeli TOW shipment (see June 24, 1987 Sporkin Cong. Tr. 129), and that the "ratification" language in that Finding was not intended to cover the TOW transaction (id. at 130). Whether the retroactive Finding could have covered replenishing Israeli stocks for the November 1985 Hawks is somewhat academic because the transaction failed, all but one of the Hawks were later returned to Israel, and no replenishment was needed. [redacted]

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actual shipment of replacement TOWs to Israel did not take place until 1986, the January 17, 1986 Finding is also silent about replenishment for earlier transactions; any effort to stretch the general verbiage of that finding ("Provide funds, intelligence, counter-intelligence, training, guidance and communications and other necessary assistance to these elements, groups, individuals, liaison services and third countries in support of these activities," AKW001921) to cover replenishment is substantially undercut by Admiral Poindexter's accompanying memorandum, which portrays the January 17 Finding as an alternative to precisely that course of action. There are, then, but two ways in which one may defend the legality of the 1985 arms sales: first, to conclude that those sales did not in fact violate the AECA; second, to rely upon other Presidential powers as excusing, or making unnecessary, compliance with the arms export statutes.

Neither the Israeli TOW sale to Iran nor the November 1985 Hawk missile transfer can be reconciled with the substantive provisions of the arms export statutes. Although both transactions satisfied the statutory

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20/ (...continued)

[redacted]

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requirement that any retransfer of U.S.-manufactured weapons to a third country (Iran) be approved by the President, see 22 U.S.C. §§ 2753 (AECA), 2314 (Foreign Assistance Act), those statutes state that the President may not give his approval unless, among other things, the third country provides written assurances concerning its own subsequent retransfer of the weapons. See 22 U.S.C. §§ 2753(a), 2314(e). There is no indication that the President paid the slightest heed during 1985 to the limitations on retransfers of weapons pursuant to the arms export statutes.[21/]

[21/] It is less clear that the President knowingly violated the Congressional reporting requirements for arms exports with respect to the 1985 arms transactions. Because 22 U.S.C. § 2753(e) says only that Congress must be notified immediately if the President learns about a retransfer that occurred without his consent -- and says nothing explicitly about whether Congress must be notified immediately if the President has consented in advance to a transfer that violates the statutory terms on which consent may be given -- it is perhaps arguable that the reporting requirement of that particular sub-section was not violated. There is, to be sure, no evidence that the President made any report to Congress concerning "implementation" of either Israeli's original retransfer agreement as to the weapons, or the nonexistent retransfer agreement by Iran, see 22 U.S.C. § 2753(a). The dollar value of the August/September 1985 TOW shipment (whether measured by the price to Ghorbanifar of roughly $5 million, the roughly $2 million original cost of 500 TOWs to the United States, or the replacement cost which would have fallen between those figures), would have placed it well below the $14 million threshold at which prior reporting to Congress is required. Under the AECA, the November Hawk transaction should have been reported to Congress in advance, whether one applied the sales price to Ghorbanifar of $300,000 per missile (which equalled the original cost of the weapons to the U.S. (see ALZ012546)), or the replacement unit cost of $437,700 (see id.) to the full 80-missile or 120-missile size at which that shipment was conceived. However, there is no concrete proof that the President was told how many missiles Israel planned to ship, or what their dollar value might be (cf. March 6, 1991 Regan 302 at 6); in the event, any "violation" of AECA's advance

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Is it possible to excuse compliance with the arms export statutes by conceptualizing the 1985 transactions, like their 1986 successors, as having been carried out under the authority of the National Security Act, albeit in a less formal (because uncounselled and unwritten) manner? In a December 17, 1986, Memorandum for the Attorney General entitled "Legal Authority for Recent Covert Arms Transfers to Iran," Cong. Ex. EM-69 (hereinafter "OLC Opinion"), the Office of Legal Counsel of the Department of Justice determined that one could support at least the August/September 1985 TOW shipment under the National Security Act. In OLC's view, the "Israeli sales" could be characterized as Israeli assistance, essentially as a conduit, to a U.S. covert action that the President had complete Constitutional power to conduct.[22/] If one combines

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[21/] (...continued)
reporting requirement would have been rather inchoate because only eighteen missiles were actually shipped, leaving the value of the November Hawk shipment well below $14 million.

[22/] In arriving at its characterization of Israel as a "conduit", OLC made a number of factual assumptions, including the absence of any Israeli profit in the transaction (OLC Opinion at 16 n.38), the supposedly fungible nature of the weapons that Israel shipped to Iran and any replacements that Israel later received from the United States (id. at 16, 17), and the notion that when it shipped the TOWs, Israel did so at the request of the United States as opposed to on her own initiative (id. at 17). As the Iran/Contra Select Committee Report notes at page 418, none of these three assumptions is correct. However, the only one of those assumptions that President Reagan would arguably have known to be false is the third. ([redacted] (b)(3) GJ In the context of the somewhat-confused origins of the Iran Initiative, the distinction among "Israeli-initiated", "cooperative", and "U.S.-initiated" covert actions, standing alone, is in my (continued...)

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this characterization of the transaction with the conclusions that no covert action finding is required by statute absent CIA involvement in the activity (see OLC Opinion at 6) and that E.O. 12333 could not be violated by the President himself (see OLC Opinion at 14), or if one takes the more aggressive view that a Presidential finding need never be written down at all (see OLC Opinion at 7-12), one can look at the entire 1985 phase of the Iran Initiative as having been conducted legally under a series of oral determinations by the President. This conclusion is not affected by the November 1985 addition to the 1986 Intelligence Authorization Act -- which defined transfers of arms worth more than $1 million as "significant anticipated intelligence activities"[23/] and thus explicitly brought them into the Congressional notification scheme of 50 U.S.C. App. § 413 -- because an accompanying OLC memorandum takes the position (as did Attorney General Meese and Mr. Sporkin) that the law "should be read to leave the President with discretion to postpone informing the committees until he determines that the success of the operation will not be jeopardized

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22/ (...continued)
judgment too thin a reed on which to support a charge that a President violated the criminal law.

23/ 50 U.S.C. § 415 applies to transfers by "any department, agency or other entity of the United States involved in intelligence or intelligence-related activities" (see §415(b)(1)), which OLC concluded would embrace the NSC (see OLC Opinion at 5 n.10). Thus, for purposes of this statute it would be immaterial whether or not CIA was involved in the transaction.

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thereby." (See December 17, 1986 Memorandum for the Attorney General entitled "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act," Cong. Ex. EM-70, at 27.)

OLC's after-the-fact conclusions are not a particularly persuasive gloss on how the civil law ought to operate; indeed, at the Iran/Contra hearings neither Mr. Meese nor Mr. Sporkin gave unequivocal support to the casual definition of Presidential findings which the OLC Opinion adopts. (See July 29, 1987 Meese Cong. Tr. 230-31; June 24, 1987 Sporkin Cong. Tr. 121-22, 137-38, 220-21.) The OLC Opinion does, however, illustrate the difficulties, where Presidential action is concerned, in drawing the types of hard-and-fast conclusions as to legal violations that would have to precede any consideration of applying 18 U.S.C. § 371 to these facts. When those difficulties are viewed in the light of the underlying complexity of the arms export statutes and the absence of any evidence of a malicious purpose to violate the law when the President authorized his hostage-release initiative, criminal prosecution on the basis that the 1985 transactions violated the arms export statutes does not appear warranted.

3. The Shipment of Arms to Iran after August 27, 1986

As noted at pages 26-27 above, in August 1986 Congress passed the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (hereinafter "DSAA"). Section 509

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of the DSAA provided that absent a Presidential waiver (which must be reported to Congress in advance of any otherwise prohibited transaction), items on the Munitions List could not be exported "to any country which the Secretary of State has determined . . . has repeatedly provided support for acts of international terrorism" -- a condition which had been satisfied as to Iran since 1984.[24/] This legislation became effective on August 27, 1986. By that date, the "U.S." phase of the Iran Initiative, conducted pursuant to the January 17, 1986 Finding (see Section I(B)(1) above), had been underway for seven months. All of the Iran arms transfers except one -- the October 1986 shipment of 500 TOW missiles to the Iranian Second Channel -- had already taken place. The question addressed in this subsection is whether the President's approval of the October 1986 TOW shipment, following the enactment of the DSAA, carries criminal ramifications.[25/]

[24/] Although the President may not be chargeable with anything more than constructive knowledge of the Secretary of State's actual determination that Iran was a supporter of terrorist nations as that determination appeared in the Federal Register, on July 8, 1985 Mr. Reagan had given a speech in which he declared Iran to be part of a "confederation of terrorist states . . . a new, international version of Murder Incorporated." (See New York Times, July 9, 1985, at A12, col. 1.)

[25/] By August 1986, Mr. Sporkin was well out of the Executive Branch; Attorney General Meese apparently was not consulted concerning any relationship between the DSAA and the Iran Initiative at any time before November 1986 (see July 28, 1987 Meese Cong. Tr. 8-10). The only evidence we have of President Reagan's awareness of the DSAA is his Signing Statement regarding the new law, which focuses entirely upon those portions of the statute aimed at enhancing the security

(continued...)

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To begin once again with the civil law, the December 17, 1986 OLC Opinion, discussed in the previous section, considered whether the DSAA undermined OLC's conclusion that the 1986 Iran Initiative was lawful (see OLC Opinion at 13-14). OLC determined that the DSAA, like the AECA, was inapplicable to weapons sales conducted pursuant to a Presidential Finding because the President

> has independent authority, recognized in the National Security Act, for transferring arms in the course of covert intelligence-related operations; the congressional notification requirement in the above-quoted provision is at odds with the congressional oversight process established in section 501 of the National Security Act; and the sparse legislative history of this new provision gives no indication of an intent to override section 501. (OLC Opinion at 14.)

The OLC Opinion, however, overlooks the interplay between Section 509 of the DSAA and 50 U.S.C. § 415. As OLC correctly notes elsewhere in its analysis (see OLC Opinion at 1-4), Section 415, first enacted in November 1985 and made permanent one year later, recognized that arms transfers could be authorized under the National Security Act. Of particular interest here, Section 415 also provided that

> An intelligence agency may not transfer any defense articles or defense services outside the agency in

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25/ (...continued)
of U.S. citizens abroad and promoting intra-government and international cooperation against terrorism, and does not mention Section 509 at all. (See Statement by President Ronald Reagan Upon Signing H.R. 4151, 22 Weekly Comp. Pres. Doc. 1124, September 1, 1986, reprinted in 1986 U.S. Code Cong. & Adm. News at 1965-66.) [redacted] (b)(3) GJ

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> conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress. See 50 U.S.C. § 415(a)(3).

A substantial argument can be made that the DSAA's flat prohibition upon the shipment of Munitions List items to terrorist states (absent a Presidential waiver, reported to Congress in advance) defines such shipments as "an intelligence or intelligence-related activity for which funds were denied by Congress". If so, then any attempt by the President to authorize such a shipment as a covert action under the National Security Act without notifying Congress would be illegal per se, no matter what one's general views might be on the President's obligation to report covert actions to Congress.

While substantial, this argument is not sufficiently conclusive to serve as the basis for a criminal prosecution of the President. First, giving due regard to the standard rule that the acts of subsequent legislatures are a suspect source in construing prior statutes, the fact remains that when Congress overhauled Section 509 of the DSAA in 1989, the amended statute contained an explicit exemption for transactions that are subject to National Security Act reporting requirements (see page 26 n.14 above). Such a provision would, of course, be completely meaningless if one defined any arms transaction falling within the DSAA as being per se prohibited under the National Security Act pursuant to 50 U.S.C. § 415(a)(3).

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Second, and bearing more directly on the issue of criminal intent, Section 509 of the DSAA amended Section 6(j) of the Export Administration Act, 50 U.S.C. § 2405 (j), which deals generally with the U.S. exports to terrorist countries. Section 509(a)'s membership in the family of arms export statutes was confirmed when it was codified at 22 U.S.C. § 2780. If President Reagan understood the Attorney General's legal advice of January 1986 to say that the January 17 Finding overrode the arms export laws (see Section I(B)(1) above), then he could reasonably have understood those laws to remain overridden as long as the Finding remained in effect, no matter how their substantive provisions might change [redacted] (b)(3) GJ

If, as is rather more likely, the President simply never focused on Section 509 of the DSAA as impacting on the Iran Initiative, then the record on criminal intent would lack the element of deliberateness (or deceitfulness) that is in my judgment essential before one can elevate a civil law violation into a criminal conspiracy under Section 371. Under either scenario, the enactment of the DSAA does not alter my conclusion that the sale of weapons to Iran, as authorized by President Reagan, did not give rise to criminal liability on his part.

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II. Military and Paramilitary Assistance to the Contras, 1984-October 1986

Summary of the Facts

Beginning in 1981, the Reagan Administration invested a great deal of effort and political capital in activities directed against the Sandinista government of Nicaragua. Those activities ran the gamut from Presidential rhetoric to financial and military support of armed resistance to the Sandinistas by a number of groups known collectively as the "Contras". In the middle of this spectrum lay such measures as economic sanctions against Nicaragua, diplomatic tactics aimed at isolating Nicaragua from other nations, and the strengthening of the economic, military and intelligence capabilities of the Central American countries that adjoin Nicaragua -- Honduras, El Salvador, and Costa Rica.

The military aspect of this effort, which was run until October 1984 (and again after October 27, 1986) as a covert action by the Central Intelligence Agency, provoked considerable controversy with members of Congress who opposed the Administration's policy. Particularly during 1984-1986, the Administration's opponents were capable of commanding a majority in the House of Representatives, and thus were in a position to deny the President the use of appropriated funds for the support of the Contras.

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Between 1981 and 1983, the debate focused more on the purpose than on the fact of United States support to the Contras. The question was whether the goal of that support -- and, by extension, the goal of the Contras themselves -- was solely to bring an end to aggressive behavior by the Sandinista government toward neighboring countries (principally, the Sandinistas' efforts to export their Marxist politics through the shipment of arms to revolutionary elements in those countries), or also included bringing an end to the Sandinista government itself. Beginning in 1981 and continuing through most of 1983, U.S. policy toward Nicaragua, and the covert activities that supported that policy, were characterized publicly and to the Congress as being aimed at halting Nicaraguan aggression, and not at the destabilization of the Sandinistas' rule within Nicaragua. In late 1982, Congress wrote the supposedly-limited objectives of U.S. assistance to the Contras into law in the first of the so-called "Boland Amendments", which prohibited the Administration from using Congressionally-appropriated monies "for the purpose of overthrowing the government of Nicaragua". Pub. L. No. 97-377, § 793 (1982).

The CIA's activities during this period were authorized under an evolving series of covert action findings signed by President Reagan and duly reported to the Congressional intelligence committees. The first, addressed to "Central America" generally, was signed on March 9, 1981 and, in terms of military activity, simply authorized CIA to

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"Provide all forms of training, equipment and related assistance to cooperating governments throughout Central America in order to counter foreign-sponsored subversion and terrorism" (AKW032131). This Central America finding -- which apparently remained in force well past 1986 -- was supplemented in December 1981 by a more specific finding that was plainly directed at Nicaragua (see ER 13147). This document authorized CIA to

> Support and conduct . . . paramilitary operations against the Cuban presence and Cuban-Sandinista support infrastructure in Nicaragua and elsewhere in Central America. Work with foreign governments as appropriate to carry out the program.

In the summer of 1983, as Congressional opposition to Contra assistance continued to build, a successor to the December 1981 finding was negotiated between CIA Director Casey and the Senate Select Committee on Intelligence. The product of those discussions was a "Nicaragua Finding," ultimately signed by the President on September 19, 1983, that was highly specific in its description of both the scope of CIA's paramilitary activities and the goals of U.S. policy toward Nicaragua (see Defendant's Exhibit 11 in United States v. Poindexter). In pertinent (and declassified) part, it authorized CIA to

> . . . in cooperation with other governments, provide support, equipment and training assistance to Nicaraguan paramilitary resistance groups as a means to induce the Sandinistas and Cubans and their allies to cease their support for insurgencies in the region; to hamper Cuban/Nicaraguan arms trafficking; to divert Nicaragua's resources and energies from support to Central American

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> guerrilla movements; and to bring the Sandinistas into meaningful negotiations and constructive, verifiable agreement with their neighbors on peace in the region.
>
> . . . in cooperation with other governments, provide support to opposition leaders and organizations . . . . Provide training, support and guidance to Nicaraguan resistance forces . . . .
>
> Seek support of and work with other foreign governments and organizations as appropriate to carry out this program and encourage regional cooperation and coordination in pursuit of program objectives. CIA may support . . . in order to hamper arms trafficking through Nicaragua, support indigenous resistance efforts and pressure the Sandinistas.

The September 1983 Finding went on to state that

> U.S. support to paramilitary activities in Nicaragua will be terminated at such time as it is verified that: (a) the Soviets, Cubans, and Sandinistas have ceased providing through Nicaragua arms, training, command and control facilities and other logistical support to military or paramilitary operations in or against any other country in Central America, and (b) the Government of Nicaragua is demonstrating a commitment to provide amnesty and nondiscriminatory participation in the Nicaraguan political process by all Nicaraguans.
>
> The Director of Central Intelligence is directed to ensure that this program is continuously reviewed to assure that its objectives are being met and its restrictions adhered to.

During the same period, growing Congressional opposition to the Contra-assistance program led members of the Reagan Administration to muse about what might be done if

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Congress were to deny the funding needed to carry it out. On September 6, 1983, Secretary of State Shultz wrote a memorandum to the President (AKW023016-19) in which he stated

> If we can continue to fund the contras (or, if necessary, alternative benefactors are found), negotiations can proceed at a measured pace with the U.S. in the background. But if the contras -- for any reason -- begin to fade as an instrument of effective pressure on the Sandinistas, what prospects there are for meaningful results from negotiations would evaporate (emphasis in original).

In preparation for a September 16, 1983 meeting of the National Security Planning Group called to discuss the new Nicaragua Finding, the NSC staff, through then-National Security Advisor William Clark, provided the President with a series of "Talking Points" that included the question "What plans do we have if Congress cuts off our support to the resistance forces?" While there is no indication that this subject was actually discussed at the September 1983 meeting[26/] -- the "watershed" meeting instead taking place on June 25, 1984 -- these references, and others like them by lower-ranking officials, illustrate the direction in which the Administration's thinking was flowing through late 1983 and into the spring of 1984.

In October 1983, the division of opinion within Congress over military assistance to the Contras manifested itself in a second "Boland Amendment." This measure, which

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26/ See [redacted] (6)(3) GJ Robert McFarlane succeeded Mr. Clark as National Security Advisor on October 17, 1983.

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was attached to the Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-212, was directed at the size rather than the purpose of the Contra program, and prohibited the CIA, the Department of Defense and any other agency or entity of the United States involved in intelligence activities from obligating or expending more than $24 million for direct or indirect support of military or paramilitary operations in Nicaragua. This amount was explicitly subject to increase by a supplemental funding request if the President reported by March 15, 1984 that the Sandinistas had thwarted negotiations for a peace treaty.

There are a number of indications that as the funding situation in Congress was becoming more difficult, the intensity of the CIA's military efforts in Nicaragua -- including both the training and equipping of Contra forces and the direction of covert operations, such as the mining of harbors, against Nicaraguan facilities -- was stepped up. (See Iran/Contra Select Comm. Rpt. at 36.) By February 7, 1984, National Security Advisor McFarlane had advised the President that unless some $12-$14 million in additional resources were found, the program would have to be curtailed by May or June, 1984 (see AKW-31454-55). Although the Administration renewed its legislative efforts to obtain this supplemental funding from Congress,[27/] no additional funds

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[27/] Mr. McFarlane has suggested that as the 1984 Presidential election approached, then-Chief of Staff James Baker, who headed the Administration's Legislative Strategy Group, made it known that he did not want Contra assistance to be a major (continued...)

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were authorized, and the CIA's resources for the program were almost entirely depleted by June 1984.

As the fall of 1984 approached, the outlook for Congressional funding of the Contras went from bad to worse. While Congress was considering what to do about the Administration's requests for a Fiscal 1984 Contra supplemental, U.S. involvement in the mining of Nicaraguan harbors became public. This disclosure helped seal the fate of the CIA's Contra support program in the Congress.[28/] The omnibus appropriations bill for Fiscal Year 1985, Pub. L. No. 98-473, which took effect on October 12, 1984 with the President's signature, contained what some have referred to as the "full prohibition" Boland Amendment. Section 8066(a) provided that

> During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

27/ (...continued)
issue, and at some point said "Just forget about trying to get it from the Congress and go and find some other way to do it if you can". (See [redacted] (b)(3) GJ March 10, 1989 McFarlane North Trial Tr. 2934-36.)

28/ In early October the Congressional intelligence committees also learned about the so-called "Tayacan Manual", a CIA-produced handbook distributed to the Contras which, in the eyes of many, called for assassinations of Sandinista officials.

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Like its Fiscal 1984 predecessor, the Fiscal 1985 Boland Amendment permitted the President to return to Congress later in the fiscal year to request additional military aid for the Contras. In the event, however, nothing more than peripheral military assistance to the Contras would be approved by the House until June 1986, and none was actually appropriated by Congress until October 1986.

By the spring of 1984, President Reagan had begun making it clear to his subordinates, and particularly his National Security Advisor, that whether or not Congress cooperated, the President wished to see the Contras supported "body and soul" (see, e.g., Iran/Contra Select Comm. Rpt. 501). There is essentially no dispute in the record that the President made this desire known on several occasions over the months between the spring of 1984 and October 1984, and that his stated views on the importance of Contra assistance remained constant throughout the vicissitudes of Congressional funding for the program between October 1984 and October 1986. As will be seen below, in many cases it does not appear that the President knew how far his subordinates went in carrying out his wishes. In other instances the record indicates that those subordinates actively kept information concealed from the President. But there is at least one area -- the obtaining of support for the Contras from foreign governments -- in which the President's knowledge was relatively complete.

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Obtaining Third-Country Support for the Contras, 1984-1986

The first six months of 1984 saw activity by both the NSC and the CIA aimed at securing the additional funding for the Contras that was not forthcoming from Congress. The preferred source for this money was foreign governments sympathetic to the United States (see, e.g., [redacted] (b)(3) GJ [redacted] Preparations were made to approach at least two such countries, one through NSC channels and the other through CIA. The NSC contact was actually pursued through a request and refusal by the subject government. The CIA approach likewise bore no fruit, at least during 1984. There is no evidence that the President was apprised of these unsuccessful maneuvers.

There is no doubt, however, that the President was told of his Administration's first success in obtaining third country funding for the Contras. In May or June 1984, during a meeting with the Ambassador of Saudi Arabia, National Security Advisor McFarlane made a point of the Administration's interest in the Contras;[29/] by McFarlane's account, this conversation resulted in the Saudis' "volunteering" to deliver $1 million per month to a Contra

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[29/] McFarlane's account of his actions in this instance corresponds directly to one of the few specific measures that the President admits to endorsing in his "body and soul" directives -- viz., that while the Administration should always operate "within the law", it would not be against the law for Executive officials to mention to U.S. allies that they should have the same interest in the Contras that the United States had. (See February 16, 1990 Reagan Dep. at 53-54; [redacted] (b)(3) GJ

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bank account. [redacted] (b)(3) GJ

On June 25, 1984, third-country solicitation was discussed at a meeting of the National Security Planning Group. Director Casey reported that the CIA was down to $250,000 remaining from the Fiscal 1984 allocation for the Contras, and that the Contras had sufficient arms and ammunition to last until August. He then offered the view that under the September 1983 Nicaragua Finding, CIA could encourage support for the Contras from various countries in the region and, with notification to the oversight Committees, could help the Contras get money from third countries. There ensued a debate between Secretary Shultz and Director Casey concerning whether the absent James Baker did, or did not, believe that solicitation of third-country funding for the Contras would be an "impeachable offense". It was decided that Attorney General Smith would be consulted in an effort to resolve those questions.[30/] Various Latin American countries were discussed as possible contributors;

[30/] For the outcome of that consultation, see pages 95-96 below.

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not one of the several attendees who were unquestionably aware of the Saudi contribution, including President Reagan, said a word about it. According to the minutes (see GX 84 in United States v. North), the meeting concluded with the following exchange:

> Vice President Bush: How can anyone object to the US encouraging third parties to provide help to the anti-Sandinistas under the finding? The only problem that might come up is if the United States were to promise to give these third parties something in return so that some people could interpret this as some kind of an exchange.
>
> Mr. Casey: Jim Baker changed his mind as soon as he saw the finding and saw the language.
>
> Mr. McFarlane: I propose that there be no authority for anyone to seek third party support for the anti-Sandinistas until we have the information we need, and I certainly hope none of this discussion will be made public in any way.
>
> President Reagan: If such a story gets out, we'll all be hanging by our thumbs in front of the White House until we find out who did it.

The President's final words were interpreted, at least by McFarlane, as amounting to a command that Congress not be informed of third-country contributions (see March 10, 1989 McFarlane North Trial Tr. 3941-45; March 15, 1989 McFarlane North Trial Tr. 4625-30). McFarlane does not claim that he understood the President to have been saying that the Administration should actively lie to Congress about such contributions if asked (id.).

Although occasional discussions of third-country funding continued, it does not appear that the President was told of any concrete efforts to solicit additional countries

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during the balance of 1984; rather, the million-dollar-a month donation from the Saudi Arabia seems to have been treated as sufficient for the moment. At a July 27, 1984 NSC meeting, Director Casey reported that "Despite lack of funds from us, the resistance carries on surprisingly well . . . . They are getting the funds from somewhere. They are asking our advice on where and how to secure weapons" (AKW043522). The last mention of Contra funding at a formal NSC or NSPG meeting during 1984 took place on October 30, when Casey informed the group that

> the Contras have increased their strength from a little over 9,000 to a little over 12,000 since the US government ceased funding at the end of May. They made substantial purchases of ammunition and have been able to sustain themselves with food . . . . If the private funding they are getting continues they should be able to maintain pressure on the Sandinista Government for an indefeinite [sic] period. (AKW043816.)

With this reference, funding for the Contras disappears from the formal NSC/NSPG agenda, and does not reappear until January 10, 1986. The Congressional oversight committees were not informed of the Saudis' largess until early 1987.

The President was the key player in the next major foreign contribution to the Contras, which also came from Saudi Arabia. [redacted] (b)(3) GJ

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(b)(3) GJ [redacted] The President later informed McFarlane and, according to McFarlane, instructed that the news of this renewed contribution not be shared with others. (See March 13, 1989 McFarlane North Trial Tr. 4203-06.) According to McFarlane, this included Congress because of the feeling that revelation of the contribution might damage U.S.-Saudi relations and deter Congress from voting renewed aid to the Contras; again, McFarlane says that he did not construe the President's direction not to inform Congress as being an instruction to lie if asked about the subject. (Id.)

The increased Saudi aid[31/] permitted the Contras to

31/ Beginning late in 1984 and continuing into 1985, the NSC staff led efforts to obtain financial and material contributions for the Contras from several other countries as well. The Republic of Korea was solicited through retired Maj. Gen. John Singlaub; no contribution resulted, and it is not known whether the President was aware of this effort. Taiwan was solicited through a number of intermediaries; two donations of $1 million each were eventually received, one in August 1985 and another in early 1986. Poindexter has stated that he "suspects" the President knew about the Taiwanese contribution (see June 17, 1987 Poindexter Cong. Dep. 269); McFarlane's account of the 1985 Taiwan solicitation is so skewed in the direction of self-exculpation that one cannot determine what, if anything, he might have told the President on the subject (see, e.g., May 11, 1987 McFarlane Cong. Tr. 59-60; March 13, 1989 McFarlane North Trial Tr. 4096-97, 4217-20). On the material front, in the fall of 1985 talking points were prepared, probably for use by the President, in connection with an attempt to solicit the Prime Minister of another Asian country to contribute communications equipment to the Contras; President Reagan does not recall delivering this pitch (February 16, 1990 Reagan Dep. 75-76 & DX 6). Finally, with regard to the Contras' unending search for antiaircraft missiles, the President indicated at his deposition at least a general familiarity with efforts to obtain foreign approvals to obtain British-made Blowpipe missiles for the Contras (id. at 76-79); [redacted]

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purchase sufficient arms and ammunition to last through early 1986. Saudi money, however, could not provide the Contras with another need -- continued access to secure bases in which they could train, receive equipment, house their dependents, and regroup after forays into Nicaragua itself. For this purpose, there was no substitute for Honduras, where Adolfo Calero's FDN Contras had traditionally encamped; to a lesser extent, the cooperation of El Salvador (primarily as a staging area for supplies) and Costa Rica (primarily to serve the role of Honduras for the Contras' sporadically-active Southern Front) was also important.

In both 1985 and early 1986, the level of the Central American countries' support for the Contras wavered in the face of continuing Congressional defeats for the Administration's Contra program, as well as threats and occasional military incursions by the Sandinistas. Broadly speaking, the Administration's response to those fluctuations consisted of frequent messages designed to "buck up" the locals in their enthusiasm for the Contras, along with not-very-subtle reminders to the affected governments of the importance of their security and aid relationships with the United States. The President participated in episodes of this type in February 1985, April 1985, May 1985, and March

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31/ (...continued)

[redacted] (b)(3) GJ

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1986[32/] with respect to Honduras; the most graphic example was a telephone call on April 25, 1985, in which the President called President Suazo of Honduras to pressure a Honduran military officer to release a Contra weapons shipment that had been seized by the Honduran army (see DX 54.08 in United States v. North). More general hortatory communications from the President and other U.S. officials to Central American leaders sprinkle the entire period during which the CIA's Contra-assistance program was suspended.

For the sake of brevity, the President's approach in this area can be summarized by his own testimony at his February 1990 deposition during a discussion of a May 1985 state visit by President Suazo. The briefing memorandum prepared for President Reagan in connection with that visit states:

> In your meeting it will be important to reiterate to Suazo the importance we attach to his continued cooperation in enabling the FDN to remain a viable element of pressure on the Sandinistas. Without making the linkage too explicit, it would be useful to remind Suazo that in return for our help -- in the form of security assurances as well as aid -- we do expect cooperation in pursuit of our mutual objectives. In this regard, you could underline the seriousness of our

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[32/] The March 1986 sequence is somewhat different from its 1985 predecessors in that the material aspect of the President's response included the dispatching of $20 million in emergency military assistance to Honduras, which was duly reported to Congress in accordance with Section 506A of the Foreign Assistance Act. The fact that this aid was provided under a statute that did not require Congressional approval received Congressional criticism at the time. See "Honduras Incursion Aid Arrives After the Fact", Washington Post, April 30, 1986, at A9.

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> security commitment, which the Hondurans seem to regard as the main quid pro quo for cooperating with the FDN.

(See DX 11 (Reagan) in U.S. v. Poindexter.) Asked to explain this passage at his deposition, Mr. Reagan said:

> A. Well, again, I think it is the same tone. That we don't want to press them to go so far that they challenge the Sandinista government and wind up in open hostilities with them. And the -- it would be useful however to remind them that in return for our help in the form of security assurances as well as aid that we do expect cooperation. That we feel that there is an obligation on their part, too.
>
> Q. Right. So, in other words, if some aid and assistance is given to them, you would expect some aid and assistance back from them --
> A. Yes.
>
> Q. -- in combating the spread of the Sandinistas?
>
> A. Yeah.
>
> [Discussion of objection by President's counsel]
>
> THE WITNESS: Well, I answered in this case because I have already indicated on other questions that this was a problem in our relationship, about the threat to them as per our ability to lessen the threat in their minds in return for joining with us on this particular subject. So, that is why I answered here on that. It is in keeping with what our whole attitude was.
> (February 16, 1990 Reagan Dep. 109-110.)

Although it is not worded precisely, a fair reading of the President's testimony, as well as the other available facts, is that while there was no dollar-for-dollar linkage expressed between U.S. aid to Central American countries and

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those countries' assistance to the Contras, the general connection between the two was unmistakable.

Beginning in early 1985, the NSC staff's planning to sustain the Contras took on an increasingly permanent cast with the development of "Nicaragua Options", a number of which assumed a continued drought in Congressional appropriations for Contra military aid. Well before the April 24, 1985 vote in the House that finally closed off any possibility for renewed Contra military support in Fiscal 1985, the NSC staff appears to have settled upon one of those options -- "Option C, Limited Non-Lethal U.S. Support with Third Country Assistance" -- as a "bottom line" (see February 5, 1985 memorandum entitled "Options and Legislative Strategy for Renewing Aid to the Nicaraguan Resistance," AKW019293-301).[33/] In North's March 16, 1985 memorandum to McFarlane

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[33/] In full text, "Option C" was described as follows:

> This alternative calls for us to submit a report justifying a "new" program which would exclude the most controversial aspects of the original program--direct support by U.S. nationals and lethal military equipment and supplies. "Lethal" assistance (munitions, ordnance, etc.) would, in this case, be provided by third countries as in Option A. In its simplest form, U.S. support could be limited to cash grants which would be used only for specified "non-lethal" purposes, such as public affairs/political action, travel and transportation, food, clothing, shelter, etc., with provision for periodic audit. While it would be preferable to have authority for the U.S. to provide advice, training, management assistance, and intelligence, we could indeed leave these to third countries, with the understanding that the USG would coordinate with these countries as under the present Finding. A new Presidential Finding would have to be developed establishing the limits of U.S. assistance. The advantage of this option is that it could be

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outlining a "Fallback Plan for the Nicaraguan Resistance" (GX 90 in United States v. North), North embellished this proposal with the suggestion that humanitarian aid for the Contras be raised from U.S. citizens through appeals by the President himself.

[redacted]

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33/ (...continued)
presented as a "new approach," not requiring opponents of the old program to reverse their previous votes. Cash transfers could be publicly acknowledged but would best be executed covertly. While a legislated mandate to limit us to overt "humanitarian" assistance (e.g., aid to refugees) would not affect the basic legislative approach, any publicly acknowledged program will have an adverse impact on Honduras and Costa Rica. (AKW019295-96.)

I am not aware of any Executive "report" to Congress that spelled out the entire "Option C" plan, although a March 12, 1985 memorandum suggests that McFarlane discussed "Option C", or something much like it, with minority members Stump, Livingston, Hyde, and McCollum of HPSCI on March 4, 1985 (see DX 59.08 in United States v. North; see also AMX000498-99 (North notebook entry)).

The "new Presidential Finding" referred to above did not come into being until January 9, 1986 (see ER, 13130-33); this document, in pertinent part, authorized CIA to "Provide assistance and non-lethal material support to the armed Resistance forces of the Nicaraguan democratic opposition", but withdraws the September 1983 Finding's authorization for lethal assistance.

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McFarlane does not recall briefing the President on the "Fallback Plan", but does not take issue with Poindexter's notes (see March 10, 1989 McFarlane North Trial Tr. 4017-4018). Poindexter also claims to have no recollection of the discussion that is described in his notes (see June 17, 1987 Poindexter Cong. Dep. 293-99; [redacted] (b)(3) GJ [redacted] In any event, the plan described in the March 25 note is precisely the one that the Administration followed during 1985, although with relatively minimal direct involvement by the President.

1985 saw two legislative developments that impacted upon third-country solicitation for the Contras. Along with the August 8, 1985 legislation that appropriated $27 million in "humanitarian" assistance for the Contras through the State Department's Nicaraguan Humanitarian Assistance Office, Congress also passed two measures that are described as follows at page 402 of the Select Committee Report:

> -- The "Pell Amendment," a prohibition against the United Stated "enter[ing] into any arrangement conditioning, expressly or implicitly, the provision of assistance under [the International Security and Development Act] or the purchase of defense articles and services under the Arms Export Control Act upon the provision of assistance by a recipient" to the Contras; and
>
> -- The "Kerry Amendment," which prohibited the use of any funds to support, "directly or indirectly, activities against the government of Nicaragua which have not been authorized by, or pursuant to law, and which would place the United States" in violation of international law. (See International Security and Development Cooperation Act

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of 1985, Pub. L. No. 99-83, §§ 722(b)-(e).)[34/]

Other NHAO-related legislation passed in August 1985 clarified the Boland Amendment to provide that it should not be "construed to prohibit the United States Government from exchanging information with the Nicaraguan democratic resistance" (see Pub. L. No. 99-88, § 102(b)).

[34/] The accompanying Conference Report, No. 99-237, stated at page 143 that

> The purpose of the [Pell Amendment] is to prohibit the United States from furnishing economic or military assistance or selling U.S. military equipment on the condition, either expressly or impliedly, that the recipient or purchaser provide assistance to insurgents involved in the struggle in Nicaragua. This section does not prohibit U.S. Government officials from discussing U.S. policy in Central America with recipients of U.S. assistance or purchasers of U.S. military equipment.

The Report added that the legislation does not prohibit

> recipients of U.S. assistance from furnishing assistance to any third party on their own volition and from their own resources.

In this connection, it is worth noting that the "secret Honduran quid pro quo" sequence that formed a conspicuous part of North's defense began and ended before these two amendments were passed. While President Reagan's March 20, 1986 letter to President Azcona of Honduras following an Administration defeat in the House (DX 85.5 in U.S. v. North) walks fairly close to the line drawn by the Pell and Kerry amendments, it stops short of conditioning U.S. aid upon Honduran assistance to the Contras, or suggesting a straight "pass through" of U.S. aid to benefit the Contras in violation of international law. The $20 million in "emergency assistance" provided to Honduras in March 1986 (see page 61 n.32 above), whatever its merits, was done with the knowledge (if not the advance consent) of Congress.

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The December 1985 legislation that renewed Boland for another year and continued the August 1985 permission for exchanges of intelligence was even more specific on the subject of third-country solicitation. Section 105(b)(2) of Public Law 99-169, enacted on December 4, 1985, provided that "nothing in this section precludes . . . activities of the Department of State to solicit . . . humanitarian assistance for the Nicaraguan democratic resistance." Public Law 99-190, enacted on December 19, 1985, also appropriated classified amounts of money to provide the Contras with communications equipment and training, and to improve U.S. intelligence-gathering efforts in the region.

On October 30, 1985, in the midst of these legislative changes, Col. North wrote a memorandum to McFarlane requesting Presidential approval of U.S. reconnaissance flights over Nicaragua (see DX 59.17 in United States v. North). The basic memorandum is initialled "Approved" by Poindexter, and also bears the words "President approved";

[redacted]

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[redacted]

(b)(3) GJ

[redacted] Defense counsel's questioning at the Reagan deposition, while sketchy, left a record which suggests that President Reagan does not recall having seen North's memorandum (see February 16, 1990 Reagan Dep. 116-118).

[redacted]

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Expanding upon these notes, Poindexter has testified that he told the President about an airstrip that was being built for "private individuals" in Costa Rica with the assistance of Costa Rican Security Minister Piza[35/]; the numbers of Contras who were in Honduras with Honduran permission; the provision of logistics support for arms coming to the Contras from Guatemala; and the fact that the newly-elected President of Guatemala would be willing to continue helping the Contras (see May 2, 1987 Poindexter Cong. Dep. 65-66; [redacted]. A very brief Poindexter note of December 20, 1985 (AKW044151) states that the 0930 briefing for that day included a discussion of "arms into Honduras". [redacted]

In late 1985 and early 1986, the Administration began gearing up to renew its campaign for Contra lethal aid

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35/ On March 19, 1986, President Reagan held a three-minute photo session with Mr. Piza, Mrs. Piza, CIA Station Chief Fernandez, Regan, Poindexter, and North (see ALU028356). North supplied a rather revealing portrait of Piza's assistance to the Contra effort in a proposed briefing memorandum from Poindexter to the President (see AKW0051204-05). [redacted] Admiral Poindexter recalls that on March 19 the President thanked Piza for his help (May 2, 1987 Poindexter Cong. Dep. 202-203); the President has testified that he has no specific recollection of the meeting at all (February 16, 1990 Reagan Dep. 111-112), but agreed with defense counsel's suggestion that Piza "had participated in the development of a logistics support base for the United Nicaraguan Opposition", and had intervened with President Monet [sic: Monge]) id. at 113).

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in the Congress. [redacted] (b)(3) GJ [redacted] All segments of the Administration, including the President himself, engaged in intense lobbying efforts. After being dealt an initial setback in the House in March, 1986, the Administration won House authorization for $100 million in military assistance in June. However, because no money was actually appropriated until October, the Contras faced a serious shortage of funds for military needs in early 1986, which later spread to the non-lethal side when the $27 million in humanitarian aid appropriated by Congress in August 1985 began to run out.

The NSC staff pursued several avenues in search of a solution to the Contras' financial needs. The most famous and the most fruitful was Poindexter's and North's decision to divert "profits" from arms sales to Iran through the Enterprise and to the Contras, resulting in the Contras' receiving approximately $4 million in lethal aid alone. There is no evidence that President Reagan received any information about this misuse of his Iran Initiative until November 24, 1986, when Attorney General Meese reported it to him as the leading result of Meese's November 21-25 investigation.[36/] Admiral Poindexter has testified that he

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[36/] In reaching this conclusion, I have considered three of the more enigmatic bits of information to emerge from the investigation: the phantom conversation between Admiral Poindexter and Bernard McMahon, onetime Staff Director of SSCI; the testimony of James Radzimski; and the "Citibank tape". In a transcribed January 20, 1987 "Business Meeting", SSCI looked into claims by some of its staff that Mr. McMahon had boasted of a conversation with Poindexter, after his (continued...)

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affirmatively decided not to tell the President about the diversion of funds from the 1986 Iran arms sales (see, e.g., July 15, 1987 Poindexter Cong. Tr. 93-94); [redacted] (b)(3) GJ

The spring of 1986 unquestionably saw renewed attention by the President to the idea of soliciting funds for the Contras from foreign governments. The catalyst for this discussion appears to have been the President's own

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36/ (...continued)
resignation, in which Poindexter said that he had told the President that funds were being raised for the Contras via the Iran Initiative. McMahon denied both the conversation with Poindexter and having told the staff about such a conversation. Poindexter has denied both the McMahon story and reports that Poindexter made similar statements to others (see, e.g., July 17, 1987 Poindexter Cong. Tr. 134-138).

Radzimski, the NSC's System IV Control Officer through October 1986, claimed to recall an April 1986 memorandum from North to Poindexter discussing the diversion and attaching a proposed memorandum from Poindexter to the President. No such memorandum was found in the files, and Radzimski later admitted the "distinct possibility" that his recollection was "not completely accurate". (See Iran/Contra Select Comm. Rpt. at 272.) More important for present purposes, Radzimski's initial recollection would only go to corroborate North's testimony that he sent diversion-related memoranda to Poindexter; it would not impeach Poindexter's testimony that he never informed the President about the diversion.

The "Citibank tape" (see Bulkies 1-600-757 and 1-600-794) consists of several minutes of inadvertently-recorded telephone "cross-talk", in which two unidentified male voices appear to discuss an unspecified "smoking gun", known to President Reagan and Oliver North, that at least at that point had not been disclosed to the Congressional Select Committees. As stated in the Government's Memorandum in Response to Defendant North's Motion for Production of Information Concerning June 17, 1987 Tape Recording, filed in U.S. v. North on March 20, 1989, our investigation to determine the identity of the two voices was unsuccessful.

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frustration with the legislative process, as captured in a May 2, 1986 PROF from Poindexter to his Deputy, Don Fortier:

> . . . yesterday in a meeting that I had with the President, he started the conversation with "I am really serious." "If we can't move the Contra package before June 9, I want to figure out a way to take action uni-laterally to provide assistance." In other words he does not buy the concept of taking actions or talking about pulling out as described in the package. He has been reading Natanyahu's (sp?) book on terrorism and he was taken with the examples of Presidential actions in the past without Congressional approval. He also read an op-ed piece on the same subject. I believe that was the one by Dick Pipes' son. The President is recalling the 506A action we took on Honduras. I told him that I didn't think that it would apply here, since we are not dealing with a government. But the fact remains that the President is ready to confront the Congress on the Copnstitutional [sic] question of who controls foreign policy. We need to get Abe Sofaer and other stalwart lawyers thinking in these terms to see if there is some way we could do this, if all else fails.
>
> With your answers to the first question, we will discuss the package on the return trip and be ready to proceed on return. I have George's proxy on the package. George agrees with the President that we have to win some way and we will not pull out. (AKW031829.)

On May 15, in preparation for an NSPG meeting scheduled for the next day, Poindexter sent the President a memorandum that discussed the Contras' overall financial plight and noted that "By mid-June the outside support the resistance has received will have been consumed and no further significant support appears readily available" [redacted] (b)(3) GJ [redacted] The memorandum proposed three options: reprogramming

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$15 million in DoD funds for humanitarian assistance to the Contras; a Presidential appeal for private donations by U.S. citizens (the memo observes that "Such a step would undoubtedly result in considerable domestic criticism and perhaps a Congressional move to make such activity unlawful")[37/]; and, finally, "A direct and very private Presidential overture to certain Heads of State who are financially and politically capable of 'bridging' the resistance until a more favorable Congressional environment obtains" (AKW000737-43).

The May 16 NSPG meeting [redacted] began with a (b)(3) GJ presentation by Director Casey on the Contras' situation, followed by a rundown of the status of the Contadora regional peace negotiations and of the Contra legislation. The minutes then reflect the following discussion of the three "options".

> SECRETARY SHULTZ: The suggestion is to go to the committees and persuade them to reprogram some money from Defense for non-military aid to the contras. Personally, I think it's breathtaking in improbability. It would be better to go to other countries.
>
> SECRETARY WEINBERGER: Try everything. We should try every country we can find, the committees, and the people of the United States. If the contras are out of business in July, we will have to fight there ourselves some day.

37/ The President's awareness of and involvement in domestic fundraising for the Contras is treated below under "Other Aspects of U.S. Military Assistance to the Contras, 1984-1986."

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SECRETARY BAKER: George says we now are in a different position with respect to approaching other countries.

OLLIE NORTH: The FY-86 intelligence authorization bill permits the State Department to approach other governments for non-military aid.

SECRETARY SHULTZ: However, if we approach the intelligence committees in Congress and are turned down, we then are in an equivocal position if we go to other countries.

DIRECTOR CASEY: Haven't we approached other countries?

SECRETARY SHULTZ: We have, but not with much success.

ADMIRAL POINDEXTER: But until now, we have not involved the President.

SECRETARY SHULTZ: I'm talking about going to [the Prime Minister of an Asian country], saying we need some communications equipment. He figures out the cost and tells us the money is not a problem, but he has to think about how to deal with our Congress, what their reaction might be. He still hasn't thought it through yet.

DIRECTOR CASEY: The Saudis, Israelis, South Koreans, Taiwanese all have some interest.

PRESIDENT REAGAN: What about the private groups who pay for ads for the Contras. Have they been contacted? Could they do more than ads?

DON REGAN: We have contacts. Anyway, the President can get friends on an emergency basis to get funds there. But there is another idea which the President has discussed with me, which I can bring up because he is reluctant to do so. If a group in Nicaragua calls itself a government or if there is a group which creates a government in exile, that could also create a way to help them.

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SECRETARY WEINBERGER: We could then use the emergency provisions, just as we did for the Saudis.

OLLIE NORTH: Or for the Hondurans.

PRESIDENT REAGAN: Can't I recognize a government like that without action by Congress?

SECRETARY SHULTZ: Yes, you can.
AMBASSADOR HABIB: But the Nicaraguan resistance themselves have some strong reservations about doing that now without support from the other countries in the area. We would need to think it through.
SECRETARY BAKER: There was a bill two years ago which had that proposal. The contras could approach the other four countries.

ADMIRAL POINDEXTER: We will work on an NSDD on the negotiating process. We will prepare it quickly and lay out where there are disagreements so we can put them before the President. George will prepare for the President a list of countries which could be approached. We also will look hard at the issue of a new Nicaraguan government. And Will Ball will discuss with Chaney and Michel the possibility of reprogramming, looking at what the damage would be if we tried and failed. (AKW08812-13.)

After May 16, 1986, the record on Presidential awareness of third-country support trails off. At Presidential national security briefings stretching into the summer, there was intermittent discussion of candidate countries for solicitation (see McDaniel notes for May 19 (ALU0128245), June 9 (ALU0128250)). At the August 14, 1986 briefing, the President reportedly asked whether the Hondurans could lend supplies to Contras (ALU0128256).

[redacted] (b)(3) GJ

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[redacted]

[redacted] The only concrete result of the Secretary of State's consideration of possible donor governments -- the misdirected Brunei contribution solicited by Abrams -- may never have been briefed to the President at all (see June 17, 1987 Poindexter Cong. Dep. 313).

Other Aspects of U.S. Military Assistance to the Contras, 1985-1986

As we know, the NSC staff's support of the Contras during the Boland period was not limited to obtaining third-country funding for the Contras and ensuring their continued sanctuary in the Central American countries adjacent to Nicaragua. Beginning shortly before the "full prohibition" Boland Amendment became law, the NSC staff also attempted to rebuild, as best it could, the logistical and advisory functions that the CIA had performed for the Contras between 1981 and mid-1984.

Starting from modest beginnings -- essentially, the substitution of Col. North for the Chief of the CIA's Latin American Division as the case officer for the Contra military program over the summer of 1984 -- the NSC staff's Contra program took on more and more of the CIA's former functions as the need and opportunity arose. By mid-1986, Col. North supervised a fully-integrated covert program that had its own

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sources of funding (principally, the diverted Iranian arms sale proceeds and monies that North raised from wealthy U.S. citizens). As the result of a key meeting held in Miami in June 1985, the NSC staff also had virtually total control over the flow of arms, ammunition, and other military supplies to the Contras. A network of shell corporations run from the program's financial center in Geneva accomplished the needed transfers of funds and held title to the program's assets, including the military materiel itself, warehouses and a small fleet of aircraft based at Ilopango Air Base in El Salvador, and a subsidiary airfield at Santa Elena, Costa Rica. The most important non-governmental figures in this operation were General Secord and Albert Hakim, who in turn supervised more specialized actors such as Thomas Clines, Rafael Quintero, Richard Gadd, Robert Dutton, and Willard Zucker, as well as over a dozen contract employees such as the pilots and loadmasters at Ilopango.

A coherent portrait of President Reagan's knowledge of these elements of the NSC staff's Contra support program is quite difficult to assemble, and the image is further clouded by several important instances in which information was apparently concealed from the President by his subordinates, particularly Admiral Poindexter. To begin with the fundraising aspect of the operation, the available evidence, as previously noted, does not support any inference that the President was aware of the diversion of funds from the Iran arms sales to the Contras. Nor, despite his general

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blessing of foreign contributions, is there any indication that Mr. Reagan knew that some of the third-country money raised during 1985 and 1986 either went (as in the case of the two Taiwanese donations) or was intended to go (as in the case of Brunei) into the coffers of the Secord/Hakim Enterprise rather than directly to the Contras. [redacted]

Domestic fundraising for the Contras presents a more complex picture. There is no doubt that, beginning at least with the Nicaraguan Refugee Dinner in April 1985 and continuing through mid-1986, the President, like North, was a frequent and enthusiastic pitchman for Contra-related causes. There were, however, some important differences between the two. First, while both men's oratory shaded over from efforts to sell the Administration's political position on the Contras to actual fundraising appeals, the President's activities seem to have been confined to non-lethal, "humanitarian" aid. North, in contrast, made directed appeals, mainly through the National Endowment for the Preservation of Liberty ("NEPL"), for funds to buy weapons, [redacted] Second, while the President was unquestionably aware of NEPL and even held meetings and exchanged correspondence with its officials and contributors, [redacted]

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[redacted]

Indeed, early in North's involvement with NEPL the President's counsel were actively misled by North concerning the nature of that organization's activities. When North sought to obtain the first two Presidential letters to Carl Channell and Barbara Newington, North saw to it that the mandatory White House review was based on false information. Thus, on October 10, 1985, White House Counsel Fred Fielding wrote:

> Oliver North has advised my office that the recipients [of the proposed Presidential letters to Channell and Newington] are not involved in raising private funds for the Contras, and that the recipients understand they may not use the letters in fundraising or other promotional activities. [redacted]

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[redacted]

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[redacted]

38/ North has testified that while he "assumed" the knowledge that he ascribed to be President in his PROF note, he has no firsthand information to back it up (see July 7, 1987 North Cong. Tr. 241). Like North, Poindexter has said that he has "no doubt" that the President understood that the purpose of his meetings with supporters was to thank them for contributing to the Contras, but has no support for this surmise except for the general sense that "we" did not distinguish between fundraising for public support and fundraising for direct support (see May 2, 1987 Poindexter Cong. Dep. 202-203).

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39/ [redacted]

[redacted]

(continued...)

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[redacted]

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* * *

[redacted]

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[redacted]

38/ (...continued)
of a humanitarian nature, and, when I met with Mrs. Garwood, this subject was not discussed.

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[redacted]

* * *

[redacted]

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[redacted]

* * *

[redacted]

39/ (...continued)

* * *

Although I did not seek or directly encourage private citizens to provide military support, I did encourage William Simon and others to provide humanitarian assistance through the Nicaraguan Freedom Fund (Tab 14A). I also knew, as had been previously reported in the press, that Mrs. Garwood had contributed money to refurbish a Medevac helicopter. I understood her contributions to be of a humanitarian nature, and, when I met with Mrs. Garwood, this subject was not discussed.

[redacted] July 15, 1987 Regan Cong. Dep. 24-25).

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[redacted]

The other evidence in the record does not materially contradict these statements. At his deposition in United States v. Poindexter, the President generally recalled North as a "communicator" between the United States Government and the Contras (February 16, 1990 Reagan Dep. 131-138). Mr. Reagan reaffirmed that he does not recall authorizing or approving the acceptance by the NSC staff of CIA's former responsibilities with respect to the Contras (February 16, 1990 Reagan Dep. 161-62, 164), and went on to say that at no time did he have "any inkling" that the NSC was guiding the Contras' strategy in any way or that North was participating in planning and directing and advising the Contras' military activities, including giving logistical support to them (id. at 170). [redacted]

(b)(3) GJ [redacted] the President testified that he had "heard reports about" Secord and Hakim in connection with Contra assistance (id. at 192), and recalled that Secord had "some kind of an aero business" or "delivery business" and "might have been involved with delivering some aid to the Contras when it was legal to provide such aid" (id. at 21), but again stated that he had no recollection of authorizing

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North or the NSC generally to use Secord and Hakim to supply financial or military support to the Contras (id. at 192). The President also recalled being informed by Poindexter about the Costa Rican airstrip, which Mr. Reagan says he

> hoped that it would be used in the delivery of when [sic] 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. (Id. at 121.)

Mr. Reagan went on to speculate that the aircraft using the strip would have been "some of those that weren't officially planes of ours that had been helping in the past in deliveries to the Contras", and that it seems "logical" that Secord would have been involved in that (id. at 122).

The President's principal advisors also add comparatively little to this picture. James Baker, the President's Chief of Staff until February 1985, has told our Office that when he left the White House, he had vague knowledge that the NSC was involved in "some operation" regarding Central America, but had no detailed knowledge about Contra funding or Contra resupply (see February 16, 1988 Baker 302 at 7). Donald Regan, who succeeded Baker, has testified that while both he and the President received information at national security briefings concerning how the Contras were getting by, neither he nor the President asked how this was happening, and Mr. Regan himself did not know that the NSC had an operational role with respect to the Contras. (See July 30, 1987 Regan Cong. Tr. 12-14, 17-19,

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22-25.) Former National Security Advisor McFarlane claims that he kept the President apprised of whatever McFarlane was doing with respect to the Contras (see, e.g., May 13, 1987 McFarlane Cong. Tr. 98); however, McFarlane's definition of his own knowledge of the NSC staff's activities is always bounded by his position that he was not aware of any Boland violations during his tenure.

As in other areas, Poindexter will say that McFarlane "no doubt" told the President in 1984 or 1985 that the NSC staff had picked up some of the CIA's responsibilities with regard to the Contras, but once again cannot specifically recall such a discussion (see June 17, 1987 Poindexter Cong. Dep. 317). Poindexter probably came closest to describing the true state of affairs when he gave the following testimony to Congress:

> Q. But did [the President] know, as far as you can say, that North was filling this vacuum that had been left by the CIA dropping out?
>
> A. Well, I don't think -- you see, in the President's mind he wouldn't know the details of what CIA was doing, what Defense was doing, what State was doing, and what we were doing. He knew the job was getting done. The exact way we were getting it done was something that would not have been particularly relevant to him. (June 17, 1987 Poindexter Cong. Dep. 316.)

Poindexter believes that the President would certainly have known that North was the NSC's action officer on Central America, and that the NSC was keeping close track of the situation in that region and "knew a lot of things"; however, Poindexter does not recall having a conversation with the President about the breadth of what the NSC was doing with

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respect to the Contras (see May 2, 1987 Poindexter Cong. Dep. 221-222; June 17, 1987 Poindexter Cong. Dep. 315-316; July 15, 1987 Poindexter Cong. Tr. 138, 191; July 20, 1987 Poindexter Cong. Tr. 3, 10). In Poindexter's opinion, while the President knew that the Contras were receiving arms from private parties and third countries (see July 20, 1987 Poindexter Cong. Tr. 3), the President's understanding did not extend to something as specific as instructing North to conduct air resupply operations (see id. at 17).

As previously discussed (see pages 68-69 above), Poindexter affirms and amplifies upon his notes of the December 13, 1985 National Security briefing at which he told the President about the Santa Elena airstrip being constructed for "private individuals" with the help of Costa Rican Security Minister Piza (see May 2, 1987 Poindexter Cong. Dep. 65-66); however, Poindexter says that he did not inform the President about U.S. Ambassador Tambs' role in connection with the airstrip, or that North had instructed Secord to build it (see May 2, 1987 Poindexter Cong. Dep. 65-66; see also June 17, 1987 Poindexter Cong. Dep 265; July 15, 1987 Poindexter Cong. Tr. 191; July 20, 1987 Poindexter Cong. Tr. 6). Poindexter does not believe that he told the President about Poindexter's roughly-contemporaneous instruction to North to "continue on course" with respect to Contra support (see July 20, 1987 Poindexter Cong. Tr. 3); Poindexter thinks that at some point he "very likely" would have mentioned to the President that the Contras would not

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have survived without North, but he does not recall specifically having said that to Mr. Reagan (June 17, 1987 Poindexter Cong. Dep. 332). Finally, and confusing matters somewhat, in his Congressional testimony Poindexter even expressed "doubts" that the President would have known about Secord in connection with the Contras (see May 2, 1987 Poindexter Cong. Tr. 66; June 17, 1987 Poindexter Cong. Tr. 320); [redacted] (b)(3) GJ

As in the case of the NSC's fundraising activities, the record on Contra resupply also contains episodes in which the President's subordinates actively denied him information that would have indicated the full scope of the resupply operation. For example, in mid-July 1986, North sent Poindexter a memorandum requesting that Poindexter speak with the Attorney General and the President about Jack Terrell, who North identified as a possible assassination threat to the President. North's memorandum says that Terrell has been "working closely with various Congressional staffs in preparing for hearings and inquiries regarding the role of the U.S. Government officials in illegally supporting the

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Nicaraguan resistance," and proclaims grandly that "Project Democracy officials decided to use its security apparatus to attempt to determine how much Terrell knows about their operations." (See AKW039081-82.) Poindexter responded with a request that North give him "another memo for the President this time" and that North specify what he wanted Poindexter to say to the Attorney General (id.). Eight days later, North sent Poindexter a second package on the subject of Terrell. North's covering memo to Poindexter again refers to the "Project Democracy security officer" and also mentions the Avirgan/Honey lawsuit against Secord and others; in sharp contrast, the memorandum prepared for, and sent to, the President omits any reference to Project Democracy, its "security officer", or Secord (see AKW039094-1064).[40/]

[redacted]

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40/ [redacted]

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(b)(3)
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41/

In the South Lawn remarks [redacted] the President denied that there was "any government connection . . . at all" with Hasenfus, adding that "We've been aware that there are private groups and private citizens that have been trying to help the contras -- to that extent -- but we did not know the exact particulars of what they're doing." [redacted]

41/ This is not to say that Mr. Reagan bears Poindexter any ill will for having provided less that the full story about Mr. Hasenfus. At his deposition, the former President -- while sticking by the description of events contained in Interrogatory Answers 45-47 (see February 17, 1990 Reagan Dep. 194-197) -- was eager to agree with defense counsel's suggestion that if Hasenfus were employed by the "private benefactors", Mr. Reagan would not consider him to be connected with the U.S. government (see id. at 283).

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[redacted] (b)(3) GJ

In conclusion, the available evidence does not clearly support -- and to some extent refutes -- the proposition that President Reagan had detailed familiarity with the role of the NSC staff in providing the Contras with military supplies during 1985 and 1986.

Congressional Inquiries Into the NSC Staff's Support for the Contras, 1985-October 1986

There were three major waves of Congressional inquiries which, if answered truthfully, would have revealed the existence of the NSC staff's Contra support operation. The first took place in August/September 1985 and included letter inquiries from HPSCI, the Subcommittee on Western Hemisphere Affairs of the House Foreign Affairs Committee, and SSCI. The second revolved around a proposed Resolution of Inquiry (H. Res. 485) introduced in the House on June 24, 1986, which both the Foreign Affairs Committee and HPSCI forwarded to the President for comment. The third followed the news of the Hasenfus shootdown and merged into the Iran inquiries that began in early November, 1986.

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The record on President Reagan's awareness of these Congressional inquiries is somewhat muddy. As noted above, Mr. Reagan has acknowledged that he heard of the press stories about North and the Contras that preceded the inquiries, [redacted]; [41] the President, however, cannot recall who told him that the allegations were incorrect (see February 17, 1990 Reagan Dep. 187). With respect to the Congressional inquiries themselves and his subordinates' false responses, [redacted]

Although McFarlane agrees that the President was not shown his proposed responses to the 1985 Congressional letters, [redacted]. McFarlane adds that he discussed the 1985 Congressional letters with the President, described what he was doing in response, and told the President that a search of the files had produced evidence of occasional advice and assistance to the Contras -- which McFarlane did

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41/ [redacted]

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President Reagan did not respond directly to any of those inquiries. The 1985 round was handled by then-National Security Advisor McFarlane; the 1986 letters to the President regarding H. Res. 485 were answered by Admiral Poindexter, who also arranged a briefing of HPSCI by Col. North that took place on August 6, 1986; and the Hasenfus inquiries were not sufficiently focused on NSC to require more than staff-level response during October 1986, although they metastasized in November with the addition of the Iran disclosures, as discussed in Section III below.

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42/ [redacted]

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There is no clear evidence that President Reagan was even aware of H. Res. 485 or Admiral Poindexter's letter responses of July 21, 1986, although the former President cheerfully endorsed Poindexter's letters when he was shown them at his deposition (see February 16, 1990 Reagan Dep.

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141-52; February 17, 1990 Reagan Dep. 222).[43/] The most that Admiral Poindexter will say is that while he doesn't recall a specific conversation, he is "relatively certain", based on his "general policy", that he told the President about H. Res. 485 and that "we" should try to defeat it ([redacted] see also July 16, 1987 Poindexter Cong. Tr. 42). Poindexter has testified unambiguously that the decision to send North before HPSCI for the August 6, 1986 briefing was Poindexter's personally, and that the President did not enter into it (see July 17, 1987 Poindexter Cong. Tr. 64).

(b)(3) GJ

Except for the President's October 8, 1986 responses to reporters' questions concerning Hasenfus, [redacted] there is no indication that Mr. Reagan was aware of, or played any conscious role in, the Administration's efforts to deflect Congressional inquiries into the shootdown during October, 1986 (see [redacted]

[43/] On cross-examination, Mr. Reagan added that he would not have approved of Poindexter's letters if he had known that they adopted false information previously provided by McFarlane (see February 16, 1990 Reagan Dep. 151-52).

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A. The Legality of the Contra-Support Activities Known to the President

Our Office has concluded that the NSC staff's Contra support activities -- which amounted, in essence, to transferring and then hiding from Congress the Contra military support program that was prohibited to CIA by the October 1984 Boland Amendment -- was a violation of 18 U.S.C. § 371. Paragraph 13(a)(1) of the March 16, 1988 Indictment charged Poindexter, North, Secord, and Hakim with having conspired to defraud the United States

> by impeding, impairing, defeating and obstructing the lawful governmental functions of the United States, including compliance with legal restrictions governing the conduct of military and covert action activities and congressional control of appropriations and exercise of oversight for such activities, by deceitfully and without legal authorization organizing, directing and concealing a program to continue the funding of and logistical and other support for military and paramilitary operations in Nicaragua by the Contras, at a time when the prohibitions of the Boland Amendment and other legal restrictions on the execution of covert actions were in effect.

In addition to the four named defendants, our Office identified McFarlane, Robert Earl, Joseph Fernandez, and Fawn Hall as additional co-conspirators for all (or any part) of the conspiracy charged in Count One of the Indictment (see April 26, 1988 letter from Associate Counsel Bromwich to defense counsel). The major question with respect to the criminal liability of the President on this charge, or one like it, is whether he knew enough of the NSC staff's Contra-

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support activities to have been a witting co-conspirator in an effort to deceive Congress about them.[44/] Before tackling that question, it is worth discussing briefly the legal environment in which those activities took place.

The overarching issue of legal interpretation is the scope and effect of the prohibitory Boland Amendments, and to some degree the provisions on authorization and reporting of covert actions that have already been discussed in Section I above. The legality of soliciting foreign governments to provide Contra assistance was first reviewed during the late spring and the summer of 1984, when CIA had almost, but not quite, run through the $24 million that Congress had allotted for Contra support on Fiscal 1984. In May 1984 an attorney in CIA's Office of General Counsel concluded that so long as the National Security Planning Group approved, and so long as the Congressional oversight committees were informed, CIA could legally solicit third countries to support the Contras, and that any funds so raised would be separate and apart from any Congressionally-

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[44/] In response to North's request for particulars concerning the March 1988 Indictment, the Office listed only the Congress as the party deceived for purposes of paragraph 13(a)(1) of the Indictment; in contrast, for paragraphs 13(a)(2) (the diversion) and 13(a)(3) (corruption of the Iran Initiative), we listed both the Congress and the "Executive Branch" (see August 10, 1988 letter from Associate Counsel Zornow to Barry S. Simon). I have always taken these references to the "Executive Branch" to include the President as having been deceived.

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imposed budget ceiling or restriction with respect to appropriated funds (ER 2961). On June 22, 1984, CIA General Counsel Sporkin passed this conclusion to Director Casey; Sporkin stated that he agreed with his staff attorney's analysis, but recommended that the Attorney General's concurrence be obtained. As described above (see pages 55-56), the June 25, 1984 NSPG meeting also concluded with the suggestion that the Attorney General be consulted about third-county solicitation.

On the very next day, Director Casey, Mr. Sporkin, Attorney General Smith, Deputy Attorney General Jensen, and Mary Lawton of DoJ -- none of whom had apparently been told about the Saudi contribution, and only one of whom had even attended the June 25 NSPG meeting -- met to acquaint the Attorney General with the idea of soliciting third countries to help the Contras, and to obtain his legal views. According to Sporkin's memorandum of the meeting, which was agreed to by the DoJ participants (see ALV035914, ALV035917),

> the Attorney General stated that he saw no legal concern if the United States Government made it clear [to contributing third countries] that they would be using their own funds to support the contras and no U.S. appropriated funds would be used for this purpose. The Attorney General also said that any nation agreeing to supply aid could not look to the United States to repay that commitment in the future. The DCI made it clear that if there is a possibility this option may be used, he would advise the CIA oversight committees.

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It is not clear how, if at all, the President was informed of Attorney General Smith's opinion ([redacted] (b)(3) GJ [redacted] we do know that by mid-July, 1984, Casey told the State Department that the Attorney General had "ruled" that seeking non-U.S. Government funding for the Contras would not be an "impeachable offense" (see ER 45,359).

In any event, the passage of the "full prohibition" Boland Amendment in October 1984 changed CIA's opinion on its ability to solicit financial or military support for the Contras from third parties. On January 8, 1985, Mr. Sporkin advised Director Casey that:

> 2. It seems clear to me that the CIA is precluded from spending any funds which would have the purpose or the effect of supporting military operation in Nicaragua directly or indirectly. Therefore, other than the activities spelled out in my memorandum of 26 December 1984 [having to do with cooperative intelligence-gathering], there is little the CIA can do with respect to third countries vis-a-vis the contra program.
>
> 3. The President is clearly charged with the conduct of foreign relations. While it seems to me that certain members of Congress would take the view that any approach to third nations to assist the contra program would violate the current law, such a view in my opinion would conflict with President prerogatives if it were applied to prevent elements other than CIA, DOD, or intelligence elements from seeking third-party assistance for the contra program. It is obvious, however, that

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the specific agency tasked, whether it be the State Department or the NSC, would be the organization to make the appropriate legal call.

4. There are two points which should be kept in mind in pursuing this matter:

a. The prohibition in the continuing resolution is written as a spending prohibition. This is in contrast to the so-called Clark Amendment, originally enacted in 1975, which prohibited any kind of assistance to augment the capacity of any individuals or groups to conduct military or paramilitary operations in Angola.

b. The 26 June 1984 memorandum prepared as a result of our meeting with the Attorney General must be kept in mind. (ER 11,763.)

We know that by January 15, 1985, this new legal view by CIA had been conveyed to North because North repeated it to McFarlane and Poindexter in his early draft of the "Nicaragua Options" paper [redacted] In the slightly more (b)(3) evolved "Options and Legislative Strategy for Renewing Aid to GJ the Nicaraguan Resistance" of February 5, 1985, the legal situation surrounding third-country support is discussed at some length:

A. <u>USG Solicitation of Third Country Support</u>

Although the Continuing Resolution addresses only the use of appropriated funds, CIA has interpreted the statutory language against "indirect" support as prohibiting contact with third countries which might be willing to fund/assist resistance activities. The Agency has, therefore, proscribed its employees from soliciting/requesting third country support, since it could be argued that funds appropriated for CIA salaries were

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being used in a manner that would have the effect of indirectly supporting paramilitary operations in Nicaragua. The CIA's concern is heightened by two considerations:

-- First, the Intelligence Committees were informed, after U.S. funding was exhausted last June, that as a matter of policy the Agency was not soliciting third country funding. State has responded to similar queries from the Foreign Affairs/Relations Committees that the Department has made no such overtures.

-- Second, Executive Order 12333 on intelligence activities provides that "no agency of the Intelligence Community shall request any person to undertake activities forbidden by this Order." While it is anomalous to read this prohibition so literally that it prevents the Agency from requesting third countries to undertake activities not addressed in the Executive Order, but otherwise forbidden to the CIA, this constraint nonetheless prevails.

It is very possible that this problem could be overcome by a careful record of consultation with the concerned committees of Congress (Intelligence and Appropriations). No new legislation or formal amendment to the Executive Order would be required. By pursuing this course, we would postpone a definitive "up or down" vote by Congress on whether or not the USG can provide support to the Nicaraguan Freedom Fighters and seek to maintain the viability of the armed resistance by encouraging only third country support. Through consultation, we would assure that we are not subject to charges of circumventing or violating

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> any statutory prohibition. We would, thereby, leave open the possibility of a new funding request until later in FY 1985 -- perhaps even waiting until the current prohibitions in Section 8066 of the Continuing Resolution expire on October 1, 1985. It should also be noted that the existing Presidential Finding (under which the U.S. program operated until FY 1984 funding was exhausted) specifically provided that our support to resistance groups would be provided both unilaterally "and in cooperation with other governments." Congress never objected to this aspect of the program. (AKW019294.)

There is no indication in the record that President Reagan saw any version of the "Nicaragua Options" paper. As previously noted, there was no notification to Congress concerning third-country assistance to the Contras. At least until the December 1985 amendment that authorized the State Department to solicit humanitarian aid, there also appears to have been no further legal analysis by the Administration concerning the permissibility of soliciting such assistance under Boland. Instead, the focus shifted to the separate question, also identified by Mr. Sporkin in his January 8, 1985 memorandum, whether the National Security Council staff was an agency covered by the statute.

The October 1984 Boland Amendment prohibited expenditures for Contra military support by "the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities". Putting aside the question whether

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Congress could constitutionally have limited the ability of the President himself to discuss foreign policy matters with other countries by passing such a statute, it seems to be conceded universally that the Boland Amendment did not apply to the actions of the President (see February 22, 1989 Hamilton North Trial Tr. 1716-18, 1727, 1751-54). [redacted] (b)(3) GJ [redacted] But what of the NSC staff?

Our Office has taken the legal position that the Boland Amendment covered the activities of the NSC staff, and did so constitutionally. See October 25, 1988 Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss or Limit Count One in United States v. North, Cr. No. 88-0080-02-GAG, at 48-82.[45/] The 1987 Iran/Contra Select Committee Report came to the same conclusion (see Select Comm. Rpt. 399-401); the Minority section of that Report disagreed (see Select Comm. Rpt. 489-497). Generally

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[45/] At the same time, we also noted that "the gravamen of Count One is not to charge North simply with violating or conspiring to violate the Boland Amendment" (id. at 48n. 23). In denying the defense motion that raised this issue, Judge Gesell concluded that he did not have to decide either the constitutionality or the reach of Boland because the Administration -- including the President -- had apparently acquiesced in the statute. See United States v. North, 708 F. Supp. 375, 377-79 (D.D.C. 1988). The court noted, however, that "any White House uncertainty [concerning the scope of Boland] may bear on North's intent on certain counts." Id. at 378.

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speaking, the contemporaneous evidence of how the statute was interpreted by Congressional members and staff is consistent with the view that Boland's prohibitions applied to the NSC staff; an interesting counter-indication is a September 5, 1985 press release issued by the Chairman and Vice Chairman of SSCI after their meeting with McFarlane to discuss the allegations about North's assistance to the Contras (GX 111 in United States v. North). That release repeats McFarlane's assurances that there was no intent at NSC to "circumvent restrictions Congress placed on aid to the Nicaraguan Resistance", but goes on to say

> Nevertheless, the Senators stated that they continue to have concern about the potential for the NSC to fill the gap when Congress had prohibited a different Branch of Government from a specific activity. [Emphasis supplied.]

Within the Administration there was apparently quite a range of opinion on Boland's application to NSC, although the only view that was plainly conveyed to Congress was that of McFarlane -- who either believed, or thought it politically expedient to act as though he believed, that the NSC staff was covered (see, e.g., March 10, 1989 McFarlane North Trial Tr. 3975; March 13, 1989 McFarlane North Trial Tr. 4138-40). Knowingly or not, the President contributed to this impression when he responded to an August 8, 1985 press question about the NSC staff's direction of Contra operations by stating that "we are not violating the law" -- a statement

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that was followed that same day by White House Press Office guidance that

> No member of the NSC staff has at any time acted in violation of either the spirit or the letter of existing legislation dealing with U.S. assistance to the democratic resistance in Nicaragua. [redacted] (b)(3) GJ

Mr. Sporkin, as noted above, had doubts that the NSC staff was subject to the law (see pages 96-97 above). Poindexter and North claim to have believed right along that they were not covered.

The Department of Justice was never consulted concerning Boland's applicability to the NSC staff (see, e.g., July 29, 1987 Meese Cong. Tr. 307-308).[46/] Between October 1984 and November 1986, the only source from which

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[46/] DoJ has been quite guarded in its after-the-fact expressions about Boland. In his Select Committee testimony, Attorney General Meese stated that he would not give a "definitive legal opinion" whether the NSC was covered by the statute, but expressed the "informal" view that NSC was not an "entity of the United States involved in intelligence activities," although he acknowledged that reasonable minds could differ on the point. (See July 29, 1987 Meese Cong. Tr. 307-311; see also id. at 324-335; June 25, 1987 Cooper Cong. Tr. 271.)

The truly careful reader will recall that in a December 17, 1986 opinion on the Iran arms transfers, the Office of Legal Counsel concluded that the NSC would be embraced by 50 U.S.C. § 415, which applies to "any department, agency or other entity of the United States involved in intelligence or intelligence-related activities" (see page 41n.23 above; emphasis supplied.) It is the absence of the phrase "or intelligence-related" from the Boland laws that permits DoJ to distinguish their reach from that of 50 U.S.C. § 415 (cf. July 29, 1987 Meese Cong. Tr. 308).

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the Administration received a formal opinion on this issue was the President's Intelligence Oversight Board. While the 1985 Congressional inquiries were pending, the General Counsel of the PIOB, Bretton Sciaroni, commenced a legal review on the issue of "Allegations Concerning a Boland Amendment Violation by the National Security Council" (see ALY000011-18). In outline, Sciaroni's analysis proceeded along two paths. First, he concluded, on the basis of the history of other intelligence oversight provisions, that the phrase "agency or entity of the United States involved in intelligence activities" is a term of art that does not include the NSC or its staff; in a footnote, he added the comment as to Col. North personally that if North's salary were being paid by the Department of Defense (which unquestionably was a covered entity), then North might nonetheless be snared by the statute. Second, Sciaroni determined, on the basis of a purported review of the facts, that North was in any event performing only a political liaison role and was not engaging in any action that would have violated Boland if it did apply to him.

We have described Sciaroni's memorandum as "discredited". See October 25, 1988 Memorandum of Points and Authorities in Opposition to Defendant's Motions to Dismiss or Limit Count One in United States v. North, Cr. No. 88-0080-02-GAG, at 49n.24. However, it is important to point

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out that the weaknesses in Sciaroni's analysis would only be apparent to someone who (a) knew how Sciaroni came to his conclusions and either (b) understood the legal background surrounding the intelligence oversight laws or (c) knew that Sciaroni's factual conclusions about the scope of North's Contra-support activities were false. Given the form in which the Sciaroni/PIOB opinion was transmitted to the President, and given the provable state of the President's knowledge of North's role in Contra support, none of these conditions is satisfied as to Mr. Reagan. The President did not receive a copy of Sciaroni's underlying memorandum; instead, on September 13, 1985, he saw a PIOB Annual Report which conveyed neither Sciaroni's analysis nor his caveat about North's DoD salary, but simply said

> we have sent to your National Security Advisor a legal opinion that the Boland Amendment does not apply to the National Security Council. [redacted]

While there is no reason to doubt that Mr. Reagan saw this report (it bears the notation "9/13/85, President has seen. JP"), it apparently did not leave much of an impression. [redacted] (b)(3) GJ

[redacted]

[redacted]

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(b)(3)
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[redacted]

At his deposition, the President repeated that he does not recall the PIOB opinion itself, but said that he remembers being told that there were "certain levels of government or agencies and so forth that were not prohibited by the Boland Amendment," and receiving legal advice that some things could be done and still be "exempt" from Boland (see February 16, 1990 Reagan Dep. at 69-71, 72).

Taking this record all in all, I believe that one cannot disprove President Reagan's assertion of a good-faith belief that the prohibitory Boland Amendments did not apply to him personally, or to the staff of the NSC. The aspect of the NSC staff's Contra-support program that Mr. Reagan was most clearly aware of (and the activity that he instructed his staff to keep quiet about) was the jawboning of foreign countries to assist the Contras. Convincing foreign countries to support the Contras was also the part of the program that looked the most like traditional (and often-secret) Executive Branch foreign policy activities -- and, conversely, looked the least like a U.S.-directed covert action. Thus, even the facial case for believing that Boland

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had been triggered is quite weak from the President's perspective. Jawboning foreign governments also would not appear to require a formal written determination under Executive Order 12,333 or NSDD 159, even assuming that a failure to adhere to those provisions by the President himself could be the basis for criminal liability (see pages 11-14, 16-17, 40-42 above).

To be sure, a good-faith, but uncommunicated belief by Mr. Reagan that Boland did not apply to the NSC's activities would not be dispositive of his liability under a charge similar to that contained in paragraph 13(a)(1) of the March 1988 Indictment if the President had known the full range of the NSC staff's Contra-fundraising and Contra resupply program. After all, both North and Poindexter were permitted to introduce evidence of their views on Boland at their trials, and yet both cases went to the jury, albeit on narrower, obstruction-related charges. The ultimate issue, as noted previously, is whether the President conspired to hide from Congress the fact that Contra-support activities, clearly prohibited to CIA, had been transferred to the NSC staff after the enactment of the "full prohibition" Boland Amendment.

On this issue, I conclude that President Reagan lacked sufficient information about what the NSC staff was doing, and the manner in which Congress was deceived, to

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support a criminal charge that he conspired to defraud the United States by deceitfully "organizing, directing, and concealing a program to continue the funding of and logistical and other support for military and paramilitary operations in Nicaragua by the Contras." There is no question that the President knew that through some combination of donations and logistical assistance, the Contras were receiving military assistance during the "full prohibition" Boland period; there is also no question that the President would have appreciated that North was the NSC's "action officer" for Nicaragua. That much, however, was common knowledge both within the Executive and in Congress, and cannot support a concealment charge. What is missing from the provable knowledge of the President (and was falsely denied in the McFarlane-Poindexter-North responses to Congress) is any clear picture of the critical role that the NSC staff played in providing material support to the Contras' military efforts. The sketchy nature of the information that <u>was</u> provided to Mr. Reagan by his subordinates -- particularly when considered alongside those same subordinates' apparent failure to provide the President with key information about how they were raising funds for the Contras, how those funds were channelled, and their absolute control over Contra resupply -- does not permit the

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conclusion that Mr. Reagan knew what was being kept from Congress.

Nor can it be proven that the President had any clear idea that Congress was in fact being deceived (as opposed to simply being ignorant) concerning any of the Contra-support activities that the President knew about. McFarlane has stated that he did not understand the President's instructions not to disclose the two Saudi contributions to mean that he should actively lie to Congress about those contributions if he were asked (see pages 57-59 above). The same McFarlane -- who evidently was the President's only source of information about the August/September 1985 letters from Congress -- has testified that he himself did not believe that the Saudi contribution, or information about the Administration's enticement of Honduras to assist the Contras, were material to Congress' inquiries (see March 13, 1989 McFarlane North Trial Tr. 4164-66; March 15, 1989 McFarlane North Trial Tr. 4570). We are therefore unlikely ever to develop evidence that McFarlane and the President discussed these subjects in the context of the Congressional letters. The only specific area of inquiry on which McFarlane says he did brief the President -- military advice and assistance provided to the Contras by North -- would have appeared rather innocuous to the President in view of McFarlane's contemporaneous

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representation that occasional advice or assistance was legal (see page 91 above). In any event, since the President apparently did not see McFarlane's answers to the Congressional letters, he cannot be shown to have been aware that McFarlane went ahead and denied that such advice and assistance were given. As previously indicated, there is no conclusive evidence that Mr. Reagan knew about the summer 1986 inquiries at all; in October 1986, the President was misled by Poindexter as to the nature of the U.S. government's relationship with Hasenfus.

Can the President nonetheless be held criminally accountable on the strength of the undisputed facts that, as the Commander-in-Chief, Mr. Reagan told his subordinates to keep the Contras together "body and soul" and not to let out information about third-country contributions; that thereafter, in Poindexter's words, Mr. Reagan "knew the job was getting done"; that the President surely must have known that Congress had attempted, through Boland, to take the United States government out of the Contra-support business and would in all likelihood have been most unhappy to learn that it had failed to do so; and that, nonetheless, after Congress asked questions of the Administration about Contra support and received answers, Congress did not act as though anything were amiss? Reaching back to the twelfth century, others have analogized this sort of Presidential conduct to

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that of King Henry II of England who, in the midst of a widely-known dispute with Thomas Becket, Archbishop of Canterbury, is said to have cried out "Who will free me from this turbulent priest?" -- and later to have expressed shock when he learned that a group of his knights, having heard the royal lament, had promptly travelled to Canterbury and hacked Becket to death. See United States v. North, 910 F.2d 843, 883n.12 (D.C. Cir. 1990), citing United States v. Ehrlichman, 546 F.2d 910, 926 & n.68 (D.C. Cir. 1976).[47/]

Both North and Ehrlichman considered the effect of such words on the criminal liability of the subordinates, and do not discuss the liability, if any, of the superior who utters them. From the standpoint of King or President, the closest approximation to the "turbulent priest" paradigm is the maxim that "a person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts". This concept has a somewhat troubled history in the criminal law, even when applied to comparatively uncomplicated crimes such as murder. See, e.g., Francis v. Franklin, 471 U.S. 311 (1985) (conviction overturned where

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[47/] As we know, Henry II continued to rule England for nineteen years after Becket's death, having submitted voluntarily to physical penance at the hands of the Church (and no doubt having sustained a drop in personal popularity, at least among religious folk, that could have been measured by polls if polls had been considered important at the time). The King suffered no secular penalty at the hands of the King's justice.

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intent was at issue and "natural and probable consequences" formulation was presented to the jury as a "rebuttable presumption", rather than a mere permissible inference). Considering the multiple layers of deception that were employed by the central actors in Iran/Contra, I believe that such a permissible inference must be used with great care in evaluating our facts, and that it is appropriately applied to the President only if one can conclude that the "Enterprise" would follow ineluctably from Mr. Reagan's Contra pronouncements and the fact of the Contras' survival during the Boland period. To be specific, I am not able to conclude that the alternative explanation of these facts that was available to Mr. Reagan -- namely, that the Contras survived as a result of the efforts of third countries and "private individuals" -- is so weak that the President would have had to posit the NSC program as a matter of pure logic. While North and Poindexter have argued that they construed Presidential actions such as his "hang by our thumbs" remark concerning disclosure of solicitation of third countries (see page 57 above) as Presidential authorization of a broad range of deception, the known evidence as to the President at most suggests an "atmosphere" of nondisclosure relevant to those defendants' states of mind. In considering the criminal liability of the President himself, such "atmospheric" evidence is insufficient in the absence of further proof that

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Mr. Reagan specifically approved lying to Congress as a general practice, or knew about and authorized even the concealment of the full range of his subordinates' Contra-support program -- which went well beyond the mere obtaining of third-country support.

In summing up the evaluation of whether President Reagan was a participant in a criminal conspiracy such as that described in paragraph 13(a)(1) of the March 1988 Indictment, it is useful to look at the general conspiracy instructions that Judge Greene gave to the jury in United States v. Poindexter (see pages 3359-3366 of Attachment A hereto). Of the three traditional elements of a conspiracy charge -- the existence of the conspiracy, the defendant's participation in it, and the knowing commission of an overt act by one or more of the conspirators, but not necessarily the defendant -- the first and third may, for purposes of this memorandum, be taken as established by virtue of the March 1988 indictment. The second element is the key to President Reagan's liability. As to that element, Judge Greene charged the jury as follows:

> It is not necessary, in order to convict a defendant of the charge of conspiracy, that he have been a member of the conspiracy from its beginning to its end. Different persons may become members of a conspiracy at different times. Furthermore, to be a member of a conspiracy, a defendant need not know the identities of, or the precise number of, all the other members, nor the entire scope of the conspiracy, nor all of the

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details of the conspiracy, nor the means by which the objects or purposes of the conspiracy were to be accomplished. Each member of the conspiracy may perform separate and distinct acts.

It is necessary, however, that the Government prove beyond a reasonable doubt that the defendant was aware of the common purpose of the conspiracy and was a willing and knowing participant with the intent to advance the purposes of the conspiracy. A person who has knowledge of the conspiracy itself and just happens unknowingly to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

To act or participate knowingly means to act or participate voluntarily and intentionally, and with a specific intent to either do something which the law forbids, or fail to do something which the law requires to be done.

Intent means that a person had the purpose to do something. It means that he acted with the will to do it; that he acted consciously and voluntarily and not inadvertently or accidentally. Specific intent, which is required for the offenses that we have here before us, requires more than a general intent to do certain acts. A person who knowingly does an act which the law forbids intending with a bad purpose either to disobey or disregard the law, may be found to act with specific intent.

Intent is a state of mind. Intent ordinarily cannot be proved directly, because there is no way of scrutinizing the operations of the human mind. But you may infer a defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by a defendant, and all the other facts and circumstances in evidence with indicate his state of mind. You may infer that a person ordinarily intends

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> the natural and probable consequences of acts knowingly done or knowingly omitted.
>
> Thus, if the defendant or any other person with an understanding of the unlawful character of the plan, knowingly encourages, advises or assists for the purpose of furthering the undertaking or scheme, he thereby becomes a willful participant and conspirator. One who knowingly joins an existing conspiracy is charged with the same blame or culpability as though he had been one of the originators or instigators of the conspiracy.
>
> In determining whether a conspiracy existed, you, the jury, should consider the actions and declarations of all the alleged participants. However, in determining whether the defendant was a member of the conspiracy, you should consider only his own acts and statements. He cannot be bound by the acts or declarations of other participants until it is established that a conspiracy existed, and that he was one of the members.
>
> The extent of the defendant's participation in the alleged conspiracy is not determinative of his guilt or non-guilt. A defendant may be convicted as a conspirator even though he plays a minor role in the conspiracy, provided that you find beyond a reasonable doubt . . . that the defendant knowingly participated in it with the intent to commit the offense which was the purpose of the conspiracy . . . . (Attachment A at 3362-3365; emphasis supplied.)

It is my conclusion that the provable facts concerning Mr. Reagan's knowledge of the NSC staff's Contra-support activities -- which lack any reflection of the extent of the NSC's control over fundraising and resupply -- do not

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demonstrate "an understanding of the unlawful character of the plan" to transfer and hide the Contra military aid program from Congress. Thus, those facts do not satisfy the intent standard set forth in Judge Greene's statement of the law of conspiracy, even with the somewhat dubious aid of the "natural and probable consequences" maxim. There is no probable cause to indict the former President for the type of conspiracy described in paragraph 13(a)(1) of the March 1988 Indictment.[48/]

B. The Diversion

As previously noted, there is no evidence that President Reagan was informed about the diversion of Iran arms sale proceeds for the benefit of the Contras, or even about the existence of any differential between the price paid by Iran for U.S. weapons and the price received by the United States government, until November 24, 1986. Thus, there is no factual basis on which to find the President guilty as a co-conspirator under paragraphs 13(a)(2) or

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[48/] Although it gets us a bit ahead of ourselves, another way to evaluate this conclusion is through the chart entitled "President Reagan's Knowledge of the Means of the Conspiracy Alleged in the March 16, 1988 Indictment", which is Attachment B hereto. Although a co-conspirator need not, as Judge Greene stated, know all the means of the conspiracy to be liable for it, he surely needs to know a "critical mass" of information about the conspiracy sufficient to acquaint him with the nature of the illegal agreement. As shown by Attachment B, I do not believe that Mr. Reagan can be proved to have known that "critical mass" with respect to the Count One conspiracy.

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13(a)(3) of Count One of the March 1988 Indictment, or to find that the President either violated or conspired to violate 18 U.S.C. § 641 or 18 U.S.C. § 1343 as alleged in that Indictment (see March 16, 1988 Indictment, Count One, pars. 13(b)(1)-(2); id. Count Two; id., Count Three).

Although it bears only brief mention, the case for applying the "natural and probable consequences" inference is even weaker with respect to the President's "authorization" of the diversion than his "authorization" of the Contra resupply operation. First, as a matter of logic the diversion simply does not strike me as a "natural and probable consequence" of the President's separate commands to "sell arms to Iran" and "keep the Contras together body and soul".[49/] Second, the entire theory of paragraphs 13(a)(2) and 13(a)(3) of the March 1988 Indictment was that the diversion was a significant departure from U.S. government policies, and we therefore described "the Executive Branch" (which I take to include the President) as one of the parties deceived with respect to those paragraphs (see August 10, 1988 letter from Associate Counsel Zornow to Barry S. Simon). The

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[49/] Although the President said during his deposition that he would have considered discussions about the proceeds of the Iran arms sales to be "operational details" that he could understand Poindexter not raising with him (see February 17, 1990 Reagan Dep. 276-282), Mr. Reagan was also emphatic that he did not approve the diversion of those proceeds and would have disapproved it if it had been called to his attention (id. at 289-90).

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information that we have learned since that time -- primarily, Poindexter's immunized testimony that he consciously decided not to tell the President about the diversion (see, e.g., May 2, 1987 Poindexter Cong. Dep. 71, 75, 183; July 15, 1989 Poindexter Cong. Tr. 93-94, 98; July 16, 1989 Poindexter Cong. Tr. 94-95) -- only reinforces that conclusion.

C. False Statements and Obstruction of Congressional Inquiries

The facts surrounding the President's knowledge of the Congressional inquiries into the NSC's Contra-support activities through October 1986 are discussed at some length at pages 89-92 and 108-109 above. In outline, the record: (1) contains no evidence that the President saw any of the incoming letters from Congress or the responses by McFarlane and Poindexter; (2) reflects that McFarlane (but not the President) recalls a briefing at which McFarlane told Mr. Reagan about the 1985 inquiries, about McFarlane's meetings with North, and about the fact that those meetings had uncovered instances of advice-giving by North, which McFarlane said he believed to be legal; (3) reflects that Poindexter (but not the President) is "relatively certain" that he told the President about H. Res. 485 in the summer of 1986, and that "we" should try to defeat it (4) reflects no Presidential awareness of North's August 6, 1986 briefing of

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HPSCI in connection with H. Res. 485; (5) reflects no Presidential knowledge about Congressional inquiries following the Hasenfus shootdown in October 1986, but only a statement to the press denying any U.S. government involvement with the Hasenfus shootdown after Mr. Reagan had received a false briefing by Poindexter to the same effect.

Applying the law to these facts, I have already concluded that the President lacked sufficient knowledge of the relevant inquiries and responses to be liable for a general conspiracy to deceive Congress about the NSC's Contra funding and Contra resupply operations, along the lines of paragraph 13(a)(1) of the March 1988 Indictment (see pages 106-115 above). That same analysis (and, particularly, the fact that the President did not actually make any of the responses to Congress' inquiries) should also make it essentially an a fortiori proposition that the President could not be charged as a primary violator of 18 U.S.C. § 1001 (the false statement statute) or 18 U.S.C. § 1505 (the statute punishing obstruction of the Congressional power of inquiry) with respect to those responses.

What remains is to consider whether the President could be subjected to liability for either an 18 U.S.C. § 371 conspiracy to violate 18 U.S.C. §§ 1001 and 1505, along the lines of paragraphs 13(b)(3) and 13(b)(4) of the March 1988 Indictment, or as an aider and abettor of §§ 1001 or 1505

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violations committed by others. To begin with Section 371, it is well established that to be held liable for conspiracy to violate a statute, a defendant must be proved to have harbored "two different types of intent . . . the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy." United States v. United States Gypsum Co., 438 U.S. 422, 444n.20 (1978). One can see this principle at work in Judge Greene's jury instructions in United States v. Poindexter, which went to the jury on the theory that Poindexter conspired to violate 18 U.S.C. §§ 1001, 1505, and 2071(b):

> Intent means that a person had the purpose to do something. It means that he acted with the will to do it; that he acted consciously and voluntarily and not inadvertently or accidentally. Specific intent, which is required for the offenses that we have here before us, requires more than a general intent to do certain acts. A person who knowingly does an act which the law forbids intending with a bad purpose either to disobey or disregard the law, may be found to act with specific intent. (See Attachment A at 3363; emphasis supplied.)

Turning now to the underlying criminal statutes, Section 1001 requires that the false statement in question have been made "knowingly and willfully". See Bryson v. United States, 396 U.S. 64, 69 (1969); see also Attachment A at 3373-74. As explained to the Poindexter jury by Judge Greene, 18 U.S.C. § 1505 has a triple intent requirement:

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first, that the defendant "knew or had reason to know that the [relevant] inquiries or investigations were being conducted when he committed or endeavored to commit the alleged acts of obstruction" (Attachment A at 3368); second, that the defendant have "knowingly committed or endeavored to commit one or more of the acts of obstruction" alleged to have taken place (id.); third, that

> the defendant made the false or misleading statements, if any, to corruptly influence, obstruct, or impede the Congressional inquiries. The word "corruptly" means having an improper purpose of obstructing the inquiry, that is, having the specific intent unlawfully to impair, obstruct, or impede the inquiry, with knowledge that the conduct was unlawful. However, the government need not prove that the defendant knew which specific law he was violating. It is not enough that the defendant's conduct obstructed or impeded the inquiry, unless he also had the specific intent to do so. I earlier instructed you on intent as well as specific intent, in the instruction I gave you on conspiracy. These instructions also apply to this crime . . . . (Attachment A at 3368-69.)

Given the President's highly incomplete awareness of the Congressional inquiries themselves, as well as his imperfect knowledge of the NSC staff activities that were the subject of those inquiries, I believe that there is simply no basis for concluding that Mr. Reagan shared the "knowing and willful" or "corrupt" intent of the primary violators, as that intent is defined in Judge Greene's charge. Thus, there

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is no probable cause to charge the former President with conspiracy to violate 18 U.S.C. § 1001 or § 1505.

An alternative theoretical basis for liability is 18 U.S.C. § 2, which provides that:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 exists in part to deal with the situation where a superior stays in the background and induces subordinates to actually do the criminal deed. However, as with conspiracy, aiding and abetting liability requires that the defendant be shown to have shared in the intent needed to prove the primary criminal offense; in the words of Judge Greene's charge, the defendant must "knowingly associate[] himself in some way with the criminal venture with the intent to commit the crime" (Attachment A at 3371). Thus, on our record, application of 18 U.S.C. § 2 to the former President founders for the same reason that prevents the application of 18 U.S.C. § 371.

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III. The November 1986 Activities

Summary of the Facts

The Origins of the November 1986 Inquiries

As November 1986 began, HPSCI was still questioning U.S. government involvement in the Hasenfus operation (see February 22, 1989 Hamilton North Trial Tr. 1704-05). The NSC staff's Contra resupply operation, having been rendered superfluous by the resumption of the CIA's Contra military aid program in mid-October, had been shut down; North has testified that at the suggestion of Casey (but not the President), he had already begun destroying records relating to his Contra operation (see, e.g., April 12, 1989 North North Trial Tr. 7584-86).

On the Iran side, discussions with the Iranian Second Channel had been underway for a number of weeks, 500 additional TOW missiles had been shipped to Iran, and the last American hostage to be freed as a result of the Iran Initiative -- David Jacobsen -- was released from his Lebanese captivity on November 2. There is evidence that Admiral Poindexter and Col. North were (as ever) hopeful that a second hostage would be released in addition to Mr. Jacobsen (see [redacted] (Oct. 29, 1986 PROF from Earl to Poindexter)). (b)(3) GJ

On November 3, 1986, a Beirut newspaper published an account of the McFarlane mission to Tehran that had taken

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place during the previous May. The Lebanese story set off a wave of Congressional and press inquiries in the United States that was initially driven by the disparity between the Reagan Administration's ferocious public rhetoric toward terrorism in general, and hostage-takers and Iran in particular, and the stark revelation that the Administration had secretly sold U.S. weapons to Iran in an effort to obtain the release of the hostages. For the entire Administration, the first three weeks of November 1986 were spent in combatting the perceived incongruity of the Iran arms sales themselves.

Poindexter and North, of course, faced an additional problem, because they knew that the Iran Initiative contained what North has called the "secret within the secret" (see April 13, 1989 North North Trial Tr. 7669) -- the diversion of funds from the Iranian arms sales to assist the Contras, disclosure of which would in turn expose the entire NSC Contra program of 1984-1986. By November 25, 1986 the discovery of the diversion by the Department of Justice had led to Poindexter's resignation, North's involuntary transfer back to the Department of Defense, and the commencement of broad-ranging investigations into the NSC's Iran and Contra programs. However, in the early going Poindexter succeeded in keeping the diversion under wraps by the simple expedient of instructing North to leave it out of

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the NSC's accounts of the Iran matter (see July 2, 1987 Poindexter Cong. Dep. 12; July 20, 1987 Poindexter Cong. Tr. 127) and making no reference to it himself. Poindexter has testified that as late as November 19, 1986, when the President made his second public appearance to answer questions about the Iran Initiative, he was still determined to keep knowledge of the diversion away from the President (see July 20, 1989 Poindexter Cong. Tr. 108, 189) -- despite McFarlane's reminder to Poindexter on that same day that "you have a problem about the use of the Iranian money" (see March 14, 1989 McFarlane North Trial Tr. 4277).

The Administration's Initial Press Strategy

Even without the diversion as a public issue, there was plenty to occupy the Administration during the first weeks of November, 1986 as the Iran disclosures mounted and Administration officials -- notably Shultz and Regan -- began trying to distance themselves from the growing perception that the Administration had engaged in a "strict arms for hostages deal" (see DX 62.01 in U.S. v. North).[50/]

[50/] In my opinion, the many statements by the President and others concerning whether the Iran Initiative did, or did not, amount to "arms for hostages" pose no criminal-law issue because any such characterization is simply too subjective to be false beyond a reasonable doubt, and thus cannot be adjudicated in a criminal proceeding. This "eye of the beholder" problem would not, of course, apply to an effort to obstruct investigations into the Iran matter by altering the record on "arms for hostages", as exemplified by Poindexter's destruction of the 1985 Iran Finding.

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After a preliminary effort at sleight-of-hand by Poindexter in the form of a November 4 press statement that "as long as Iran advocates the use of terrorism, the United States arms embargo will continue" (Cong. Ex. GPS-37), the Administration opted to stonewall with respect to the details of the Iran Initiative. McDaniel's notes of the National Security briefings for November 6 and November 7, 1986, reflect a decision to adopt a "no comment" posture with respect to Iran (see ALU0128263-64).

The President's initial public statements on Iran embodied the stonewall. On November 6, Mr. Reagan answered a press question as follows:

> Q: Mr. President do we have a deal going with Iran of some sort?
>
> THE PRESIDENT: No comment, but could I suggest an appeal to all of you with regard to this, that the speculation, the story that came out of the Middle East, and that . . one that to us has no foundation, that all of that is making it more difficult for us in our effort to get the other hostages free. (DX 87 in U.S. v. North.)

On the next day the President tried again, this time with an assist from former hostage Jacobsen, who was at the White House for a ceremony celebrating his release:

> Q. Mr. President, the Iranians are saying that if you'll release some of those weapons, they'll intercede to free the rest of the hostages. Will you?
>
> THE PRESIDENT: Bill, I think in view of this statement, this is just exactly what I tried to say last night. There's no

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way that we can answer questions having anything to do with this without endangering the people we're trying to rescue.

Q. Could you just tell us whether Secretary of State Shultz agrees with your policy or disagrees, and has protested as has been reported.

THE PRESIDENT: We have all been working together.

Q. And Secretary Shultz supports the policy and so does Cap Weinberger?

THE PRESIDENT: Yes.

Q. Why not dispel the speculation by telling us exactly what happened, sir?

THE PRESIDENT: Because it has to happen again and again and again until we have them all back. And anything that we tell about the things that have been going on in trying to effect his rescue, endangers the possibility of further rescue.

Q. Your own party's Majority Leader says you're rewarding terrorists.

MR. JACOBSEN: Please. You didn't hear what I said at the beginning. Unreasonable speculation on your part can endanger their lives. I would like to take some time now and talk. But this is a day of joy for me. I have my children inside. I want to share it with them. And I want Terry Anderson to share the same joy with his family and I want Tom Sutherland to share the joy with his family. And in the name of God, would you please just be responsible and back off. Thank you.

Q. Mr. Jacobsen, how are we to know what is responsible and what is not?

Q. How about your TV address? [redacted] (b)(3) GJ

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[redacted] On November 7, we also see the first reference in a national security briefing to the need to discuss Iran with Congressional leaders (see ALU0128264). At about the same time, Poindexter assigned North to develop a Chronology of the Iran matter (see April 7, 1989 North North Trial Tr. 7032, 7036-37). (b)(3) GJ

On November 10, 1986, President Reagan, Vice President Bush, Poindexter, Regan, Shultz, Weinberger, Casey, Meese, and Deputy National Security Advisor Keel held a ninety-minute meeting to discuss what to do about both the Iran Initiative itself and its disclosure. We have copies of notes taken by Regan, Weinberger, Meese, and Keel concerning what was said at this meeting (see [redacted] Cong. Ex. CWW-28; [redacted] Cong. Ex. EM-19); in Shultz's case, we have a transcription of his notes by Charlie Hill (ANS0001766-67), as well as Hill's notes of Shultz's after-the-fact "readout" of the meeting (ANS0001762-64). The various notes differ in ways that are immaterial to this memorandum, but they share one attribute that is striking: all of them reflect a purported description of the Iran Initiative by Poindexter which focused on the January 17, 1986 Finding, referred to an

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Israeli shipment of 500 TOWs that the U.S. had found out about "after the fact" but agreed to replenish, and made no mention at all of the November 1985 Hawk transaction or the 1985 Iran Finding. Much of the meeting was spent debating whether to issue any sort of public statement about the Iran matter; a part of that discussion, as captured in Regan's notes, is as follows:

Pres	We must say something but not much.
John	If we go with this [a proposed brief statement drafted by Casey] we end our Iranian contacts.
DTR	Must get a statement out now, we are being attacked, and we are being hurt. Losing credibility.
JP	No statement needed, news has peaked, no hearings until Jan., so should not say anything.
Pres	Must say something because I'm being held out to dry. Have not dealt with terrorists, don't know who they are. This is long range Iranian policy. No further speculation or answers so as not to endanger hostages. We won't pay any money, or give anything to terrorists.
JP	Say less about what we are doing, more about what we are not doing. [redacted]

After the meeting, work continued on a statement; [redacted] (b)(3) GJ

[redacted]

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[redacted] (b)(3) GJ

[redacted] The statement [redacted] said:

> The President today met with his senior national security advisors regarding the status of the American hostages in Lebanon. The meeting was prompted by the President's concern for the safety of the remaining hostages and his fear that the spate of speculative stories which have arisen since the release of David Jacobsen may put them and others at risk.
>
> During the meeting, the President reviewed on-going efforts to achieve the release of all the hostages, as well as our other broad policy concerns in the Middle East and Persian Gulf. As has been the case in similar meetings with the President and his senior advisors on this matter, there was unanimous support for the President. While specific decisions discussed at the meeting cannot be divulged, the President did ask that it be re-emphasized that no U.S. laws have been or will be violated and that our policy of not making concessions to terrorists remains intact.
>
> At the conclusion of the meeting, the President made it clear to all that he appreciated their support and efforts to gain the safe release of all the hostages. Stressing the fact that hostage lives are at stake, the President asked his advisors to ensure that their departments refrain from making comments or speculating about these matters.

The Initial Briefings of Congress

On November 12, 1986, the Administration held a briefing for Senate Majority Leader Dole, Senate Minority Leader Byrd, House Majority Leader Wright, and House Minority

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Whip Cheney.[51/] According to Thompson's notes [redacted] and Meese's notes [redacted], the Administration was represented at this meeting by the President, the Vice President, Shultz, Weinberger, Meese, Casey, Regan, Poindexter, Keel, Will Ball, Larry Speakes, and Thompson. The meeting began with a preliminary statement by the President, which Thompson has rendered as follows:

> The Iran initiative was principally a covert intelligence operation, it was not a rogue operation. There were no negotiations directly with terrorists and the purpose of the initiative was to enhance our position in the Middle East.

(b)(3) GJ

Then, according to both sets of notes, Poindexter took over with a lengthy narrative on the Initiative. Just like his similar performance on November 10, Poindexter began with the January 17, 1986 Finding, and then described the McFarlane trip to Tehran, listed the 1986 weapons shipments to Iran (omitting the October 1986 shipment), and concluded with the statement "Mr. President, these are all of the facts." The only references to the 1985 phase of the Initiative are oblique; Thompson's notes show Poindexter stating that "the Israelis are probably still shipping to Iran" [redacted] which Meese's notes expand into a statement that "Israelis may be continuing to ship arms (w/o our authorization) as

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[51/] On November 10 HPSCI had called for hearings into the Iran matter, which were to begin on November 21, 1986 and to involve briefings of the Committee by Poindexter, Shultz, Weinberger, and Casey (see GX 119 in U.S. v. Poindexter).

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they did before our contacts began" [redacted]. According to Thompson, later in the meeting,

> Byrd asked, initial contact was made when?
>
> Poindexter said, first in 1985 but no transfer of material. We needed to assess the situation in Iran. About one year until the Finding. [redacted] 52/

A more skeletal version of this exchange appears in Meese's notes ("Contacts w/ Iranians began in 1985 (about 1 yr before finding)"). [redacted]

The Public Stonewall Begins to Crumble

At the national security briefing on November 12, there was discussion both of the briefing of Congressional leadership referred to above and of a public statement by the President that was to take place within the next two days. McDaniel's notes for that day contain the phrase "Deny facts where possible" (ALU0128265), which suggests the emergence of a more flexible Administration press strategy, in which the stonewall would be replaced by a rolling defense that

(b)(3) GJ

52/ Although the point is tangential to this memorandum because the President was not involved, it is interesting to note that Poindexter took exactly the same line the next day in his briefing of Senators Byrd, Leahy, Thurmond, and Stevens, and Congressmen Hyde, Broomfield and Aspin. According to Thompson's notes of that session,

> Aspin said, you did nothing before January?
>
> [Poindexter said,] that's right, except talk. [redacted]

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involved admitting (and trying to blunt the political impact of) the publicly-known facts concerning the Iran Initiative, while holding the line on further disclosures. By this time, however, the Iran story had acquired so much momentum that this shift to a damage-control strategy came too late to do much good politically, as the President seems to have realized on November 13 when he told his national security staff: "Should have gone public sooner" (ALU128266).

Too late or not, the President's televised address to the Nation on November 13 was consistent with the new public relations approach. In the main, it was an effort to blunt the political impact of the Iran arms sales by stressing four principal points: (1) that the weapons shipments were not ransom for the hostages; (2) that the quantities of weapons shipped by the United States were small; and (3) that the weapons themselves were "defensive" in nature; and (4) that the goals of the Iran Initiative were broader than simply arms-for-hostages, and included renewing the United States' relationship with Iran, bringing an honorable end to the Iran/Iraq war, eliminating state-sponsored terrorism, and obtaining the safe return of the hostages (see GX 223 in U.S. v. North).

The President's November 13 speech was completely silent about the 1985 "Israeli" arms shipments to Iran, and was generally quite short on specific facts; one of the few

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factual assertions in it was the statement that in the aggregate, the weapons shipped to Iran could be fit into a single cargo plane (GX 223 at 2).[53/] Consistent with the "deny where possible" approach (see ALU0128266), the President also attempted to squelch some aspects of the Iran story as it was being reported at the time:

> Other reports have surfaced alleging U.S. involvement. Reports of a sealift to Iran using Danish ships to carry American arms. Of vessels in Spanish ports being employed in secret U.S. arms shipments. Of Italian ports being used. Of the U.S. sending spare parts and weapons for combat aircraft. All of these reports are quite exciting, but as far as we are concerned, not one of them is true. (GX 223 at 1.)

Most of these specifics were, in fact, easy to deny because they stemmed from confusion between the facts of the Evans case in New York and the NSC's Iran Initiative; the allegation that was closest to the truth -- the reference to the Danish ship, which turned out to be the Enterprise's

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53/ According to Regan, this idea was first broached to the President by Poindexter on the morning of the speech; when Regan asked Poindexter to check it, Poindexter returned to say "Well, make it a C-5" -- a reference to the largest transport in the United States inventory. (See July 30, 1987 Regan Cong. Tr. 64-66; see also ALU0128266 (McDaniel note stating "DTR - how big? (tons))-less than one 747 or C-5 (cargo plane?)".) Poindexter still claims that this estimate is "reasonably accurate" if one subtracts the 17 Hawk missiles that were returned to Israel (see July 20, 1987 Poindexter Cong. Tr. 37-39; but see July 17, 1987 Poindexter Cong. Tr. 184 (Rep. Hyde claiming that even without the Hawks, he had been informed that if one could even find a plane that [the Iran arms] could fit in, it would never fly")).

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Erria -- was narrowly deniable by the Administration because the Erria never delivered U.S. arms to Iran, as opposed to patrolling the Mediterranean in hopes of recovering hostages, transporting weapons to Central America, and vainly awaiting receipt from Iran of three captured T-72 tanks. From the President's perspective, the Erria appears to have been more broadly deniable because Poindexter says that he never told Mr. Reagan about the vessel in the first place (see July 15, 1987 Poindexter Cong. Tr. 153).

The President's November 13 speech failed to stem the tide of questions about the Iran Initiative. In particular, the following week saw the breakdown of the policy of silence concerning the 1985 Israeli arms shipments to Iran. That policy was already crumbling by November 13, because Admiral Poindexter, in his background briefing to the press before the President's speech, had been forced to admit U.S. knowledge of the August/September 1985 Israeli TOW shipment. Although he initially tried to deny that the United States had condoned any pre-January 17-Finding shipments of weapons to Iran (see AKW028975-76), Poindexter's denials foundered on the obvious point that something beyond just "talk" must have led to the release of hostage Weir in September 1985:

> Q . . . . Could you say then what prompted the release of Benjamin Weir then in September of '85? What event do you think was related to his release?

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SENIOR ADMINISTRATION OFFICIAL: Well, I think that it was a matter of our talking to the contacts through our channel, making the case as to what our long-range objectives were, demonstrating our good faith --

Q How did you do that?

Q How was that done?

SENIOR ADMINISTRATION OFFICIAL: Well, that was one of the motivations behind the small amount of stuff that we transferred to them.

Q But that was done later?

Q But where -- before this January document was signed?

SENIOR ADMINISTRATION OFFICIAL: The problem is -- and don't draw any inferences from this -- but there are other countries involved, but I don't want to confirm what countries those are and -- because I think that it is still important that that be protected. And going back to the question you asked me earlier, there was one shipment that was made not by us, but by a third country prior to the signing of that document.

Q This shipment to Israel?

SENIOR ADMINISTRATION OFFICIAL: I'm not confirming that, George.

Q Was that on our behalf?

SENIOR ADMINISTRATION OFFICIAL: It was done in our interests.

Q Sir, what --

Q Was that before Weir was release?

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SENIOR ADMINISTRATION OFFICIAL: I honestly don't know. And if I knew, I don't think I would tell you precisely.

Q You just said previously that you did not condone any shipments.

SENIOR ADMINISTRATION OFFICIAL: I went back and corrected -- there was one exception and that was the one I just described.

Q And that was --

SENIOR ADMINISTRATION OFFICIAL: That was it.

Q And that was around the time of Weir's release. When you said demonstrating our good faith we have to assume -- infer from what you've said that there was some kind of quid pro quo.

SENIOR ADMINISTRATION OFFICIAL: It was in the general time frame. (AKW0288978-79.)

[redacted] (b)(3) GJ

"Confusion" Concerning the November 1985 Hawks and the Birth of the Meese Investigation

The forced admissions by Poindexter and Regan concerning U.S. condonation of the 1985 "Israeli" TOW transfer left the November 1985 Hawk shipment, the related 1985 Iran Finding, and the diversion as the major remaining undisclosed facts surrounding the Iran Initiative. During the week of November 17 the NSC Iran Chronology -- which omitted the diversion throughout, but which had up to then

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contained a relatively truthful, if incomplete, account of the November 1985 shipment similar to that contained in the early versions of the CIA Chronology (see, e.g., GXs 116, 124 in U.S. v. Poindexter) -- began to change, first toward the omission of the November shipment and, later in the week, toward the affirmatively false statement that the United States had believed the shipment to be oil well drilling parts (compare GX 134 in U.S. v. Poindexter).

On the afternoon of November 19, the President received a warning from Secretary Shultz that "We've been deceived and lied to and you have to watch out about saying no arms for hostages" (see July 23, 1987 Shultz Cong. Tr. 110). Mr. Shultz has testified that he cannot recall whether it was at this session or a subsequent meeting that he first told Mr. Reagan that McFarlane had given Shultz contemporaneous information about the November 1985 Hawk shipment (id. at 111-112). Charlie Hill's notes of Shultz's "readout" of the November 19 meeting with the President suggest that Shultz alluded to this subject, but not in a way that would necessarily have identified the shipment as the November 1985 Hawks (see ANS0001852 ("Bud once told me about a plane of arms that would go if hostages released -- not if not", with an adjoining notation that says "President knew of this - but it didn't come off")).

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Despite these cautionary signals, at Regan's urging the President was sent out in a second effort to stem the tide of public criticism about Iran (see [redacted]. The President's prepared remarks at his November 19 news conference were essentially a rehash of the themes stressed in his November 13 speech (see DX 91 in U.S. v. North at ALU016817-18). Judging by his responses to the press' questions, it does not appear that anyone did an adequate job of bringing the President up to speed on the nuances of partial disclosure concerning the 1985 shipments, because Mr. Reagan flatly denied the 1985 phase of the Iran Initiative altogether.[54/] The key questions and answers were as follows:

> Q Mr. President, I don't think it's still clear just what Israel's role was in this -- the questions that have been asked about a condoned shipment. We do understand that the Israelis sent a shipment in 1985 and there were also reports that it was the

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54/ [redacted]. Regan has stated that he did not remind the President about the November 1985 Hawks during the press conference "pre-briefs" that Regan attended (see July 30, 1987 Regan Cong. Tr. 62-64), although Regan missed the relevant pre-brief on the day of the press conference (id. at 226). Although Israel is mentioned in McDaniel's notes of national security briefings on November 14 and November 17 (see ALU0128267 ("VP: Rabin/Israeli angle? JMP - No winking or nodding), ALU0128268 ("Jack Anderson: Arms & Israel (VP-Chronology?) (Do it in Congress)"), neither of these entries distinguishes between the two 1985 Israeli shipments.

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Israelis that contacted your administration and suggested that you make contact with Iran. Could you explain what the Israeli role was here?

THE PRESIDENT: No, because we, as I say, have had nothing to do with other countries or their shipment of arms or doing what they're doing. And, no -- as a matter of fact, the first ideas about the need to restore relations between Iran and the United States or the Western world, for that matter, actually began before our administration was here. But from the very first, if you look down the road at what could happen and perhaps a change of government there -- that it was absolutely vital for the Western world and to the hope for peace in the Middle East and all, for us to be trying to establish this relationship. And we worked to -- it started about 18 months ago, really, as we began to find out -- some individuals that it might be possible for us to deal with, and who also were looking at the probability of a further accident. (DX 91 in U.S. v. North at ALU016821.)

* * *

Q Mr. President, going back over your answers tonight about the arms shipments and the numbers of them, are you telling us tonight that the only shipments with which we were involved were the one or two that followed your January 17th finding and that, whatever your aides have said on background or on the record, there are no other shipments with which the U.S. condoned?

THE PRESIDENT: That's right. I'm saying nothing but the missiles that we sold -- and remember, there are too many people that are saying "gave." They bought them.

Andrea?

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> Q Mr. President, to follow up on that, we've been told by the Chief of Staff Donald Regan that we condoned, this government condoned an Israeli shipment in September of 1985, shortly before the release of hostage Benjamin Weir. That was four months before your intelligence finding on January 17th that you say gave you the legal authority not to notify Congress. Can you clear that up why we were not -- why this government was not in violation of its arms embargo and of the notification to Congress for having condoned American-made weapons shipped to Iran in September of 1985?
>
> THE PRESIDENT: No, that -- I've never heard Mr. Regan say that and I'll ask him about that, because we believe in the embargo and, as I say, we waived it for a specific purpose, in fact, with four goals in mind. (Id. at ALU016823.)

Immediately after the press conference, the President's aides attempted to rectify the inconsistency between the Reagan and Regan/Poindexter versions of events by issuing the following written statement:

> There may be some misunderstanding of one of my answers tonight. There was a third country involved in our secret project with Iran. But taking this into account, all of the shipments of the token amounts of defensive arms and parts that I have authorized or condoned taken in total could be placed aboard a single cargo aircraft. This includes all shipments by the United States or any third country. Any other shipments by third countries were not authorized by the U.S. government. (DX91 at ALU016815.)

Late on November 19, Secretary Shultz also called the President to say that his performance had included many

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statements that were wrong or misleading and that Shultz wished to meet with him (July 23, 1987 Shultz Cong. Tr. 112-113). The President agreed to see Shultz on the following day (id.). Charlie Hill's notes for the morning of November 20, 1986 recount a conversation (apparently face to face in Regan's office, see March 6, 1991 Regan 302 at 6) between Secretary Shultz and Donald Regan. The pertinent part of the notes is as follows:

> P w VP told Pdx of my [i.e., Shultz's] telling him [i.e., President Reagan] things were wrong -- shd convene a meeting to go over what everybody knows & get it together. On Monday P will think it over at ranch.

(ANS0001866.) The phrase "my telling him things were wrong" appears to refer to either or both of the Shultz-Reagan conversation that preceded the President's November 19 press conference or Shultz's telephone conversation with the President following the press conference, in which Shultz told Mr. Reagan that he had made many statements that were wrong or misleading. Although none of the apparent participants has pinpointed a Reagan-Bush-Poindexter conversation, witnessed by Regan, concerning Shultz's protestations, the November 20 0930 National Security Briefing featured precisely that cast of characters, and also lacked a note-taker such as McDaniel who might have recorded what was said (see ALU028705; see also AKW044199 (Poindexter Appointment Schedule stating that at 9:30 a.m. on November 20

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there was a Presidential NSB -- "JMP alone w/Regan and VP"). However, Regan believes that he did not hear about Shultz's concerns until later in the day on November 20, and therefore has no recollection that they came up at this 0930, where he thinks that the President's press conference and the associated problems were discussed (see March 6, 1991 Regan 302 at 3-5). [redacted] (b)(3) GJ

On the evening of November 20, Shultz and Regan met with the President at the family quarters. According to Shultz, the gist of his presentation was that the President was being briefed with information that was not correct (see July 23, 1987 Shultz Cong. Tr. 113-114). Shultz says that he left the meeting thinking that he "had not made a dent in the President" (id. at 114; see also ANS0001871 (Hill notes)). Charlie Hill's notes of Shultz' November 22 interview with Attorney General Meese supply some additional detail concerning the November 19-20 meetings between Shultz and the President. According to the notes, Shultz told Meese:

> You should know I went to President on Thurs. night. Asked to go see him. Went w/DR to family qtrs. I had called after press conf. to tell him he did fine job but a lot of yr statements won't stand up

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> to scrutiny and I'll come tell you what you said was wrong. How you have those ideas I don't know but it's wrong -- and I described Bud talk to me in Geneva. President said oh I knew about that -- but that wasn't arms for hostages! I said no one looking at the record will believe that. (ANS0001883.)

Regan recalls that Shultz told the President that Abraham Sofaer, State's Legal Advisor, was worried about what Casey was going to say in his testimony the next day, and was specifically concerned about the likelihood of a public discrepancy between Casey's testimony and that of Assistant Secretary of State Michael Armacost; the November 1985 Hawks were only one of the troublesome issues raised with the President by Shultz, who also said that he had made his views known to Meese (see July 15, 1987 Regan Cong. Dep. 40-42; see also March 3, 1987 Regan Cong. Dep. 47). Regan also says that the November 20 meeting was the "genesis" for his suggesting to the President that an NSPG meeting be scheduled for Monday, November 24, 1986 to discuss the Iran Initiative, and that in the meantime Attorney General Meese, who was already working on Director Casey's Congressional testimony, be asked to gather the facts about the Initiative to date (see [redacted] July 30, 1987 Regan Cong. Tr. 71). [redacted]

[redacted]

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[redacted]

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[redacted]

The President's recollection of the November 20 meeting had vanished by the time of his deposition (see February 16, 1990 Reagan Dep. 39), although it reappears at page 529 of his 1990 book An American Life.

Early the next morning, Poindexter provided briefings to HPSCI and SSCI which, while purporting to be complete narratives of the Iran Initiative, made no reference to either the diversion or the 1985 Iran Finding, and contained affirmatively false statements about the November 1985 Hawk shipment. Later in the morning, Director Casey gave testimony to these committees that paralleled Poindexter's false denials about the November Hawks.

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At his deposition, the President claimed not to recall even knowing that Admiral Poindexter was going to brief Congress on the Iran matter on November 21 (see February 16, 1990 Reagan Dep. 44-45). However, it is not likely that in November 1986 Mr. Reagan was quite that oblivious to his surroundings. The President was generally aware that more Congressional briefings were to follow the November 12 meeting with the leadership at which Poindexter was the principal briefer (see [redacted] GX 223 in U.S. v. North at 3); [redacted]

[redacted]

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[redacted] At the very least, Mr. Reagan was no doubt told why Poindexter failed to turn up at the November 21, 1986 National Security briefing, which was handled by Keel (see ALU0128270) because Poindexter was speaking to the Committees. But even though there is little doubt that the President would have known generally that Poindexter would be meeting with Congress on Iran, [redacted]. The President has testified affirmatively that he did not and would not authorize any false statement to Congress by Poindexter in connection with the Iran Initiative (see February 17, 1990 Reagan Dep. 250-251). (b)(3) GJ

The pattern with respect to the President's knowledge of Casey's November 21, 1986 testimony is similar. [redacted]

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[redacted]

What is undisputed is that immediately after Poindexter's briefings of the Intelligence Committees, and contemporaneously with Casey's testimony to those Committees, the President ordered Meese to find out the relevant facts and to report them by the following Monday. [redacted]

[redacted]

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55/ Regan adds that before Poindexter came to the Oval Office on November 21, he told the President about Poindexter's unsuccessful effort to take back the copy of the NSC Chronology that Regan had obtained on the previous day, advised Mr. Reagan that "something sure as hell was screwy," and suggested that he make the NSC come up with a correct chronology (see July 30, 1987 Regan Cong. Tr. 70-71).

[redacted]

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Mr. Meese has testified that on Friday morning, after reviewing the Iran matter with his colleagues at Justice, he called Poindexter and Regan and told them that he wanted to meet with the President, and then suggested to the President that someone should look into the facts (see [redacted] July 28, 1987 Meese Cong. Tr. 75-77; see also [redacted] March 29, 1989 Cooper North Trial Tr. 5958, 5960-63, 5965-67). The only person present at the 11:32 a.m. meeting who does not claim to have thought up the Meese inquiry is Poindexter, who nonetheless is credited by Meese with agreeing "that something like that had to be done" (July 28, 1987 Meese Cong. Tr. 77).[56/]

Everyone seems to agree that Meese's first move was not to ask the President or Regan what either of them recalled about the November 1985 Hawk shipment or any of the other known "disputed facts" about the Iran matter (see July 30, 1987 Regan Cong. Tr. 72-73; July 28, 1987 Meese Cong. Tr.

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56/ [redacted]

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80; July 16, 1987 Poindexter Cong. Tr. 121[57]), although it is interesting to note that according to Charlie Hill's notes of Meese's November 22 interview of Shultz, Meese told Shultz that

> Certain things could be violation of a law. President didn't know about Hawk in Nov. If it happened & President didn't report to Congress, it's a violation. He said to me if it happened I want to tell Congress not have them tell me. (ANS00018888; emphasis supplied.)[58]

By all accounts, the President was not informed of any of the results of the Meese investigation until Monday, November 24, by which time the question of who knew what about the November 1985 Hawk shipment had been largely eclipsed by the diversion.

Destruction and Alteration of Documents

In addition to DoJ's interviews and document reviews, the three days beginning on Friday, November 21 saw a renewed spasm of document destruction and alteration at NSC. North redoubled his efforts to dispose of troubling records, and on November 21 Poindexter joined in the process

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[57] Poindexter also says that he never asked the President whether he had approved the November shipment because he didn't think Mr. Reagan would remember that level of detail. (Id.)

[58] This statement by Meese echoes Poindexter's testimony that two days earlier, Meese told Casey and Poindexter that the November 1985 shipment was the only one with a legal problem and that it would make a difference whether the President approved it before or after the fact (see June 19, 1987 Poindexter Cong. Dep. 349).

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by ripping up the original 1985 Iran Finding signed by the President, along with some ancillary documents. North and Poindexter also deleted their inventories of stored PROF notes.

Poindexter has testified that he neither sought nor received the President's authorization to destroy the 1985 Iran Finding, and that it never even crossed his mind whether Mr. Reagan would have wanted him to do so. (See July 16, 1987 Poindexter Cong. Tr. 50, 53; July 16, 1987 Poindexter Cong. Tr. 127.) [redacted]. President Reagan testified at his deposition that he did not authorize Poindexter to destroy any document related to Iran/Contra (see February 16, 1990 Reagan Dep. 160; February 17, 1990 Reagan Dep. 267). [redacted] (b)(3) GJ

[redacted]

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[redacted]

Meese Reports the Results of His Investigation

By Monday, November 24, Attorney General Meese had turned up North's involvement in the diversion of Iranian arms sale profits to the Contras. At 11:15 a.m. [redacted] (b)(3) GJ Meese and Regan met briefly with the President, [redacted] The principal briefing of the President about the diversion

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59/ At one point Mr. Reagan testified as follows:

> Q. . . .
> Did you ever authorize or approve any member of the National Security Council in November of 1986 to destroy or alter any records or documents relating to the Iran or Contra affair?
>
> A. 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. (February 17, 1990 Reagan Dep. 255.)

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appears to have taken place at a second meeting among Reagan, Regan and Meese later on Monday afternoon.

Apart from a state visit and an "issues briefing lunch" [redacted] the major Presidential event that intervened between Meese's two meetings with the President was a two-hour NSPG meeting about the Iran Initiative, attended by the President, the Vice President, Shultz, Weinberger, Casey, Regan, Poindexter, Meese and George Cave. The meeting was primarily devoted to the merits of the Initiative; there appears to have been no mention of the diversion. There was, however, a brief discussion of the November 1985 shipment; as recorded in Meese's notes, that discussion contained an extraordinarily misleading statement by Poindexter who, three days before, had ripped up the 1985 Iran Finding:

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> DTR
> Q re Hawk missile shipment: Who authorized? Who knew? Was RR told?
>
> JMP
> Bud handling by self from Jul to Dec 85. No documentation.
>
> GPS
> Knew about situation and opposed it. (Cong. Ex. EM-49.)

Following the NSPG meeting, Meese spoke to Poindexter, who stated that he was generally aware of the diversion (see [redacted] 1987 Meese Cong. Tr. 193-198). At 4:20 p.m. [redacted]

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the President, Regan and Meese met once again. Meese informed the President about the diversion and Poindexter's acknowledgement of it; according to both Meese and Regan, the President appeared "shocked" and "surprised". There was a discussion of whether Poindexter should be relieved of his duties, at the conclusion of which the President said that he wished to think about the matter overnight. (See [redacted] July 28, 1987 Meese Cong. Tr. 147-156; July 29, 1987 Meese Cong. Tr. 199-200; [redacted]

Early in the morning of November 25, both Meese and Regan advised Poindexter that he should resign; Regan told Poindexter that he should have the resignation ready by 9:30 that morning. (See [redacted] (b)(3) GJ 30, 1987 Regan Cong. Tr. 85-87, 238-39.) At 9:00 the President, the Vice President, Regan and Meese held a meeting at which Meese went over the diversion in detail, and the four men discussed notifying Congressional leaders about the matter, the appointment of a three-man Commission to look into the facts, and the fact that Regan had advised Poindexter to resign. (See [redacted] July 31, 1987 Regan Cong. Tr. 25-27.) At 9:30 Poindexter arrived in the Oval Office, told the President that he was sorry for what had happened and that he "probably should have looked into it

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more", but hadn't, and tendered his resignation. ([redacted] July 30, 1987 Regan Cong. Tr. 87; see also July 2, 1987 Poindexter Cong. Dep. 20-21; July 16, 1987 Poindexter Cong. Tr. 91.) According to Poindexter, the President replied that he "had great regret and said that this was in the tradition of a Naval officer accepting responsibility" (July 16, 1987 Poindexter Cong. Tr. 91).

[redacted] (b)(3) GJ

After briefing Cabinet officials, President Reagan and Attorney General Meese (accompanied by at least Shultz, Casey, and Regan) had a meeting with Congressional officials including Senators Dole, Byrd, Nunn, Warner, and House Majority Leader Wright. According to John Richardson's notes of the meeting, the discussion focused solely upon the diversion, the current status of the Iran Initiative, and future inquiries and investigations into the Iran matter (see Cong. Ex. EM-53).

At noon on November 25, the President and Meese held a press conference (see Public Papers of the Presidents, Ronald Reagan, 1986 Vol. II at 1587-88; DX 92 in U.S. v. North). The President made a brief initial statement in

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which he said that Meese's weekend review of the Iran Initiative had turned up information that "I was not fully informed on the nature of one of the activities undertaken", which raised "serious questions of propriety" (Public Papers of the Presidents, Ronald Reagan, 1986 Vol. II at 1587). The President went on to announce the resignation of Poindexter and the firing of North, the forthcoming appointment of a special review board to determine the role of the NSC in the newly-found activity, and the continuation of Justice Department review of the matter (id.). The President then exited the briefing room, leaving Meese to announce the diversion (id.). Meese's description of the diversion -- complete with the minimal role ascribed to Poindexter -- accorded with what Meese had previously told the President and what the President and Meese had told the Congressional leaders earlier that morning (see DX 92 in U.S. v. North). With respect to the 1985 Iran arms transactions and the President's knowledge of them, the Attorney General had this to say:

> Q Would you, please, clarify the whole question of the President condoning a third country shipment prior to signing this order -- this intelligence finding in January. Exactly what did the President know, and when did he know it? Who told him the details were, in terms of Israel shipping arms to Iran, apart from this additional question of shipping arms to the Contras?
>
> ATTORNEY GENERAL MEESE: This is still being looked into.

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The President did not have full details of all of the aspects of transactions that took place prior to the finding. There were -- there was at least one transaction that we know about in which Israel shipped weapons without any authorization from the United States. There was another transaction of a similar nature, although there was probably knowledge on the part of people in the United States about it, and this --

Q When was that?

ATTORNEY GENERAL MEESE: -- is one of -- there was a transaction, one transaction in late August or September, and there was another transaction in --

Q Of '85?

ATTORNEY GENERAL MEESE: -- of '85 -- in November. And in the November transaction, actually, those weapons were returned to Israel, it's our understanding. That was -- that whole -- both of those transactions took place between Israel and Iran, did not involve, at that time, the United States.

Q Mr. Attorney General, on that transaction in September --

Q Did the President know about it afterwards, or at what point --

ATTORNEY GENERAL MEESE: Wait a minute.

Q -- at what point did the President know? You said he didn't have the full details.

ATTORNEY GENERAL MEESE: Yes.

Q What details did he have about those transactions, and when did he have them?

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ATTORNEY GENERAL MEESE: The President --this is one of the things that we're recollecting now. The President was informed generally that there had been an Israeli shipment of weapons to Iran sometime during the late summer, early fall of 1985, and then he later learned in February of 1986 details about another shipment that had taken place in November of '85, which had actually been returned to Israel in February of '86.

Q Mr. Attorney General, Admiral Poindexter --

Q If he didn't really know, why did he call Shimon Peres to thank him right after Benjamin Weir's release? Why did he call the then Israeli Prime Minister to thank him for Israel's help in sending that shipment of arms?

ATTORNEY GENERAL MEESE: Well, he thanked -- he called -- I don't know, because that's something I have not discussed with the President specifically the call to Shamir, but I think there was no question that the Israelis had been helpful in terms of their contacts with other people in regard to Weir.

Q Attorney General, Admiral Poindexter has told reporters that the President verbally authorized that shipment in September 1985 from Israel to Iran. Does your information dispute that?

ATTORNEY GENERAL MEESE: Our information is that the President knew about it probably after the fact and agreed with the general concept of continuing our discussions with the Israelis concerning these matters. That's the information I have.

Q But who had the authorization ability, if not the President? Who can authorize --

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Q -- why did he condone --

ATTORNEY GENERAL MEESE: Well, nobody -- to my knowledge --

Q Let me just ask the question.

ATTORNEY GENERAL MEESE: To my knowledge, nobody authorized that particular shipment specifically.

Q The Israelis did it on their own?

ATTORNEY GENERAL MEESE: That's my understanding, yes.

Q Do you know the Israelis claim that they never did anything without the full knowledge, understanding and consent of the United States government?

Q That's what Rabin says.

ATTORNEY GENERAL MEESE: My understanding is that in the terms of that particular shipment --and this is one of the --

Q Which one? The September '85?

ATTORNEY GENERAL MEESE: The September -- August or September -- it's either August or September -- that on that particular occasion, it was done at their -- on their own motion by the Israelis. It was known to us, and it's uncertain as to whether it was known before or after and --

Q Didn't Bud McFarlane meet with an Israeli official just at that time?

ATTORNEY GENERAL MEESE: Wait a minute. Let me finish my answer -- and that it was, however, after the fact, at

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least, was condoned by the United States government.

* * *

Q Andrea's had a few questions already. (Laughter.) What's to prevent an increasingly cynical public from thinking that you went looking for a scapegoat and you came up with this whopper, but it doesn't have a lot to do with the original controversy?

ATTORNEY GENERAL MEESE: Well, the only thing that I can say is that we have been very careful to lay out the facts for you and for the American public just as rapidly as we've gotten them, much different than we would do in a normal inquiry or investigation when we usually wait until the inquiry is complete. But the President felt that in the interests of getting the full story out that he should make the statement that he did today and that I should appear before you and answer questions, which I think you will agree is doing everything we can to be sure that there is no hint that anything is trying to be concealed. (Id. at ALV014374-77.)

That evening, President Reagan telephoned North.

[redacted]

[redacted]

[redacted]

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Col. North, when advised of Earl's recollection, testified that Earl was mistaken and that the President had told North, and North had told Earl, "I just didn't know", and perhaps that it was important that North understand that the President didn't know. (See July 8, 1987 North Cong. Tr. 95-96.) Fawn Hall, North's secretary, corroborates North by saying that North told her the President had said "I just didn't know" (see June 8, 1987 Hall Cong. Tr. 297).

A. False Statements and Obstruction of Congressional Inquiries

As described above, the President made public statements concerning the Iran matter on November 6, 7, 10, 13, and 19, 1986, and assisted in a briefing of the Congressional leadership on November 12. Poindexter and Casey provided false and misleading briefings to the

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intelligence committees on November 21. Putting aside the "arms for hostages" quagmire (see page 124n. 50), the Administration or parts of the Administration were attempting during that time to withhold information about: (1) the August/September 1985 TOW shipment, although U.S. condonation of that shipment was disclosed fairly promptly; (2) U.S. participation in the November 1985 Hawk shipment and the existence of the related 1985 Iran Finding, and (3) the diversion. Did the President's conduct with respect to these matters violate any criminal law?

To begin with, there is no basis in the law to charge any false statement by the President in a speech or news conference as a freestanding crime because the relevant statute, 18 U.S.C. § 1001, punishes only false statements made to a "department or agency of the United States". Thus, the President's public statements during this period can, at most, be viewed as evidence of a scheme to deceive Congress or to aid and abet others in doing so. The November 12 briefing of Congressional leaders may stand on a different legal footing, as would any Presidential involvement in Poindexter's and Casey's November 21 statements to the intelligence committees.[60/] However, under the legal

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[60/] The reason for distinguishing legally between the November 12 briefing and the November 21 briefings is that the latter were clearly held pursuant to Congressional intelligence committee inquiries that fit snugly into 18 U.S.C. §§ 1001 and 1505, as established in the North and Poindexter cases.

(continued...)

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standards discussed in Section II(A)-(C) above, the President could only be criminally liable if he knew the facts concerning which Congress was either lied to or obstructed, and also joined in or authorized the lying and obstruction itself. Because of the complete lack of any evidence that the President knew about the diversion until the day before it was announced, the inquiry boils down to the following questions: (1) did President Reagan recall his authorization of the 1985 "Israeli" arms shipments to Iran at any time up to November 21, 1986?; (2) did President Reagan supply Congress, or condone or authorize Poindexter and Casey supplying Congress, with false information about those shipments?

There is little or nothing in the record concerning whether the President did, or did not, remember the August/September 1985 TOW shipment in early November 1986. As will be seen in Section IV below, the President's statements about that shipment wandered all over the lot in

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60/ (...continued)
The November 12 briefing, on the other hand, took place at the instance of the White House and involved a group of four "Congressional leaders"; in that situation, it is less obvious that any false statements could be characterized as having been made "in [a] matter within the jurisdiction of [a] department or agency of the United States" (Section 1001) or to "influence[], obstruct[], or impede[], or endeavor[] to influence, obstruct or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint Committee of the Congress" (Section 1505).

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the months following November 1986, and ultimately settled down to an account that resembles McFarlane's testimony that the President approved the Israelis' action in advance. In any event, because U.S. condonation (if not prior Presidential approval) of that shipment was publicly acknowledged by Mr. Regan almost immediately after the November 12 Congressional briefing, I do not believe that there was any effective obstruction of Congress on that subject, nor even a creditable endeavor to obstruct.

The Administration's efforts on the 1985 Hawks were much more persistent. At his deposition in United States v. Poindexter, Mr. Reagan stated that he cannot recall today whether he remembered the November 1985 Hawk shipment at the time he met with Congressional leaders on November 12, 1986, or even whether he had heard about it before the Lebanese newspaper article on November 3 (see February 16, 1990 Reagan Dep. at 37-38). In my view, the available facts do not permit a definite conclusion concerning the state of the President's recollection on this issue. On the one hand, at the November 10 meeting and again at the November 12 Congressional briefing, the President was exposed to highly incomplete accounts of the Iran Initiative by Poindexter, who did not mention the November 1985 shipment or the related Finding, and made only veiled references to the

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August/September 1985 TOW shipment.[61/] It is equally clear that the President lacked the access to detailed facts that Poindexter possessed, including most notably the 1985 Iran Finding, which Poindexter destroyed without telling the President, as well as the progression of draft Chronologies that, over time, became less and less truthful on the subject of the November shipment. On the other hand, the President was not wholly without access to information; if he had simply consulted his diary, he would have found entries for November 22 and November 23, 1985 that, while silent on the subject of Hawk missiles or indeed any armaments at all, plainly show that the President knew something was up with the hostages in late November of that year. In addition, on November 19-20, 1986, Mr. Reagan received more or less direct information from Secretary Shultz concerning Shultz' contemporaneous knowledge of the November 1985 shipment, to which Mr. Reagan is said to have responded that he "knew of this" (see page 137 above) or "knew about that" (see pages 142-143 above). At the same time -- although Meese's articulation of it carries some of the flavor of counsel's advice in Anatomy of a Murder -- there is evidence that President Reagan suggested to Meese that he did not know

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61/ [redacted] (b)(3) GJ

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about the November shipment, and asked Meese to tell him what had happened (see pages 148 above). Meese stuck with that account through November 25, 1986 (see pages 154-158 above). On balance, I do not believe that one can conclude with any certainty that President Reagan recalled his authorization of the November 1985 Hawk shipment at any time before November 25, 1986.

The record also does not permit a conclusion that the President authorized or condoned false statements or obstruction by Poindexter or Casey on November 21. While there is, as noted at pages 144-146 above, little doubt that the President knew in advance that Casey and probably Poindexter were going to be briefing Congress about the Iran matter, there is no indication that Mr. Reagan knew specifically what they were going to say, or acquiesced in their making intentionally false or misleading statements. Indeed, the only warnings that the President did receive about his briefings on the Iran Initiative and the upcoming testimony -- Shultz' November 19 statements that "we've been deceived and lied to" (see page 137 above) and Shultz' November 20 advice that there were discrepancies between Shultz' knowledge and what Casey was about to tell Congress (see page 143 above) -- led immediately to the President ordering the Meese investigation. Referring once again to Judge Greene's jury charge in Poindexter, these facts are

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inconsistent with either a knowing and willful participation by Mr. Reagan in a conspiracy to make false statements or mislead Congress (see Attachment A at 3359) or a specific intent on his part to assist in the commission of false statements or obstruction (see Attachment A at 3371). Thus, I conclude that there is no probable cause to charge former President Reagan with conspiracy or aider/abettor liability with respect to false statements or obstruction in November 1986.

B. Document Destruction/Alteration

As discussed at pages 148-150 above, no witness, and no documentary fact, provides the slightest reason to believe that President Reagan was aware of any destruction or alteration of documents relating to Iran or the Contras in October-November 1986 until after those acts were complete. There is accordingly no basis for even considering Presidential liability for such activities either as an act of obstruction under 18 U.S.C. § 1505, or in their own right as a violation of 18 U.S.C. § 2071.

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IV. Responses to Investigations

The final section of this memorandum considers whether President Reagan committed any crimes in his responses to the three principal investigations that followed the November 25, 1986 news conference: the Tower Commission investigation, the investigation performed by the Congressional Iran/Contra Select Committees, and the criminal investigation conducted by our Office.

Summary of the Facts

President Reagan's Statements to the Tower Commission

On December 1, 1986, President Reagan signed Executive Order 12575, which established a Special Review Board "to review activities of the National Security Council", and specifically to

> conduct a comprehensive study of the future role and procedures of the National Security Council (NSC) staff in the development, coordination, oversight, and conduct of foreign and national security policy; review the NSC staff's proper role in operational activities, especially extremely sensitive diplomatic, military, and intelligence missions; and provide recommendations to the President based upon its analysis of the manner in which foreign and national security policies established by the President have been implemented by the NSC staff.

The Board was directed to submit its findings and recommendations to the President (id.). President Reagan named former Senator John Tower to be Chairman of the Special

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Review Board, which came to be known commonly as the "Tower Commission"; the other members were Edmund Muskie, former Senator from Maine and Secretary of State in the Carter Administration, and Brent Scowcroft, a retired General of the Air Force and National Security Advisor to President Ford.

The Tower Commission conducted a substantial number of interviews over a period of some three months; the Commission's February 26, 1987 letter submitting its Report to President Reagan states that in addition to the evaluative mission described in the Executive Order,

> At your direction, we also focused on the Iran/Contra matter and sought to follow your injunction that "all the facts come out." We attempted to do this as fairly as we knew how so that lessons for the future could be learned.

At page I-1 of its Report, the Commission noted that

> The Board was not, however, called upon to assess individual culpability or be the final arbiter of the facts. These tasks have been properly left to others. Indeed, the short deadline set by the President for completion of the Board's work and its limited resources precluded a separate and thorough field investigation. Instead, the Board has examined the events surrounding the transfer of arms to Iran as a principal case study in evaluating the operation of the National Security Council in general and the role of the NSC staff in particular.

The Tower Commission conducted two interviews with President Reagan, received a letter from the President correcting one aspect of his accounts at those interviews,

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and was provided the opportunity to examine excerpts from the President's diary. The Commission's Report attempted to draw conclusions concerning the President's knowledge and authorization of the Iran Initiative in general, and of four controversial Iran/Contra events in particular: (1) the August/September 1985 Israeli TOW shipment; (2) the November 1985 Hawk shipment; (3) the diversion; (4) NSC staff assistance to the Contras during the Boland period. President Reagan's responses to the Commission in these four areas, as summarized in the Tower Report, were as follows:

The August/September 1985 TOW Shipment

> In his meeting with the Board on January 26, 1987, the President said that sometime in August he approved the shipment of arms by Israel to Iran. He was uncertain as to the precise date. The President also said that he approved replenishment of any arms transferred by Israel to Iran. Mr. McFarlane's testimony of January 16, 1987, before the Senate Foreign Relations Committee, which the President embraced, takes the same position. This portion of Mr. McFarlane's testimony was specifically highlighted on the copy of testimony given by the President to the Board.
>
> In his meeting with the Board on February 11, the President said that he and Mr. Regan had gone over the matter a number of times and that Mr. Regan had a firm recollection that the President had not authorized the August shipment in advance. The President said he did not recall authorizing the August shipment in advance. He noted that very possibly, the transfer was brought to him as already completed. He said that subsequently there were arms shipments he authorized that may have had to do with replenishment, and that this approval for

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replenishment could have taken place in September. The President stated that he had been "surprised" that the Israelis had shipped arms to Iran, and that this fact caused the President to conclude that he had not approved the transfer in advance.

In a subsequent letter to the Board received on February 20, 1987, the President wrote: "In trying to recall events that happened eighteen months ago I'm afraid that I let myself by influenced by others' recollections, not my own . . ."

> ". . . I have no personal notes or records to help my recollection on this matter. The only honest answer is to state that try as I might, I cannot recall anything whatsoever about whether I approved an Israeli sale in advance or whether I approved replenishment of Israeli stocks around August of 1985. My answer therefore and the simple truth is, 'I don't remember - period.'"

The Board tried to resolve the question of whether the President gave prior approval to Israel's transfer of arms to Iran. We could not do so conclusively.

We believe that an Israeli request for approval of such a transfer was discussed before the President in early August. We believe that Secretary Shultz and Secretary Weinberger expressed at times vigorous opposition to the proposal. The President agreed to replenish Israeli stocks. We are persuaded that he most likely provided this approval prior to the first shipment by Israel.

In coming to this conclusion, it is of paramount importance that the President never opposed the idea of Israel transferring arms to Iran. Indeed, four months after the August shipment, the President authorized the United States government to undertake

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directly the very same operation that Israel had proposed. Even if Mr. McFarlane did not have the President's explicit prior approval, he clearly had his full support. (Tower Commission Report at III-7-8; see also id. at B-19-20.)[62/]

The November 1985 Hawk Shipment

In his first meeting with the Board on January 16, 1987, the President said he did not remember how the November shipment came about. The President said he objected to the shipment, and that, as a result of that objection, the shipment was returned to Israel.

In his second meeting with the Board on February 11, 1987, the President stated that both he and Mr. Regan agreed that they cannot remember any meeting or conversation in general about a HAWK shipment. The President said he did not remember anything about a call-back of the HAWKs. (Tower Commission Report at III-9; see also id. at B-37.)

The Diversion

The President said he had no knowledge of the diversion prior to his conversation with Attorney General Meese on November 25, 1986. No evidence has come to light to suggest otherwise. Contemporaneous Justice Department staff notes of Lt. Col. North's interview with Attorney General Meese on November 23, 1986, show North telling the Attorney

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[62/] At pages 283-284 of his recent book, Consequences, Chairman Tower characterizes this series of statements by the President as "a major contradiction" which "bore all the earmarks of a deliberate effort to conceal" the role of Donald Regan in the Iran Initiative. Tower goes on to say that he does not know whether the President knowingly went along with false accounts in order to deceive the Commission, or was the victim of his aides -- a possibility which Tower believes is buttressed by the fact that at his second interview, Mr. Reagan made it obvious that he was relying on a statement prepared by others.

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> General that only he, Mr. McFarlane, and VADM Poindexter were aware of the diversion.
> (Tower Commission Report at III-21.)

NSC Staff Assistance to the Contras

> The President told the Board on January 26, 1987, that he did not know that the NSC staff was engaged in helping the Contras. The Board is aware of no evidence to suggest that the President was aware of Lt. Col. North's activities. (Tower Commission Report at III-24; see also id. at C-14.)[63/]

[63/] A July 29, 1987 memorandum to the file by Associate Counsel Roth, which summarizes his review of the actual Tower Commission memoranda of its two interviews of the President, suggests that Mr. Reagan made a series of discrete statements about North's and the NSC staff's Contra-related activities: (a) that the President didn't know of private funding for non-lethal aid for humanitarian purposes to the Contras (Roth memo at 4); (b) that the President did not know of NSC help to the Contras, but knew of State Department efforts to persuade other countries to help, and speculates that North may have thought this "opened the door" (id.); (c) that the President never directed individual NSC staff members, and did not know of North's involvement with the Contras (id. at 5); and (d) that the President did not know about the NSC staff supplying lethal aid to the Contras (id. at 7).

Both the Commission's sweeping conclusion of Presidential ignorance set forth in text above, and the President's actual statements to the Commission regarding aid to the Contras, are difficult to reconcile with documents that plainly were in the possession of the Commission, such as North's March 16, 1985 "Fallback Plan for the Nicaraguan Resistance" memo (see Tower Commission Report at C-4), or even with the President's pre-November 1986 public statements such as the October 8, 1986 South Lawn remarks (see page 88 above). The Commission's failure to resolve these contradictions may have stemmed from the fact that it was much more focused on Iran than on the Contras; as the Commission itself noted, it

> "had neither the time nor the resources to conduct a full inquiry into the role of the NSC staff in the support of the

(continued...)

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President Reagan's Responses to the
Iran/Contra Select Committees

The investigative methodology and resources of the Congressional Iran/Contra Select Committees were very different from those employed by the Tower Commission. As regards the President's role in Iran/Contra, the principal differences were these: first, unlike the Tower Commission, the Select Committees received no interviews or testimony from Mr. Reagan himself; second, the Select Committees possessed a critical investigative tool that the Tower Commission lacked -- the ability to compel testimony from reluctant witnesses, most notably Poindexter and North, under grants of statutory use immunity; third, the Select Committees had comparatively a much greater time in which to conduct their investigation[64/], and a vastly larger staff with which to carry it out, so that the Committees received and processed a far larger number of White House and NSC documents. Indeed, the only relevant similarity between the two investigations lay in the fact that both groups received

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[63/] (...continued)
Contras that was commensurate with its work on the Iran arms sales. As a consequence, the evidence assembled by the Board was somewhat anecdotal and disconnected." (Tower Commission Report at III-22.)

[64/] There are those, to be sure, who suggest that the Select Committees set themselves too short a time within which to complete their work. See "Investigator criticizes Iran-contra probe," USA Today, May 8, 1989, at 4A.

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access to excerpts from the President's diaries, although it seems likely that the Select Committees (like our Office) saw more such excerpts than were made available to the Tower Commission.

Given these investigative differences (not to mention the distinct political influences driving each body), it is not surprising that the Select Committees drew somewhat different conclusions concerning Presidential knowledge and authorization of each of the controversial Iran/Contra events except the diversion and, in large measure, the August/September 1985 TOW shipment. The Select Committee Majority's conclusions in those four areas were as follows:

The August/September TOW Shipment

> The President, in his Tower Board interview, originally confirmed that he had authorized the sale, but later stated that he had no actual recollection one way or another. No documents record the decision.
>
> The Tower Board concluded that the President most likely approved the Israeli sales before they occurred. The evidence supports that conclusion. The Israelis expressly sought the President's approval of the Israeli sales and confirmation that the Secretary of State had been consulted. By McFarlane's own admission, he told the Israelis that they were authorized to sell the TOWs. McFarlane had no motive to approve a sale of missiles to Iran if the President had not authorized it. Moreover, Ledeen testified that McFarlane told him of the President's decision. McFarlane also contemporaneously reported the President's approval to Kimche.

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(Iran/Contra Select Committee Report at 167-168 [footnotes omitted], see also id. at 501)

The November 1985 Hawk Shipment

McFarlane told the President about the developing plans for the HAWK transaction shortly before they left on November 17 for a summit meeting with Soviet leaders in Geneva. Regan, who was present, said it was:

> [J]ust a momentary conversation, which was not a detailed briefing to the President, that there [is] something up between Israel and Iran. [McFarlane said] [i]t might lead to our getting some of our hostages out, and we were hopeful . . . .

McFarlane did not stress that what he and Rabin saw as Ghorbanifar's unreliability was adding to the risks of the operation. Instead, McFarlane merely made "a passing reference here or there" about these concerns, and did not discuss them at length with the President at the time. The President's reaction was "cross your fingers or hope for the best, and keep me informed." (Iran/Contra Select Committee Report at 176 [footnotes omitted].)

* * *

While they were still in Geneva, McFarlane updated the President and Chief of Staff Donald Regan on the status of the HAWK shipment and the anticipated hostage release. McFarlane informed them that the Israelis were about to ship the weapons, and expressed hope that the hostages would come out by the end of the week. McFarlane specifically told the President that Israel was about to deliver 80 HAWK missiles to Iran via a warehouse in Country 15, and that Israel wanted the United States to replace those missiles.

McFarlane testified that he simply told the President that the Israelis were

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about to act, but did not ask for specific approval:

> [T]he President provided the authority in early August for Israel to undertake, to sell arms to Iran, and to then come to the United States for replenishment, to buy new ones. That didn't require then the Israelis to come back to us on each occasion and get new approval.

The President asked McFarlane to arrange a meeting at which the President and his top advisers would review the initiative after the summit. (Id. at 178 [footnotes omitted].)

* * *

On the day the CIA sent the proposed Finding to the White House, November 26, the President authorized continuing the arms-for-hostages transaction. North's notes indicate that he was so informed by Poindexter at an hour-long meeting:

> 0940-1050. Mtg w/JMP. RR directed op[eration] to proceed. If Israelis want to provide diff model, then we will replenish. We will exercise mgt over movmt if yr side cannot do. Must have one of our people in on all activities.

Later that day, North related to an Israeli official that the Americans wanted to carry on even if the supply of additional arms was needed and even if the weapons had to come from the United States. But events not within the control of the American side prevented immediate progress in accord with the renewed authorization of the President. (Id. at 186-187 [footnotes omitted].)

* * *

On December 5, in one of his first acts as National Security Adviser, Poindexter presented the Finding to the President at his daily national security briefing. The President signed it. Poindexter's notes of his daily briefing of the President refer to the Finding.

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Chief of Staff Donald Regan was present at this briefing, but testified that he has no recollection of the Finding or the President's signing it:

> I have racked my brains since I've read about it in the press, that you have had testimony to that effect. I've checked with my members of the staff, the White House staff who were working with me at the time, as to whether they remember it. No one can remember seeing that document.

(Id. at 195 [footnotes omitted].)

The Diversion

The central remaining question is the role of the president in the Iran-Contra Affair. On this critical point, the shredding of documents by Poindexter, North, and others, and the death of Casey, leave the record incomplete.

As it stands, the President has publicly stated that he did not know of the diversion. Poindexter testified that he shielded the President from knowledge of the diversion. North said that he never told the President, but assumed that the President knew. Poindexter told North on November 21, 1986 that he had not informed the President about the diversion, but North testified that he had fabricated this story to bolster Secord's morale.

Nevertheless, the ultimate responsibility for the events in the Iran-Contra Affair must rest with the President. If the President did not know what his National Security Advisers were doing, he should have. It is his responsibility to communicate unambiguously to his subordinates that they must keep him advised of important actions they take for the Administration. The Constitution requires the President to "take care that the laws be faithfully executed." This charge encompasses a responsibility to leave the members of his Administration in no doubt that the

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rule of law governs. (Iran/Contra Select Committee Report at 21.)

NSC Staff Assistance to the Contras

The President told the Tower Review Board that he did not know that the NSC staff was assisting the Contras. After the Tower Report was issued, the President stated that private support for the Contras was "my idea." In fact, the President knew of the contributions from Country 2. According to Poindexter, the President's policy was "to get what support we could from third countries."

In general, Poindexter understood that the President wanted the NSC staff to support the Contras, including encouraging private contributions. The President also knew, according to Poindexter, that North was the chief staff officer on Central America who was responsible for carrying out the President's general charger to keep the Contras alive. Poindexter regularly reported to the President on the status of the Contras, the fact that they were surviving, and "in general terms" North's role in facilitating their survival. As a result of these briefings, Poindexter thought that the President understood that both he and North were coordinating the effort to support the Contras. Poindexter also believed the President understood that "Col. North was instrumental in keeping the Contras supported without maybe understanding the details of exactly was he was doing."

As to the level of detail provided to the President on the Contra support operation, Poindexter testified that he:

> would not get into details with the President as to who was doing what. The President knew that there was a Boland Amendment, he knew there were restrictions on the government. As he has said, I think, since November of 1986, that he did not feel that the Boland Amendment applied to his

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> personal staff and that that was his feeling all along. I knew that.
>
> He knew the Contras were being supported, and we simply didn't get into the details of exactly who was doing what.

Poindexter testified that on one occasion, he briefed the President with some specificity about the Contra support program, but understood that the President did not recall the briefing:

> Now, you know, the President doesn't recall apparently a specific briefing in which I laid out in great detail all of the ways that we were going about implementing the President's policy, and I frankly don't find that surprising. It would not, frankly, at the time have been a matter of great interest as to exactly how we were implementing the President's policy.

Without getting to the "extraneous detail[s]" of how the President's policy was being implemented, however, Poindexter briefed the President on the Sant Elena airstrip in Costa Rica. Poindexter testified that in December 1985, after he returned from Central America, he specifically briefed the President about the local assistance provided in establishing the airstrip. In addition, Poindexter informed the President that the "private individuals" were also involved in establishing the airstrip. At the same time, Poindexter excluded the "extraneous detail" that North, through Tambs and Castillo, had facilitated the construction of the airstrip. Similarly, while Poindexter thought that the President was aware of North's role in supporting the Contras, "it did not include something as specific as directing Col. North to conduct air supply operations." North testified that he believed that the President approved his efforts to resupply the war. In fact, his actions support that belief.

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(Iran/Contra Select Committee Report 77 [footnotes omitted]; see also id. at 501)

* * *

In a May 19, 1986, PROF note to Poindexter, North wrote "the President obviously knows why he has been meeting with several select people to thank them for their 'support for Democracy' in Cent[ral] Am[erica]. In fact, what the President knew is a matter of some doubt.

The President, in his March 19, 1987, press conference said that he believed that contributors he met had donated money for political advertising for the Contras. The minutes of the May 16, 1986, National Security Planning Group (NSPG) meeting reveal the same understanding on the part of the President. He stated, "What about the private groups who pay for ads for the Contras? Have they been contacted? Could they do more than ads?" Similarly, in preparation for the January 30 briefing, Linda Chavez wrote a memorandum to the President, stating that "ACT and NEPL spent in excess of $3 million supporting the President's programs through public awareness using television and newspaper messages." In fact, much of the $3 million was directed toward Contra support activities, including arms.

Poindexter, however, testified at his deposition that "[t]here wasn't any question in my mind" that the President was aware that the contributors he was thanking were giving to the Contras. He added that "in the White House during this period of time that we were encouraging private support, we really didn't distinguish between how the money was going to be spent." North testified that in writing his May 19 PROF note, he assumed that the President was aware that the contributions were for munitions, as well as other things, although he denied ever discussing this with the President.

The President met with and thanked several large contributors for their

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> support of his policies. David Fischer, former Special Assistant to the President, arranged Presidential photo opportunities or meetings with at least seven major Channell-Miller contributors in 1986. Fischer and Martin Artiano, a Washington lawyer, were paid steep fees by IBC (which charged these fees to NEPL) for arranging these meetings (among other services). Channell's statement to O'Boyle that these meetings carried a $300,000 price tag is substantiated by Edie Fraser's cryptic note to North (mentioned above); at least five of the six contributors who donated more than $300,000 to NEPL were invited to meet with the President. (Id. at 96 [footnotes omitted].)

As noted previously, the President gave no interviews or testimony to the Congressional Select Committees. In fact, the only investigative source over which Mr. Reagan had any obvious possibility of control was the production to Congress of White House and NSC documents, an area that we are not in a position to evaluate generally because we made no effort to monitor either the Committees' requests or the Administration's compliance. We do know, however, of one notable claim of incomplete production by the White House and NSC, which is described briefly below.

In April 1989, the Senate Select Committee on Intelligence, joined by HPSCI, undertook a review to determine why several documents, introduced into evidence during the North trial, either had not been produced to the Iran/Contra Select Committees or had been produced in incomplete form. HPSCI conducted a similar, but less fully

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documented, review at the same time. The "new" documents were:

- Certain memoranda relating to the February 1985 "Honduran Quid Pro Quo" sequence (see page 58-61 above), some of which (February 19, 1985, February 20, 1985, and February 22, 1985) were not produced at all, and one of which (February 11, 1985) was produced without routing information, handwritten notes, and a signed version of one attachment.

- The version of the April 25, 1985 Presidential call memorandum to Honduran President Suazo (see page 59 above) that bears President Reagan's handwritten notes of the substance of the call

- The version of the October 30, 1985 "Reconnaissance Overflights" memorandum that bears Poindexter's notation that he had briefed the President on it, and appends the final sheet suggesting that the President be briefed about the provision of recoilless rifles to the Contras (see pages 66-67 above).

After an investigation that lasted for several weeks and which included the cooperation of this Office, SSCI issued a report on these documents. See Senate Select Comm. on Intelligence, Were Relevant Documents Withheld from the Congressional Committees Investigating the Iran-Contra Affair?, S. Prt. 101-44, 101st Cong., 1st Sess. (1989) ("SSCI Report"). In substance, SSCI concluded that there was no evidence that the Honduras-related documents were deliberately withheld by the White House, and that their non-production most likely resulted from a mistaken but good-faith belief by the reviewing FBI agents that the documents

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were not relevant; with regard to the "Reconnaissance Overflights" memorandum, which this Office had received during 1987, the Committee could not explain Congress' failure to receive it. (SSCI Report at 7-14.) HPSCI announced that it had reached the same conclusions.

Office of Independent Counsel

Like the Tower Commission and the Congressional Select Committees, our Office has been provided with considerable quantities of White House and NSC documents (both for investigative purposes and as a result of court-ordered discovery in the indicted cases), and with access to excerpts from President Reagan's diary. Unlike either of the other investigations, we have obtained sworn disclosures from President Reagan on two occasions: first, in the President's answers to this Office's Interrogatories; second, in the deposition of Mr. Reagan that was conducted on February 16-17, 1990 pursuant to order of Judge Greene in United States v. Poindexter.

In his Interrogatory Answers and at his deposition, the President again provided information regarding the four key areas of his knowledge and authorization that have been identified above:

The August/September 1985 TOW Shipment

> Mr. McFarlane briefed me about an approach by individuals in Iran while I was in the hospital in July 1985, but I do not specifically recall any discussion of the sale of arms by Israel as being

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part of that initiative at that time. I do recall that later in the summer or fall of 1985 I was advised that Israel sought to ship TOWs to individuals in Iran who would influence the Hazballah to free our hostages. It was part of Israel's plan that it would abort the sale if it became apparent that the hostages would not be released. My best recollection is that, at that time, I agreed that Israel should be permitted to purchase replacement TOWs from the United States. I am aware that Robert McFarlane has testified that I was briefed on all of these matters while I was in the hospital. I do not recall, however, the precise date on which I was told of the delivery of TOW missiles by Israel to Iran, nor the precise date on which I authorized the replenishment of the TOWs by the United States to Israel. I do not recall any discussion of price whatsoever. (Pres. Int. Ans. 23; see also February 16, 1990 Reagan Dep. 16-19; February 17, 1990 Reagan Dep. 226-228.)

The November 1985 Hawk Shipment

At the time of the shipment of HAWKs by Israel to Iran, I was in Geneva meeting Secretary General Gorbachev and discussing with him United States-Soviet relations.

I was told at that time that there was a possibility that the hostages might be released, but I do not recall that the shipment of HAWK missiles was involved. I have no recollection today whether I authorized or approved the shipment of HAWKs by Israel to Iran in November 1985, nor do I recall undertaking at that time a commitment to replenish those HAWKs from United States inventory. While I initially told the Tower Board that I disapproved the transfer, I later advised the Board that I simply had no recollection on this issue. I am aware that Don Regan has stated that in November 1985 in Geneva we were told to expect a shipment of HAWKs by Israel to Iran and that I approved such a transfer

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but made no commitment on replenishment. I am also aware that Robert McFarlane has stated that he advised me of the shipment but said that the shipment was comprised of oil drilling equipment. I have no current recollection whatsoever of approving or disapproving this shipment or replenishment. I do not recall any discussion of prices at all, but I recall that any weapons involved in the initiative generally were to be paid for by the recipient country. (Pres. Int. Ans. 24; see also February 16, 1990 Reagan Dep. 10, 35-37, 41; February 17, 1990 Reagan Dep. 229.)

* * *

I do not recall signing a Finding relating to Iranian arms transactions in November or December 1985. I am aware that an unsigned version of such a Finding exists (see Tab 27A), although I am told that a signed version has not been found. I have been advised that the CIA was told contemporaneously that on December 5, 1985, I signed a Finding relating to this initiative. While I do not deny having signed such a Finding, I have no current recollection of doing so.

In November and December 1985, I was briefed on an initiative involving Israel's attempts to secure the return of our hostages and an initiative to facilitate a dialogue between our Government and moderate leaders in Iran. I approved of such a initiative and directed my National Security Adviser Robert McFarlane to take part in such a dialogue. My review of the unsigned Finding at Tab 27A leads me to believe that I would have understood it to relate to such an initiative. (Pres. Int. Ans. 27; see also February 17, 1990 Reagan Dep. 231-232.)

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The Diversion

The first time I learned that the proceeds of any Iranian arms transactions might have been paid to any account used to provide weapons and military aid to the Nicaraguan Freedom Fighters -- what has been termed the "diversion" -- was on November 24, 1986, when Attorney General Edwin Meese reported to me that a memorandum had been found referring to such a use. I immediately instructed that the NSC, the leadership in Congress and the general public be told of this development.

I never authorized nor approved the "diversion", nor was I ever asked to authorize or approve it. I can recall no conversation or discussion whatsoever of any such idea prior to my conversation with the Attorney General. As noted above, I was unaware that any profits or "residual funds" were to be generated by such sales.

It was only as the investigation by the Tower Board got underway that I learned of the operational roles of North, Secord or Hakim. I do not recall authorizing or approving, nor do I believe I was ever asked to authorize or to approve, operational details, such as what accounts were to receive payments.

It was only in my discussions with Attorney General Meese on November 24, 1986, and after that I learned any details of any bank accounts into which the proceeds of arms shipments were paid, or the retention of these proceeds by anyone other than the United States Government. I do not recall any discussion prior to that time concerning the proceeds of such sales, nor do I recall being asked for authority by anyone to use, control or retain these funds. (Pres. Int. Ans. 36-38; see also February 16, 1990 Reagan Dep. 29, 155, 157; February 17, 1990 Reagan Dep. 236-237, 243-244, 276-282, 289-290.)

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NSC Staff Assistance to the Contras

See pages 76-82, 87-88 above.

Subsequent Disclosures Concerning the President's Diaries

As noted above, both our Office and the Select Committees were provided through White House Counsel with access to typed excerpts from President Reagan's diary. Our only "windows" into the completeness of that production have been provided by the former President's publication of certain diary excerpts in his 1990 book An American Life, and by Judge Greene's January 30, 1990 preliminary ruling that certain Presidential diary entries, which counsel for former President Reagan had provided to the court for in camera review in connection with defendant's subpoena in the Poindexter case, were material to Poindexter's defense. See United States v. Poindexter, 732 F. Supp. 134 (D.D.C. 1990); see also United States v. Poindexter, No. 88-0080-01 (HHG), slip. op. (D.D.C. March 21, 1990) (subsequent order upholding formal claims of privilege as to those diary entries and granting motions to quash subpoena on ground that production of the diaries was not essential to achievement of justice).

An American Life refers to a number of diary entries that we saw in 1987. It also contains a handful of quotations from the diary for 1985-1986 that are not reflected as broadly in the not-quite-verbatim notes of this

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Office's review of the diary excerpts for the same period.

The differences are shown below:

Rendition in OIC Notes	Rendition in An American Life
July 3, 1985. Frustrating NSPG meeting re the 7 kidnap victims and the matter of Lebanon generally.	At pages 497-98, Reagan publishes the following additional material for this diary entry: "Some feel we must retaliate. I feel to do so would definitely risk the lives of the 7. We are going to proceed to enlist other nations in closing down the Beirut airport . . . we know the identity of the two hijackers who murdered Robbie Stethem. The problem is how do we get them for trial in U.S. All in all, it's frustrating even though we are overjoyed at our success in getting the hostages back."
December 7, 1985. Meeting with Regan, Weinberger, McFarlane, Poindexter, Shultz and Mahann [sic: McMahon] of CIA - complex plan which would return our 5 hostages and help some officials in Iran who want better relationship with us - Israel would sell weapons to Iran, hostages released as soon as delivered in installments by air - weapons to go to moderate leaders in army who are essential if to be changed to more stable govt - we then sell Israel replacements - none of this is a gift.	At page 510, Reagan renders this diary entry as follows: "Saturday, Dec. 7, Pearl Harbor Day: I . . had a meeting with Don R, Cap W, Bud M, John P, George S and McMahon of CIA. This has to do with the complex plan which could return our five hostages and help some officials in Iran who want to turn that country from its present course and onto a better relationship with us. It calls for Israel selling some weapons to Iran. As they are delivered in installments by air, our hostages will be released. The weapons will go to the moderate leaders in the army who are essential if there is to be a change to a more stable government. We then sell Israel weapons replacements for the delivered weapons. None of this is a gift. The Iranians pay cash

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	for the weapons - so does Israel. George Shultz, Cap and Don are opposed. Congress has imposed a law on us that we can't sell Iran weapons or sell any other country weapons for resale to Iran. George also thinks this violates our policy of not paying off terrorists. I claim the weapons are for those who want to change the government of Iran and no ransom is being paid for the hostages. No direct sale would be made by us to Iran but we would be replacing the weapons sold by Israel. We're at a stalemate. Bud is flying to London where the Israelis and Iranian agents are. Britain has no embargo on selling to Iran . . . . The plan is set for Wednesday."
December 9, 1985. Bud back from London but not in office yet - his meeting with Iranians did not achieve its purpose to persuade them to free our hostages first their top man said he believed if he took that proposal to the terrorists they would kill our people.	Same, except that after the word "first", Reagan interpolates "and then we'd supply the weapons". See page 510 of book.
May 28, 1986. McFarlane Mission to Tehran.	It is possibly on this day that according to page 521 of his book, Reagan wrote in his diary that the McFarlane mission was "a heart breaking disappointment for all of us."
July 26-27, 1986. Release of Father Jenco.	At page 522, Reagan publishes the following as the diary entry for July 26: "[Jenco's] in West Germany on his way home. The Hizballah sent a video tape out with him on which one of the remaining hostages - [David] Jacobsen

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	dressed me and our govt. down for not lifting a finger to try and get their freedom. This release of Jenco is a delayed step in a plan we've been working on for months. It gives us hope the rest of the plan will take place. We'd about given up on this."
November 7, 1986. Discussion of how [to] handle press who are off on wild story originating in Beirut - I've proposed message be we can't & won't answer Q's because would endanger those we are trying to help.	At page 527, Reagan publishes this entry in the following form: "Usual meetings. Discussion of how to handle press who are off on a wild story built on unfounded story originated in Beirut that we bought hostage Jacobsen's freedom with weapons to Iran. We've tried 'no comment.' I've proposed and our message will be: 'We can't and won't answer any questions on this subject because to do so will endanger the lives of those we are trying to help.'
November 10, 1986. I ordered statement we were NOT dealing in ransom etc. but we would not respond to charges or Qs.	At page 528, Reagan publishes this entry as follows: ". . . . At 11:30 a meeting in Oval Office - Don R., George Shultz, George Bush, Cap W., Bill Casey, Ed Meese, John P. and two of his staff. Subject the press storm charging that we are negotiating with terrorist kidnappers for the release of hostages using sale of arms as ransom. Also that we are violating our own law about arms sales to Iran. They quote as gospel every unnamed source plus such authorities as a Danish sailor who claims to have served on a ship carrying arms from Israel to Iran etc. . . . etc. . . . etc. I ordered a statement to effect we were not dealing in ransom, etc., but that we would not respond to charges or questions that

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	could endanger hostage lives or lives of people we are using to make contact with the terrorists". [Emphasis in original.]
November 12, 1986. A meeting with Shultz - he'll be a team player but he was never happy about our Iran policy.	At page 528, Reagan says that his diary for this date states "This whole irresponsible press bilge about hostages and Iran has gotten totally out of hand. The media looks like it's trying to create another Watergate. I laid down the law in the morning meetings. I want to go public personally and tell the people the truth. We're trying to arrange it for tomorrow."
November 24, 1986. Big thing of day was 2 hr. meeting in Situation Room on Iran affair - after meeting Meese & Regan told me of smoking gun - Israelis put difference in secret bank account - then our Col. North (NSC) gave the money to the contras - this was a violation of the law against us giving the contras money without an authorization by Congress - North didn't tell me about this - worst of all Poindexter found out about it & didn't tell me - this may call for resignations.	At page 530 Reagan interpolates "On one of the arms shipments the Iranians had paid Israel a higher purchase price than we were getting" after the word "gun". Also at page 530, Reagan publishes a diary entry, apparently relating to the "2 hr meeting" in the Situation Room, which says "George Shultz is still stubborn that we shouldn't have sold the arms to Iran. I gave him an argument. All in all, we got everything out on the table."

Similarly, if one compares the diary entries that are described in Judge Greene's January 30, 1990 opinion with the OIC notes, one can identify several items that were produced to Judge Greene and found to be relevant, but which apparently were not produced to us:

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- "A diary entry furnished to the Court by the former President [which] reports on a 'successful' trip Poindexter took in December 1985 to Central America", see 732 F. Supp. at 138-139, and which "includes a somewhat ambiguous comment arguably indicating that the former President knew of defendant's activities on behalf of the Contras" (id. at 139 n.9).

- An entry which "addresses briefly the issue of the proceeds from [the Iran arms] sales" (no date indicated by Judge Greene), see 732 F. Supp. at 139;[65/]

- An entry dated December 2, 1986 that relates in some manner to "the former President's knowledge of the arms sales to Iran", see id.;

- [D]iary entries [which] address United States military-type assistance to a Central American nation arguably in support of the military activities of the Contras or in opposition to their opponents" (no dates indicated by Judge Greene), see 732 F. Supp. at 140.[66/]

[65/] The true materiality of this entry is rather doubtful in light of Judge Greene's subsequent finding that "Where President Reagan testified to a lack of memory about some aspects of the arms sales to Iran and the diversion of the proceeds to the Contras, the diary entries themselves offer no new insights about these events" [footnote omitted]. United States v. Poindexter, No. 88-0080-01 (HHG), slip. op. at 11 (D.D.C. March 21, 1990).

[66/] This could possibly be a reference to diary entries for September 11, 1984 or March 24, 1986, which are captured in the OIC notes.

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A. The Tower Commission

In Counts Three and Four of its April 24, 1989 Indictment of Joseph Fernandez, this Office concluded that an interviewee's false statements to the Tower Commission were punishable under both 18 U.S.C. § 1505 (penalizing obstruction of the due and proper administration of the law under which a pending proceeding is being had by a department or agency of the United States) and 18 U.S.C. § 1001 (penalizing material false statements to a department or agency of the United States in a matter within its jurisdiction). The discussion that follows will assume that the same legal theories would apply to the President himself.[67/]

[67/] Although useful for purposes of this memorandum, this assumption is not as free from doubt as one might wish it to be. The President set up the Tower Commission as a unilateral act pursuant to Executive Order, and the Commission's "jurisdiction", as well as the definition of the "due and proper administration of the law" under which it operated, were wholly a creature of the President. Thus, if the President himself (as opposed to a subordinate official like Fernandez) were indicted for making unsworn false statements to the Commission, or obstructing its investigation, I suspect that he would have available a non-frivolous (although distasteful) defense that he had rolled back the jurisdiction of the Commission to the extent of any subjects on which he gave the Commission less than full information, and that Sections 1001 and 1505 therefore would not apply to his statements on those subjects. Such a defense would probably have less force in a perjury prosecution if the President made false statements under oath, but the Tower Commission did not administer an oath to the President.

Of President Reagan's statements to the Tower Commission on the four key subjects mentioned above, only the President's claimed lack of knowledge of the diversion remains totally unimpeached. His statements in two areas -- knowledge and authorization of the 1985 TOW shipment and the November 1985 Hawk shipment -- are internally contradictory. The remaining significant assertion -- Mr. Reagan's supposed ignorance of any NSC staff actions in support of the Contras -- has not stood the test of time at all well. Nonetheless, for the reasons set forth below, I do not believe that any of these statements amounted to criminal conduct.

1. Statements Regarding The August/September 1985 TOW Shipment (see pages 168-170 above). The fundamental barrier to concluding that any of the President's various statements to the Tower Commission on this subject was criminally false is that no one can document just what the President remembered about this shipment in January-February 1987. While one could attempt to make a case in this area by placing all of the President's statements on the table and asserting that because they are self-contradictory, one or more of them must be false, such a tactic would be legally insufficient with respect to the issue of intent -- i.e., it could not withstand a defense contention that the President, under the influence of his various advisors, truly believed each statement to be true at the time that it was made. In

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addition, the effect of any prosecution on this matter would almost inevitably be to punish Mr. Reagan's earlier statements in light of his most recent and most forthcoming description of his knowledge in his Answers to his Office's Interrogatories -- a prospect that would send a rather unfortunate message about the wisdom of Presidential cooperation with Independent Counsel investigations. Chairman Tower's speculations notwithstanding (see footnote page 170 n.62 above), I do not believe that this area merits prosecutorial attention.

2. Statements Regarding the November 1985 Hawk Shipment (see page 170 above). Similar considerations argue against prosecution in this area. Again, the President's later statement to Tower and his Interrogatory Answer 24 sound a good deal more plausible than his January 26, 1987 story that he objected to the Hawk shipment when he learned about it after the fact, and that as a result of his objection, the shipment was returned to Israel -- even though the later statements simply amount to a claimed lack of recollection, coupled with an apparent willingness to accept the word of others as to what happened. As concluded in Section III above with respect to the November 1986 events, the lack of concrete evidence of the President's state of mind at the time he made his various statements about the Hawk shipment, particularly in light of the success (through

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July 1987) of Poindexter's effort to change history on this subject by destroying the 1985 Iran Finding, preclude a conclusion that any of the President's statements in this category was made with criminal intent.

3. Statements Regarding NSC Staff Assistance to the Contras (see page 171 above). The Tower Commission's flat conclusion that Mr. Reagan knew nothing of the NSC staff's Contra-support activities, and the individual statements by the President that support that conclusion, verge on the bizarre. These assertions are arguably inconsistent with the President's prior public statements (see page 88 above), and certainly with his later admissions that "with regard to whether private individuals were giving money to the Contras, yes, I was aware that there were people doing that . . . . just as people have done that for causes in other countries" (Presidential Pub. Papers, Vol. I at 451-52 (May 3, 1987)), that McFarlane had kept him briefed on Contra aid (Presidential Pub. Papers, Vol. I at 512-516 (May 15, 1987)), and that "I was very definitely involved in the decisions about support to the freedom fighters. It was my idea to begin with" (id.). They also do not square with either the President's Answers to this Office's Interrogatories or his deposition testimony in Poindexter (see pages 76-82, 87-88 above).

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For purposes of criminal analysis, I believe that the Tower account is most appropriately viewed as an exaggerated version, hastily arrived at, of the facts as we know them -- namely, that President Reagan did not know the fundamental nature of the NSC's fundraising and Contra-resupply activities, as concluded in Part II above. The provable facts about the President's Contra-side knowledge -- that Mr. Reagan was aware of North's role as the NSC's "action officer" for Nicaragua and knew that through a combination of donations and logistical assistance from figures such as Secord, the Contras were "getting by" during the Boland period, but cannot be shown to have understood the extent of the NSC's control over funding and resupply -- probably would not have materially advanced the Tower Commission's inquiry. I would, accordingly, decline to prosecute the former President for this group of statements.

B. The Iran/Contra Select Committees

Apart from the SSCI/HPSCI inquiry into White House document production -- which Congress resolved to its own satisfaction in 1989, as described at pages 180-182 above -- we have no indication that the President obstructed the Congressional Select Committee investigations. There is no possibility of an 18 U.S.C. § 1001 or 18 U.S.C. § 1621 violation in this area because Mr. Reagan made no statements to the Congressional Select Committees.

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C. The Office of Independent Counsel

I am not aware of any substantial evidence to suggest that President Reagan intentionally made any material false statement, or committed any perjury, in his Answers to this Office's Interrogatories, or in his deposition in the Poindexter case.

The apparent discrepancies that have come to light concerning the 1987 production of Presidential diary entries were set out at considerable length at pages 186-191 above because any deliberate effort by Mr. Reagan, or those acting for him, to obstruct this Office's investigation by concealing material diary entries would (to put it mildly) be a serious matter for the Office, and because it therefore seemed appropriate to be very explicit about them in this memorandum. That said, I do not view any of the additional verbiage published in An American Life, or any of the additional entries alluded to in Judge Greene's January 30, 1990 Opinion, as disclosing new or otherwise-material information, let alone material information that was withheld from our Office in a deliberate manner. I am not aware of any other irregularities in the White House's and NSC's production of documents to this Office that amount to more than the usual bumps and grinds inherent in complicated, large-scale document productions.

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In conclusion, I see no basis for a criminal prosecution of President Reagan in connection with his responses to any of the post-November 1986 investigations into Iran/Contra.