

1 (In open court)

2 THE COURT: Members of the jury, these are four
3 exhibits -- Exhibits 16A, 16B, 16C and 16D -- four
4 different sets of notes, apparently prepared by the
5 defendant, George Crile.

6 One of them, 16A, was prepared after the
7 broadcast. The other three were prepared prior to the
8 broadcast.

9 These documents are offered by the plaintiff and
10 are received in evidence only with respect to the issue
11 over here in this quadrant (indicating) that has to do with
12 the defendants' state of mind. They are to be considered
13 by you only with respect to the issue of whether the
14 defendants produced their broadcast knowing it to be false
15 or recklessly with respect to whether it was true or false.
16 They are not to be considered on the issue of whether the
17 broadcast was true or false but only on the issue of the
18 defendants' state of mind.

19 You may proceed, Mr. Burt.

20 MR. BURT: Thank you very much, your Honor.

21 BY MR. BURT:

22 Q. Mr. Carver, did there come a time in 1982 when
23 you met a man named George Crile?

24 A. Yes.

25 Q. Do you recall when that meeting occurred?

1 A. It occurred on Tuesday, the 12th of January,
2 1982.

3 Q. Do you know, as you sit here now, when the
4 broadcast, The Uncounted Enemy, was aired by CBS?

5 A. Eleven days later, on Saturday, the 23rd.

6 Q. How did you come to meet Mr. Carver?

7 A. I think you mean Mr. Crile.

8 Q. Sorry. Mr. Crile. It is the C's that get me.

9 A. They will get you every time, yes.

10 Q. Please, how did you come to meet him?

11 A. He called me either the morning -- I believe on
12 the morning of the 12th and asked if he could come by my
13 office and see me.

14 Q. Did you meet with him in your office?

15 A. I did.

16 Q. Can you tell me what the subject matter was?
17 First of all, did you have any conversation with him when
18 you met him?

19 A. Excuse me?

20 Q. Did you have any conversation with him when you
21 met him?

22 A. Yes, we talked for about forty-odd minutes.

23 Q. Forty-odd minutes. Can you tell me what the
24 subject matter of the conversation was?

25 A. Generally, it related to the upcoming broadcast

1 and some of the particular subjects discussed -- that were
2 apparently going to be discussed therein.

3 Q. Can you tell me whether you had any discussions
4 concerning Mr. Samuel Adams?

5 A. During this conversation with Mr. Crile?

6 Q. Yes.

7 A. Yes.

8 Q. Can you tell me whether Mr. Crile asked you any
9 questions about Mr. Adams? Just whether he asked you.

10 A. Yes.

11 Q. Can you tell me what he asked you about Mr.
12 Adams, if you can recall?

13 A. He asked me for general comments on Mr. Adams'
14 abilities, approach to his work, personality, description
15 of the man.

16 Q. Did you answer his questions?

17 A. I did.

18 Q. Will you tell me what you told Mr. Crile in
19 answer to those questions?

20 A. I cannot recall my exact words, but the
21 substance, as closely as I can recall, includes the
22 following: I said that Mr. Adams had a great deal of
23 enthusiasm and energy, that he had done good work for my
24 staff, and that I had gotten him his last promotion in the
25 agency, which I thought he deserved; that Mr. Adams,

1 however, his enthusiasm was not always tempered with
2 judgment. I said at one point that Mr. Adams was often in
3 error but seldom in doubt. And I said at another point
4 that Mr. Adams tended to regard all those who disagreed
5 with him as either fools or knaves, and if they were too
6 intelligent or informed to be be fools, they must obviously,
7 according to Mr. Adams, be knaves.

8 Q. Can you tell me, sir, what you mean by a knave?

9 A. By a knave, I mean someone who is operating out
10 of some sort of ulterior or malign motive rather than a
11 disinterested quest for truth.

12 Q. Thank you very much.

13 Mr. Carver, I would like to read you a portion
14 of notes Mr. Crile prepared of the meeting with you. First,
15 let me ask some more questions about that meeting.

16 Do you know whether Mr. Crile took notes at the
17 meeting with you?

18 A. He had a shorthand-type notebook in which he
19 seemed to be scribbling, so I assume he did.

20 Q. Did he take notes through the entire meeting?

21 A. Off and on, as I recall. I really wasn't
22 concentrating.

23 Q. Let me now read you some passages from those
24 notes: "Carver said" --

25 THE COURT: Just a second. Exhibit? Page?

1 MR. BURT: I am sorry, your Honor. Exhibit 16A
2 first. After that I will question from Exhibit 16D.

3 THE COURT: I think that the comments that you
4 just made do not describe 16A correctly.

5 MR. BURT: Let me read first from 16D and we
6 will go on to 16A.

7 THE COURT: We are on 16B?

8 MR. BURT: 16D, as in David, your Honor.

9 THE COURT: D? Where are you reading from?

10 MR. BURT: I will be reading from the third full
11 paragraph and the first line on the fifth full paragraph.

12 THE COURT: What page are you referring to?

13 MR. BURT: Page 1, your Honor.

14 THE COURT: All right.

15 MR. BURT: The penultimate paragraph on page 2,
16 the first two lines.

17 THE COURT: As you read them, point out where
18 they are.

19 MR. BURT: All right.

20 Q. Mr. Carver, I am reading to you now from the
21 first two lines of the third paragraph on Exhibit 16D, and
22 this is headlined "An Interview with George Carver, January
23 11, 1982, at Georgetown Center for Strategic Studies."

24 THE COURT: I am sorry. Maybe the exhibits you
25 have given me are not correctly labeled. 16D that you gave

me is handwritten notes and it doesn't have any caption like that.

MR. BURT: That is my fault, your Honor. I couldn't see. The typescript is my problem. It is 16B.

THE COURT: 16B, all right.

Q. Mr. Carver, the first few lines of 16B, as in boy, go: "Re. Gaines Hawkins.. he had as much respect for Hawkins as he had for anyone he knew in intelligence in 25 years."

Did you say that in words or substance --

A. No.

Q. Please let me finish. Did you say that in words or substance to Mr. Crile?

A. No. I said I had respect for Colonel Hawkins. The rest is Mr. Crile's invention.

Q. The second line that I would like to read to you is the third line down of the same paragraph. "Westmoreland was under pressure to demonstrate progress..."

Did you say that in words or substance to Mr. Crile?

A. No. I said General Westmoreland may have felt he was under such pressure, but I never said that he was.

Q. Let me read the last three lines in that paragraph. "Danny Graham put together crossover thesis in spring '67 to show by extrapolation that enemy was

1 scheduled to run out of men in not too distant future."

2 Did you say that to Mr. Crile in words or
3 substance, sir?

4 A. No, not in those words, no.

5 Q. What did you say, sir?

6 A. I mentioned General Graham and the crossover
7 analysis -- which occurred in the fall of '67 -- not the
8 spring. And I described the crossover approach as
9 suggesting that the enemy was having a net drain in
10 manpower. I also mentioned that there were a lot of people
11 in the intelligence community who did not accept the
12 crossover analysis and it was quite controversial.

13 Q. I will read to you now from the first line of
14 the fifth full paragraph down, page 1 of 16B, which says:

15 "There was a good deal of fiddling going on."

16 Did you say that in words or substance to Mr.
17 Crile?

18 A. Again, no, not in those words.

19 THE COURT: I don't think you are answering the
20 question. The question is: Did you say that in words or
21 substance? Then you answer "I didn't say it in those words."
22 It is not possible to tell by your answer whether you
23 didn't say anything of that substance or whether you simply
24 didn't use those words.

25 THE WITNESS: Your Honor --

1 MR. BURT: May we give the witness these notes?

2 THE COURT: Yes, please.

3 MR. BURT: Thank you very much.

4 THE COURT: I think that would be helpful.

5 (Papers handed to the witness)

6 THE COURT: The question is whether you said --

7 THE WITNESS: Where was this, your Honor?

8 Q. 16B, fifth paragraph down, first full line.

9 THE WITNESS: Can I ask a question?

10 THE COURT: Speak up.

11 A. We discussed acrimonious debates between the
12 Washington delegation and the MACV staff, and I said that
13 the protagonists in these debates thought the others with
14 whom they were debating were at times involved in fiddling.
15 In that sense I said people thought there was some fiddling
16 going on. But in the generic, general sense, no.

17 Q. I would like you to look at the second page of
18 16B, which you have in front of you. Look at the last --
19 sorry -- the first two lines on the next-to-the-last
20 paragraph.

21 Did you tell Mr. Crile, in words or substance --
22 I will wait until you have it, sir. Do you see that,
23 next-to-the-last paragraph?

24 A. Yes.

25 Q. First two lines. Did you tell Mr. Crile in

1 words or substance that "I always thought White House and
2 military were guilty of manipulating the statistics...."?

3 A. I said I thought the White House and military
4 were guilty of manipulating statistics, but not the
5 statistics.

6 Q. Did you discuss this question of manipulating
7 statistics with Mr. Crile?

8 A. I did, because I said I thought that the
9 Pentagon and also at times the White House was overly fixed
10 on numbers.

11 Q. Was that in reference to the phrase "manipulating
12 statistics"?

13 A. I said that I thought that they manipulated
14 numbers. I don't recall using the word "manipulate," but I
15 do vividly recall saying that I thought they had a fixation
16 on numbers which they tended to employ and interrelate in
17 ways that suggested a solidity of judgment that was not
18 warranted by the evidence. To that extent, I resented the
19 way that they played with statistics.

20 Q. Will you turn to Exhibit 16A.

21 MR. BOIES: Your Honor, can we approach the
22 bench?

23 THE COURT: Yes.

24 (At the side bar)

25 MR. BOIES: 16A is the document that was written

1 after the broadcast. It does not purport to be notes of
2 the interview but purports to be comments on various things
3 that were said. I think that there is a relevance or can
4 be a relevance and admissibility to things that were said
5 after the broadcast.

6 If, for example, Mr. Crile after the broadcast
7 said Carver told me that infiltration was 5,000 a month in
8 my interview on January 11, then even though Mr. Crile
9 wrote that after the broadcast, it seems to me that that is
10 something that could be used.

11 As I apprehend what Mr. Burt is doing, though,
12 he is going through and reading portions and saying,
13 "Did you tell Mr. Crile that?" If he intends to do that
14 with 16A, then I would object to the relevance.

15 THE COURT: Let's find out. Which passages do
16 you want to read? Is it what you have yellow-lined?

17 MR. BURT: Not all of it, your Honor.
18 Particularly this one, "Carver said that he was under
19 instructions." That purports to quote Mr. Carver.

20 MR. BOIES: No, it doesn't purport to quote Mr.
21 Carver. What it does is purport to interpret what this
22 statement by Carver is (pointing). This purports to be a
23 statement by Carver. It is exactly my problem that the
24 portion that he wants to read that he underscored in yellow
25 that says, "Carver said that he was under instructions from

1 Helms to reach an agreement," does not purport to be a
2 quote from Carver. What follows, and there is a colon
3 immediately following the word "agreement," and then there
4 is a quoted passage that purports to --

5 MR. BURT: What I wish to prove, your Honor, is
6 that there were no other comments by Mr. Carver that would
7 support that statement "Carver said that he was under
8 instructions." I may be faced with saying, well, you know,
9 this is what Crile wrote down, but that isn't everything he
10 was told by Mr. Carver. Once Mr. Carver is off the stand I
11 have no way of confirming or denying that fact.

12 MR. BOIES: I think Mr. Burt can ask Mr. Carver
13 what Mr. Carver told Mr. Crile, at least if it is relevant,
14 to an issue that is here. I think that what Mr. Burt wants
15 to read here (a) is not relevant to what I had at least
16 understood Mr. Burt's case to be, and (b) I would object to
17 his use of this post-broadcast characterization. I think
18 it would be a different question if he just wants to use
19 the quoted portion. I still think that would be a problem
20 of relevance.

21 THE COURT: It seems to me that there are
22 several fairly convincing arguments to be made against your
23 position, Mr. Boies, just as to Mr. Burt being allowed to
24 conduct this examination even if the appropriate finding on
25 the evidence would be consistent with your arguments.

1 First of all, you are arguing for one
2 interpretation out of several possible interpretations of
3 the relationship between the sentence "Carver said that he
4 was under instructions" and the quoted portions down below.
5 You argue, and certainly plausibly, that the sentence in
6 the text is Crile's interpretation of the quoted portion
7 below. It is also possible, however, that it might mean
8 that the sentence at the top is a paraphrase, a paraphrase
9 of things said by Carver, and that the sentence indented or
10 the paragraph that is indented purports to be an exact
11 quote but that they aren't necessarily the same reference;
12 that they might represent two different things, partially
13 overlapping, partially not. There is a colon which tends
14 to support your argument, but it is not necessarily the
15 same.

16 Secondly, and I think more important, if you are
17 right and the sentence in text at the bottom of the
18 paragraph is to be regarded as Crile's interpretation of
19 the textual matter below, it seems to me to be relevant to
20 Crile's credibility as a witness in the case, assuming that
21 he will be a witness in the case, which I understand he is
22 going to be.

23 I think there are two possible correct --
24 correct in the sense of permissible -- lines of approach.
25 I think he, Mr. Burt, can ask Carver whether he said this

1 line or whether he said that, and what if any relationship
2 there is between them.

3 Furthermore, if you are correct that the last
4 line of text is nothing other than Crile's extrapolation
5 from nothing other than the quoted passage just below it, I
6 think, especially given the circumstances in which this was
7 made, apparently, as you say, after the broadcast when all
8 of a sudden there was heat on, that is, after not only the
9 broadcast but after the Westmoreland attacking press
10 conference, it may be relevant to credibility.

11 MR. BOIES: I can see a use of this document or
12 a possible use of this document, depending on what was
13 testified to, during Mr. Crile's cross-examination, your
14 Honor. My problem is with the use of it at this time,
15 because I think that using it at this time, if there is a
16 proper use, has to go to this issue of whether Helms wanted
17 agreement and what Helms told Carver.

18 THE COURT: Yes, but the use that you are
19 talking about can't be done effectively unless it is first
20 established through Carver's testimony that Carver did not
21 say to Crile what is contained in the last sentence of the
22 paragraph. If that is not nailed down now, then the point
23 can't be made later, when Crile is being examined, that
24 Crile was playing fast and loose in extracting the last
25 sentence of the paragraph from the quoted material, because

1 at that point it could be argued that this was something
2 else Carver had said.

3 MR. BOIES: My problem is that I have been
4 precluded from examining this witness about his
5 conversations with Helms.

6 (In open court)

7 THE COURT: Let's take a break. The jury may go
8 into the jury room.

9 (The jury left the courtroom.)

10 (At the side bar)

11 THE COURT: You may proceed.

12 MR. BOIES: I have been precluded from examining
13 this witness about his conversations with Helms at the
14 so-called morning meetings and what Carver told Helms or
15 Helms told Carver. If that is going to be an issue, then
16 there is, I think, both discovery to which I am entitled
17 and there is a scope of other evidence to which I am
18 entitled. The scope of other evidence is something that I
19 am prepared to deal with in the future; that is, I have the
20 other evidence that I can put in, and obviously I wouldn't
21 be doing that now in any event. The issue of discovery
22 with Mr. Carver, though, is an issue that I have got to
23 face right now. If this witness is going to be able to
24 testify, at least implicitly, as to the substance of
25 conversations between him and Mr. Helms, then I think I am

1 entitled to pursue with him those questions that he was
2 instructed not to answer.

3 THE COURT: I think the jury should be
4 instructed that there is no issue what in fact Helms told
5 Carver. The only purpose for which this is being
6 considered is what Carver told Crile and what Crile did
7 with that. I can tell the jury that there is no issue
8 being disputed in this case as to whether conversations in
9 fact occurred between Helms and Carver, and that the
10 evidence will not go into that. The referent here, the
11 relevant issue, has to do only with what Crile did with the
12 words spoken to him by Carver.

13 MR. BOIES: The only problem I have with that,
14 and this may have been one which I have lost before so I
15 won't press the Court very long on it, but if there is no
16 issue as to what Helms told Carver, then I argue that it is
17 irrelevant and prejudicial to put before the jury the issue
18 of what Mr. Crile said Mr. Carver said about that issue.
19 In other words, if the issue of what Helms told Carver is
20 not an issue in this case, then I think it is irrelevant
21 and prejudicial to put before the jury the apparent issue
22 of whether Mr. Crile was accurately reflecting what Mr.
23 Carver said that Helms told Carver.

24 THE COURT: I don't see where the prejudice
25 comes from. Here the first sentence is "Carver said he was

1 under instructions from Helms to reach an agreement." I
2 assume, given the fact that this inquiry comes from Mr.
3 Burt, that Mr. Burt is going to ask him whether he said
4 that to Crile, and he is going to say no.

5 MR. BURT: Correct.

6 MR. BOIES: I assume that as well, your Honor.
7 If it is true that what Helms told Carver is not an issue
8 in this case, then I think that that testimony that Mr.
9 Burt says he plans to elicit is irrelevant and prejudicial,
10 because it doesn't relate to an issue that is in this case.

11 I also think that if he elicits that testimony,
12 then I must be free to prove that in fact Helms told Carver
13 to reach an agreement.

14 THE COURT: I don't think you would ever be
15 permitted to prove that under general rules of evidence.
16 What you could certainly prove is that Carver did tell
17 Helms that. You could certainly contradict Carver's
18 statement that he didn't tell him. You could put on Crile
19 as a witness or anybody else who was present or any other
20 evidence you could muster, to show that Carver did say that.
21 And I will tell the jury, as many times as you want me to,
22 that the issue is not whether Helms did tell anything to
23 Carver or not; the issue is only what conversation occurred
24 between Carver and Crile as it bears on the issue of the
25 defendant's' state of mind. But even if it were shown that

1 Helms had instructed Carver, that wouldn't be evidence that
2 Carver said that to Crile. It doesn't follow that, because
3 in the highest councils of the CIA that certain
4 instructions were given, that Carver in an interview with
5 somebody from CBS told the person from CBS that the Director
6 of Central Intelligence gave him instructions.

7 MR. BOIES: I think there would be an inference,
8 but I think I have said all I can say on the issue. I
9 still don't see how the issue of state of mind about an
10 issue that is not in the case is something that is relevant.

11 THE COURT: I think that is a reasonable
12 argument on your part. I think it is a reasonable argument
13 that the issue of state of mind is generally to be avoided
14 where it relates to a factual issue that is not one of
15 those being disputed in the case. But that leaves out the
16 other branch of the offer of this evidence that I just
17 mentioned a few moments ago, which has to do with this
18 evidence being received on the subject of Crile's
19 credibility.

20 One of the standard instructions on credibility
21 is, if you find that a witness has said something false on
22 a prior occasion, you may take that into account with
23 respect to his credibility in his testimony on the stand.
24 Here the prior occasion is not only a prior occasion, it is
25 a prior occasion that is very closely linked with this

1 business. If Mr. Burt were able to prove, muster evidence
2 in support of the proposition, that Crile falsely took
3 notes of his interview with Carver and did so arguably for
4 the purpose of giving ostensible support to the thesis of
5 his broadcast, particularly in the time frame that is being
6 discussed here -- the interview taking place when the
7 broadcast has essentially been put to bed; Carver being an
8 important potential source of information who had not, I
9 take it, been previously interviewed -- if it can be shown
10 by the plaintiff that Crile fraudulently and lyingly
11 reported that interview to make it look as if Carver
12 supported the thesis of the broadcast, it seems to me that
13 would have a high potential relevance on credibility.

14 What is the approximate date, if it is known, of
15 this 16A?

16 MR. BURT: I can only speculate that it must
17 have been within days of the press conference, but I am
18 speculating, your Honor, which would be January 26 or
19 sometime around the 1st of February.

20 THE COURT: In any event, if after some heat is
21 turned on to Crile by virtue of Westmoreland fighting back
22 and conducting a press conference and saying this is a pack
23 of lies, if Crile then can be found to make a record in
24 which he further makes arguably false statements, what the
25 plaintiff would characterize as false statements to bolster

1 his position, I don't see why that would not be something
2 appropriately received on Crile's credibility, even
3 assuming that you would be right that it ought to be
4 received if it related only to the issue of state of mind,
5 because it relates to the issue of state of mind on a set
6 of facts that are not among those in dispute in the case.

7 MR. BOIES: One of the problems I have with, of
8 course, hypotheticals here is that you build in things like
9 fraudulently and lyingly --

10 THE COURT: That is what the plaintiff is
11 arguing; that is the plaintiff's characterization.

12 MR. BOIES: But all I am saying is that unless
13 there is more support for that characterization than what
14 we have here, I don't think that the kind of argument that
15 the Court is alluding to supports admissibility.
16 Particularly, your Honor, it seems to me, if Mr. Burt were
17 to ask this witness, "What did you tell Mr. Crile? Did you
18 tell him anything else?", and elicited what he told Mr.
19 Crile, he has whatever foundation is necessary without the
20 use of the document.

21 THE COURT: You may be right as to the form of
22 presentation. It may be that at this point in the
23 presentation of evidence perhaps this sentence "Carver said
24 he was under instructions" should not be read to the jury,
25 but perhaps what should be done is that it should be a

1 predicate for use later in impeaching Crile. In other
2 words, the examination might be in form as follows: "Mr.
3 Carver, I direct your attention to the last sentence of the
4 top paragraph on Exhibit 16A, beginning with the words
5 "Carver said" and ending with "agreement:" "Did you say in
6 words or in substance what is in that sentence?" and get
7 his answer and develop the record in that fashion. Then
8 that would be available to be read to the jury as something
9 that Carver denied when it is being used to impeach Crile.

10 MR. BURT: Happy to do that, your Honor. So I
11 just won't read the language to the jury at this point.

12 THE COURT: But you will just identify it
13 precisely by your question.

14 MR. BURT: I will, your Honor.

15 MR. BOIES: And you will ask the same thing
16 about what follows, I take it, whether he told Mr. Crile in
17 word or substance, etc.

18 MR. BURT: Yes, but there, your Honor, since
19 that is a series of statements, we are going to have to get
20 him to explain what if anything he did say.

21 THE COURT: Yes, you may have to ask him "What
22 did you say to Crile, as best you can recall it?" I don't
23 think there would be any prejudice to having him summarize
24 what he said to Crile on the subject. I don't think that
25 it would call forth any requirements for responsive proof.

1 MR. BOIES: I think that as long as we have
2 essentially this witness just saying what he told Mr. Crile,
3 it may be possible to contain the issue. I think that when
4 that is then used with Mr. Crile, we have a different
5 question in terms of how much we can contain it. I do
6 think that the issue of what the fact is and what Mr. Crile
7 believed the fact to be and why, that is, all the other
8 evidence that Mr. Crile had on this, is relevant to the
9 basis that Mr. Crile had for interpreting certain things
10 that Mr. Carver said in a particular way.

11 So I think that that is something that, while we
12 may not need to get into it now, I want to flag for the
13 Court to at least think about.

14 My problem is that we are inching into things
15 that the plaintiff wants to put in, and then when I want to
16 meet those things directly, I know that there is going to
17 be a problem as to the admissibility of what I want to put
18 in. I want to flag it now at the very beginning or as
19 close to the beginning as I can.

20 MR. BURT: I will state for the record very
21 clearly what I want to do with this document. I am looking
22 to have the jury determine Mr. Crile's credibility, and
23 that it would seem to me I can do with any statement Mr.
24 Crile says Mr. Carver made if Mr. Carver says he didn't
25 make it. That goes to the question of whether Crile is

1 accurately and honestly reporting what he was told.

2 THE COURT: It goes to the question whether
3 Crile made a false statement at some previous time.

4 MR. BURT: That is right.

5 THE COURT: You have confused two things, when
6 you say it goes to his credibility. It goes to whether he
7 was accurately and honestly reporting what he was told.
8 That last part of it sounds as if it addresses itself to
9 the issue of truth or falsity in the broadcast, when it is
10 a credibility argument. What you are looking for is a
11 prior false statement of Crile --

12 MR. BURT: Exactly.

13 THE COURT: -- with which to impeach him, if and
14 when he is on the stand.

15 MR. BURT: The hypothetical that springs to mind
16 is supposing that we could find that your Martian came down
17 and told Crile that there were six people who infiltrated,
18 and Crile said he said there were 17 million people who
19 infiltrated, we wouldn't be interested in the issue of
20 whether or not there were 6 or 17 million, but just that
21 Crile didn't report accurately what the Martian told him.

22 THE COURT: All the more significant would be if
23 the event you just hypothesized took place after the
24 broadcast occurred --

25 MR. BURT: Right.

1 THE COURT: -- it would have no bearing on Crile's
2 state of mind in the preparation of the broadcast.

3 MR. BURT: Exactly.

4 THE COURT: But it might be evidence of
5 credibility of Crile that might be used to impeach him.

6 MR. BOIES: I remind the Court that, as the
7 Court reminded me when we were talking about General
8 Graham's belief that lilac bushes can protect you from
9 nuclear bombs, that ordinarily on issues of credibility it
10 is collateral to try to attack that credibility from --

11 THE COURT: That is not what I said.

12 MR. BOIES: Let me finish. -- from evidence
13 other than from the witness.

14 THE COURT: No, that is not what I said. That
15 is not what I said or meant. I said that when the issue of
16 credibility relates to a statement that is collateral, the
17 usual rule is that the impeaching examiner is bound by the
18 witness' answer.

19 MR. BOIES: But that is exactly what I meant,
20 your Honor, in the sense that I respectfully suggest to the
21 Court that when you start dealing with issues that are not
22 issues in this litigation, you are dealing with collateral
23 issues.

24 THE COURT: That is true. Mr. Burt's example
25 dealt not with what Helms told Carver -- if that had been

1 in, I would agree with you -- it dealt with how much
2 infiltration there was, and that might make a difference.

3 Once again, it is not clear whether how much
4 infiltration there actually was is collaterally relevant
5 and maybe I would agree with you.

6 MR. BOIES: Infiltration is a different question,
7 I agree with that, and although I spoke after he talked
8 about infiltration, I was really picking up on what we were
9 talking about here relating to what Helms told Carver.

10 THE COURT: Yes, that is correct. The normal
11 operation of this rule with respect to this very thing we
12 are talking about is that if you seek to impeach on
13 cross-examination, if you seek to impeach Carver as to
14 whether he said any of these things that he denies having
15 said, you are stuck with his answer. You can't then go and
16 prove through external sources of evidence that he lied on
17 that because the issue is a collateral one.

18 That rule is not one that is applied with
19 ironclad regularity. I would certainly apply it if what
20 you sought to do was to prove that Helms did instruct him
21 as proof that he must have told Crile that Helms instructed
22 him. On the other hand, if you sought to elicit the
23 testimony of a third person who was present in the
24 conversation, who says, "I was there and he did say it to
25 me, " or even a second person who was present, that being

1 Crile, I would certainly permit it from Crile, I very
2 likely would permit it from a third person who was present,
3 even though that would technically violate the rule I am
4 talking about.

5 MR. BOIES: One of the things I was suggesting
6 along that line was that there is a sense in which what Mr.
7 Burt is now trying to do is to attack credibility on a
8 collateral issue, that is, what Helms told Carver, through
9 another witness. That is, if he tried to use this with Mr.
10 Crile and Mr. Crile denied it, ordinarily it would be a
11 collateral attack to bring Carver on afterwards and say, "Oh,
12 no, I did tell Crile that, or didn't tell Crile that,"
13 depending on the form of the question. I think it is
14 equally collateral to do that with Mr. Carver preceding
15 Crile's testimony if the purpose of it is impeachment. I
16 think that since this is an issue that is not in the case,
17 the only conceivable relevance is the relevance of
18 impeachment.

19 I agree with the Court that it is not an
20 ironclad rule, but that was the point that I wanted to make.

21 THE COURT: I think we have this all
22 straightened out?

23 MR. BURT: Your Honor, can we have three more
24 minutes?

25 THE COURT: Yes.