

Maybe the notion of conspiracy was simplistic. Carolyn tells Crile that from what she read, she does not believe LBJ did not know. Crile says you're probably right, but it's not important to the essence of the show. (PTX 61, Benjamin's notes of McDaniel interview, p. 38518)

An eighth member of the production team, Mike Wallace, was questioned at his deposition about the accuracy of the term "conspiracy" in the Broadcast. He testified that under the definition of the term used by CBS senior executive producer Burton Benjamin, his conclusion that a conspiracy "was not proved" was fair. Wallace said: "if we are to agree, and I do not, that this [Benjamin's definition of conspiracy] is the acceptable definition of the word, 'conspiracy' I guess I would have to say that [Benjamin's conclusion that it was not proven] is fair." (Wallace Dep. Tr. 352) ⁶⁶ Benjamin got his definition from two widely used dictionaries:

CONSPIRACY: An illegal, treasonable or treacherous plan to harm another person, group or entity . . . A combination of persons banded secretly together and resolved to accomplish an evil or unlawful end.

Webster's Third New International Dictionary

(JX 884, p. 391)

LAW: An agreement by two or more person to commit a crime, fraud, or other wrongful act.

Random House Dictionary of the English Language

(JX 883, p. 313)

Finally, a ninth member of the team, assistant film editor, Phyllis Hurwitz, did not believe the focus of the show was accurate:

I believe that the focus of the show was that General Westmoreland led a conspiracy to suppress information. I do not believe, and did not believe when I was working on the show, that this focus was accurate. I believed that President Johnson must have known what was happening, and that General Westmoreland could not have been withholding information from the President. Sam Adams expressed these same doubts to me during production of the show.

⁶⁶ When asked by his own counsel what he meant by fair, he testified further that: "... I believe that Mr. Benjamin fairly undertook this inquiry, that he is a fair man and that he is mistaken in his understanding of the word 'conspiracy', as far as we'd undertook to understand the word 'conspiracy', and our use of it in the broadcast, but that he was trying to be fair in the way that he came down." (Wallace Dep. Tr. 373-6)

I remember that Ira Klein told me while the show was in production that he did not believe LBJ was ignorant of the information that supposedly was being suppressed. At that time, I remember saying to Mr. Klein something to the effect, "How could LBJ not know?" (Hurwitz Aff. ¶¶ 12, 13)

Thus, *at least* the following CBS personnel expressed doubt as to the truth and accuracy of the Broadcast:

- The first *Executive Producer* of the Broadcast, Howard Stringer;
- The *Senior Producer* and second *Executive Producer* of the Broadcast, Andrew Lack;
- The *Correspondent* of the Broadcast, Mike Wallace;
- The *Producer* of the Broadcast, George Crile;
- The *paid Consultant* of the Broadcast, Sam Adams;
- The *Editor* of the Broadcast, Ira Klein;
- The first *Researcher* for the Broadcast, Alex Alben;
- The *Secretary* to the producer and the second researcher for the Broadcast, Carolyne McDaniel; and
- The *Assistant Film Editor* of the Broadcast, Phyllis Hurwitz.

Finally, defendants' doubts about the major thesis of the Broadcast, namely, that General Westmoreland was an active participant in a conspiracy to deceive the President are confirmed by two facts:

First, CBS's newspaper advertisement for the Broadcast which features the term "CONSPIRACY" in large letters states that there was a "deliberate plot to fool the American public, the Congress, and perhaps even the White House . . ." Other promotional material was similarly qualified. The Broadcast was not: it said that the conspiracy and deception fooled the President.

Second, several CBS executives, including defendants Wallace and Stringer claimed in their depositions that the Broadcast did not charge General Westmoreland with being a member of a conspiracy, but referred only to the relatively junior military officers who appeared on the Broadcast — McArthur, Cooley, Meacham, Hamscher and Hawkins. At his deposition Wallace testified as follows:

Q. Did you believe there was a conspiracy at the highest levels of American military intelligence?

A. Yes.

Q. Who were the individuals about whom you were talking that you believed were members of the conspiracy?

A. Do you want them by name?

Q. Yes.

A. Colonel Gains Hawkins, George Hamscher, James Meacham, Russell Cooley, Richard McArthur." (Wallace Dep. Tr. 72)

When he was deposed, McArthur was asked about Wallace's testimony that he was involved in a conspiracy:

Q. . . . Do you know why Mr. Wallace would include you as a person with those he believed were members of the conspiracy?

A. That is the transcript from the show?

Q. That is the transcript of the deposition, the sworn statement that Mr. Wallace gave under oath, like you are sitting here giving a deposition.

A. I have no idea why he would include me in that.

Q. Do you know of any basis that he would have for making that accusation?

A. No.

* * *

Q. Having now understood exactly what I am talking about, do have you any basis for knowing what the basis would be for him making that accusation?

A. None whatsoever, no.

Q. Assuming Mr. Wallace was familiar with all of the evidence and all of the materials, do you think he could make such a statement in good faith?

A. Absolutely not. (McArthur Dep. Tr. 235-37)

The jury is entitled to find that the testimony of Wallace, Stringer and others that the Broadcast did not charge General Westmoreland with being a conspirator was a false exculpatory statement demonstrating consciousness of guilt.

19. *The Advertising for the Broadcast*

On January 21, 1982, Wallace and Crile appeared on the CBS Morning News. Introducing them, Diane Sawyer stated:

On Saturday night, the CBS News broadcast CBS Reports will show that *the American government in Washington* was deceived

about the enemy in Vietnam. Specifically, in 1966 and 1967, deceived about how vast their numbers were. (JX 903, p. 1) (emphasis added)

On January 22 and 23, 1982, full page advertisements ran in the *New York Times*, the *Chicago Tribune*, the *Washington Post* and the *Los Angeles Times* depicting a group of men in uniform sitting around a table with the word "CONSPIRACY" in large letters superimposed over the group:

CBS Reports reveals the shocking decisions made at the highest level of military intelligence to suppress and alter critical information on the number and placement of enemy troops in Vietnam. A deliberate plot to fool the American public, the Congress, and perhaps even the White House into believing we were winning a war that in fact we were losing. Who lied to us? Why did they do it? What did they hope to gain? How did they succeed so long? And what were the tragic consequences of their deception? Tonight the incredible answer to these questions. At last. (JX 615)

On Saturday, January 23, 1982, at 9:30 p.m., "The Uncounted Enemy: A Vietnam Deception" was aired on CBS affiliates across the country.

The Broadcast charged that General Westmoreland suppressed and concealed from the government, crucial intelligence on the size of the enemy in Vietnam. It purported to explain "why for so long *our government* apparently believed, and wanted all of us to believe, we were winning the war." (JX 1, p. 1) (emphasis added)

It charged General Westmoreland with not informing "the President, not even the Joint Chiefs of Staff, of the evidence collected by his intelligence chief, evidence which indicated a far larger enemy." (JX 1, p. 6)

It charged General Westmoreland with suppressing General McChristian's report and transferring him out of Vietnam rather than "take the bad news to the President." (JX 1, p. 6)

It charged General Westmoreland with originating orders to keep the estimates of the enemy unchanged despite strong evidence to the contrary. (JX 1, pp. 11, 12)

It charged General Westmoreland with pursuing "a new tactic" during the summer of 1967—dropping the self-defense militia from the OB and treating them "as if they didn't exist," (JX 1, p. 12) thereby preventing "a re-evaluation . . . [by] the Administration." (JX 1, p. 16)

It charged General Westmoreland and his aides with blocking reports of dramatically increased infiltration so they "never got past the higher headquarters." (JX 1, p. 17)

It charged General Westmoreland with not "alert[ing] the President of the fact that . . . the enemy had a considerably greater capability than we imagined" (JX 1, p. 20) so that "the President of the United States, the American Army in Vietnam and the American public back home were destined to be caught totally unprepared for the size of the attack that was coming the following month." (JX 1, p. 21)

Finally, it charged General Westmoreland and his aides with engineering a cover-up to hide their prior deceptions. (JX 1, p. 24)

CBS broadcast these falsehoods although some of the people who made the Broadcast knew they were false and others who made it had serious doubts as to their truth.

C. Post-Broadcast

1. *General Westmoreland's Press Conference*

General Westmoreland held a press conference on January 26, 1982, stating that he had been "subjected to a vicious scurrilous and premeditated attack on [his] character and personal integrity" and that he had been accused of "withholding and falsifying important intelligence information." He related that he had sent a correction letter to CBS along with a number of relevant documents and a list of names of knowledgeable people CBS should call, such as Ambassador Bunker, Ambassador Komer, George Carver, William Colby and Walter Kerwin. Joining General Westmoreland on the podium were Ambassador Bunker, General Graham, General Davidson, Colonel Morris, and George Carver.

They explained that the charges made against General Westmoreland were false; that nothing was withheld from the President, the Joint Chiefs of Staff or Congress; that no one had lied; that infiltration did not reach 20,000 until January 1968; that the ratio of wounded in action to killed was 1.5 to 1; and that there was no conspiracy. Carver pointed out that it was he who had proposed to General Westmoreland the compromise that resolved the dispute between the CIA and the military. (JX 600)

That evening, Wallace placed a call from Nicaragua to CBS in New York. Adams took the call in Crile's absence. He left Crile a memorandum

of the conversation which said he told Wallace that they were beginning to think "that maybe LBJ knew more than the documentary implied he did." (JX 913, p. 37280)

Dan Rather reported on General Westmoreland's press conference during the CBS Evening News of January 26, 1982. Rather stated:

The commander of U.S. forces in Vietnam during the height of American involvement there, General William Westmoreland, held a news conference in Washington today to *(refute) **(challenge) charges made against him in a CBS News broadcast

CBS News, in a statement today, said it stands by **(both) the accuracy and fairness of the CBS REPORTS broadcast. **(But) the statement added that because of the issues involved, CBS News—quote—"will give further study to the specific allegations made at the news conference."

*Word in parenthesis in 6:30 East only.

**Words in parentheses added in 7:00 East. (JX 877, p. 57177)

CBS did not conduct an investigation. (Wallace Dep. Tr. 219; Klein Aff. ¶ 75) The days just before and just after the Broadcast saw considerable press coverage of the Broadcast and the press conference. Many of the reporters who saw and then wrote about the Broadcast summarized it as accusing General Westmoreland of participating in a conspiracy to deceive the President.

The reporters who wrote about the Broadcast had little difficulty in ascertaining the thrust of the piece:

a. William F. Buckley said about the Broadcast:

. . . absolutely establishes that General Westmoreland, for political reasons, withheld from the president . . . information about the enemy (JX 783LL)

b. The *Christian Science Monitor* reported that CBS News charged that "Gen. William Westmoreland gave President Lyndon Johnson the inaccurate figures to get him to commit 300,000 additional soldiers to the war effort. (JX 783D)

c. In the *Boston Glode*, Robert Healy wrote that "Washington, Congress and the American people were misled" because General Westmoreland "could not deliver the bad news to a President who would not listen until it was too late." (JX 783S)

d. In the *Dallas Morning News*, a columnist wrote that "Wallace makes a strong case that President Lyndon Johnson also was kept in the dark" (JX 783AA)

e. The *New York Times* commented in a 1982 editorial that "'The Uncounted Enemy: A Vietnam Deception' showed that Lyndon Johnson himself was victimized by mendacious intelligence." (JX 783CC)

f. And finally, CBS itself said, on July 25, 1982:

JEFF GREENFIELD: Ten days ago, CBS News released the findings of an internal investigation into a controversial documentary, and the response suggests that the investigation's conclusions may be more controversial than the original documentary itself.

The investigation concerned a program broadcast last January [sic] 23rd, called "The Uncounted Enemy: A Vietnam Deception." The program, reported by Mike Wallace, charged that a "conspiracy" existed, *a conspiracy on the part of the Vietnam military command to deceive the Johnson Administration about enemy strength.* (PTX 7)

Crile, Adams, McDaniel and Klein viewed the videotape of the January 26, 1982, press conference sometime in February. Klein learned for the first time about the correction letter and, at his request, McDaniel gave it to him along with the accompanying documents. (Klein Aff. ¶ 61; PTX 49, Benjamin's notes of Klein interview, p. 38477)

The next day Adams told Klein, Hurwitz and another CBS producer Kent Garrett, "We have to come clean, we have to make a statement that the premise of the show is inaccurate. LBJ had to know." Adams told Klein that he had been trying to tell this to Crile all along. (Klein Aff. ¶ 64; PTX 49, Benjamin's notes of Klein interview, p. 38477)

Klein went to talk to Andrew Lack the following day. Klein mentioned Carver's statement at the press conference and, in response to a question, informed Lack that he thought Carver had not been interviewed by Crile. Klein also told Lack about Westmoreland's correction letter. When Lack asked Klein why he didn't complain to anyone during the production process, Klein said that he had complained to Crile and Zigman, but he did not know about many things until General Westmoreland's press conference. Klein also said that Crile had told him that Stringer and Colloff were reviewing the transcripts. (Klein Aff. ¶¶ 67-69, 71; PTX 49, Benjamin's notes of Klein interview, p. 38477)

The next day Klein spoke to Lack and Wallace at a meeting in Lack's office at which Judy Reemstma, a CBS producer was also present. Wallace said that he had passed General Westmoreland's correction letter on to Crile without reading it and that his role in the show was "just cosmetic." He added, "I respect your opinion. But don't worry, at 60 Minutes this kind of thing happens all the time." (Klein Aff. ¶¶ 73-4; PTX 49, Benjamin's notes of Klein interview, p. 38477)

2. Other Statements on the Broadcast

In addition to the denunciation of the Broadcast at the Westmoreland press conference by Ambassador Bunker, General Davidson, General Graham, Colonel Morris and George Carver, key people in the events in 1967 and 1968 presented refutations of the Broadcast. Many had already told CBS that the Broadcast was wrong, including Secretary of Defense McNamara and Deputy Secretary of Defense Nitze. Others had been on record for years as disputing the Broadcast's thesis, including CIA Director Colby, Deputy Director Rufus Taylor and CIA employees James Graham, Paul Walsh and George Allen. Still others came forward after the Broadcast.

General Maxwell D. Taylor, whose positions included Chairman of the Joint Chiefs of Staff, Ambassador to Vietnam and Advisor to President Johnson, wrote an article which appeared in the February 5, 1982, *Washington Post* entitled, "The Hatchet Job on Westmoreland." General Taylor's article stated:

But the fact is that I was quite aware at the time of the nature of the issue that has stirred up this rumpus, as were most of the officials in Washington watching over the situation in Vietnam. The matter was relatively trivial—an argument between the intelligence officers of Westmoreland's headquarters and the local CIA over the proper classification of Viet Cong who were apparently part guerrillas and part political activists. No one denied or ignored the existence of some thousands of these hybrids, although there was no assurance as to their exact numbers—an uncertainty applicable to almost all Viet Cong statistics. The question was whether they should be counted as soldiers, a position Westmoreland's headquarters opposed. (JX 818)

John P. Roche, Academic Dean of the Fletcher School of Law and Diplomacy, former national chairman of ADA and special consultant to President Johnson, in his syndicated column on March 7, 1982, described

George Allen "as the guy who always brought the coffee and Danish when I visited the CIA's top Vietnam analyst, George Carver." (JX 821) He answered the question why none of Walt Rostow's interview was used: "In 10 minutes Rostow would have informed Wallace's audience that this whole enterprise was bunk." (JX 821) He called the Adams position the "trivial" one at the time:

The trivial, or Sam Adams' battle, centered on whether or not Viet Cong political Commissars and part-time guerrillas should be counted in their order of battle. Adams, a CIA analyst, wanted to count them; others, correctly in my judgment, discounted them. (JX 821)

Numerous others criticized the Broadcast. Among them:

General Andrew Goodpaster, who succeeded General Creighton Abrams as Deputy COMUS MACV when General Abrams succeeded General Westmoreland as COMUS MACV. (JX 861-63)

General Bruce Palmer, General Westmoreland's deputy for US Army matters in 1967-8. (JX 856)

Captain Ben Blee (US Navy, Ret.), Fleet Intelligence Officer, U.S. Pacific Fleet from 1965-67. (JX 865)

General Willard Pearson, Superintendent of Valley Forge Military Academy, and a 33-year veteran of the US Army who served directly under General Westmoreland for 4 years. (JX 857)

Barry Zorthian, Minister-Counselor for Public Affairs at the American Embassy in Saigon, from February 1964 to July 1968. (JX 867)

3. *The TV Guide Article*

In mid-March 1982, upon returning from a vacation, Klein learned that CBS had not initiated an investigation but that *TV Guide* was doing a story on the show. Klein saw Lack again and told him that Crile had shown Allen footage from some other interviews before he was re-interviewed. Lack was shocked. Lack also said that Adams has denied saying that he doubted the show's premise. Klein responded that Crile must have gotten to Adams. Lack replied, "I guess so." (Klein Aff. ¶ 76)

On or about May 23, 1982, the May 29-June 4, 1982, issue of *TV Guide* reached the news stands. It described the Broadcast as follows:

The program attacked the reputation of Gen. William Westmoreland, the former commander of U.S. military forces in

Vietnam. The evidence amassed by CBS seemed to prove the U.S. military's intelligence operation in Vietnam, led by General Westmoreland, conspired to deceive President Lyndon Johnson, the Congress and the American public. (PTX 1, p. 3)

The authors concluded that:

- * CBS began the project already convinced that a conspiracy had been perpetrated, and turned a deaf ear toward evidence that suggested otherwise.
- * CBS paid \$25,000 to a consultant on the program without adequately investigating his 14-year quest to prove the program's conspiracy theory.
- * CBS violated its own official guidelines by rehearsing its paid consultant before he was interviewed on camera.
- * CBS screened for a sympathetic witness—in order to persuade him to redo his on-camera interview—the statements of other witnesses already on film
- * CBS asked sympathetic witnesses soft questions while grilling unfriendly witnesses with prosecutorial zeal.
- * CBS misrepresented the accounts of events provided by some witnesses, while ignoring altogether other witnesses who might have been able to challenge CBS's assertions.
- * CBS pulled quotes out of context.
- * CBS's own paid consultant now doubts the documentary's premise of a Westmoreland led conspiracy. (PTX 1, p. 4)

TV Guide stated that, by September, the on-camera interviews were complete, but CBS still had not contacted a number of officials "pivotal to the controversy covered by the program," such as Ambassador Ellsworth Bunker, Ambassador Robert Komer, George Carver of the CIA, Colonel Charles Morris and General Phillip Davidson, Jr., "the top military intelligence officer in Vietnam." (PTX 1, p. 12)

TV Guide described General Davidson as "the most important of all these omissions." They quoted him as saying when they interviewed him that, "[i]f the figures on enemy strength were going to be manipulated, I had to do it . . . Westmoreland gave no orders about intelligence matters that didn't go through me." (PTX 1, p. 12) He also told the *TV Guide* reporters that as far as he knew CBS had "made absolutely no effort to get hold of me. They did not telephone me. They did not write me." (PTX 1, p. 12)

4. *Benjamin's Investigation*

On May 24, 1982, CBS News President Van Gordon Sauter asked Burton Benjamin if he would undertake an investigation of the show and Benjamin agreed. (PTX 2, p. 34454) CBS announced that it would make the results of the investigation public when it was completed. Assisted by two CBS researchers, Benjamin undertook the project and wrote a report.

Burton Benjamin interviewed over 30 people including most of the CBS employees who participated in the making of the Broadcast. The interviews brought to the surface many of the deficiencies and fabrications in the Broadcast heretofore known only by the handful of people most intimately involved in the production.

Discussed above is the fact that virtually every person connected with the project entertained doubts about the accuracy of the Broadcast itself, the newspaper advertisement for the Broadcast, or both.

5. *The Benjamin Report*

In his Report dated July 8, 1982, Benjamin stated:

The core of this report is a point-by-point examination of the charges leveled by *TV Guide*. *But it goes beyond that. It includes an examination of the charges made in the January 26, 1982 news conference called in Washington by General William C. Westmoreland, commander, U.S. Military Assistance Command, Vietnam, from 1964 to 1968. General Westmoreland was joined by five of his military and civilian associates from Vietnam.* (PTX 2, p. 34454) (emphasis added)

After spending six weeks reviewing the transcripts of the CBS interviews for the Broadcast, other documents and interviewing over 30 persons, Benjamin completed his report and delivered it to Sauter. His summary read:

Based on our examination, the broadcast had these principal flaws:

- The premise was obviously and historically controversial. There was an imbalance in presenting the two sides of the issue. For every McChristian there was a Davidson; for every Hawkins, a Morris; for every Allen, a Carver.
- A "conspiracy", given the accepted definition of the word, was not proved.
- The double interview of George Allen.

- The screening of interviews for Allen.
- Sam Adams not being properly identified as a *paid* consultant.
- Journalistic oversight which permitted two McChristian-Hawkins meetings to appear to be one meeting.
- Journalistic oversight which permitted General Westmoreland to discuss one meeting which was then cut into a sequence about another meeting.
- Other violations of CBS News Guidelines.
- The coddling of sympathetic witnesses.
- The lack of journalistic enterprise in trying to find General Davidson or in checking out his "illness".
- Imprecisions in handling of the Hamscher introduction and in the "Meet the Press" matter involving Westmoreland's "correction letter." (PTX 2, p. 34511)

6. *The Sauter Press Release*

CBS decided not to release the Report. Instead, on July 15, it released what purported to be an accurate summary of the Report in the form of a press release, namely, the so-called Sauter memorandum. It stated in part:

CBS News stands by the broadcast.

(JX 372, p. 2)

* * *

Because of this documentation, we support the substance of the broadcast.

But we now feel it would have been a better broadcast if:

- it had not used the word conspiracy;
- it had sought out and interviewed more persons who disagreed with the broadcast premise; and
- there had been strict compliance with CBS News Standards.

In the broadcast, the manipulation of enemy-strength figures is called a "conspiracy." The word appeared frequently in planning reports for the broadcast, but was used only once in the broadcast. It also appeared in promotion for the broadcast. Our colleagues involved in the production of this broadcast are convinced that the interviews and events related to this question justify the use of the word conspiracy. The use of the word "conspiracy" in its application to the facts within this broadcast necessarily involved

a subjective judgment. The broadcast presented ample evidence of deception but we now believe that a judgmental conclusion of conspiracy was inappropriate. (JX 372, pp. 3-4)

The press release detailed some of the allegations against the Broadcast. It announced that there were some violations while saying that other accusations were unwarranted, including the charge that Adams "has not, as alleged, backed away from the premise of the broadcast." (JX 372, p. 6) It described as a "judgment call" whether the Rostow interview should have been used and whether General Westmoreland's correction letter "would have served to clarify the General's position." (JX 372, pp. 5-6) The release claimed that CBS believed that General Davidson was ill throughout the preparation of the Broadcast:

An individual who lent support to General Westmoreland's position was not interviewed because it was reported that he was ill. Greater diligence would have shown that he was not ill and might have been available. (JX 372, p. 6)

When deposed, Benjamin testified that his Report should have pointed out that CBS knew before the Broadcast that General Davidson was in good health. (Benjamin Dep. Tr. 54-5)

The Sauter press release did not contain Benjamin's conclusion that, "[a] 'conspiracy', given the accepted definition of the word, was not proved." (PTX 2, p. 34511)

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT

Defendants have moved for summary judgment on the ground that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. Proc. In 1962 the Supreme Court held in *United States v. Diebold*, 369 U.S. 654, 655 (1962):

On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion.

Accordingly, defendants must take into account plaintiff's facts in the light most favorable to him. But, defendants have not even attempted to deal with the requirements of Rule 56(c). Instead, they have presented a disingenuously selective and one-sided view of their materials, much of it inadmissible, more of it unreliable or controverted. Their motion for summary judgment appears to rest on the invalid assumption that if they can find enough people to make enough assertions that support their position, they are entitled to summary judgment, regardless of the fact that most of those people have little or no personal knowledge of the major events, and are contradicted both by plaintiff's affidavits and manifold contemporaneous documents. That is not the law.

The facts plaintiff sets before this Court require the denial of defendants' motion. In section III, plaintiff has presented a detailed statement of the facts that a jury would be entirely justified in accepting. These facts irrefutably establish that the Broadcast is untrue. Section IV describes how defendants assembled the Broadcast and what they learned in the course of it. The facts set forth in this memorandum leave no doubt that a jury could find the defendants aired the Broadcast with actual malice. Argument Section II demonstrates that the evidence of defendants' actual malice is, like the evidence of falsity, overwhelming. These presentations are sufficient to require the denial of defendants' motion for summary judgment under any conceivable burden of proof.

Defendants argue, however, that in answering defendants' motion, plaintiff must establish defendants' actual malice and the Broadcast's falsity by clear and convincing evidence in order to survive defendants' motion for summary judgment. While the higher standard would not affect the result in

this case, defendants misstate the law. The burden on plaintiff to prevail at this stage of the litigation is no different from the burden of nonmoving parties in other kinds of civil actions. Plaintiff need only show that there is a genuine issue as to a material fact. The Court is not to weigh the evidence but only to establish the existence of disputed issues of material fact. The existence of disputed issues of fact is clear.

A. Plaintiff Need Establish Only a Disputed Issue of Material Fact on the Issue of Actual Malice.

1. First Amendment Considerations Do Not Apply in Summary Judgment Motions in Defamation Cases.

The Supreme Court has recently put to rest the debate over how to handle summary judgment motions in defamation cases and has directed that they are to be treated like summary judgment motions in any other case. In *Calder v. Jones*, ___ U.S. ___, 104 S.Ct. 1482 (1984)⁶⁷, the Court was invited to extend First Amendment protection to the issue of jurisdiction and to hold that publishers may not be brought into court in locations distant from their headquarters simply because a defamatory publication was distributed in a distant state. A unanimous Court emphatically rejected this invitation, holding that "jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California." (*Id.* at 813.) The Court explained the reasoning for its decision as follows:

We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry. *Estin v. Estin*, 334 U.S. 541, 545 (1948). Moreover, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times, Inc. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). *To reintroduce these concerns at the jurisdictional stage would be a form of double-counting.*

(*Id.*) (emphasis added)

⁶⁷ *Calder* was announced the same day as *Keeton v. Hustler* 79 L.Ed.2d 790, which held that the regular circulation of *Hustler* magazine in New Hampshire was sufficient to support a libel judgment in an action brought by a non-resident plaintiff.

This is but the latest in the line of cases in which the Court refused to expand the scope of the *Sullivan* qualified privilege.⁶⁸ The *Calder* Court thus explained:

We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979) (no First Amendment privilege bars inquiry into editorial process). See also *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n. 9 (1979) (implying that no special rules apply for summary judgment).

(*Id.*) The Supreme Court was unwilling to extend the protection of the *Sullivan* rule to pre-trial matters. Therefore, CBS's pleas for a special standard of review for its motion for summary judgment must be denied.

Prior to the Court's decision in *Calder*, it had already expressed its doubts about the so-called "rule" adopted by some courts that favored granting summary judgment in defamation cases on the basis of First Amendment considerations. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). The Court of Appeals for this Circuit held in response to *Hutchinson* that, as a legal matter:

[N]either grant nor denial of a motion for summary judgment is to be preferred. Defamation actions are, for procedural purposes, such as discovery, see *Herbert v. Lando*, or for summary judgment, to be treated no differently from other actions; any "chilling effect" caused by the defense of a lawsuit itself is simply to be disregarded, to have no force and effect.

Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir.), cert. denied, 449 U.S. 839 (1980) (citations omitted; emphasis added). Other courts likewise ruled that no special rules apply to summary judgment motions. Thus, numerous courts denied summary

⁶⁸ Since *New York Times v. Sullivan*, the Court has refused to extend the qualified privilege to all issues of public interest, limited its scope to public figures, not permitted it to shield the editorial process from discovery, and further limited the scope of the public figure classification. The Court has, thus, demonstrated its intent to narrowly construe the *Sullivan* qualified privilege and not to extend the substance of the privilege beyond the limits set forth in *Sullivan*. Most recently, for example, the Court denied a stay of a trial court order holding a reporter in contempt and ordering him to jail for his failure to disclose during pre-trial discovery the names of confidential sources. The reporter is a defendant in a public figure case and relied on these sources in the preparation of a defamatory editorial accusing a candidate for office of lying. *Hargraves v. Scrivner*, No. A-1027 (July 2, 1984).

judgment motions when plaintiffs have been able to demonstrate a triable issue of fact. *See, e.g., Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 1277 (1983); *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208, 1212 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 1433 (1983); *Schultz v. Newsweek*, 668 F.2d 911, 917-18 (6th Cir. 1982) (“we agree with the conclusion of the Second Circuit [in *Yiamouyiannis*] that there is no rule which favors either granting or denying motions for summary judgment in defamation cases. . . . We agree with the plaintiff that the issue of malice is a jury question and that malice can be established by inferences as well as by direct proof”); *Lawrence v. Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981); *Rebozo v. Washington Post*, 637 F.2d 375 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981); *Pep v. Newsweek*, 553 F. Supp. 1000 (S.D.N.Y. 1983); *McManus v. Doubleday & Co.*, 513 F. Supp. 1383; *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 94 (S.D.N.Y. 1980) (“the court is mindful of the Second Circuit’s recent pronouncement that it is no longer permissible to take into account the ‘chilling effect’ a libel suit may have on the exercise of first amendment rights . . .”); *Church of Scientology v. Siegelman*, 475 F. Supp. 950, 955 (S.D.N.Y. 1979), *rehearing denied*, 481 F. Supp. 866 (“while the supporting material submitted as to [actual malice] is far from convincing, the plaintiffs have managed to place the defendants’ state of mind into question, and, in view of the Supreme Court’s statement in *Proxmire*, the Court does not believe it appropriate to grant summary judgment at this time”); *DeRoburt v. Gannett*, 83 F.R.D. 574 (D. Haw. 1979); *Hart v. Playboy Enterprises*, 5 Med. L. Rep. 1811 (D. Kan. 1979).⁶⁹

Both the *Yiamouyiannis* and *McManus* courts recognized that the Supreme Court might choose to fashion a rule that favored the granting of summary judgment. But the Court didn’t. In order to avoid “double-

⁶⁹ Similarly, state courts have recognized this neutrality rule for summary judgment motions. *See, e.g., McCusker v. Valley News*, 121 N.H. 258, 428 A.2d 493, 495, *cert. denied*, 454 U.S. 1017 (1981); *Maine Yankee v. Maine Nuclear Referendum Committee*, 9 Med. L. Rep. 1561 (Maine Sup. Ct. 1983); *Braig v. Field Communications*, 456 A.2d 1366, 1377 (Pa. Sup. Ct. 1983); *cert. denied*, 80 L.Ed.2d 816 (1984); *Mehau v. Gannett Pacific Corp.*, 658 P. 2d 312, 321 (Hi. Sup. Ct. 1983); *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y. 2d 422, 437, 438 N.Y.S. 2d 496, 420 N.E. 2d 377 (1981); *Davis v. High Society Magazine, Inc.*, 90 App. Div. 2d 374, 384, 457 N.Y.S. 2d 308 (2d Dept. 1982); *Greenberg v. CBS*, 69 App. Div. 2d 693, 419 N.Y.S. 2d 988 (2d Dept. 1979); *Wise v. Dallas South West Media Corp.*, 596 S.W. 2d 553 (Tex. Civ. App. 1979); *American Benefit Life Insurance Co. v. McIntyre*, 375 So. 2d 239, 249 (Ala. Sup. Ct. 1979) (*Sullivan* “does not require the application of a clear and convincing test on a motion for summary judgment when the plaintiff is a public figure”); *Fulton v. Advertiser Co.*, 388 So. 2d 533 (Alaska 1980) *cert. denied*, 449 U.S. 1131 (1981).

counting," *Calder, supra*, 79 L.Ed.2d at 813, second-guessing, prejudice, and unnecessary interference with plaintiff's right to a trial and a decision by a jury of his peers, the Supreme Court has "directly advised" the lower courts, *Yiamouyiannis*, 619 F.2d at 640, that the quantity of proof be determined by a properly instructed jury, and not ruled upon by the district court on a motion for summary judgment.

2. *This Court Need Not Make an Independent Examination of the Entire Record at this Stage of the Proceeding.*

CBS also contends that this Court must make an independent examination of the whole record at this point to assure the protection of constitutional values. *Calder* emphatically rejected this contention. The Supreme Court refused to add to the burdens of a libel plaintiff at the pretrial stage of the proceeding on the ground that this would "double count" the first amendment. At this stage the Court should not usurp the function of the jury and weigh the evidence. Rather, it should decide whether there is a disputed issue of material fact and, if so, permit the parties to present their evidence, including live testimony, to the jury.

Bose Corp. v. Consumers Union of the United States, Inc., ___ U.S. ___, 52 U.S.L.W. 4513 (April 30, 1984), and the other cases cited by CBS in its footnote 188 are consistent with this premise. *Bose* dealt with the necessity of independent *appellate* review—after a full trial—of the actual malice determination. Once a jury is properly instructed on the standard of proof and renders its verdict, the appellate courts are not prohibited from seeing to it that the jury performed its constitutional function.

3. *Summary Judgment Is Especially Inappropriate Because the Existence of Actual Malice Is Uniquely a Question for the Jury.*

Since there is no "rule" favoring summary judgments, summary disposition should in fact be the exception in defamation cases, used only to dispose of truly non-meritorious cases. Libel and defamation, like other torts that have descended to us through the common law, are uniquely suited to resolution by a jury. The ultimate question of liability is very much based on determinations by the jury as to the credibility of witnesses and the weight to be accorded their testimony.⁷⁰ As the *Bose* Court noted, "[w]hen

⁷⁰ The Advisory Committee on Rules noted in commenting on the 1963 amendment to Rule 56 that "[w]hen an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."

the testimony of a witness is not believed, the trier of fact may simply disregard it". *Bose*, 52 U.S.L.W. at 4520.

The Supreme Court further recognized the inherently factual nature of the actual malice determination in *Hutchinson's* footnote 9:

Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called "rule" [favoring summary judgment on First Amendment grounds]. The proof of "actual malice" calls a defendant's state of mind into question, *New York Times v. Sullivan*, 376 U.S. 254 (1964), and does not readily lend itself to summary disposition. See 10 C. Wright & Miller, *Federal Practice and Procedure* §2730, at 590-92 (1973). Cf. *Herbert v. Lando*, 441 U.S. 153 (1979).

443 U.S. at 120 n.9.

The Court again reaffirmed its concern that issues of good faith should normally go to the jury in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), holding that even close advisors to the President were entitled only to qualified immunity. Citing *Hutchinson's* footnote 9, the Court noted that:

Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motions for summary judgment. And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury.

457 U.S. 800, 816.⁷¹

In *Nader v. de Toledano*, 408 A.2d 31 (D.C. App. 1979), *cert. denied*, 444 U.S. 1078 (1980), the District of Columbia Court of Appeals noted that:

[W]hile courts and commentators have emphasized the vitality of summary judgment in First Amendment libel cases, the Supreme Court has recently sounded a note of caution in this area. The Court recognized that proof of "actual malice" calls a defendant's state of mind into question . . . and does not readily lend itself to summary judgment.

408 A.2d at 43-44.

⁷¹ See also *Poller v. CBS*, 368 U.S. 464 (1962), in which the Court held that "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id.* at 472.

B. Plaintiff Need Establish Only a Disputed Issue of Material Fact on the Issue of Falsity.

Plaintiff has demonstrated the existence of multitudinous disputed facts regarding the issue of the falsity of the Broadcast. The affidavits, deposition testimony and, above all, the uncontrovertible contemporaneous documents (see Argument Section II.B.27 *infra*) refute the charge that General Westmoreland engaged in suppression, alteration or faking of intelligence. Thus, under any standard, the Court would be obliged to deny defendants' motion on the issue of the falsity of the Broadcast.

Plaintiff's standard at this stage of the proceeding is the same as in other summary judgment cases. One reason has just been discussed—the Supreme Court has decided that there will be no double-counting of the First Amendment during the pre-trial stage of defamation actions. A second reason is that at trial plaintiff need prove falsity only by a preponderance of the evidence. CBS's contention that General Westmoreland must at trial prove falsity with the same convincing clarity required of the "actual malice" element was disposed of recently by the Supreme Court in *Bose*. The Court took pains to distinguish the trial court's finding on the falsity of the statements at issue, which it did not disturb, and the finding of actual malice, *Herbert v. Lando*, 441 U.S. 153, 170 (1979), which it held was properly subjected to appellate review and reversal for lack of proof by convincing clarity.

Bose sued Consumers Union ("CU") because of a report published in its magazine that the instruments projected from Bose's speakers tended to "wander about the room." The district court held that under applicable state law, plaintiff had the burden of proving, *by a preponderance of evidence*, that the statements at issue were false and defamatory, and also had the burden of establishing actual damages.

In summary, the Court has ruled that with respect to one statement made in the Article—"individual instruments heard through the *Bose* system . . . tended to wander about the room"—*the plaintiff has sustained its burden of proving by a preponderance of the evidence* that the statement was both false and disparaging. With respect to each of the other statements contained in the Article the Court has ruled that the plaintiff has failed to sustain that burden in some respect.

508 F. Supp 1249, 1269 (D. Mass. 1981) (emphasis added) The district court proceeded to hold for Bose.

The Court of Appeals accepted the findings of the trial court that the statement about the speakers was disparaging and assumed without deciding both that the statement was one of fact, rather than opinion, and that it was false. 692 F.2d 189 (1st Cir. 1982). The Court of Appeals held that its review of the "actual malice" determination was not limited by the clearly erroneous standard of Rule 52(a). Its task was to perform a de novo review by independently examining the record to insure that the district court had properly applied the governing constitutional law and that the plaintiff had indeed satisfied its burden of proof. *Id.*, at 195. Thus, appellate review focused on the evidence of actual malice to determine if the "clear and convincing" standard had been met. The Court of Appeals concluded that "we are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*, at 197. The Court of Appeals did not even review the district court's decision that the statement about the speakers was false.

The Supreme Court affirmed. It defined the issue before it as "whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 52 U.S.L.W. at 4520. Significantly, the Court did not require clear and convincing proof of actual malice and falsehood. Further, the Court noted that the Court of Appeals was "correct in its conclusions . . . that there is a significant difference between *proof of actual malice and mere proof of falsity*. . . ." (*Id.* at 4520 & n.30) (emphasis added).

Finally, the Court concluded that "[w]e may accept all the purely factual findings of the district court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence that [author] or his employer prepared the loudspeaker article with knowledge that it contained a false statement, or with reckless disregard of the truth." (*Id.* at 4521 & n.31) Thus, the Court has left no doubt that at trial clear and convincing proof is required only of the element of actual malice and not with respect to the other elements of plaintiff's case, including falsity. See *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970) (proof of state law elements of defamation undisturbed by required proof of constitutional malice).

II. ACTUAL MALICE

A. Actual malice is the publication of a statement with knowledge that the statement was false or with reckless disregard for whether the statement was false or not.

Defendants published the defamatory statements that are the subject of this lawsuit with actual malice.

A defamatory statement is published with "actual malice" if the publication is made "with knowledge that it was false or in reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). "Reckless disregard" is publication with "serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, ___ U.S. ___, 52 U.S.L.W. 4513 (April 30, 1984).

Although this standard is "subjective," actual malice can be proved by means other than wringing an admission from the defendant. A defendant's self-serving protestations of good faith do not demonstrate lack of culpability. *St. Amant v. Thompson*, *supra* at 732; *Goldwater v. Ginzburg*, 414 F.2d 324, 337, 343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970). Indeed, the Court in *Herbert v. Lando*, 441 U.S. 153, 160, 165 (1979), emphasized that either direct or indirect evidence of a defendant's state of mind may prove actual malice.

Actual malice may be inferred from numerous circumstances. The Supreme Court in *St. Amant v. Thompson* offered four examples of circumstances from which a jury could constitutionally infer actual malice: (1) when the defamatory statement is "fabricated by the defendant," (2) when the defamatory statement is "based wholly on an unverified anonymous telephone call," (3) when the defendant's allegations are "so inherently improbable, that only a reckless man would have put them in circulation," and (4) when there are "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." 390 U.S. at 732. The Court emphasized that these examples were not exclusive. 390 U.S. at 730-31.

For example, actual malice can also be proved by evidence of a contemporaneous expression of uncertainty about the statements made, or by consistent resolution of significant ambiguities or uncertainties "in favor of the most potentially damaging alternative." *Rebozo v. Washington Post*

Co., 637 F.2d 375, 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). Purposeful mischaracterization of persons or events is also proof of actual malice, *Time, Inc. v. Hill*, 385 U.S. 374 (1964); *Time, Inc. v. Ragano*, 427 F.2d 219 (5th Cir. 1970); *Wasserman v. Time, Inc.*, 424 F.2d 920 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970), as is taking statements out of context, omitting qualifying or contradictory evidence, and other selective reporting designed to achieve a predetermined result. *Goldwater v. Ginzburg*, *supra*, at 329-37.

The actual malice determination concentrates on defendants' attitude toward the truth or falsity of the material published. *Carson v. Allied News Co.*, 529 F.2d 206, 209 (7th Cir. 1976); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1116 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979) ("the constitutional definition of malice is more concerned with showing the publisher's subjective reckless disregard for accuracy"); *see also*, *Nevada Broadcasting v. Allen*, 664 P.2d 337 (Nev. 1983); *Lawrence v. Bauer Publishing*, 89 N.J. 451, 467-68, 446 A.2d 469, *cert. denied*, 459 U.S. 999 (1982). In *Pep v. Newsweek*, 553 F. Supp. 1000, 1002-1003 (S.D.N.Y. 1983), Judge Lasker explained that:

The actual malice standard is subjective . . . Facts such as failure to investigate, or reliance on a questionable source are relevant to the determination; they may tend to show a publisher did not care whether an article was truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his source.

The district court in *Herbert v. Lando* noted that identifying reckless disregard of the truth is:

subtle, complex and subjective. The concept of "reckless disregard for truth" inevitably carries the trier of facts into the thought processes of the defendant; the evaluation and balancing he made of conflicting information available; and the misgivings he may have suppressed when deciding to publish.

73 F.R.D. 387, 393 (S.D.N.Y. 1977), *rev'd on other grounds*, 568 F.2d 974 (2d Cir.), *rev'd*, 441 U.S. 153 (1979). The court also noted that inferences as to prepublication state of mind can be drawn from evidence of state of mind after publication. 73 F.R.D. at 396-97. Judge Oakes noted in his concurrence in the Court of Appeals' decision that methods of proving actual malice were not addressed in *Sullivan*. He suggested as the obvious starting points the "logical inferences from the inconsistency . . . between a television program's content and contrary facts which a plaintiff might independently

establish," and "circumstantial evidence from participants or interviewees on the television program." 568 F.2d at 993; 441 U.S. at 161-63, 165 n.15, 168 n.17.

Indirect as well as direct evidence can be used to establish malice. In *Herbert v. Lando, supra*, the Court permitted extensive discovery into the editorial process in order to determine the defendants' state of mind:

In *Butts*, for example, it is evident from the record that the editorial process had been subjected to close examination and that direct as well as indirect evidence was relied on to prove that the defendant magazine had acted with actual malice. The damages verdict was sustained without any suggestion that plaintiff's proof had trespassed upon forbidden areas.

441 U.S. at 160 (footnote omitted).

Goldwater v. Ginzburg explains that circumstantial evidence and logical inferences drawn from the evidence can be accumulated to show actual malice:

Moreover, the court properly instructed the jurors that they should consider all the evidence concerning appellants' acts and conduct in publishing *Fact* in deliberating upon whether the defendants published with actual malice. There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing by accumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.

414 F.2d at 342. Further emphasizing the role that evidence of negligence plays in the actual malice determination, the *Goldwater* court continued:

Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court.

Id. at 343.

Commenting on the usefulness of inferences in the determination of actual malice, the Court of Appeals in *Bose Corp. v. Consumers Union of the United States, Inc., supra*, explained:

The subjective determination of whether CU in fact entertained serious doubts as to the truth of the statement may be proved by

inference, as it would be rare for a defendant to admit such doubts . . . a court typically will infer actual malice from objective facts . . . these facts should provide evidence of negligence, motive, and intent such that an accumulation of the evidence and appropriate inferences supports the existence of actual malice.

692 F.2d at 196. See also, e.g., *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, 337 F. Supp. 421, 429 (D.D.C. 1972); *Maressa v. New Jersey Monthly*, 89 N.J. 176, 199-200, 445 A.2d 376, cert. denied, 459 U.S. 907 (1982).

Whether or not actual malice exists, i.e., whether the publisher of a defamatory statement knows it is false or has serious doubts about its truth, is a question of what the state of mind of the publisher was at the time of publication. Since neither plaintiff, judge, nor jury can read defendants' minds, the courts in "actual malice" defamation cases must rely on various types of evidence from which a jury may infer that a defamatory statement was published with "actual malice."

B. Twenty-seven indicia of actual malice are present in this case.

Plaintiff can identify 27 indicia of actual malice under the law. Every one is present in this case.

1. *Admissions of doubt regarding the truth of the Broadcast.* See, e.g., *Time v. Hill*, 385 U.S. 374 (1967); *Rebozo v. Washington Post Co.*, supra at 382 (5th Cir.), cert. denied, 454 U.S. 964 (1981) (summary judgment denied because material question of fact regarding pre-publication memorandum from reporter to editor "in which the reporter expressed uncertainty about whether the Key Biscayne Bank or Rebozo himself cashed the stock"); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971).

Admissions of doubt are present here, where no fewer than nine persons involved in the production of the Broadcast have said that they did not believe or entertained doubts as to the accuracy of defendants' charge that General Westmoreland deceived his superiors, including the President of the United States and the Joint Chiefs of Staff. They were:

The first *Executive Producer* of the Broadcast, Howard Stringer;

The *Senior Producer* and second *Executive Producer* of the Broadcast, Andrew Lack;

The *correspondent* of the Broadcast, Mike Wallace;

The *producer* of the Broadcast, George Crile;

The *paid consultant* to the Broadcast, Sam Adams;
 The *film editor* of the Broadcast, Ira Klein;
 The first *researcher* for the Broadcast, Alex Alben;
 The *Secretary* to the producer and the second *researcher* for the
 Broadcast, Carolyne McDaniel; and
 The *assistant film editor* of the Broadcast, Phyllis Hurwitz;

The admissions of defendants and CBS employees are discussed in Section IV 14.B.18, above.

2. *Ignoring warnings that the statements are inaccurate.* See, e.g., *Rebozo v. Washington Post Co.*, *supra* at 382; *Goldwater v. Ginzburg*, *supra* (warned of invalid results from a contrived poll regarding Goldwater's psychological fitness to be President); *Alioto v. Cowles Communications, Inc.*, 430 F. Supp. 1363 (N.D. Cal. 1977), *aff'd*, 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); *Church of Scientology v. Dell Publishing Co.*, 362 F. Supp. 767 (N.D. Cal. 1973) (third-party denial coupled with letter from plaintiff's attorney); *Peisner v. Detroit Free Press*, 104 Mich. App. 59, 304 N.W.2d 814 (1981) (retraction demand received after original article but before editorial); *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rep. 29, *cert. denied*, 444 U.S. 984 (1979); *Stevens v. Sun Publishing Co.*, 270 S.C. 65, 240 S.E.2d 812, *cert. denied*, 436 U.S. 945 (1978); *Mahnke v. Northwest Publications, Inc.*, 280 Minn. 328, 160 N.W.2d 1 (Minn. 1968).

Prominent examples in this category are the following people who told defendants in 1981 or early January 1982 that the central charge of the Broadcast was wrong:

- a. Presidential Special Assistant for National Security Affairs Walt W. Rostow—During a three hour interview, Walt Rostow told CBS, "you have really got to take this seriously, because you're going to do great damage to the country and you're going to get it wrong." (JX 14, Rostow CBS interview, Dep. Tr. 68)
- b. Secretary of Defense Robert S. McNamara—In a conversation, McNamara told Crile that "I do not believe it would have been possible for the military command in Vietnam to engage in a conspiracy to suppress or fake intelligence on enemy troop strength and, if such a conspiracy had existed I do not believe it could have been kept secret from myself or the President." (McNamara Aff. ¶ 6)

- c. Deputy Secretary of Defense Paul N. Nitze—During the summer of 1981, Crile described to Nitze that “the documentary was going to charge that there was a conspiracy and other misconduct in which General Westmoreland participated that prevented the President and his aides from obtaining accurate intelligence on the size and capabilities of the enemy in the months before Tet.” Nitze responded: “I told Mr. Crile that I believed that his thesis was incorrect and tried to discourage him from doing the documentary.” (Nitze Aff. ¶ 7)

Although each of these individuals was intimately involved with the events and had no particular reason to favor Westmoreland, defendants ignored their warnings.

In addition to the three individuals listed above, defendants interviewed a wide spectrum of people familiar with the events that were an integral part of the Broadcast. Some of them were:

Presidential Advisor, former Ambassador to Vietnam and Chairman of the President's Foreign Intelligence Advisory Board,
General Maxwell Taylor;

COMUSMACV,
General William Westmoreland;

Special Assistant for Vietnamese Affairs to the Director of Central Intelligence,
George Carver;

MACV Director of Intelligence Production,
Colonel Charles Morris;

Chief of CIIED,
Colonel Daniel Graham;

MACV Public Information Officer,
General Winant Sidle;

Current Intelligence and Indications (CIIED) chief,
Colonel Jean Joyce;

Current Intelligence (CIIED) chief,
Commander Robert Heon;

Current Intelligence (CIIED) chief,
Captain (USN) Robert Leverone;

Current Intelligence (CIIED) chief,
Colonel Robert Storey;

Current Intelligence (CIED) analyst,
Captain (USN) Michael Delpercio;

Current Intelligence (CIED) analyst,
Major Bobby Overcash;

Chief of Order of Battle Studies (CICV),
Lt. Col. Everette Parkins;

Guerrilla analyst (CICV),
Captain Joseph Price.

The testimony of every single one of them—submitted by affidavit or deposition—has conflicted with defendants' version of the facts. Defendants also ignored the overwhelming contemporaneous documentary evidence that refuted their broadcast version of the events. See Subsection 27, *infra* and Section III.B. generally.

Not only did defendants ignore the protestations of interviewees who were not included in the program as broadcast, they also disregarded the warnings of inaccuracy given by those persons whose interviews were ultimately used to advance CBS's charges. For example:

- a. Joe Hovey told Crile that there was no conspiracy to suppress intelligence (JX 3, Hovey CBS interview Tr. 33), that he and others were aware that some analysts were saying that enemy forces were larger than accepted figures (JX 3, Hovey CBS interview Tr. 36) and that the Viet Cong lost at Tet. (JX 3, Hovey CBS interview Tr. 11)
- b. Richard McArthur explained that the key to why the report of the captain in the field had not been reported in the OB as submitted was a question for his predecessor—a McChristian-era analyst. (JX 2, McArthur CBS interview Tr. 13) As McArthur tried to explain to Crile before being cut off, sector advisor reports could be legitimately changed based on other documentation or information. (JX 2, McArthur CBS interview Tr. 26)
- c. James Meacham said in his interview that Tet was a military victory. (JX 8, Meacham CBS interview Tr. 20) Despite efforts by Crile to divert him, he explained how McArthur's guerrilla category was treated as a temporary balancing category for enemy casualties incurred during the Tet offensive. (JX 8, Meacham CBS interview Tr. 22-23, 36) Meacham told CBS that he had no sense of anyone falsifying intelligence. (JX 8, Meacham CBS interview Tr. 38)

- d. Gains Hawkins told Crile several times that Robert Komer knew of MACV's higher numbers and presumably reported them to President Johnson. (JX 9, Hawkins CBS interview Tr. 30, 52, 54) Hawkins also informed Crile that he disagreed with Sam Adams' figures on magnitude of enemy strength. (JX 9, Hawkins CBS interview Tr. 32, 38)
- e. George Hamscher's statements to CBS reinforced Hawkins' warnings: Hamscher told CBS that the SNIE estimates were not the only figures President Johnson would get (JX 5, Hamscher CBS interview Tr. 11) and that the CIA figures would be reported at least through the back door. (JX 5, Hamscher CBS interview Tr. 11, 36) As to the accuracy of those CIA figures, Hamscher felt they were over-extrapolated by about 20%. (JX 5, Hamscher CBS interview Tr. 31)
- f. Russell Cooley told Crile that there was no erasing of the computer memory or storage by Graham (JX 11, Cooley CBS interview Tr. 72, 73, 75, 78) and explained the tone and humor in Meacham's letters home. (JX 11, Cooley CBS interview Tr. 46, 47, 59)
- g. George Allen informed CBS in his interview that Walt Rostow was fully aware of the SNIE (JX 6, Allen first CBS Interview Tr. 46) and that the SD had always been a footnote, in a way. (JX 6, Allen first CBS Interview Tr. 50)

Despite all of these statements controverting almost every aspect of the program, defendants ignored these interviewees in a blatant display of actual malice. It is a small wonder that the detailed denials of wrongdoing by Generals Graham and Westmoreland were ignored in the interest of reaching defendants' goal of producing the documentary as commissioned.

3. *Fabricating events without evidentiary support.* *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 253 (1974); *Carson v. Allied News*, *supra* at 212-13 ("If a writer can sit down in the quiet of his cubicle and create conversations as 'a logical extension of what must have gone on' and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim"), *on remand*, 482 F. Supp. 406 (N.D. Ill. 1979); *Goldwater v. Ginzburg*, *supra*; *Indianapolis Newspapers, Inc. v. Fields*, 254 Ind. 219, 259 N.E.2d 651, 664, *cert. denied*, 400 U.S. 930 (1970).

Defendants fabricated a number of events. Some of them are:

- a. Defendants charged in the Broadcast that, pursuant to the general agreement, MACV officers "alter[ed] MACV's historical record," "tamper[ed] with the computer memory" and engaged in a "cover-up." (JX 1,

p. 24) Defendants cannot point to a single person who had anything to do with the allegedly improper act that lends the slightest support to defendants' serious charges. Indeed, as Section III.B.18 of *supra*, of memorandum discloses, all the people most intimately involved in the event told CBS that nothing improper happened. What actually took place involved a discussion of a completely innocent adjustment to a computer tape to allow for the accounting of new information and events, including the Tet offensive. Defendants now try to describe the incident as an innocuous "reshuffling" of "MACV's enemy strength figures." (CBS Mem. 177) The serious charge portrayed in the Broadcast, however, was a fabrication by defendants.

b. Defendants charged that General Westmoreland transferred General McChristian out of Vietnam as a means of resolving his "dilemma":

WALLACE: Consider Westmoreland's dilemma. If he accepted his intelligence chief's findings, he would have to take the bad news to the President. If he didn't, well, there was only General McChristian to deal with.

* * *

WALLACE: Shortly after Westmoreland suppressed his intelligence chief's report, General Joseph McChristian was transferred out of Vietnam. It was at this point, we believe, that MACV began to suppress, and then to alter, critical intelligence reports on the strength of the enemy. (JX 1, p. 6)

Not one person ever told defendants that there was the faintest connection between General McChristian's report of higher estimates to General Westmoreland in May 1967, and his transfer. General Westmoreland denied any connection. Defendants knew from their interview of McChristian and from Col. Hawkins' March 21, 1967 letter to his wife (JX 213C) that General McChristian knew of—and was delighted with—his transfer two months before General Westmoreland first heard of the higher estimates in mid-May 1967. Despite documentary proof that the story was false, defendants broadcast a fabricated story. (See Section III.B.4)

4. *Making false statements of fact which the publisher knows to be false when he makes them.* See, e.g., *St. Amant v. Thompson*, *supra* at 732 (1968); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Carson v. Allied News*, *supra* at 212-13 (7th Cir. 1976), *on remand*, 482 F. Supp. 406 (N.D. Ill. 1979); *Guam Federation of Teachers v. Ysrael*, 492 F.2d 438 (9th Cir. 1973), *cert. denied*, 419 U.S. 872 (1974); *Time, Inc. v. Ragano*, *supra*; *Goldwater v. Ginzburg*, *supra*; *Schermerhorn v. Rosenberg*,

73 App. Div. 2d 276, 284-85, 288, 426 N.Y.S.2d 274, 282, 284 (1980); *Sprouse v. Clay Communications, Inc.*, 158 W.Va. 427, 211 S.E.2d 674, 686, 688 (W.Va.) *cert. denied*, 423 U.S. 882 (1975); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (S.C. 1968).

Defendants repeatedly published charges that they knew or suspected were false. Three examples of where defendants necessarily knew that they were publishing falsehoods are listed:

a. Defendants stated on the Broadcast that despite Hawkins' belief that we were fighting a larger enemy than contained in published reports, MACV stuck to its old estimates and refused to raise them when it attended the August 1967 session of the SNIE. Defendants had in their possession MACV's Vu-Graph slides which formed the basis for MACV's position at the SNIE session. They showed that MACV's estimates rose from just under 300,000 in their OB Summaries to over 400,000 at the conference session. (JX 248) (*See Plate 6A above*)

b. Defendants charged that MACV's guerrilla estimates were fraudulently reduced after Tet from about 70,000 to about 40,000. They relied on Lt. McArthur's recollection of a 1968 event. However, defendants had contemporaneous documents which showed that after Tet guerrilla totals were reduced as an interim measure—as a "slop factor"—until the casualties could be sorted out and ascribed to the units that actually suffered them. (*See Section III.B.17 above*)

c. Defendants broadcast the ratio that there were three wounded to one killed, relying on what they knew to be a misstatement by General Westmoreland. General Westmoreland pointed out during his interview that the ratio was "specious" and shouldn't be used. (JX 349, Westmoreland CBS Interview Tr. 78) In fact, as many documents that defendants had in their possession uniformly showed, the official ratio was far lower. (*See Section III.B.16*)

During the course of the interview Westmoreland's memory was refreshed enough for him to realize that his initial estimate was too high. This recall is understandable since in his book, *A Soldier Reports*, Westmoreland lists the ratio of KIA to WIA at 1 to 1.5. (JX 328, p. 273) Crile who has admitted to reading the book (Amended Response of Defendants to Plaintiff's Third Set of Interrogatories No. 113) yet proceeded to use a false figure in the documentary's graphic on casualties.

The official ratio of those *put out of action* by wounds (permanently disabled or died of wounds) was necessarily even lower—.35 to 1 (35 put out of action for every 100 killed in action). (JX 273, JX 227) In fact the ratio used for the Tet offensive was even lower because of the nature of the fighting. (See Section III.B.16)

Three more examples of defendants knowing that they were probably publishing falsehoods or were, at the very least, acting with reckless disregard for the truth follow:

a. Defendants alleged that CIA Director Helms instructed George Carver to give in to all of General Westmoreland's demands. Initially, there is no way that defendants can explain their statement that the CIA gave in to all of MACV's demands since the final estimate was almost exactly midway between the proposals of MACV and CIA and since it was Carver who proposed to Westmoreland the resolution that was finally implemented.

It is true that people told defendants that there was a rumor that the CIA gave in to MACV. These rumors were fostered by people like Richard Kovar, who heard it from Adams but who were not personally involved. The rumors were then accepted by people like author Thomas Powers. But Carver told George Crile before the Broadcast that he was not instructed to "cave in" to MACV. (JX 16B, Crile's Notes on Carver, p. 21161; JX 16A, Crile's Notes on Carver, p. 21142) The available documentary evidence proves the result was a compromise—as George Allen told CBS it was before the Broadcast. (JX 6, Allen 5/26/81 CBS Interview Tr. 51)

b. Apparently DIA's John Barrie Williams or CINCPAC's George Hamscher told Adams at one point that six people, including General Godding, Col. Hawkins, Lt. Col. Graham and another officer gathered with them in a room in the Pentagon in late August 1967 to cut estimates of units. As discussed in Section III.B. 8, above, no one now contends that Godding or Hawkins were there. Defendants knew before the Broadcast that Adams said he first saw Graham in September in Saigon. There were other indications that the alleged meeting portrayed by the Broadcast did not take place.

c. Defendants claimed that General Westmoreland requested 206,000 additional troops in Vietnam. This story had long since been contradicted in accounts published by General Westmoreland, John P. Roche and Herbert Schandler. (See discussion at Section III. B. 19) Defendants continue to cite the discredited evidence on which they relied in order to try to show that

they acted responsibly. They do not address the question of what basis they had for rejecting reliable contemporaneous documents, statements by people with personal knowledge of the events or responsible historical treatments.

5. *Disregard for evidence contradicting the story by those in the best position to know the truth.* See, e.g., *Alioto v. Cowles Communications, Inc.*, *supra*; *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, *supra* at 428-29 (ignored CIA denial that it funded private foundation, noting that "once one has undertaken to conduct an investigation he should not be permitted to ignore with impunity the fruits of that investigation"); *Indianapolis Newspapers, Inc. v. Fields*, *supra* at 664, *cert. denied*, 400 U.S. 930 (1970).

Defendants frequently ignored the only people with knowledge of the events portrayed. For example:

a. In late April 1967 a small group of senior Administration officials met with the President and General Westmoreland. Defendants had the accounts of three of them: Walt Rostow in his CBS interview, President Johnson in his autobiography and General Westmoreland in his autobiography. Nevertheless, defendants relied on a person who was not even there, Assistant Secretary of Defense John T. McNaughton, and then arbitrarily picked the one of his two inconsistent hearsay accounts that lent support to their thesis, *i.e.*, that General Westmoreland told the President that the cross-over point had been reached. (JX 1, p. 3; CBS Mem. 41) (See Section III. B. 2, above)

b. The MACV delegation to the August SNIE session in Langley, Virginia, consisted of three officers, General Godding, Col. Hawkins and Lt. Robinson. Both Godding and Hawkins told Crile or Adams that the delegation went to the session with the best estimates they had. Robinson said there was no "ceiling per se." They would have been the ones who would have known whether they were ordered to stay within a ceiling. No such orders were given. Even CINCPAC's Lt. Colonel George Hamscher surmised and told defendants in his taped CBS interview, MACV's conviction in its position was interpreted as a "ceiling" or "negotiating ploy" to counter the CIA's "floor" which was already built into the draft SNIE when MACV arrived at Langley. In fact, MACV's estimate was over 400,000 at the August session. Nevertheless, defendants claim that General Westmoreland ordered the delegation, "You're not to go above 300,000." (JX 1, p. 11)

Other examples appear in this section at item 2.

6. *Reliance upon inherently unreliable sources.* See, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-58 (1967); *Alioto v. Cowles Communications, Inc.*, *supra*.

Defendants repeatedly presented sources they knew or suspected were unreliable. Three examples are:

a. Five former officers were present at the so-called firing of Lt. Col. Parkins—Col. Morris, Col. Ponder, Col. Halpin, Col. Liewer and Parkins. Defendants interviewed two, Morris and Parkins, both of whom contradicted the story as aired. Defendants had Parkins' contemporaneously prepared evaluation report which also contradicted their version. (JX 290, pp. 35038-42) Yet they went on the air relying on second- and third-hand hearsay accounts. (See Section III. B. 13, *supra*)

b. Defendants relied on junior officers in the Combined Intelligence Center, Vietnam, ("CICV") for their infiltration suppression charge. The highest ranking officer was a major, Russell Cooley, in a headquarters that had hundreds of generals, colonels and lieutenant colonels. Moreover, as defendants knew, with just a very few exceptions (such as the chief and deputy chief of CICV), CICV officers lacked clearance to the highly classified intelligence sources essential to accurate infiltration estimation. (See Section III. B. 12.a)

c. For the "pressures on General Westmoreland" in 1967, defendants relied on none other than the same Major Cooley who conceded at his deposition that he did not know where he had gotten his information, but thought it had come from a newspaper. (Cooley Dep. Tr. 210-11)

Defendants' defense consists of nothing more than repeating the accounts of these sources, whose unreliability has been demonstrated.

7. *Publication of statements which do not reflect the actual interviews held or evidence gathered: omission and distortion.* See, e.g., *Cantrell v. Forest City Publishing Co.*, *supra* at 252-53 (1974); *Time, Inc. v. Pape*, 401 U.S. 279, 285 (1971) ("When a reporter is making allegations himself, actual malice might reasonably be inferred from the very act of deliberate omission, and the issue of malice [is] consequently one for the jury."); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Wasserman v. Time, Inc.*, *supra*; *Goldwater v. Ginzburg*, *supra*, ("[author] added innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or

avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context. Also, if [author's] 'melding' and 'distillation' of letters results in misplaced emphasis, exaggeration, or distortion, he cannot reasonably maintain that the misstatements contained in the new product he thereby created are not his own misstatements."); *Varnish v. Best Medium Publishing Co., Inc.*, 405 F.2d 608 (2d Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); *McManus v. Doubleday & Co., Inc.*, 513 F. Supp. 1383, 1389 (1981); *Carson v. Allied News*, 482 F. Supp. 406 (N.D. Ill. 1979); *Airlie Foundation v. Evening Star Newspaper Co.*, *supra* at 427-28; *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 540-41, 522-53, 435 N.Y.S. 2d 556, N.E. 2d 557 (1980); *Steadman v. Lapensohn*, 408 Mich. 50, 288 N.W.2d 580 (1980); *Indianapolis Newspapers, Inc. v. Fields*, *supra* at 664, *cert. denied*, 400 U.S. 930 (1970).

Defendants' actual malice is demonstrated by their mis-editing of statements by people they interviewed, including General Westmoreland himself. There is a whole section in this memorandum describing defendants' editing fabrications. (Section IV. B.) These include taking an answer by General McChristian to a *hypothetical question* (see also PTX 2, Benjamin Report, p. 46) and making it appear that he was directing his remarks at General Westmoreland:

WALLACE: [W]e went to General McChristian, his old intelligence chief, to ask what we should think of General Westmoreland's instructions. (JX 1, p. 11)

In discussing plaintiff's stated libel involving this portion of the Broadcast, defendants manage to leave out the Wallace introduction just quoted. (CBS Mem. 353-54)

Another of the 19 editorial fabrications listed in the Memorandum was defendants' cutting in half a sentence from General Westmoreland's November 1967 interview on *Meet the Press* to conceal the fact that he told the American people that the enemy had the capability of increasing infiltration. When asked about the level of infiltration, General Westmoreland said on *Meet The Press*:

I would estimate between 5,500 and 6,000 a month, *but they do have the capability of stepping this up.* (JX 276, p. 18)

Defendants simply put a period after the number 6,000 and dropped the significant italicized words.

See also Section IV B, above.

Another significant distortion by CBS concerns the letters written by Commander Meacham to his wife. Although Meacham explained the meaning of several of the letters in his interview and Cooley corroborated Meacham's rhetorical flair, describing it as "Shakespearean." (JX 11, Cooley CBS interview Tr. 59) Defendants continued to use the letters to evoke responses and as evidence for the broadcast thesis without putting the letters in the context described by Meacham.

8. *Use of the most damaging interpretation of ambiguous statements.* See, e.g., *Rebozo v. Washington Post Co.*, *supra* at 382 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981) (citing *St. Amant v. Thompson*, *supra* at 732) (resolution of significant ambiguity "in favor of the most potentially damaging alternative creates a jury question on whether the publication was indeed made without serious doubt as to its truthfulness"); *Goldwater v. Ginzburg*, *supra*.

Every time there was an opportunity to construe the facts against General Westmoreland, defendants did so. Nothing was resolved in his favor.

When General Westmoreland says he "did not accept his [General McChristian's] recommendation" (JX 1, p. 6), defendants *underscored* that he "said" that "he chose not to inform the Congress, the President, not even the Joint Chiefs of Staff, of the evidence collected by his intelligence chief, evidence which indicated a far larger enemy." (*Id.*, p. 6)

When MACV sent Col. Hawkins, the logical person to represent MACV, as one of its representatives to the SNIE, it is described by CBS as "ironic" rather than as being a reflection of MACV's good faith. (JX 1, p. 9)

When newspapers produced one or two sensational headlines during General Westmoreland's visit to the United States in November 1967, defendants used them, despite the fact that headlines are necessarily taken out of context and are frequently inaccurate, rather than the actual texts of General Westmoreland's recorded remarks.

When Col. Cooley completely garbled a description of an on-the-record speech that General Westmoreland gave in November 1967 about Phase Three and Phase Four of the war, defendants went with the garbled version rather than the transcript of the speech, a copy of which CBS had.

9. *Inherently improbable statements.* *St. Amant v. Thompson*, *supra* at 731.

Much of the Broadcast is inherently improbable to any moderately knowledgeable and intelligent person. Defendants charged General Westmoreland and his aides with concealing the infiltration of 100,000 to 150,000 NVA regular troops into South Vietnam in the five months preceding the Tet offensive—a doubling of the enemy's regular uniformed forces—and keeping it a secret for 14 years! All this was supposedly hidden despite thousands upon thousands of identifiable enemy casualties, prisoners of war who were interrogated, and millions of captured documents. Setting aside defendants' knowledge that at the time the most important and reliable intelligence source on infiltration came *from* Washington to Saigon, the charge becomes inherently improbable after a few hours' thought—much less 15 months of work.

It is also inherently improbable that more than *three months after the Tet offensive* and after a major inter-agency intelligence conference in Washington, MACV engaged in a "cover-up" by erasing a computer memory that had been duplicated in hundreds of hard copies and sent to U.S. agencies throughout the world. (See Section III. B. 18)

10. *Conforming story to predetermined outcome.* See *Curtis Publishing Co. v. Butts*, *supra* at 158 ("The Saturday Evening Post was anxious to change its image by instituting a policy of 'sophisticated muckraking,' and the pressure to produce a successful expose might have induced a stretching of standards") (plurality opinion, applying a "highly unreasonable" standard, but noting that evidence probably satisfied *Sullivan* standard, *id.* at 161 n.23; Warren, C.J., concurring, applying the *Sullivan* standard expressly found such evidence probative of actual malice, *id.* at 169-70.); *Goldwater v. Ginzburg*, *supra*; *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, *supra* at 424 n.9 (selective reporting, particularly where it tends to lend credence to a predetermined result, is a factor to be considered on the issue of malice"); *Widener v. Pacific Gas & Electric Corp.*, 75 Cal. App. 3d 415, 434, 142 Cal. Rptr. 304, 314 (1977), *cert. denied*, 436 U.S. 918 (1978).

There is no question defendants decided how they were going to come out before they started production; the outcome was predetermined. After speaking to Adams and briefly to Hawkins when he edited Adams' *Harper's* article in 1975, Crile had formulated a thesis. Sauter acknowledged:

The editorial process for this broadcast was initiated with the premise that there had been a deliberate distortion by the

American military of enemy strength figures in Vietnam. (JX 372, p. 2)

In a remarkably candid letter to Wallace soon after the Broadcast, Crile acknowledged that CBS "bought the Adams thesis . . . at the beginning of the project" and sent Crile and Adams out to get Adams' thesis on film. In other words, CBS did not investigate Adams or his thesis; they "commissioned the documentary":

My commission was to go out *with* Adams and prove on film that these people would testify to what Adams told us they had told him. So I did it. And CBS News with its eyes wide open looked at the interviews, decided to commission the documentary, hire Adams and send us on our way to complete the work as spelled out in the blue sheet. The documentary they got is the documentary they commissioned. (PTX 3, p. 3) (emphasis in original)

11. *Reliance on obviously biased sources.* See, e.g., *Stevens v. Sun Publishing Co.*, *supra*; *Indianapolis Newspapers, Inc. v. Fields*, *supra* at 664.

Defendants relied extensively on biased sources, especially Sam Adams, someone who had been trying to get even for more than a decade. To begin with, CBS approved the Broadcast on the basis of a Blue Sheet (or prospectus) that was almost entirely based on Adams' version of the events. They then let him play a major role in selecting whom Crile and Wallace would interview. (JX 881, Adams Prospects list) They basically relied on Adams' summaries of events, choosing to let Adams communicate his views from his distilled chronologies rather than even examine his raw interview notes. Then Adams proceeded, sometimes alone sometimes with Crile, to talk to potential witnesses to provide assistance to them in recalling events (e.g., Gattozzi Dep. Tr. 257-58; Hawkins Dep. Tr. 280-82; Defendants' Answers to Plaintiff's Interrogatory No. 1 of Plaintiff's First Set of Interrogatories). Defendants have described Adams' role as a "reporter," (Wallace Dep. Tr. 11) "associate producer," a paid consultant and a Broadcast interviewee. He was also a partisan in the dispute in 1966-68, a person trying to have General Westmoreland court-martialed. (JX 12, Adams CBS interview Tr. 16696)

Crile, for his part, was described by Benjamin as "obsessive" (PTX 70, p. 38552) and by Stringer as a "conspiracy thinker." (PTX 11, transcript of Kowet's interview of Stringer) Crile had already put himself on record by having edited Adams' 1975 *Harper's* article, the title of which also described the situation as a conspiracy.

12. *Failure to interview key witnesses, particularly after having been requested to do so.* See, e.g., *Time v. Hill*, *supra*; *Rebozo v. Washington Post Co.*, *supra* (reporter could have asked investigator what he told Rebozo but failed to do so); *Hart v. Playboy Enterprises*, 5 Med. L. Rep. 1811 (D. Kan. 1979); *Alioto v. Cowles Communications, Inc.*, *supra*; *Kuhn v. Tribune-Republican Publishing Co.*, 637 P.2d 315 (Col. 1981); *Burns v. McGraw-Hill*, 659 P.2d 1351 (Col. 1983); *Greenberg v. CBS, Inc.*, 69 App. Div. 2d 693, 710; 419 N.Y.S. 2d 988, 998 (2d Dept. 1979) (not asking those questions insured the defendants against the possibility of doubt); *Kerwick v. Orange County Publications*, 53 N.Y.2d 625, 438 N.Y.S.2d 778, 420 N.E.2d 970 (1981); *Mahnke v. Northwest Publications, Inc.*, *supra*.

Defendants failed to interview many of the most knowledgeable and authoritative people necessarily involved in the matters supposedly being investigated by the defendants. General Westmoreland suggested to Wallace and Crile that they talk to the following people:

Ambassador Ellsworth Bunker
 Ambassador Robert Komer
 General Walter Kerwin, Jr.
 George Carver
 William Colby
 Col. Charles Morris
 Admiral U.S.G. Sharp
 General Phillip Davidson

The only people on the list to whom they talked were Morris and Carver. But they didn't talk to them until after the Broadcast had been approved for showing by CBS News executives and had been put in final form except for technical adjustments. With respect to General Davidson, even if defendants suspected during the summer of 1981 that he had been dying of cancer since 1974, they learned he was well on December 15, 1981. (Hamilton Aff. ¶ 4) (See also, Section IV.B. 10) As affidavits filed by plaintiff demonstrate, defendants ignored many other well informed sources.

13. *Common law malice, i.e., spite and ill will.* See, e.g., *Goldwater v. Ginzburg*, *supra*; *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975), *aff'd on other grounds*, 551 F.2d 910, 913-14 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977); *DiLorenzo v. New York News*, 78 App. Div. 2d 669, 672 (2d Dept. 1980) 432 N.Y.S. 2d 483, (reporter published article on election eve stating that judge had been convicted of perjury even though he had previously published truth that judge had been acquitted); *Cochran v. Indianapolis Newspapers*, 175 Ind. App. 548, 372 N.E.2d 1211 (Ind. App.

1978) (while evidence of common law malice may not establish, *by itself*, actual malice with convincing clarity, such evidence is “nevertheless relevant and admissible as evidence in the determination of whether defendants possessed *a state of mind highly conducive to reckless disregard of falsity.*” (emphasis added)); *Stevens v. Sun Publishing Co.*, *supra*; *Sprouse v. Clay Communications, Inc.*, *supra* at 686, 688 (reporter in league with opponent’s campaign manager defamed gubernatorial candidate, and used salacious headlines to suggest involvement in corrupt land deal); *Indianapolis Newspapers, Inc. v. Fields*, *supra* at 664.

Ill will against the plaintiff by those responsible for the publication is evidence of a lack of objectivity and a desire to prove a case despite the evidence. Howard Stringer, the Broadcast’s Executive Producer, believed that “General Westmoreland’s reputation . . . [was] intact out of all proportion to his failings” and that he should have been fired years earlier. (PTX 11, Transcript of Kowet interview of Stringer) Carolyne McDaniel, who became the researcher for the Broadcast in September 1981, thought Westmoreland a “lousy” general. (PTX 61, p. 38521) Adams’ ill will is evidenced by his efforts to get General Westmoreland court-martialed—as Wallace and Crile both knew. (JX 12, Adams CBS interview Tr. 16690)

14. *Prior instances of an author or source making defamatory statements against the plaintiff.* See *Hellman v. McCarthy*, 10 Med. L. Rep. 1789 (N.Y. Sup. Ct. 1984)

Evidence of a pattern of hostility by an author or source against a person or of prior defamatory statements demonstrates lack of inadvertence and a predisposition against the plaintiff. This evidence provides notice to those ultimately responsible for publication. Starting in 1972, Adams has made serious accusations against General Westmoreland, including testimony at the *Ellsberg* trial and before the Pike Committee (both of which were privileged), and in an article in *Harper’s*, which Crile edited. One paragraph in the *Harper’s* article referred to General Westmoreland as one of the people who acted improperly. The *Harper’s* article and other accusations constitute evidence of a prior defamatory statement.

15. “*Ambushing*” hostile witnesses, or witnesses the reporter thinks may be hostile, in an attempt to have them say things which may be useful to the reporter’s thesis. See, e.g., *Davis v. Schuchat*, *supra* at 733 (“technique of ‘throwing a lot of things out in an interview just to get a response’” described as “reckless disregard of the truth” under *Sullivan*); *Cochran v. Indianapolis Newspapers*, *supra*.

Ambushing witnesses about complex and old events reflects an interest in proving a point, not obtaining the truth. An integral part of defendants' plan was to ambush General Westmoreland and others who were responsible for the military intelligence operation in MACV. (JX 911, Crile's May 1981 memo to Wallace) Several people involved in the production of the Broadcast even admitted that that was their intent and the contemporaneous documents prove that point beyond doubt. (PTX 17, p. 38204, Benjamin's notes of Adams interview)

Defendants discussed surprising several other people in order to obtain the evidence they wanted, not the truth. The Prospects list Adams gave Crile relating to Col. Charles Morris, MACV Director of Intelligence Production; and General Winant Sidle, MACV Public Information Officer, demonstrate that it was their *modus operandi* to try to ambush people who would repudiate defendants' thesis.

16. *Rehearsing or coaching of favorable witnesses.* (JX 376, CBS News Standards, p.22) ("Interviews which are not spontaneous and unrehearsed are prohibited unless specifically approved by the President of CND.")

"Coddling" sympathetic witnesses has been admitted by CBS in the Benjamin Report. (PTX 2, p. 57) Defendants engaged in this improper practice by spending hours, days and sometimes weeks going over the events with witnesses to help them get their story straight. (Hawkins Dep. Tr. 280-82) Then, when they were supposedly doing a "spontaneous" interview, as required by CBS Guidelines, Mike Wallace and George Crile kept going over the same material over and over to get an answer that would look or sound better, encouraging the witness with sympathetic statements like, "Let me do it a different way for you." (JX 3, Hovey CBS interview Tr. 29); "Let me try to help you." (JX 5, Hamscher CBS interview Tr. 4); "Let's go back and set the scene." (JX 5, McArthur CBS interview Tr. 20); "Let me give you a sense of what has emerged." (JX 8, Meacham CBS interview Tr. 40); "Could I ask you to do a little better." (JX 9, Hawkins CBS interview Tr. 12); "Just want to drop a cue here." and "See if I can trigger this from you." (JX 11, Cooley CBS interview Tr. 56); and "Please help your protege." (JX 6, first Allen CBS interview Tr. 15)

Adams: "I'm not doing this very well."

Wallace: "Oh, no, no. You were perfect. Don't say that! You're doing it just right." (JX 12, Adams CBS Interview Tr. 16642)

An extreme case of witness coddling and rehearsal was showing George Allen a selective and one-sided reel of portions of interviews that supported

Adams' thesis after his initial interview in order to get Allen to make a stronger statement for use in the Broadcast. The stark difference in the treatment of favorable as opposed to unfavorable witnesses warrants consideration of this as strong evidence of actual malice.

17. *Failure to ask critical questions of key witnesses.* See, e.g., *Rebozo v. Washington Post Co.*, *supra*, (reporter could have asked investigator what he told Rebozo but failed to do so); *Airlie Foundation, Inc. v. Evening Star Newspaper Co.*, *supra* at 428-29.

On several occasions Crile refrained from asking critical questions of knowledgeable witnesses. The obvious reason: Crile did not want to have on tape anything damaging to his thesis that he could avoid. Conspicuous examples are:

a. Crile did not ask Allen, a CIA employee whose responsibilities involved Vietnam, whether there was or could have been an undisclosed enemy infiltration of 100,000 to 150,000. At his deposition, Allen said that there was no unreported infiltration of any significant amount reflected in the Tet offensive. He pointed out, as did others, that some infiltration discovered through all source-intelligence, including Source X, was included in some reports but not the low classification MACV collateral OB Summaries that were distributed to the South Vietnamese as well as Americans. (Allen Dep. Tr. 135-36)

b. Crile did not ask General McChristian about two areas. One was the proper ratio of killed to wounded which McChristian developed. The other was the May 28, 1967 meeting at which Col. Hawkins briefed General Westmoreland and his senior staff on the revisions in estimates contained in General McChristian's report. On the latter point, Hawkins and Lt. Robinson place McChristian at the meeting; Hawkins had General Westmoreland turning to McChristian and saying, "General, I'd like you to take another look at these numbers." (JX 105A, Adams notes, 27893-4; Adams Dep. Tr. 51) McChristian's failure to remember the briefing is compelling evidence that nothing untoward happened. Crile solved this problem by the simple but deceptive device of mis-editing to combine several meetings in the Broadcast.

18. *Reporter's false statements in interviews to elicit false or favorable responses to questions.* See, e.g., *Davis v. Schuchat*, *supra* at 733 ("technique of 'throwing a lot of things out in an interview just to get a response'" described as "reckless disregard of the truth" under *Sullivan*).

Falsely telling a sympathetic witness that another witness made an accusation against the target of a planned publication may encourage the first witness to agree without personal knowledge. Falsely telling a witness that the target of a planned publication made derogatory statements about him may encourage the witness to react with hostility against the target. Falsely telling the target of a planned publication that others have made accusations against him may cause the target to react defensively and appear to support the accusation. Defendants used all these techniques in putting together the Broadcast.

For example, Crile told Graham that Meacham had said that MACV had engaged in the equivalent of burning records. (JX 13, Graham Interview Tr. 113)

Crile told General McChristian that General Westmoreland had made serious charges against him, when the source of the story, as Crile had been told, was Robert Komer. (JX 10, McChristian CBS Interview Tr. 25)

Wallace told General Westmoreland that Hawkins remembered what Westmoreland supposedly said, when he didn't. (JX 349, Westmoreland CBS Interview Tr. 29)

19. *Deficient journalistic practices in investigating, preparing, editing, and publishing a story.* See, e.g., *Time v. Hill*, *supra*; *Curtis Publishing Co. v. Butts*, *supra* at 161 n.23, 169-70 (Warren, C.J., concurring) (1967) (no editorial review of source materials); *Time, Inc. v. Ragano*, *supra* (deliberately editing distortions); *Goldwater v. Ginzburg*, *supra* at 329-37; *Montgomery v. Baltimore & Ohio Railroad Co.*, 22 F.2d 359, 360 (6th Cir. 1927) ("Such a safety rule [*cf.* CBS standards] is, as against the defendant, substantial evidence that reasonable care required the precaution which the rule directs; . . . its own rules furnishing competent evidence, as against itself, of a proper standard of care."); *Deloach v. Beaufort Gazette*, 10 Med. L. Rep. 1733 (S.C. 1984) (reporter ignored usual practice of checking public arrest docket); *Sprouse v. Clay Communications, Inc.*, *supra* at 686, 687 (W. Va.), *cert. denied*, 423 U.S. 882 (1975) ("when a newspaper departs from an attempt to report the news objectively, the fact of such departure can be considered by the jury and an appellate court in determining whether there was willful disregard of truth."); *Corabi v. Curtis Publishing Co.*, *supra*, (distortion during editing); *Mahnke v. Northwest Publications, Inc.*, *supra*, (reporter and editor admitted need for verification but failed to do so); see also, *Curtis Publishing Co. v. Butts*, *supra* at 158 (muckraking campaign); *cf. Yiamouyiannis v. Consumers Union*, 619 F.2d 932, 940 (2d Cir.), *cert.*

denied, 449 U.S. 839 (1980) (in finding no malice court emphasized that "entire article was checked and rechecked across a spectrum of knowledge and, where necessary, changes were made in the interest of accuracy."); *Reliance Insurance Co. v. Barron's*; 442 F. Supp. 1341, 1351 (S.D.N.Y. 1977).

Defendants employed improper and unprofessional production procedures in making "The Uncounted Enemy: A Vietnam Deception." For example, Crile excluded others from the editing room to avoid dispute over the final version. (Klein Aff. ¶¶ 13, 14) He barred the researcher on the Broadcast, who might have asked difficult questions, (PTX 21, p. 38227, Benjamin's notes of Alben interview) and instead used personal friends unconnected with the production of the Broadcast to help him. Also, as discussed above, Crile interviewed George Allen twice, screening for him in the interim selected pieces of interviews that supported defendants' thesis. (PTX 2, pp. 16-17)

20. *Distortion of source credentials. Hart v. Playboy Enterprises, Inc., supra; Goldwater v. Ginzburg, supra.*

Defendants regularly inflated or distorted the qualifications of the people on whom they relied on the Broadcast in order to overcome their paucity of substantial people. (a) Lt. Col. Gains Hawkins is described as "the military's leading expert on the Viet Cong" (JX 1, p. 6) when his job was largely adding up the estimated number of enemy for bookkeeping purposes in preparing MACV collateral OB Summaries; (b) George Allen, George Carver's deputy who neither attended any key meetings or conferences in 1967 nor participated in briefings of the "Wise Men" or the President, "was the government's leading expert on the enemy" in 1967 (*Id.*, p. 8); (c) George Hamscher, a CINCPAC officer, became "the head of MACV's delegation" to the August 1967 session of the SNIE (*Id.*, p. 11); (d) CICV-Major Russell Cooley became "the man in charge of MACV's infiltration analysts" when he was no such thing, and although he never spoke to General Westmoreland in his life or left Saigon to go out into the provinces, Cooley became the expert on General Westmoreland (*Id.*, p. 19) and on the extent to which American troops in the field were put on alert (*Id.*, p. 24); and (e) Joseph Hovey's memorandum to Walt Rostow, became "one of the most notable intelligence breakthroughs of any war" (*Id.*, p. 19).

Joe Hovey was also introduced in the broadcast as the man who predicted the Tet offensive, (*Id.*, p. 19) when in fact Hovey was one of three CIA analysts at the Saigon Station who prepared papers in early December on a Winter-Spring Campaign by the VC. (Ogle Aff. ¶ 4) MACV also had analysts working in this area who predicted the more specific time frame of the Tet holidays for the commencement of the Viet Cong attack. (Michalski Aff. 4/18/84 ¶ 14)

21. *Taking inaccurate notes. See De Loach v. Beaufort Gazette, supra*, (source disagreed with reporter's version of their meeting).

The taking of self-serving and inaccurate notes by an author is evidence of actual malice in that he is falsely creating a paper record to protect himself in case he is challenged later. The following people have testified that Crile's notes of interviews were inaccurate in one or more substantial respects: Secretary of Defense Robert McNamara (McNamara Dep. Tr. 62); MACV J2 Director of Intelligence Production Col. Charles Morris (Morris Dep. 8/9/83 Tr. 217, 220-239); Special Assistant to MACV's Chief of Intelligence General George Godding. (Godding Dep. Tr. 107-09)

22. *Ignoring an interviewee's request for corrections. See Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 155 Cal. Rep. 29 (1979).

General Westmoreland told defendants at the close of his interview that he intended to look into the records on subjects raised by Wallace. Three and a half weeks later, he sent Wallace and Crile a letter and a packet of materials that dealt specifically with several matters covered by his interview, including MACV's best estimates on infiltration compiled in mid-1968. (JX 390) Defendants had not alerted General Westmoreland to their intention to interview him on the subject of infiltration. Despite having been sent a correction of his previously erroneous statement, defendants simply ignored the information. Although addressed to him, Wallace did not read the letter. (Klein Aff. ¶ 74) Apparently all that Wallace knew about the contents of the letter was what Crile told him in the following conclusory statement:

As far as I can make out Westmoreland doesn't bring anything to our attention that is particularly relevant. Certainly nothing that causes concern and requires a new look at anything we have been asserting. (JX 601, p. 35785)

Defendants proceeded to ignore General Westmoreland's letter and utilized the taped interview without mentioning the corrections. The jury is entitled to conclude that defendants knew that General Westmoreland misspoke during his interview and, nevertheless, used his misstatement.

23. *Failure to retract obviously false statements.* Cf. *Kerwick v. Orange County Publications, supra*; *Kuan Sing Enterprises v. T. W. Wang, Inc.*, 86 App. Div. 2d 549 446 N.Y.S.2d 76 (1st Dept.), *aff'd*, 58 N.Y.2d 708, 458 N.Y.S.2d 544, 444 N.E.2d 1008 (1982); *DiLorenzo v. New York News, supra*; *Cape Publications v. Teri's Health Studio*, 385 So.2d 188 (Fla. App. 1980); *Mahnke v. Northwest Publications, Inc., supra* (failure to retract obviously false story); *Peisner v. Detroit Free Press, supra*:

Under certain circumstances the failure to retract can be evidence of malice. Obviously, no inference may be drawn from the failure to make a retraction in the case of an accurate publication. But the failure to retract a plainly false statement is evidence that the libel was not made inadvertently or negligently. Defendants refused to issue a retraction.

Defendants' attitude toward telling the truth about General Westmoreland is reflected in a June 1982 letter Crile wrote Wallace:

I really think it's worth talking to Dan about this. It seems to me that this is a clear-cut question of what's in CBS's best interest and he could be of help. (PTX 3, p. 1)

There is no mention of the importance of accurate reporting, the reputation of General Westmoreland or the necessity of correcting false allegations.

24. *Destruction of evidence of what the reporter was told.* See, e.g., *Deloach v. Beaufort Gazette, supra* (after learning of lawsuit, reporter inadvertently destroyed notes of conversation with source).

In this case, Crile interviewed Secretary of Defense Robert McNamara in the only interview. McNamara is known to have given regarding the Vietnam War since he left the government. Crile taped the telephone interview on two cassettes. Crile claims he accidentally erased the major portion of the interview. (Crile Dep. Tr. 578, 597, 619) If the jury concludes that the destruction of the evidence was intentional, it can be considered by them as evidence of malice. At the present time, that is the only evidence that defendant Crile has acknowledged that he destroyed.

25. *False exculpatory statements.* See, e.g., *Wilson v. United States*, 162 U.S. 613 (1896) (false exculpatory statements by accused, or procured by him, give rise to presumption of guilt); *Davis v. Schuchat, supra* at 733 (reporter's evasive testimony; third-party testimony indicated reporter knew more than he admitted); *Warner Barnes Co. v. Kokosai Kisen Kabushiki Kaisha*, 102 F.2d 450, 453 (2d Cir. 1939) (Hand, J.) ("When a party is

once found to be fabricating, or suppressing documents, the natural, indeed the inevitable, conclusion is that he has something to conceal, and is conscious of guilt."); *McManus v. Doubleday & Co., Inc.*, *supra* at 1389; *Glucksman v. Birns*, 398 F. Supp. 1343, 1350-51 (S.D.N.Y. 1975); *Bird Provision Co. v. Owens Country Sausage, Inc.*, 379 F. Supp. 744, 750-51 (N.D. Tex. 1974) *aff'd*, 568 F.2d 369 (1978) (fabrication); *People v. Davis*, 43 N.Y.2d 17, 400 N.Y.S.2d 735, 371 N.E.2d 456 (1977), *cert. denied*, 435 U.S. 998 (1978) (fabricated evidence); *Jarett v. Madifari*, 67 App. Div. 2d 396, 415 N.Y.S.2d 644 (1st Dept. 1979) (strongest inference which the opposing evidence in the record permits may be drawn against a party who withholds evidence in his custody or control which would support his version of the facts).

Listed below are some exculpatory statements by defendants which a jury could readily find were false:

a. At his deposition in April 1983, Wallace was asked about the use of the term "conspiracy" at the beginning of the Broadcast, "Who were the individuals about whom you were talking, that you believed were members of the conspiracy?" Wallace answered: "Colonel Gains Hawkins, George Hamscher, James Meacham, Russell Cooley, Richard McArthur." (Wallace Dep. Tr. 73) Wallace was also asked whether he was testifying that the Broadcast "took no position" on whether General Westmoreland "was a participant or a member of the conspiracy." Wallace answered that the Broadcast "didn't say" that General Westmoreland took part in the conspiracy. (Wallace Dep. Tr. 62)

The jury could conclude that Wallace was testifying falsely when he said that the Broadcast was referring only to the five people he named and that he testified falsely because he believed that the defendants could not show that General Westmoreland had done anything improper.

b. Similarly, CBS's statement that the Broadcast did not charge that General Westmoreland deceived the President is evidence of consciousness of guilt:

The broadcast itself does not take a position as to specifically who was deceived by the conspiracy to suppress and alter intelligence, but uses instead the general description of "we Americans" to describe who was deceived. (JX 1, p. 1) At the time of the broadcast, CBS described the deception as an attempt to deceive "the American public, the Congress, and perhaps even the White House." (JX 385) (CBS Mem. 273) (footnote omitted) (emphasis added)

Elsewhere, defendants' memorandum contends, "the broadcast does not assert a conspiracy to deceive the President. . . ." (CBS Mem. 275)

Defendants cite the full-page newspaper advertisement, not the Broadcast itself, for its claim that the Broadcast did not accuse General Westmoreland of deceiving the President. The advertisement—but not the Broadcast—said that those deceived included "perhaps the President." A viewing of the Broadcast demonstrates the irresponsibility of the claim.⁷²

The *New York Times* and William Buckley, among others, described the Broadcast as charging General Westmoreland with deceiving the President. (JX 783LL; JX 783CC)

c. George Crile told the authors of *TV Guide* that the word "conspiracy . . ." was a characterization which we agreed to use in the script at the very end, after reviewing everything in the show." (PTX 1, p. 5) In fact, in his Blue Sheet, the word "conspiracy" or "conspirator" appeared 29 times. (JX 375)

The jury could conclude that Crile falsely told the *TV Guide* reporters that the term conspiracy was first used after hearing all the evidence because he did not want them to know that defendants produced the Broadcast to conform to a predetermined result.

d. Shortly before the Broadcast was aired, Adams wrote a letter to Crile saying that the Broadcast was "superb". (JX 366) This letter conflicts with other statements which Adams made during that period including a letter he wrote to Col. Hawkins in which he said that there was a "major problem" with the Broadcast. (JX 380)

e. In an affidavit filed on November 19, 1982, Van Gordon Sauter, then President of CBS News, stated that he did not rely on the Benjamin Report for the conclusions announced in the so-called Sauter Memorandum that CBS stood by the Broadcast:

My July 15, 1982 memorandum stated that CBS News stood by the broadcast. That judgment was predicated upon my conversations with persons directly involved with the broadcast, and

⁷² The obvious falseness of defendants' claim that the Broadcast did not accuse General Westmoreland of deceiving his superiors is further demonstrated by the charge that American troops were "going to get slaughtered" (JX 1, p. 10) and by the charge that "the President of the United States, the American Army in Vietnam . . . were destined to be caught totally unprepared for the size of the attack" at Tet. (*Id.* p. 21) Such charges make no sense if the only people General Westmoreland allegedly deceived were the press, the public or perhaps Congress.

readings relevant to the broadcast and the issue it addressed. My judgment as to the substance of the broadcast was *not* based upon Mr. Benjamin's retrospective report. (Sauter Aff. ¶ 10) (emphasis added)

The purpose of the affidavit was to convince the Court not to order CBS to turn the Benjamin Report over to plaintiff.

At his deposition on April 4, 1984, Sauter gave an inconsistent answer:

Q. What led you to state in your memorandum, "We stand by this broadcast"?

A. In reaching the conclusions articulated in that memo, I drew upon the broadcast transcript, the *Benjamin Report*, documents that were sent to me, that were provided to me, conversations with people, the memo that I released on the July 15th date, predicated upon a variety of sources. (Sauter Dep. Tr. 117) (emphasis added)

Edward Joyce likewise included the Benjamin Report as a source for the Sauter Memorandum's conclusion. (Joyce Dep. Tr. 48)

The jury could conclude that Sauter filed a false affidavit because he knew that the Benjamin Report was inconsistent with the Sauter Memorandum, which forms the basis for Count IV.

26. *Failure to investigate further where warranted by accusations of an especially serious nature or where substantial danger to reputation was apparent, especially where "hot news" is not involved.* See, e.g., *St. Amant v. Thompson, supra*; *Curtis Publishing Co. v. Butts, supra* at 156-59; *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 1233 (1983); *Carson v. Allied News Co.*, *supra* at 211; *Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026 (5th Cir. 1975); *Goldwater v. Ginzburg, supra* at 339; *Torres v. Playboy Enterprises, Inc.*, 7 Med. L. Rep. 1182 (S.D. Tex. 1980); *Rogers v. Doubleday*, 644 S.W.2d 833, 1615 (Tex. Civ. App. 1982); *Greenberg v. CBS supra*, ("Investigative reporting is high-risk journalism. The degree of care which determines the amount of risk in such a venture lies exclusively within the control of those conducting and monitoring the investigation. In this case the decisions of defendants in their endeavors must be evaluated at trial."); *Stevens v. Sun Publishing Co.*, *supra* at 815, *cert. denied*, 436 U.S. 945 (1978) ("We believe actual malice is established when reporters and publishers depart from responsible standards of investigation and print articles on the basis of an admittedly unreliable source, without further verification."); *Widener v. Pacific Gas &*

Electric Corp., supra at 434 (“Where the defamatory statements made by the defendant do not involve an element of ‘hot news’ and the need for expeditious release is not present, reckless disregard for the truth may be evidenced in part by failure to investigate thoroughly and verify the facts. This is particularly true where the substance of the defamatory statements . . . were such that substantial danger to reputation was apparent.”).

There were no deadline pressures to excuse defendants’ failure to thoroughly investigate. Although Wallace actually testified that he did not know what the term “hot news” meant (Wallace Dep. Tr. 41), the Supreme Court and other courts do, as the cited cases reflect. Defendants took 15 months to gather evidence to support their story, one that already was more than 12 years old at the time. More time was available: Andrew Lack told Benjamin that there was no time pressure. Lack said, “Air date is bogus pressure. There’s no pressure, from the time you walk into the screening room. There’s no problem if you can’t make a release date.” (PTX 54, p. 38500) So, if Crile couldn’t manage to put the 90-minute Broadcast together in 15 months, his superiors would have let him work on it longer.

The need for a thorough investigation was clear, given the serious charges against General Westmoreland. Wallace readily acknowledged at his deposition that: he had no reason to doubt General Westmoreland had a good reputation for honesty and integrity in 1981. (Wallace Dep. Tr. 23) Adams, who attended two years of law school, believed that the acts allegedly committed by General Westmoreland were violations of the Uniform Code of Military Justice. (JX 12, Adams CBS interview Tr. 16696) Adams told Wallace he had tried to get General Westmoreland court-martialed. The Broadcast quoted Adams as saying that American troops would be “slaughtered” because of the alleged deception. Wallace agreed with this statement. (Wallace Dep. Tr. 371) There can be no doubt that the charges were serious.

Lack of thoroughness in CBS’s investigation is illustrated by the efforts of Zane E. Finkelstein and Colonel Donald P. Shaw who spent approximately 7 to 10 man days over several months to produce the manuscript, “It’s Still Show Biz, a critique of the CBS program.” Mr. Finkelstein’s affidavit described their effort which was based on research readily available to the public, as “a far more accurate presentation than what CBS aired following fifteen months of alleged research and the expenditure of countless thousands of dollars.” (Finkelstein Aff. ¶¶ 5, 8)