

27. *Persistent disregard of evidence which conflicts with the story the reporter is telling, particularly when the evidence consists of reliable and highly probative contemporaneous documents.* See, e.g., *Time Inc. v. Hill*, *supra*; *Davis v. Schuchat*, *supra* at 733; *Goldwater v. Ginzburg*, *supra*; *Varnish v. Best Medium Pub. Co.*, *supra*; *Speake v. Tofte*, 327 F. Supp. 200 (D.D.C. 1971); *Green v. Northern Publishing*, 655 P.2d 736 (Alaska 1982) (newspaper ignored coroner's report and inquest); *Hansen v. Stoll*, 130 Ariz. App. 454; 636 P.2d 1236 (Ariz. App. 1981) ("[A] person cannot close his eyes to the obvious truth, yet still claim lack of knowledge."); *James v. Gannett Co.*, 40 N.Y.2d 415, 424, 386 N.Y.S.2d 871, 877-78, 353 N.E.2d 834, 841 (1976); *Indianapolis Newspapers, Inc. v. Fields*, *supra* at 664, *cert. denied*, 400 U.S. 930 (1970).

Defendants ignored the wealth of information in their possession and/or read by them during the production of the program. For example:

- a. Hawkins' Vu-Graphs of MACV's Langley Conference position in August 1967. (JX 248)
- b. CIA April 1, 1967 cable reporting DIA-initiated suggestion to break out guerrillas from other elements in the category. (JX 895)
- c. Hawkins' letter home of March 21, 1967 describing news of McChristian's future command assignment. (JX 213C)
- d. Hawkins' letter home of May 31, 1967 acknowledging briefing of Mr. Zorthian on new strength figures. (JX 213)
- e. Honolulu Conference Report. (JX 227)
- f. SNIE 14.3-67. (JX 273)
- g. MACV Press Release of November 24, 1967. (JX 277)
- h. *New Republic* article, "Westmoreland's Progress Report", 12/16/67. (JX 287)
- i. Memo, 3/12/67, from McChristian to Sandine re captured notebooks (JX 229)
- j. CIA cable, 6/2/67 (JX 239)
- k. CIA cable 6/9/67 (JX 240)
- l. Cable, 7/10/67, from Carver to Helms (JX 245)
- m. Cable, 8/19/67, from Komer to Carver (JX 250)
- n. Calbe, 8/6/67, from Abrams to Wheeler, Sharp, Westmoreland (JX 252)

- o. Cable, 8/20/67, from Westmoreland to Wheeler and Sharp. (JX 253)
- p. Memo 9/15/67, from Carver to Bunker (JX 261)
- q. Cable, 10/28/67, from Bunker to Rostow (JX 767)
- r. Memo 11/9/67 by Adams (JX 269)
- s. CINCPAC/MACV dissent to the CIA OB analysis, South Vietnam. (JX 312)
- t. House of Representatives Hearings before the Select Committee on Intelligence: testimony of Daniel O. Graham, William Colby, George Carver, George Allen, James Graham (JX 311)
- u. 5/23/67 extract from CIA publication (JX 217A)
- v. 4/2/68 cable re Tet (JX 373)
- w. 1/16/68 Adams memo of conversation w/Hawkins's (JX 379)
- x. 2/20/68 Halpin memorandum (JX 382)
- y. 2/11/67 Sandine cable (JX 395)
- z. 1/14/68 Westmoreland cable to Sharp (JX 399)
- aa. 1/15/68 Westmoreland cable to Sharp (JX 400)
- bb. 1/25/68 Westmoreland cable to Sharp (JX 401)
- cc. 1/21/68 Westmoreland cable to Sharp (JX 402)
- dd. Taylor & Graham letters to Harper's (JX 407)
- ee. 6/23 draft memo by Adams on NIE session (JX 421)
- ff. 1/19/68 Westmoreland cable to Sharp (JX 423)
- gg. 1/23/68 Westmoreland cable to Sharp (JX 424)
- hh. 1/23/68 Westmoreland cable to Sharp (JX 425)
- ii. 12/16/70, MACV infiltration study (JX 444)
- jj. Statement on Adams by Carver (JX 446)
- kk. 8/22/67 revised section of NIE 14.3-67 (JX 524)
- ll. 8/9/67 Draft changes in NIE (JX 538)
- mm. 8/29/67 CIA cable to Saigon (JX 540)
- nn. 3/23/67 CIA cable Saigon to Washington (JX 575)
- oo. 9/1/66 MACV study on infrastructure (JX 555)
- pp. General Westmoreland's correction letter (JX 390)

III. CRITIQUE OF DEFENDANTS' WITNESSES

Defendants' statement of facts is based upon a very carefully selected and misleading group of witnesses. Defendants ignore many of the most knowledgeable participants in the events in favor of persons who were either absent from or insignificant participants in these events. Defendants persistently construe all evidence they cite in a light most favorable to themselves, contrary to the mandate of Rule 56.

Defendants' "Table of Witnesses" is remarkable for its omissions. It does not even list General Westmoreland's two immediate superiors—Ambassador to South Vietnam Ellsworth Bunker and Commander-in-Chief, Pacific Admiral Sharp. Nor does it list the following persons who knew about, advised and or took the action the Broadcast supposedly portrayed: Assistant Secretary of State for Far Eastern Affairs William Bundy, Senior Advisor to the Secretary of State Phillip Habib, CIA Director Richard Helms, Deputy Secretary of Defense Paul Nitze, CINCPAC J2 General Chesley Peterson, nor Chairman of the President's Foreign Intelligence Advisory Board General Maxwell Taylor. Conspicuous by his absence from defendants' "Table of Witnesses"—as he was similarly absent from the Broadcast—is Walt Rostow, former Special Assistant to the President for National Security Affairs, whom defendants interviewed for three hours on film.

Plaintiff discusses below each individual whom defendant cites on five or more pages. Plaintiff has divided them into five groups:

1. Individuals who were not present at or near any of the key events described in the Broadcast;
2. Individuals who, while on the periphery of the events, derive most of their information from hearsay or apparently have little or nothing to contribute other than speculation or conclusory statements;
3. Individuals who suffer some infirmity to their being competent or reliable witnesses;
4. Individuals who were present at events discussed and who may have something to contribute as witnesses but who, in most cases, provide substantial support to plaintiff; and
5. Individuals whose role or position is not clear and who have yet to be deposed.

Plaintiff does not discuss those persons who have flatly and unequivocally denied that there was any wrongdoing, such as George Carver, Special Assistant to the Director of the CIA for Vietnamese Affairs; MACV J2 General Phillip Davidson; Chief of MACV Current Intelligence, Indications and Estimates Division Lt. Col. Daniel Graham; Secretary of Defense Robert McNamara; MACV Director of Intelligence Production Colonel Charles Morris; Secretary of State Dean Rusk; and General William Westmoreland.

This Section discusses the inadequacy of defendants' witnesses in meeting defendants' Rule 56 burden to demonstrate that there are no disputed material facts based on credible, competent evidence on the entire record.

A. People Absent from the Events

Much of defendants' testimonial evidence—affidavits and deposition testimony—is incompetent and inadmissible. A substantial amount of the testimonial evidence on which defendants rely is from people with absolutely no personal knowledge whatsoever of the relevant events but whose source of information is hearsay, such as from the newspapers, or even from defendants and their lawyers within the last two years.

Thus, defendants violate Rule 56(e), Fed. R. Civ. Proc., which requires that supporting affidavits “shall be made on personal knowledge.”

Professor Moore has stated the rule succinctly:

Hearsay testimony and opinion testimony that would not be admissible if testified to at trial may not properly be set forth in an affidavit. The affidavit is no place for ultimate facts or conclusions of law, nor for arguments of the party's cause.

6 J. Moore, *Moore's Federal Practice* ¶ 56.22[1] at 56-1312-17. See also, e.g., *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539 (5th Cir. 1980) cert. denied, 454 U.S. 927 (1981) (affidavits primarily consisting of statements allegedly made by others and characterizations of the beliefs of others inadmissible; similarly, newspaper articles constituted inadmissible hearsay); *Cummings v. Roberts*, 628 F.2d 1065 (8th Cir. 1980) (affidavit which stated that plaintiff “was observed” doing things not based on personal knowledge and therefore insufficient); *Jaroslawicz v. Seidman*, 528 F.2d 727 (2d Cir. 1975) (detective's affidavit incompetent on suggestiveness of line-up when he was not present); *Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 188 (2d Cir.) cert. denied, 439 U.S. 861 (1978) (affidavit that “it

was apparent to [the plaintiffs] in this personal confrontation with the agents of the defendants that they were unhappy over the race and color of the plaintiffs" insufficient to raise triable issue that contract termination was racially motivated); *Washington Post Company v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966) *cert. denied* 385 U.S. 1011 (1967).

Lack of personal knowledge has been demonstrated with respect to the following individuals:

Aaron Donner was Chief Counsel to the House Select Committee on Intelligence in 1975. He does not even state what he was doing in 1967 and 1968. Donner's sole source of information is hearsay and he has no personal knowledge of the events covered by the Broadcast.

David Halberstam is the author of the book *The Best and the Brightest*. Halberstam's primary if not sole source of relevant information is hearsay and he has no personal knowledge of the events covered in the Broadcast. He has trouble even with his hearsay statements. In paragraph 32 of his affidavit he attributes a statement to General Westmoreland; the transcript of that Westmoreland speech shows Westmoreland never made the statement attributed to him. Nevertheless, he is relied on in defendants' motion. (See CBS Mem. 42)

Richard Kovar, a CIA officer, admits in his deposition testimony that he did not attend either the Langley Virginia, SNIE conference in June 1967 or the September Saigon conference but derived his knowledge principally from George Carver's cables, "informal discussions and corridor talk" (Kovar Dep. Tr. 139); that he did not read the published SNIE 14.3-67 (Kovar Dep. Tr. 162); and that his information about the Tet offensive is based on what other persons told him and what he read in the newspapers. (Kovar Dep. Tr. 207-08)

Elmer Martin was a colonel on the staff of the Army Assistant Chief of Staff in 1967 and 1968. An engineer by training, his affidavit is full of speculation and rumor without any indication of the factual or evidentiary basis for his statements. He makes conclusory and extravagant pronouncements without a hint of the foundation for them:

The Johnson Administration wanted to be able to demonstrate that we were winning this "war of attrition" through statistical indicators of progress, such as enemy strength estimates and "body count" figures. General Westmoreland was under tremendous political pressure to demonstrate progress in the war effort.

I was appalled by the incompetence and outright dishonesty of the MACV intelligence staff which served General Westmoreland in Vietnam in 1967 and 1968. In military circles the lesson of Tet was not to trust MACV reporting. I do not know of any other time in our history when there was as much falsification and manipulation of intelligence information by a military command as there was in Vietnam in 1967 and 1968 under General Westmoreland's command. (Martin Aff. ¶¶ 10, 15)

Martin's deposition demonstrated that he had absolutely no basis for his charges. He admitted that he did not know and had never spoken to a single person involved in the OB matters in 1967 and 1968. He admitted that he received his information from the newspaper and from documents which defendants' attorneys selectively fed him. (Martin Dep. Tr. 153)

Paul N. McCloskey was a member of Congress from December 16, 1967 to 1982.

He told Congress during a floor debate concerning "The Uncounted Enemy" that he "cannot disagree" with the statement that the Broadcast "made every effort to discredit him [Westmoreland], it did not give him a fair opportunity to present his side." (JX 793, p. 549001)

McCloskey states no facts based on his personal knowledge that relate to the Broadcast. Rather his knowledge is limited to a few encounters each of which occurred while on a Congressional visit to Vietnam in December 1967: (1) a briefing "by a group of officers from the military" (McCloskey Aff. ¶ 6); (2) a MACV manual which he "briefly scanned" (*Id.* ¶ 7); and (3) a series of assertedly candid briefings he received in the field (*Id.* ¶ 8). McCloskey also made a later visit to Southwest Vietnam, described in his affidavit as occurring in early 1970 (*Id.* ¶ 11); however, this same visit is described as occurring in April 1971 in a letter he wrote to Crile. (Exhibit to Affidavit)

Despite this lack of relevant knowledge, in a speculative and conclusory paragraph of his affidavit, which defendants quote from or cite five times in their Motion for Summary Judgment, McCloskey asserts:

By December, 1967, when I visited South Viet Nam, individual members of Congress were beginning to debate the limiting of funds for Viet Nam and the need to commence withdrawal of U.S. Forces. MACV's policies and practices with respect to the deception of Congress were not surprising: the "national security," i.e., the need to retain public support for the Viet Nam war, was used to rationalize a conspiracy to deceive in which General

Westmoreland participated. The rules of Nuremberg had been forgotten, and post-Watergate ethics were still in the future. A military establishment which was ordered by the White House to conceal massive bombing of the neutral countries of Laos and Cambodia could scarcely rebel at promoting public and political support of the war by concealing North Vietnamese infiltration figures or removing the Self-Defense and Secret Self-Defense Forces from the Enemy Order of Battle. The goal, continuing the favorable trend in reporting, required deception; and from General Westmoreland's standpoint, it was undoubtedly deemed essential to performing the tasks he was ordered to do, i.e., winning the war, in accord with the morality of the time as he saw it. (McCloskey Aff. ¶ 10)

Thomas Powers is a Pulitzer Prize-winning author of the book, *The Man Who Kept the Secrets*, which he researched in 1977 and 1978. (Powers Aff. ¶ 2) Powers' sole source of information is hearsay and he had no firsthand knowledge of the events covered by the Broadcast. Although he claims that his book is accurate with respect to the events at issue here, former CIA Director Richard Helms, John A. Bross and Lawrence A. Houston have all filed affidavits stating that it is inaccurate with respect to these events, and further, Helms disputes Powers' statement that he reviewed the book with him.

George Romney was Governor of the State of Michigan from 1963 to 1969 and candidate for the Republican Presidential nomination in 1968. His major complaint relates to a briefing which Ambassador Lodge and General Westmoreland gave him in November 1965. "We did the very thing that the officials told me we would not do—we 'Americanized' the Vietnam War." (Romney Aff. ¶ 6). He states he was 'brainwashed . . . American-style.'" (*Id.*) He asserts that the news Ambassador Bunker and General Westmoreland "brought with them [to Washington in November 1967] was extremely optimistic." (*Id.*, ¶ 9) In a visit to South Vietnam in December 1967, Ambassador Bunker and other unnamed diplomatic and military officials "gave a rosy picture of how the war was progressing" and "no indication in any of those briefings that the enemy was planning a full-scale, country-wide offensive in the immediate future." (*Id.*, ¶ 10) The relevancy or competency of most of Romney's statements to the Broadcast's charge of a deliberate falsification of intelligence by Westmoreland is not clear.

Gregory Rushford was a staff investigator with the House Select Committee on Intelligence in 1975. Rushford's sole source of information is

hearsay and he has no firsthand knowledge of the events covered by the Broadcast.

David Sennett was employed by the CIA as a "reference analyst" between 1974 and 1979. Sennett's sole source of information is hearsay and he has no firsthand knowledge of the events covered by the Broadcast.

Pierre Sprey was an analyst in the Office of the Assistant Secretary of Defense (Systems Analysis). Sprey made clear at his deposition that he was not an intelligence analyst and that he had no personal knowledge of the events reported in the Broadcast concerning enemy strength or infiltration estimation in 1967 by MACV. Although Sprey states in an affidavit that he is convinced of the documentary's accuracy in its treatment of enemy strength estimation based on information available to him from "Pentagon documents" and military and civilian participants, Sprey could not name a single military or civilian individual who was involved in enemy strength or infiltration estimation for MACV or the CIA in 1967 with whom he discussed these subjects or from whom he had received information on these subjects. Sprey's "Pentagon documents" are limited to DIA reports of enemy strength, the OASD Southeast Asia Programs' reports and unspecified cable traffic. Sprey's "knowledge" of alleged "suppression" of infiltration figures for the Fall of 1967 derives solely from persons he subsequently talked with at the National Security Council—none of whom were participants in infiltration estimating with CIA or MACV in 1967 and whose own knowledge derives solely from sources other than their own personal experience. (Sprey Dep. Tr. 86-89) It is clear that Sprey's information is at best second- or thirdhand.

B. People in the Periphery of Events

A second group of witnesses was on the periphery of the events described in the Broadcast, but speak with presumed authority on events they have little or no firsthand knowledge about, including such things as the motivation of people they never met. They purport, frequently, to give an opinion without its being "rationally based on the perception of the witness." Fed. R. Ev. 701. That rule reads in full:

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Professor Moore has described two safeguards that will minimize potential abuses under Rule 701:

First, since a witness' detailed account carries more conviction than his conclusory statement, and since a lawyer will choose to use his witness to the best advantage, opinion testimony will usually not be used where detailed testimony is feasible. And, to the extent opinion testimony is used, its underlying factual foundations can be fully scrutinized on cross-examination.

Second, if meaningless opinions without satisfactory factual foundation are proffered by a party in the hope that the fact finder will be persuaded by them, the evidence can be excluded for lack of helpfulness. Illustrative is *United States v. Fox*, 437 F.2d 733 (7th Cir.) cert. denied, 402 U.S. 1011 (1971) where a federal agent who had infiltrated defendants' narcotics operation was asked at trial if he was the "motivating, influencing force" behind the conspiracy at issue. The appellate court upheld the trial judge's ruling that the question was improper because it called for an expression of the witness' "subjective feelings and conclusions." The court then stated:

"... The question called for a speculative conclusion which the witness was not competent to make. Hill's answer to the ... question could not be 'rationally based on the perception of the witness,' so that his opinion would not be admissible even under liberal standards. See ... Rule 701, Preliminary Rules of Evidence for the United States District Courts and Magistrates ..."

The Advisory Committee's notes to Rule 701 say that if "attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule." *Butler v. Polk*, 592 F.2d 1293, 1297 (5th Cir. 1979)

Cases adhere to the rule that at times permits lay opinions that are based on personal knowledge, *Bohannon v. Pegelow*, 652 F.2d 729 (7th Cir. 1981); *United States v. Butcher*, 557 F.2d 666 (9th Cir. 1977), but preclude witnesses from speculating beyond that. *Butler v. Polk*, supra (5th Cir. 1979) (lay witnesses' testimony on their interpretation of conversations excluded as not helpful to the jury); *United States v. Jackson*, 569 F.2d 1003 (7th Cir.) cert. denied, 437 U.S. 907 (1978) (witness testimony limited to that which was rationally based on her perception; therefore, her testimony as to why her husband was depressed was properly excluded). Courts allow lay opinion based on personal knowledge when it is helpful to the trier of fact's understanding of the case. *Joy Mfg. Co. v. Sola Basic Ind., Inc.*, 697 F.2d 104 (3d Cir. 1982) (production supervisor's testimony on reasons for

inoperability of furnace); *Young v. Illinois Central Gulf R.R.*, 618 F.2d 332 (5th Cir. 1980) (observations concerning condition of railroad crossing); *Greenwood Ranchers, Inc. v. Skie Constr. Co.*, 629 F.2d 518 (8th Cir. 1980); *Lubbock Feed Lots, Inc. v. Iowa's Beef Processors, Inc.*, 630 F.2d 250 (5th Cir. 1980) (the identity of the principal of an agent).

In the light of these established principles, the major portion of defendants' proffered testimony of the following group of witnesses, few of whom were in MACV and all of whom held relatively junior positions, is incompetent and inadmissible.

George Allen was Deputy to the Special Assistant to the Director of CIA for Vietnamese Affairs from 1966 to 1968. He did not attend *any* of the major meetings or events portrayed in the Broadcast. He was not present at any of the MACV meetings, the February 1967 Honolulu conference, the June 1967 session of the SNIE conference in Langley, Virginia, the August 1967 session of the SNIE conference in Langley, Virginia, or the September 1967 session of the SNIE conference in Saigon. He did not actively participate in the drafting of SNIE 14.3-67 or discuss the matter with CIA Director Helms. He did not brief the "Wise Men" or the President in March 1968. All or virtually all of his information was hearsay, coming to him from Sam Adams, George Carver and documents.

Donald W. Blascak was an Army major working as a CIA intelligence officer from January 1966 to August 1968. While it is possible that Blascak may have competent evidence to give, it is not apparent from his affidavit. He says he attended some sessions of the August 1967 SNIE session but does not say what he saw and heard; instead he makes conclusory and argumentative statements without setting forth the factual or evidentiary basis for them. For example:

.... from the outset of the August 1967 NIE conference, it became obvious that the MACV delegation—and the "rubber stamping" DIA and CINCPAC contingents—were not prepared to negotiate in good faith. They simply would not consider any set of numbers which would significantly increase MACV's existing official total enemy strength figure of approximately 300,000, despite the strong evidentiary support marshalled by Mr. Adams and other CIA representatives in support of the CIA's much higher enemy strength figures. MACV took a rigid, "stonewalling" position insisting on an estimate which would show a total enemy strength in the neighborhood of 300,000, which was the total shown in the then-current MACV Order of Battle. MACV and DIA simply raised and lowered figures arbitrarily in the

various categories without raising the total enemy strength figure. (Blascak Aff. ¶ 12)

Blascak makes almost identical statements about the September session of the SNIE—which he did *not* attend:

To attempt to break the impasse, Mr. Helms dispatched George Carver to Saigon in September 1967 to attempt once again to reach agreement, this time with the MACV principals—including, if necessary, General Westmoreland, the MACV commander. Carver was accompanied by Sam Adams and William Hyland of the CIA. Carver's mission, however, was beset from the start with MACV's stonewalling and rigid adherence to its previous figures—or at the most simply sliding these figures around without any flexibility in the total figures. I and the other members of the CIA's Vietnamese Affairs Staff felt, as we observed the conference through the cable traffic from Saigon, that no amount of reason or evidence could move MACV above its ceiling position. Mr. Carver felt he could not get MACV to agree to any significant increase in the total enemy strength which would be reported; he had done his best and Mr. Helms wanted him to reach an agreement on such terms as were available from MACV. (Blascak Aff. ¶ 14)

Much of the balance of the affidavit is similarly without a factual or evidentiary basis and is at most marginally relevant, such as an April 1968 conference, which occurred after the events portrayed in the Broadcast.

George Christian was President Johnson's press secretary from 1965 to 1969. His affidavit says "the scope and ferocity" of the Tet offensive were a surprise, but that "the universal military opinion beginning with that of General Westmoreland—was that the enemy had suffered a staggering defeat." (Christian Aff. ¶ 5) While Christian may be competent to testify about White House reaction to the Tet offensive, he does not offer a basis for preferring his account of events over Dr. Rostow's and President Johnson's on the issue of the warning of the Tet offensive.

William Cover was a colonel in the Army, MACV's Chief of Estimates until March 1967 and thereafter on the staff of the Army's Chief of Staff of Intelligence through 1968. His two affidavits point out that there were intelligence officers under General McChristian whose views were not incorporated into the Order of Battle estimate, including their views on the relevance of self-defense militia evidence. There appears to be no factual

basis for any of Cover's statements after he left Vietnam in March 1967. Much of what he states is plainly hearsay. In his first affidavit he states:

... As I understand it, he [Hawkins] and his staff found that we had been grossly underestimating the true size of the enemy, particularly in the irregular and political categories. . . .

* * *

I did not personally attend the famous Order of Battle conferences held in the fall of 1967 and the spring of 1968. However, I sent an officer as an observer. I recall that the observer I sent to the Washington conference in August 1967 reported back that he was disturbed by the acrimony among the participants at the conference. He told me that he did not believe that much progress towards a satisfactory agreement had been made. (Cover Aff. 12/1/83, ¶¶ 25, 29)

There is no foundation for much of Cover's speculation:

Throughout the late Summer and Fall of 1967, I was struck by the dramatic change in intelligence reports coming from Saigon about how the war was progressing. These reports became increasingly sanguine in emphasizing how much the U.S. situation in Vietnam had improved. Having been in Vietnam only a few months earlier, I was suspicious of such reports of great progress in the war effort. I called this newfound optimism "the rosy glow coming across the Pacific." I feared that under an impulse for change and progress, the new regime in MACV J2, like a new broom sweeping clean, was creating an unduly favorable ambience and telling President Johnson, Secretary of Defense McNamara, and the American public what they wanted to hear—that we were about to win the war . . . (*Id.* ¶ 31)

Cover says that the Tet offensive "came as a complete surprise in Washington" and that he "had seen no indication in the official channel traffic coming from Saigon that such a coordinated, countrywide offensive was possible, let alone imminent." (*Id.*) He does not indicate whether he saw all the official cables or the more important back-channel cables so his testimony may be irrelevant.

John Dickerson was a CIA analyst in Saigon from December 1965 to December 1967. Although he was in Saigon, his affidavit appears on its face to be entirely speculation and hearsay. For example:

In the latter half of 1967, the repetitive topic of discussion among analysts at the CIA Saigon Station concerned the gross underestimation of total enemy strength which the MACV command

was relating in its official reports. Political considerations seemed to dominate the estimative process. The MACV command approved only those conclusions which were politically acceptable, whether or not those conclusions comported with the evidence. . . .

Those of my CIA colleagues who attended MACV briefings on enemy strength in the latter half of 1967 regularly reported their shock and amazement at the way in which estimates of total enemy strength were arrived at by the MACV command. General Westmoreland often attended these sessions. It was reported to me at the time that General Westmoreland frankly admitted at these sessions that he was under political pressure to produce optimistic reports on the war's progress. . . . (Dickerson Aff. ¶ 314)

Dwain Gatterdam was an analyst in the South Vietnam Branch of the CIA's Office of Economic Research beginning in the fall of 1967 and continuing until the summer of 1975. Gatterdam prefaces his affidavit with the statement that he was not a direct participant in the formulation of SNIE 14.3-67. He then opines about the SNIE's formulation and General Westmoreland's own knowledge of enemy strength estimation based on unspecified "reports." Moreover, while Gatterdam claims to have analyzed captured documents in late 1967 concerning the identity of enemy units in-country, he later states that only post-Tet, CIA research showed "that the rate of enemy infiltration into South Vietnam rose considerably in the several months leading up to the Tet offensive. . . . (*Id.* ¶ 14) The alleged post-Tet CIA research showing a considerable rise in infiltration for several months pre-Tet escaped the attention of Sam Adams who was a co-worker of Gatterdam. Gatterdam appears to provide relevant evidence on the apparent lack of knowledge of infiltration on the part of Adams.

George Hamscher was a lt. colonel in DIA and then starting in mid-1967 assigned to Commander-in-Chief Pacific. He "was not an Order of Battle Analyst." (Hamscher Aff. 2/3/83, Exhibit A, Q.1) He attended two sessions of the SNIE in August 1967 in Langley, Virginia, and in September 1967 in Saigon. He would be competent to describe what he saw and heard at the sessions. Presumably, he would be competent to testify as to the alleged meeting of six officers in a room in the Pentagon in August 1967 which was portrayed in the Broadcast (JX 1, pp. 14-15), even though he can identify only one of the other five alleged participants, and, with one exception, J. Barrie Williams of DIA, all of the other participants say the described meeting did not take place (See Section III B. 8, above).

The passage from Hamscher's deposition on which defendants repeatedly rely reads:

it seemed very clear to me and everyone else that it was in fact General Westmoreland who had set the ceiling. (Hamscher Dep. Tr. 108-09)

Hamscher equates the term "ceiling" with the term "negotiating ploy":
the "ceiling" seemed acceptable as a negotiating ploy against CIA's "floor." (Hamscher Aff., *supra*, Q.6)

Thus, it is questionable whether he should not be limited to stating facts. Perhaps more important, his reference to General Westmoreland is hearsay, rumor and speculation. At his deposition he acknowledged that he had never spoken to General Westmoreland. (Hamscher Dep. Tr. 203)

Bruce Jones was a lieutenant in CICV from August 1967 to August 1968. His affidavit contains vague, conclusory statements like, "The MACV command exerted strong pressure on us to reduce the enemy unit strengths listed in the Order of Battle." (Jones Aff. ¶ 1) In addition, he purports to give three specific examples. All are false, misleading or inherently incredible.

First, he swore that "In August 1967 the I Corps Ground Order of Battle officers and enlisted men received a copy of a memorandum from General Phillip B. Davidson, Jr., then MACV J-2" which established a new procedure that required an "assumption" that the enemy did not replace casualties. (*Id.* ¶¶ 7, 8, DX 113, CBS Mem. 123) At his deposition, Jones admitted that the memorandum was *never* distributed to anyone but apparently purloined surreptitiously by one of his colleagues from the desk of an unnamed CICV officer; that constituted the only distribution Jones knew about. (Jones Dep. Tr. 51) Second, Jones said in his affidavit that a new "Disposition Form" was distributed that required a certification from the senior officers in CICV and MACV before enemy strength could be increased. According to Jones, a version of the "Disposition Form had been used previously, but had never included limitations like the paragraph requiring that any change not increase total enemy strength. . . ." (Jones Aff. ¶ 9, DX 94, CBS Mem. 123) When the "[new] Form was distributed . . . the enlisted men and junior officers who conducted the day-to-day analysis of documentary evidence were deeply disturbed. . . ." (*Id.* ¶ 10) At his deposition Jones admitted that he did not know who issued the form and that, moreover, it was immediately withdrawn by MACV J2 when

the analysts objected to its distribution. In fact, the form *was never used*. (Jones Dep. Tr. 61-62)

Jones' affidavit also describes an incident in which the estimate for the 38th VC Battalion was reduced to zero in the March 1968 OB Summary. Jones claims that when he subsequently had occasion to look at the March 1968 OB Summary, the entry for the 38th VC Battalion was no longer zero but had somehow been replaced with a higher estimate. (Jones Aff. ¶¶ 12,13) Jones believes that new pages were somehow substituted in file copies of the March 1968 MACV OB Summary, which had a distribution list of over 400. (JX 638, *Role of Military Intelligence*, p. 131) Jones believes that this alteration and others were connected with the My Lai massacre incident. (*Id.* ¶ 14; Jones Dep. Tr. 179-92, PX 254)

Jones also believes that General Daniel Graham is having him followed. (Jones Dep. Tr. 212-14)

Carl Marcy was Chief of Staff of the Senate Foreign Relations Committee from 1955 to 1973. It is far from clear that a staff member is competent to state the views of Congress and much of Marcy's affidavit is hearsay from members of Congress. Even if he is competent as a witness for certain purposes, his affidavit is replete with speculation, vague and unsupported allegations, and hearsay relating to General Westmoreland:

It appeared that General Westmoreland was under strong political pressure from the White House to show progress in the war. *I suspect he knew* what message President Johnson *wanted to hear*, and that was the *message* General Westmoreland conveyed.

In the succeeding months of 1967, the military's reports of our progress in the Vietnam War became increasingly optimistic. In November 1967 General Westmoreland returned to Washington, D.C., with U.S. Ambassador to Vietnam Ellsworth Bunker for a series of official briefings on the war. The news they brought with them was extremely optimistic. They reported that we were winning the war of attrition and that the end of the war was in sight. General Westmoreland reported to the Senate Armed Services Committee and Ambassador Bunker reported to the Senate Foreign Relations Committee. Both men also briefed President Johnson. In addition, they held a series of press conferences and public briefings. The *message* that General Westmoreland and Ambassador Bunker delivered in these sessions was unmistakable—there was light at the end of the tunnel.

* * *

... In the months before Tet, we had consistently been told by administration and military officials that the enemy's ranks were declining, yet the enemy had just launched a countrywide, coordinated offensive which showed far greater enemy manpower, resources and capabilities than Congress had been led to believe the enemy possessed. Even after the Tet Offensive, however, military and administration officials continued to dispense their optimistic but inaccurate information about enemy capabilities and strength. (Marcy Aff. ¶¶ 13, 14, 18) (emphasis added)

Douglas Parry, a former CIA analyst, is presented as a "specialist on enemy irregular forces." (CBS Mem. 98) Defendants extensively cite his criticisms of MACV's 1967-68 enemy-strength estimates. Far from being "a specialist," in 1967-68 Parry was a young, inexperienced analyst with no background or training in estimating and analyzing communist irregular forces in South Vietnam. Parry himself admits that when he joined the Vietnam Studies Branch at the CIA in May or June of 1967 (Parry Dep. Tr. 208): "I was a beginner at the time. I was no super analyst." (Parry Dep. Tr. 209) Parry further admits that he did not become involved in developing enemy strength estimates until after the September 1967 Saigon conference. (Parry Dep. Tr. 179) Obviously, he is in no position to comment on MACV's estimates at and prior to the conference. Finally, Parry acknowledges that he "learned" how to analyze captured enemy documents from George Allen and Sam Adams, some of whose present views he shares. Some of his information was derived from Allen and Adams and is secondhand. (Parry Dep. Tr. 212)

David Shields was a CIA analyst in Saigon from the Winter of 1966 to the Fall of 1967. From the Fall of 1967 to the Fall of 1970, he was an analyst in the South Vietnam Branch of the Office of Economic Research in Langley, Virginia. His affidavit concerning his activities in Vietnam fails to provide a basis for admissibility since it is conclusory and speculation:

... It was Adam's conclusion at the time that official reports from the U.S. Military Assistance Command Vietnam (MACV) generally underestimated actual enemy strength... My research confirmed what Adams had been saying all day...

I and I believe others in the branch perceived that MACV was attempting to maintain an arbitrary ceiling on the enemy Order of Battle in the fall and winter of 1967.... (Shields Aff. ¶¶ 4, 5)

Shields appears to confirm what plaintiff contends, namely, that enemy units not listed in the MACV collateral OB were otherwise identified in

highly classified intelligence reports, although his affidavit is unclear. (Shield Aff. ¶¶ 5-7)

Joseph C. Stumpf was a CIA analyst in Langley, Virginia, working on Vietnam matters. The first event he describes took place in *December 1967*—well after the SNIE was signed. His account of his activities in a visit to Vietnam in December 1967 is hearsay and vague. For example:

During my visit in Saigon, several CICV analysts privately confided to me that MACV command arbitrarily reduced their strength estimates, and that they agreed with me that the actual numbers recruited were far higher than the MACV estimates. . . . (Stumpf Aff. ¶ 6)

The balance of the Stumpf affidavit deals with reactions to the Tet offensive in Washington, his opinion of the size of enemy strength, and an April 1968 Order of Battle conference in Langley, Virginia, that was not portrayed in the Broadcast.

John Barrie Williams, then an Army major, was a Vietnam Desk Officer at DIA from 1966 through 1968. Even though Williams was not part of the MACV delegation he would be competent to testify concerning certain things he saw and heard and conferences he attended on enemy order of battle in 1967. However, the great majority of the references to him in defendants' Motion for Summary Judgment are not for facts, but, rather for speculation and conclusory remarks:

My personal belief is I think the policymakers were misled by the numbers game and I think the American people were misled by the numbers game. Unfortunately, there may have been those of us within our own organizations, and I speak of the defense establishment, who started to believe what we were saying and thereby misled ourselves. (CBS Mem. 167)

* * *

. . . politically once you build up a sense of a threat then you need to show progress—had to prove we were diminishing the threat—that as the antiwar movement grew there was a growing need to demonstrate success. (CBS Mem. 391)

* * *

Godding was told to use the May Order of Battle as a ceiling. (CBS Mem. 201, 323)

C. Present but Incompetent Witnesses

There are several other witnesses who suffer from various infirmities. Colonel Gains Hawkins and Bernard Gattozzi had total "memory blocks" about major portions of the events portrayed in the Broadcast. However, defendants personally "unblocked" the witnesses and defendants now rely extensively on that testimony. A third witness admitted that his interview with CBS, his first affidavit and his deposition were the product of bias.

My saddest sense of realization is that Sam Adams' quest, taken as a crusade by so many of us who helped him, appears to have been a reckless vendetta that became a money-making scheme. In any event, I will no longer take any side. More importantly, I want to rid myself of bias. (Hamscher Aff. 11/18/83)

A fourth witness on whom defendants rely, George Allen, admitted at a deposition that he had never been candid in any of his previous statements—including one to the Pike Committee, and his interview with CBS. (Allen Dep. Tr. 350-352) He said he changed his affidavit so that it was more favorable to defendants, discussing parts of it with a CBS lawyer who persuaded him that the changes were necessary. (Allen Dep. Tr. 797) The same witness asked to have the oath reread on the second day of his deposition because he wanted to verify that he had to tell "the whole truth." (Allen Dep. Tr. 159) Allen and Hamscher are discussed in the preceding subsection.

Bernard Gattozzi was a CICV lieutenant between 1967 and 1968 who helped prepare the MACV OB Summaries. His job was to put together a table showing estimated enemy gains (infiltration and recruitment) and losses (KIA, estimated disabled and died of wounds, POWs and deserters). He did no analysis in any of these areas, but rather received the totals from the various analysts who did the original arithmetic: For example, Michael Hankins provided him with aggregate totals of monthly infiltration to insert in Gattozzi's table. (Gattozzi Dep. Tr. 207)

Defendants rely on Gattozzi's deposition testimony regarding infiltration, the Parkins firing and post-Tet casualty analysis. Since he did not do any work on infiltration his testimony is even less competent than Hankins', who at least had something to do with the preparation of infiltration statistics (see discussion of *Hankins*, below). His knowledge of the Parkins firing is concededly hearsay. (CBS Mem. 152) His knowledge of post-Tet events appears likewise to be incompetent. He admitted that he had a total block concerning post-Tet events which Adams and Crile tried to help him

reconstruct based in large measure on Adams' suggestions as to what may have occurred. (Gattozzi Dep. Tr. 107, 258-59, 299) Crile told Gattozzi that Adams and he had great success in helping Gains Hawkins overcome his memory block and cooperate with CBS. (JX 743, Gattozzi audiotape, p. 14-15) It is quite possible that Adams succeeded in implanting in Gattozzi's mind whatever is there on certain matters.

Lt. Col. Gains Hawkins was Chief of MACV's Order of Battle Branch from mid-1966 to mid-September 1967. On the face of it, Hawkins would appear to have a considerable amount of valuable information—but he doesn't. He recalls almost nothing. He testified remembering well only two statements from all of 1967—one by General Westmoreland apparently at a May 28, 1967 briefing in which he recalled General Westmoreland telling General McChristian to "take another look at these numbers," and one by Ambassador Komer, apparently at a June 14, 1967 briefing, in which he recalled Ambassador Komer's saying that he considered his briefing "Byzantine."

Perhaps more important is that Adams or Crile spent weeks with Hawkins reconstructing Hawkins' memory. In a telephone interview which Crile taped without Gattozzi's knowledge, Crile told Gattozzi that Hawkins had a "legitimate total block, memory block, around a certain area until he started to—until he struggled with us to go through the chronology, and it all came out." (JX 743, p. 23518) Needless to say, Crile and Adams were not impartial trained memory reconstructors. Finally, as discussed in Section, Hawkins' memory does not square with the uncontrovertible documentary evidence even when reconstructed. For example, one of a number of inconsistent statements Hawkins made concerning his actions following his May 28, 1967 briefing of General Westmoreland—allegedly within the period covered by his memory block—has him reducing MACV's estimate of irregulars twice. However, during the period between May 28, 1967 and mid-August 1967, MACV's total irregular estimate stayed virtually the same while the MACV guerrilla estimate actually rose 5,000 from 60,000 to 65,000.

The Court may wish to hold a voir dire before permitting Hawkins to testify.

D. People Whose Competent Testimony Supports Plaintiff

A number of listed witnesses have demonstrated an apparent basis for expressing competent evidence. Much of that evidence is helpful to plaintiff. In many instances defendants cited only one of multiple signed affidavits

given by a witness. They simply ignore, despite Rule 56, the evidence *from the same witness* that favors plaintiff. Some of the evidence defendants have chosen to ignore is quite significant.

Thomas Becker who was at the CIA Saigon Station in the Collation Branch beginning in December 1965, was involved in a special joint project (CIA, MACV and South Vietnam National Police) focusing on the political cadre operating in the six districts comprising the Saigon area from the Fall of 1966 through mid-November 1967. After two months personal leave, Becker joined SAVA in late January 1968 and stayed until some time in April 1968. Becker's belief that MACV's official estimates of enemy strength for irregulars and political cadre were too low dates from 1966 when the MACV J2 was General McChristian. (Becker Dep. Tr. 72) Becker stated at his deposition that the underestimation was well known among CIA and MACV analysts, although he admits that his visits with MACV J2 analysts were limited outside his joint project responsibility. His contacts with CIA Collation Branch analysts were on social occasions during this time. Becker has no knowledge as to whether this underestimation was known more widely than just at the analyst level. It was, as has been demonstrated elsewhere in this memorandum, a topic of open discussion at the DIA, CINCPAC, the Joint Chiefs of Staff and among policymakers in the offices of the Secretary of Defense, the Secretary of State and the White House.

Russell Cooley was a CICV major from October 1967 to October 1968. He was a supervisor in connection with the preparation of the MACV collateral OB Summary. On the Broadcast, Cooley talked about enemy infiltration in the Fall of 1967, the "pressures of General Westmoreland" in the headquarters, and the alleged erasure of the computer memory. As discussed in Section III.B above, Cooley and his subordinates could not and did not produce reliable estimates of infiltration since they lacked full access to the reliable, highly classified sources; thus, Cooley may not be competent as a witness on estimates of enemy infiltration in the Fall of 1967. With respect to alleged actions relating to General Westmoreland, Cooley never spoke to General Westmoreland until after the CBS Broadcast. Lastly, on the subject of the computer memory, where Cooley was personally involved, he denied that there was anything improper. (See Section III.B above)

Michael Dilly was a lieutenant in CICV from September 1966 to September 1967, working on estimates on the political cadre. He states that in the Spring and Fall of 1967, he was "constantly reporting that the total size of the enemy's political infrastructure was approximately 139,000." His

reports were constantly being rejected by Colonel Hawkins, General McChristian and General Davidson who estimated the political cadre as between approximately 80,000 and 90,000 from January or February 1967 until long after Dilley left Vietnam. His testimony shows that there was disagreement under General McChristian as well as under General Davidson about the size of the noncombatant enemy elements.

Michael Hankins, a lieutenant in CICV between July 1967 and July 1968, assisted in the compilation of MACV's collateral Order of Battle Summary relating to infiltration. Defendants described him throughout their Motion for Summary Judgment as "MACV's principal enemy infiltration analyst in 1967 and 1968." Hankins says he was only one of several analysts at CICV working on infiltration statistics, and by no means MACV's "principal" analyst. Hankins testified that he was a member of the "Order of Battle Section, OB Branch, Combined Intelligence Center, Vietnam." (Hankins Dep. Tr. 8) He then described the OB Branch:

Q. Was the Order of Battle section broken down into subparts of any kind?

A. Yes, it was. Three teams or four. There was some special studies folks, there was a section on guerrillas, section on in-country units, an NVA personnel infiltration team, which was the one I was at. That changed periodically while I was there, the internal grouping, except for mine. (Hankins Dep. Tr. 10)

Section III.B above, explains that the Current Intelligence, Indications and Estimates Division (CIIED) at MACV analyzed infiltration and that CICV did not have access to information which would permit meaningful analysis of infiltration. As discussed above, he testified that he believed CIIED acted in good faith. (Section III. B.12)

Bobby Layton was a CIA officer and intelligence analyst. Defendants' Memorandum contains 21 references to his March 26, 1984 affidavit. Although Layton executed another affidavit for plaintiff, on March 5, 1984, that affidavit is not mentioned. In his March 5, 1984 affidavit, Layton makes the following conclusions which supplement the statements relied upon by defendants:

The important conclusion of the SNIE 14.3-67 was that the communists had the ability to continue the war. That conclusion was quite apparent from the language of the SNIE 14.3-67. (Layton 3/5/84 Aff. ¶ 10)

When Sam Adams first began presenting his analysis on the various components of the communists' military and political structure in 1966, he seemed to recognize the uncertainties inherent in his estimates, which were based on extrapolations and data of varying degrees of reliability. As time went on, however, Mr. Adams seemed to become less flexible about his estimates and attributed a higher degree of certainty to these estimates than I thought was warranted by the evidence. (Layton 3/5/84 Aff. ¶ 18)

None of the numbers used in the SNIE 14.3-67 as strength estimates for the various components of the communists' military and political structure were based on what I considered hard, conclusive evidence. The best available evidence was on the Main Force and Local Force Units. The evidence on the other components of the communists' military and political structure was weaker, more fragmentary, and, thereby, less reliable. The evidence for the militia and the other components comprising the lower levels of the communists' military and political structure was the weakest. (Layton 3/5/84 Aff. ¶ 8)

Marshall Lynn was a second lieutenant assigned to CICV who studied enemy logistical capabilities. (Lynn Aff. ¶ 2) Although Adams testified that Lynn was responsible for monitoring six units in III Corps (Adams Dep. Tr. 308), defendants describe him as "MACV's principal administrative service troop analyst in 1967." (CBS Mem. 85) Lynn described apparently unsupported raisings and lowerings of estimates under both Generals McChristian and Davidson; but Lynn's affidavit and defendants' Memorandum cite only one allegedly unsupported lowering of an estimate under General Davidson.

Richard McArthur was a CICV lieutenant from July 1967 to March 1968 analyzing guerrilla strength. He testified at his deposition about three areas: first, the complaint he received in July 1967 when he was in the field about MACV's failure to change the guerrilla estimates in April 1967 (Section III.B, above); second, the Saigon session of the OB conference in September 1967 (Section III B.9, above); and, third, that his estimates for guerrillas were changed after the Tet offensive while he was on R & R in Bangkok (Section III.B.17, above). The first item, though hearsay, is probably admissible and contradicts the Broadcast. The second item likewise appears to be admissible and is supportive of plaintiff's case. To the extent that the third item shows that McArthur was not consulted about the

change because he was on R & R, his testimony is of doubtful relevance since contemporaneous documents demonstrate that the changes were made in accordance with established MACV procedures and explained to the CIA. (JX 558, CIA 4/2/68 Cable re: Briefing of Mission Council)

Joseph McChristian, a major general, was the MACV J2, chief of intelligence from July 1965 to June 1, 1967. According to the Broadcast and defendants' deposition testimony, nothing improper took place while he was J2. Aside from background testimony he would also be able to testify concerning the following:

(1) General Westmoreland never asked him to do anything improper;

(2) he knew in mid-March 1967 or earlier that he would be transferred out of Vietnam;

(3) General Westmoreland had asked him to stay longer;

(4) General McChristian wanted an armor assignment and was pleased by receiving it;

(5) he and General Davidson were long-standing rivals;

(6) he nevertheless recommended General Davidson as his successor;

(7) his best estimate of political cadre was between 80,000 to 90,000;

(8) he prepared a report dated May 18, 1967, which he delivered to Ambassador Robert Komer;

(9) the report concluded that guerrillas were the "only category of VC irregulars which constitute a real military threat in SVN" and that self-defense militia were "only marginally effective" as a combat force and did "not constitute an aggressive enemy threat";

(10) the report concluded that there were to the best of his knowledge about 185,300 irregulars of whom 60,500 were guerrillas;

(11) General Westmoreland was first advised on or about May 10-14, 1967, of General McChristian's higher estimates for irregulars and political cadre;

(12) General McChristian informed General Westmoreland of his staff's nine-month review of the irregulars and self-defense militia no earlier than mid-May, 1967, not out of any dereliction of duty but because he did not believe that it was sufficiently important to brief General Westmoreland before May 1967;

(13) General McChristian was not satisfied that the study of irregulars was complete any earlier than mid-May, 1967;

(14) General Westmoreland asked for a full briefing before his senior staff;

(15) he has no recollection of General Westmoreland communicating to Col. Hawkins by words or signals to reduce his estimates;

(16) General McChristian has no personal knowledge of any improper conduct at MACV; and

(17) after General Westmoreland became Army Chief of Staff in mid-1968, he appointed General McChristian as his Assistant Chief of Staff for Intelligence.

James Meacham, a Navy Commander, was the chief of the Order of Battle Studies component of MACV's Order of Battle Branch from October 1967 to July 1968. Meacham's testimony is admissible to explain that the letters he wrote to his wife were not intended to be taken literally and to explain that there was nothing illegal or improper in the post-Tet adjustments to the MACV computer which was described on the Broadcast as a "cover-up." (See Sections III.B.18 and III.B.20, above)

John Moore, a former CIA analyst, has acknowledged in deposition testimony that he received information from MACV and other independent agencies about enemy preparations for the 1968 Tet offensive in the Fall of 1967 while he was on the staff of the Watch Committee of the U.S. Intelligence Board. (Moore Dep. Tr. 139) He has also acknowledged that his analysis of this information was presented to the members of the Watch Committee but was not accepted by the Chairman—an individual not affiliated with MACV or the military. (Moore Dep. Tr. 157) The Watch Committee's receipt of the intelligence is inconsistent with a MACV-orchestrated conspiracy.

David Morgan was a lieutenant colonel and the deputy chief of the Order of Battle Branch of CICV during the Summer and Fall of 1967.

Colonel Morgan's affidavit is cited by CBS as evidence that enemy unit strengths were arbitrarily reduced. Colonel Morgan said in his deposition that the "certain enemy units" referred to in his affidavit as being reduced in September 1967 (Morgan Aff. ¶ 6) were strictly administrative service units—not VC regular Forces. (Morgan Dep. Tr. 41-42, 57 & 59) Thus, Morgan's testimony demonstrates that defendants' sworn answers to interrogatories were false:

As a result of the meeting between Westmoreland and Carver, Westmoreland's MACV command and the CIA reached an agreement which included the following components:

- The number of Regulars would be carried at 119,000. (This 119,000 estimate included units the individual strength estimates for which had been cut arbitrarily by Lt. Col. Morgan prior to the Saigon conference.)

(Defendants' Answers to Plaintiff's First Set of Interrogatories, No. 3 at p. 97).

Administrative service was an area of enemy strength where Colonel Morgan's experience was "devoted practically to two days" during his entire Vietnam tour. (Morgan Dep. Tr. 23) Colonel Hawkins had explained to Colonel Morgan that the reason the estimates were being changed was because some of these people might not be armed. (Morgan Dep. Tr. 42) Although Colonel Morgan may have stated that he thought that Colonel Hawkins' orders were arbitrary, he admitted having no evidence to refute the accuracy of the estimates Colonel Hawkins provided him. (Morgan Dep. Tr. 43-46) Although Colonel Morgan did not believe that porters or civilians were being counted among the administrative services (and should not have been if they were) (Morgan Dep. Tr. 68), Colonel Hawkins testified that indeed the counting of porters and civilians had been a problem with MACV estimates and had to be weeded out. (Hawkins Dep. Tr. 226)

Kelby Robinson was a lieutenant in CICV during 1967 assigned as an analyst of the VC infrastructure or political cadre. Robinson has executed two affidavits in this case; but defendants, who chose to take the evidence most favorable to their position, have failed to cite Robinson's first affidavit. For instance, Robinson said in his first affidavit "I have no knowledge that members of MACV artificially reduced their estimates of enemy strength prior to SNIE 14.3-67. It is my opinion that MACV went to SNIE 14.3-67 with its best estimates of enemy strength." (Robinson 7/25/83 Aff. ¶ 10)

Peter Sandman headed the Political Order of Battle Section at CICV between February and July 1967. He recounts efforts to improve estimates of political cadre and his briefings of visiting senior military officers giving the higher estimates that were in the process of revision, which appear to be competent evidence. On the other hand, he also recounts an incident involving Colonel Gains Hawkins which includes speculation as to Hawkins' intent:

It seemed to me that there was a clear attempt by my superior officers to provide less than complete and accurate information to General Wheeler. (Sandmann Aff. ¶ 10)

Ronald Smith, the head of the South Vietnam Branch at CIA, had little or no direct personal knowledge of the events depicted in the Broadcast. He relies primarily on impressions derived from discussions with colleagues, including Sam Adams, for his conclusions about the September 1967 Saigon Conference and the resultant SNIE 14.3-67. (See e.g., Smith Dep. Tr. 85, 97, 164-166, 180, 224) Contrary to the Broadcast's thesis that MACV suppressed critical information about enemy strength, however, Smith stated at his deposition that MACV and CIA analysis had the same base of information (Smith Dep. Tr. 122) and that the disagreement with MACV was over the analysis of this information. (Smith Dep. Tr. 127)

E. People Whose Status as Witnesses Is Uncertain

Contrary to the suggestion in defendants' Memorandum, discovery is continuing through August. Thus, only defendants' counsel have questioned a number of witnesses who have additional evidence to provide that supports plaintiff's case. These people include several who have not submitted affidavits: General Phillip Davidson, MACV J2; Colonel Charles Morris, MACV Director of Intelligence Production; Lieutenant Colonel Daniel Graham, MACV chief of the Current Intelligence, Indications and Estimates Division of J2; George Carver, Special Assistant to the Director of Central Intelligence for Vietnamese Affairs; and General Westmoreland himself.

More than that, however, there are a number of people from whom defendants have secured affidavits whose testimony cannot be evaluated at this stage.⁷³ Particularly in view of defendants' tendency to obtain affidavits

⁷³ Twenty-five of the 43 listed have not been deposed. The persons who have been deposed are: George Allen, Thomas Becker (open), Russell Cooley, Bernard Gattozzi, George Godding, George Hamscher, Michael Hankins, Gains Hawkins, Richard Kovar, Elmer Martin, Richard McArthur, John Moore (open), David Morgan, Douglas Parry, Gregory Rushford, Ronald Smith (open), Pierre Sprey and John Barrie Williams.

not based on personal knowledge without making that clear (*see e.g.*, the discussion above of Martin Affidavit and Sprey Affidavit) and to supply potential affiants with carefully screened material to "refresh their recollection" (such as one of a series of cables or memoranda about drafts of documents that were thereafter rewritten) (*see* Smith Dep. Tr. pp. 196-200), the affidavits of certain people must be viewed with caution.

Howard A. Daniel was a sergeant and a computer analyst at CICV from January 1966 to August 1968. He seems to say that CIIED prepared the figures for regular forces (Daniel Aff. ¶ 6) and that enemy units not listed in the collateral source MACV OB Summary were nevertheless listed in other reports (*Id.* ¶¶ 8, 11)

None of his testimony substantiates any of the Broadcast's claims.

Norman House was a CIIED officer from August 1967 until November 1967, when he was transferred to CICV by Colonel Goche, his superior. His affidavit asserts that new enemy units that appeared around Khe Sanh were reflected in highly classified documents, but were not reflected in the MACV collateral Order of Battle Summaries. That is competent testimony, but hardly news.

Louis Sandine was in the CIA Saigon Station from June 1966 to January 1968. He confirms that MACV gave CIA the documents on which the CIA based its estimates and that MACV told CIA of its new estimates in March 1967. He attended the September 1967 session of the SNIE in Saigon which he describes in conclusory language of limited probative value:

At the outset of the conference, CIA and MACV seemed to have irreconcilable differences of opinion on enemy strength. The CIA delegation was arguing for a total enemy strength figure far greater than MACV was willing to accept. As the conference progressed, however, CIA's position changed abruptly, and the final agreement was essentially everything [sic] that MACV wanted. (Sandine Aff. ¶ 9)

He adds:

As part of that NIE agreement, the enemy's self-defense and secret self-defense militia were excluded from total enemy strength figures. I believe that the enemy's self-defense and secret self-defense militia should have been included in calculations of total enemy strength. They posed a military threat to our forces and were an integral part of the enemy's overall operation. (Sandine Aff. ¶ 10)

F. Inadmissible Conclusory and Opinion Statements

The various infirmities of defendants' affidavits examined above preclude their admissibility on the ultimate facts of conspiracy and Broadcast accuracy. Federal Rule of Civil Procedure 56(e) is applicable to the defendants' affiants' statements asserting the existence of a conspiracy and affirming the accuracy of the Broadcast. At the very least, they must be based on personal knowledge and set forth a factual basis admissible in evidence. Even then, their admissibility is doubtful. Examination of the cited paragraphs in Section II.I.3. of CBS's Memorandum, "The Use of the Word 'Conspiracy' in the Broadcast" (CBS Mem. 223-25) reveals no more than a recitation of unsubstantiated and conclusory testimonials. For instance,

David Halberstam: "I must agree that this distortion of intelligence was the result of conspiracy." (Halberstam Aff. ¶ 51)

John Moore (CIA): "Based on my experience as a CIA analyst, I have become convinced that there was a conspiracy or cover-up among various elements of the intelligence community, including persons from MACV, CIA and DIA, to distort and to suppress intelligence information during the months prior to the Tet offensive so that the American public would have the impression that we were winning the war." (Moore Aff. ¶ 16)

David Sennett (CIA): "Based on my experiences at the CIA, I had reached the same conclusion as the CBS broadcast that in 1967 and 1968 the military had engaged in a conscious effort or conspiracy to distort and alter critical intelligence on enemy strength in Vietnam." (Sennett Aff. ¶ 9)

No evidence to substantiate the above statements or the other statements cited by CBS in the section are set forth in the affidavits. In fact, not one of defendants' 14 affiants cited in the section can claim personal knowledge of the events which would substantiate their conclusions sufficient to meet Evidence Rule 701 standards. Each is expressing a conclusion based on hearsay or other secondhand sources.

Similarly, defendants' Section entitled "Recognition of the Accuracy of the Broadcast" (CBS Mem. 239-43) presents a litany of 21 witnesses who endorse the program in conclusory terms. These witnesses do not identify or attest to the accuracy of any significant event shown on the Broadcast based on personal experience.

It is plain that the affidavits relied on by the defendants for the accuracy of the Broadcast and the conspiracy charge are not competent or admissible for those purposes under Federal Rule of Civil Procedure 56(e) nor Federal Rule of Evidence 701. See pages 307-08, 311-13, *supra*.

Based on the clear statement of numerous Courts of Appeals, this Court would be obliged to disregard many of the conclusory, speculative and hearsay remarks that appear liberally in the affidavits and deposition testimony cited by defendants. This result is all the more required with respect to conclusory and unhelpful assertions of people with limited or no personal knowledge of the facts necessary to form a probative judgment as to whether there was a conspiracy in 1967 or whether the Broadcast was accurate.

In addition, a substantial amount of defendants' documentary evidence is inadmissible for the purpose of supporting their contention that the Broadcast was accurate. Newspaper stories are not ordinarily admissible to prove truth, but are admitted for that purpose only in special circumstances. Compare *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 556-57 (5th Cir. 1980) (newspaper accounts of alleged antitrust violations with *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388, 396 (5th Cir. 1961) (newspaper report of fire 58 years earlier admissible in absence of more accurate and reliable evidence); See 11 Moore's Federal Practice § 803 (24) [4], [7], discussing House and Senate Reports. This is particularly the case when better evidence is available. Thus, reports of Sam Adams' testimony at the *Ellsberg* trial or before the Pike Committee presumably would not be admissible on the issue of truth, as opposed to malice, in view of the availability of transcripts.⁷⁴ Indeed, defendants reliance on newspaper reports rather than transcripts smacks of recklessness. Similarly, it is far from clear that newspaper accounts of press conferences during the Vietnam War would be admissible in lieu of transcripts or, alternatively, the testimony of persons who attended and who would be subject to cross-examination. (See CBS Mem. 134-39)

⁷⁴ Thus, many of the citations in defendants' memorandum in the section "Pre-Broadcast Controversy With Respect to Enemy Strength Figures" (CBS Mem. 189-94) apparently would not be admissible on the issue of truth.

IV. OTHER LEGAL ISSUES

A. The Broadcast is Not Absolutely Privileged and Defendants May Rely, at Most, on the Qualified Privilege Announced in *New York Times v. Sullivan*

CBS asks this Court to absolve it of all liability for its knowing and recklessly false defamatory statements concerning General Westmoreland. This claim for absolute immunity is based on: (1) Westmoreland's status; (2) his ability to respond to the CBS charges; (3) his voluntary assumption of the risk of criticism; and (4) the status of the issues discussed by CBS. The Supreme Court has already considered these very same factors in arriving at its decisions in *New York Times v. Sullivan* and its progeny, which unambiguously permit public officials and public figures to recover damages for defamation upon proof of actual malice.⁷⁵ By conditioning public official recovery on proof of actual malice the Court rejected the alternative, advanced by Justices Black, Goldberg, and Douglas, of absolute immunity.⁷⁶ 376 U.S. at 293 (Black, J., concurring); *id.* at 297 (Goldberg, J., concurring in result).

Ten years later, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), the Court observed that a rule of absolute immunity "would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation." The Supreme Court was not willing to cede unlimited, unchecked power to the media. The Court concluded that the First

⁷⁵ See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979); *Time v. Firestone*, 424 U.S. 448; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323; *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

⁷⁶ Shortly after the announcement of the qualified privilege in *Sullivan*, the Court declined to review a jury verdict *Goldwater v. Ginzburg*, 414 F.2d 324 (1969), in favor of Senator Barry Goldwater for a defamatory article that appeared in *Fact* magazine on the eve of the 1964 presidential election concerning his qualifications for President. 396 U.S. 1048 (1970). Justice Brennan, dissenting from the denial of *certiorari* noted that "New York Times and cases following it permit public figures and officials to recover damages for libelous statements made about them if the publication was made with 'actual malice'..."

Amendment ⁷⁷ did not require giving authors and publishers, including a multi-billion dollar conglomerate that owns a TV network (*Cf. First National Bank of Boston v. Bellotti*, 435 U.S. 765, 802-03 (1978), (Burger, C.J., concurring)), the unlimited ability to make statements about public figures that they knew or strongly suspected were false and defamatory.

In *Gertz*, the Court declined to extend further the protection of qualified immunity that had been extended to "public figures" in *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring). *Gertz* explained that a twofold rationale justified extending the *Sullivan* qualified immunity to public figures. First, the Court recognized that public figures are less vulnerable to injuries from defamatory statements because of their superior ability to utilize "self-help" in the form of greater access to the channels of effective communication enabling them to counter criticism and expose the fallacies of defamatory statements. 418 U.S. at 344; *see Curtis Publishing Co. v. Butts*, 388 U.S. at 155 (plurality opinion); *id.* at 164 (Warren, C.J., concurring in result). The second rationale was a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." 418 U.S. at 345; *see Curtis Publishing Co. v. Butts*, 388 U.S. at 164 (Warren, C.J., concurring in result).

In *Herbert v. Lando*, 441 U.S. 153 (1979), the Supreme Court left no doubt that the First Amendment did not bar recovery by Col. Anthony Herbert, a conceded "public figure," and that the press was at most entitled only to the qualified *Sullivan* privilege:

Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability. . . . New York Times and Butts effected major changes in the standard applicable to civil libel actions. Under these cases public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability.

Given the required proof, however, damages liability for defamation abridges neither freedom of speech nor freedom of the press.

⁷⁷ In *Gertz* the Court observed that "there is no constitutional value in false statements of fact." 418 U.S. at 340.

See, e.g., Hubert v. Lando, 441 U.S. 153, 172 (1979); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Pickering v. Board of Education*, 391 U.S. 563 (1968) (White, J., concurring in part); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

Id. at 158-60. The *Herbert* Court also observed that:

Only complete immunity from liability for defamation would [relieve the media from the burdens of libel litigation], and the Court has regularly found this to be an untenable construction of the First Amendment.

Id. at 176.

Most recently, in *Calder v. Jones*, 79 L.Ed.2d 804 (1984), the Court warned against "double counting" First Amendment considerations by expanding the influence of the First Amendment beyond the protection afforded by *Sullivan*.

1. *CBS Is Only Entitled To Qualified Immunity on the Basis of General Westmoreland's Status as a Public Figure and Former Public Official.*

CBS is entitled to only a qualified privilege for two reasons. First, the rationale of *New York Times v. Sullivan* is not reciprocal immunity. Second, at the time of the Broadcast, General Westmoreland enjoyed no immunity for statements he might make.

The Supreme Court's extension of the qualified privilege to public figures demonstrates that the rationale for the privilege is not reciprocal immunity, but rather a presumed greater ability to respond to criticism and a presumed assumption of the risk of good-faith criticism. Following the Court's decision in *Sullivan*, the qualified privilege was extended from the limited category of public officials to the broader category of public figures. *Curtis Publishing Co. v. Butts*, *supra*, and *Walker v. Associated Press*, 388 U.S. 130 (1967). *Butts* involved a *Saturday Evening Post* article accusing Wally Butts, University of Georgia athletic director, of conspiring to fix a football game. *Walker* concerned a news dispatch describing Walker, a former U.S. Army general, as having personally led a crowd in a charge against federal marshals in an attempt to block the enrollment of James Meredith in the University of Mississippi. At the time of the dispatch, Walker was a private citizen, but he had previously commanded federal troops during the 1957 school desegregation confrontation in Little Rock, Arkansas.

The Court found that both Walker and Butts were public figures and that some form of constitutional protection should be afforded to publishers

of defamatory statements about such plaintiffs.⁷⁸ Justice Harlan reasoned that two similarities between public figures and public officials justified imposition of constitutional safeguards on state libel actions involving public figures:

[B]oth commanded sufficient public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.

388 U.S. at 155.

These opinions clarify the rationale for the *Sullivan* rule. Unlike public officials,⁷⁹ public figures enjoy no immunity from common law defamation suits. The rule is based, therefore, not on the notion of reciprocal immunity,⁸⁰ but on the two traits shared by public officials and public figures, presumed greater ability to respond to criticism and presumed assumption of the risk of greater exposure to criticism. The cases provide no authority for holding that public officials, present or former, may be libeled with abandon.

Moreover, General Westmoreland is no longer a public official and is, at most, a public figure. The Court has not yet resolved the role that the passage of time plays in determining whether a former public official should

⁷⁸ However, there was disagreement over the standard to be applied. Four Justices in *Butts* would have held that a public figure may recover upon a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers." 388 U.S. at 135. Chief Justice Warren, on the other hand, saw no reason in "law, logic, or First Amendment policy" to differentiate between public figures and public officials, and would have applied the *Sullivan* standard to both. *Id.* at 163-64 (Warren, C.J., concurring). His opinion was joined in both cases by Justices White and Brennan, and in *Walker* by Justices Black and Douglas. Thus, in *Walker*, a majority of the Court voted in favor of applying the *Sullivan* standard to public figures.

⁷⁹ Even the continued viability of official immunity is in doubt. Since *Barr v. Matteo*, 360 U.S. 564 (1959), the Court decided in *Garrison v. Louisiana*, 379 U.S. 64 (1964) that government officials could be convicted for criminal libel upon proof of actual malice. In *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court concluded that legislative immunity did not shield Senator Proxmire's libelous statements about a government-funded scientist. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (no absolute immunity for close advisors of the President).

⁸⁰ In *Sullivan*, the Court reasoned that the qualified immunity accorded the media for criticism of public officials was consistent with, not required by, the common law immunity enjoyed by public officials. The level of "reciprocal" immunity provided by *Sullivan* was only qualified, not absolute.

be considered a public official or a public figure. *Cf. Wolston v. Reader's Digest Association*, 443 U.S. 157, 166 (1979); *id.* at 171 (Blackmun, J., Marshall, J., concurring). In *Herbert v. Lando*, the Supreme Court referred to retired Army Colonel Herbert as a "public figure." 441 U.S. at 156; *id.* at 181 (Brennan, J., dissenting).

Finally, CBS's reciprocal immunity argument fails for the simple fact that General Westmoreland did not enjoy the common law immunity available to a public official at the time of the Broadcast. Thus, he could have been sued for defamation when, on January 26, 1982, he had accused George Crile and Mike Wallace of deliberately lying about him on CBS Reports. At most, CBS is entitled to claim the qualified privilege set forth in *Sullivan*. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

2. *This Suit Is Not Tantamount to a Seditious Libel Prosecution.*

CBS claims that this action is a constitutionally barred suit for seditious libel. This contention, however, is completely without merit. Seditious libel actions were criminal prosecutions brought by the state against a publisher in the name of the state.⁸¹ This civil action is brought by a private citizen to recover damages to his honor and reputation. *Sullivan* distinguished actions for seditious libel, which are impermissible under the First Amendment, from common law civil libel actions. The Court specifically held that public officials could maintain a civil libel action and could recover damages arising from statements made about their official conduct if they were able to prove that such statements were made about them with actual malice.

The Court held in *Sullivan* that Sullivan's action was barred because the First Amendment prevented the jury from concluding that the allegedly defamatory newspaper advertisement referred in any way to him, simply because he was one of the individuals who supervised the police. 376 U.S. at 273-76. The advertisement did not mention Sullivan by name, title, or office, nor did it picture him. The advertisement was highly critical of police conduct in general. Nor were there extraneous facts which placed the focus on Sullivan.

The Broadcast, on the other hand, accused General Westmoreland of a conspiracy to suppress vital military intelligence and to lie to the President and to his military commanders. General Westmoreland was mentioned by

⁸¹ In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Court held that states could constitutionally maintain a criminal libel action as long as they satisfied the same *Sullivan* Standard Application in civil action.

name some 58 times during the Broadcast. General Westmoreland's picture appeared repeatedly during the Broadcast, and his picture was shown on all of the "bumpers." The press, the public, and CBS understood the Broadcast to make serious charges against General Westmoreland. See Section IV.3.a. *supra*. Likewise, the public understood the full-page newspaper advertisement, which appeared after CBS identified General Westmoreland as the focus of the Broadcast in its CBS Morning News segment, to refer to him.

CBS accused General Westmoreland not of government wrongdoing, but of misdeeds and crimes directed *against* government and which were quite contrary to the national interest. This is a far cry from *Sullivan* where the Court was concerned that a "good faith critic of government will be penalized for his criticism We hold that such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." 376 U.S. at 292. For many reasons, including that the Broadcast named General Westmoreland and it was not an "impersonal" attack on governmental operations but rather on him, defendants' argument must fall.

3. *General Westmoreland's Presumed Ability to Respond to Criticism Does Not Justify Granting CBS Absolute Immunity.*

CBS also contends that General Westmoreland is barred from seeking redress in this Court because of "the access such officials have to public and political forums for disputing such criticism." (CBS Mem. at 251) Again, CBS has overstated the privilege to which it is entitled. All of the Supreme Court cases advancing this rationale to justify a privilege to publish defamatory statements have extended only a qualified privilege. Public officials and public figures—those having presumed greater access to the channels of counterargument—nevertheless are permitted to recover for defamation if they can prove that defamatory statements were made with actual malice.

The qualified privilege provides "breathing room" for press comment by protecting the publication of some false statements. Such protection guards against "chilling" the publication of true statements. The Court believed that the "greater access" enjoyed by public officials/figures would roughly balance the protection afforded the press by the qualified privilege.

CBS points to General Westmoreland's "self-help" remedy as a justification for its claim to an absolute privilege. It is true that General

Westmoreland as a public figure has greater access to the press than do most purely private citizens and that he did have an opportunity to respond to the Broadcast in his January 26, 1982 press conference. But CBS also enjoys access, indeed far greater access to the public, and has used that access to repeatedly "stand by" the charges made in the Broadcast. It is now, therefore, appropriate to resolve both the truth of the charges and the existence of actual malice in court. No court has ever held that "access to the means of counterargument" was a substitute for a state law libel remedy. Instead, it is simply one of the two explanations offered by the Court for according the media a qualified privilege.

4. *General Westmoreland's Presumed Assumption of the Risk of Criticism Does Not Entitle CBS to Absolute Immunity.*

CBS also relies on the "assumption of the risk" argument in an attempt to justify its claim to absolute privilege. (CBS Mem. at 253) However, this is only the second prong of the justification offered by the Court to support the *Sullivan* qualified privilege. No Court has held that this argument entitles the media to claim an absolute privilege.

Furthermore, although public officials and public figures have exposed themselves to the risk of criticism through their own voluntary conduct, they often have a greater interest in their good name, honor, and reputation. In this case, this greater reputational interest is signified by the West Point motto, "Duty, Honor, Country," which CBS quoted as part of its libel of General Westmoreland.

CBS's argument that the state has only a *de minimis* interest in protecting General Westmoreland's reputation is baseless.⁸² While public figures—or even public officials—may invite criticism through their own voluntary action, they have not surrendered the interest in their good names and reputations. Indeed, because of their roles in public life—their careers—protection of their reputations is even more essential. They are in great need of protection because, in a very real and personal sense, they have so much to lose from unremedied damage to their reputations. No entity, such as CBS, should be given unfettered power to destroy the reputations of citizens who choose to take an active role in public affairs.

⁸² The Court has frequently reiterated its conviction, reflected in state libel laws, that an individual's interest in his reputation is a fundamental concern. See, e.g., *Herbert v. Lando*, 441 U.S. at 169; *Time v. Firestone*, 424 U.S. at 455-57; *Gertz v. Robert Welch, Inc.*, 418 U.S. at 348-49.

5. *The Status of the Issues Discussed by CBS Does Not Entitle It To Claim Absolute Immunity.*

CBS contends that the importance of the issues in the Broadcast justifies an absolute privilege. The "public interest" standard for determining the availability of the *Sullivan* qualified privilege was specifically repudiated by the Court in *Gertz*. Instead, the Court adopted a more objective test that focused on the status of the plaintiff. Justice Powell explained as follows:

The extension of the New York Times test proposed by the Rosenbloom plurality would abridge the legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of "general or public interest" and which do not—to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971).

418 U.S. at 346; see *Wolston v. Reader's Digest Association*, 443 U.S. 157, 167 (1979) ("a libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*").⁸³

B. Defendants Are Not Entitled to Absolute Immunity with Respect to the Few Statements They Characterize as Opinion.

CBS argues that the Broadcast was an absolutely privileged expression of pure opinion. Citing *Gertz*, defendants proclaim that, "Under the First Amendment there is no such thing as a false idea." 418 U.S. at 339-40. But, as the Second Circuit has observed, the passage from *Gertz* quoted by defendants "has become the opening salvo in all arguments for protection from defamation actions on the grounds of opinion, even though the case did not remotely concern the question." *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 61 (2d Cir. 1980). Defendants' contention is without merit because CBS has simply ignored the essential factual nature of the Broadcast. Moreover, any of its statements which could arguably be characterized as pure opinion are not entitled to the absolute privilege because such statements were based on either undisclosed material facts or on disclosed

⁸³ In *Time v. Firestone*, 424 U.S. 448, 456 (1976), the Court explained that "use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area. It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff."

defamatory assertions or were accusations of criminal and dishonest conduct.

1. *The Broadcast was a News Broadcast*

Contrary to CBS's claim that the Broadcast merely expressed an opinion that General Westmoreland was politically motivated to present an optimistic picture of progress in Vietnam, the Broadcast in fact presented a detailed litany of "evidence" supporting CBS's charges that Westmoreland led a conspiracy or concerted effort to suppress and alter vital military intelligence during the months preceding the Tet offensive. The Broadcast described events in great factual detail: places, dates, meetings, cables, and specific acts of alleged deception, suppression and faking. See *Bose Corp. v. Consumers Union of the United States*, 692 F.2d 189, 194 (1st Cir. 1982) ("the seeming scientific nature of the article . . . would support the position that the statements are facts"). Significantly, CBS has not even attempted to demonstrate that the 128 false Broadcast statements listed by General Westmoreland in response to CBS's Interrogatory No. 13 or the specific libelous statements filed with the Court as part of Plaintiff's Statement of Libels are anything but factual. Thus, CBS apparently concedes that General Westmoreland's statements of libel are factual in nature, and therefore entitled only to the qualified *Sullivan* privilege. Its claim, unclearly stated, seems to be that defendants were criticizing only General Westmoreland's motivation and as a matter of law that is a protected expression of opinion. That claim can hardly survive even the most cursory scrutiny.

Aside from an examination of the words themselves, courts often look to the context in which the words were offered to the public as an aid in the fact/opinion determination. The Broadcast was offered as investigative journalism, as facts and findings about events that took place 14 years earlier. The advertisement that preceded the Broadcast told potential viewers that they could expect to see facts, not opinions. The title of the Broadcast, "CBS Reports—" (not "CBS Editorial—") and the unit responsible for producing the Broadcast suggest the presentation of facts, not opinions. No portion of the Broadcast was segregated and delimited as opinion, as is customarily done on a newspaper's editorial page or in the commentary segment of the network evening news. CBS News Standards applied to the Broadcast.

A January 11, 1982 CBS press release announced that "CBS News unravels the story The explanation is what Wallace and Crile offer is evidence . . . CBS Reports 'The Uncounted Enemy: A Vietnam Deception' documents . . . The broadcast reports . . . The broadcast examines . . . 'The Uncounted Enemy: A Vietnam Deception' is 'a disturbing case study'" (JX 613, 37354-55) On January 26, 1982, Dan Rather on CBS Evening News called the Broadcast "a CBS News Broadcast." (JX 837, p. 571-77)

Furthermore, the Broadcast was not a contribution to a live and heated debate, but was composed of "factual" statements about events that occurred 14 years earlier. The "fiery discussion," if one can be said to exist at all, came exclusively from Sam Adams. Adams has told and retold his story countless times, although it was not until the Broadcast that he or anyone else accused Westmoreland of being at the center of a conspiracy to deceive his superiors in the government. CBS resurrected and paid Adams to tell his story yet one more time. CBS cannot now argue that it was simply one more voice shouting in the midst of a heated controversy.

Therefore, as a news program, the Broadcast was designed to be treated literally. The press coverage of the Broadcast demonstrates that it was taken literally. It was not until after plaintiff filed suit that CBS News took the position that the Broadcast was opinion.

2. *The Broadcast Used the Term "Conspiracy" in Its Literal Sense.*

CBS's argument that conspiracy and cover-up were used in their loose and figurative sense (CBS Mem. at 259-66), and are, thus, protected rhetorical hyperbole, is unacceptable. These terms constitute accusations of crimes—treason, lying to a superior officer and manslaughter, if not premeditated murder. The Broadcast proceeded to offer documentation of these charges in minute detail. Furthermore, the full-page newspaper advertisements, with which many CBS executives found serious fault, portrayed the precise view of General Westmoreland and his colleagues that CBS wanted the viewers to accept. It was not until after plaintiff filed this action that CBS News took the remarkable position that the charges the Broadcast made against General Westmoreland, including the devastating charge of conspiracy, were "rhetorical hyperbole." (CBS Mem. at 261-65)

Courts have on occasion accepted the fact that strong language is sometimes used in a loose, figurative sense. "Blackmail" was used in its

figurative sense in *Greenbelt Coop. Pub. Co. v. Bresler*, 398 U.S. 6 (1970). The Supreme Court, in reaching this conclusion, carefully noted that:

It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was Bresler's public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meeting or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought that Bresler had been charged with a crime.

398 U.S. at 14.

Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), concluded that, in the context of the existing labor dispute, use of the word "scab":

was obviously used here in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization.

418 U.S. at 284. Comparing the use of "scab" to the use of "blackmail" in *Bresler*, the Court found it:

similarly impossible to believe that any reader of the Carrier's Corner would have understood the newsletter to be charging the appellees with committing the criminal offense of treason . . . Jack London's 'definition of a scab' is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members toward those who refuse to join.

Id. at 285-86.

By contrast, the word "conspiracy" appeared in the Broadcast after 15 months of preparation and production. That it was used in its literal sense is demonstrated by Crile's statement to Benjamin in June 1982, reprinted in the Benjamin Report:

It was absolutely proper to use the word conspiracy. We went through everybody before we used the word. It was the only word that worked for me to explain the pattern of events. (PTX 2, pp. 6-7)

Benjamin also did not believe that CBS used the word "conspiracy" in a "loose, figurative sense." When Benjamin reviewed the Broadcast he understood his employer CBS to be using the word "conspiracy" in "the accepted definition of the word." Otherwise, why would he quote the definition of conspiracy which appears in *Webster's Third New International Dictionary*?

CONSPIRACY: An illegal, treasonable or treacherous plan to harm another person, group or entity . . . A combination of persons bonded secretly together and resolved to accomplish an evil or unlawful end. (PTX 2, p.6)

Why also would Benjamin list the following as a "principal flaw" of the Broadcast?

—A "conspiracy," given the accepted definition of the word, was not proved.

Finally, there was nothing in the Broadcast to show that CBS used the word "conspiracy" in other than its ordinary sense.

3. *The Use of the Term Conspiracy Is Not Protected Opinion*

The use of the term "conspiracy" is not protected opinion for at least two reasons: First, it charged General Westmoreland with criminal conduct and dishonesty. Second, defendants withheld critical evidence from the viewers.

a. *The Broadcast Charged General Westmoreland With Criminal and Dishonest Conduct and, Therefore, Is Not Protected Opinion.*

The charge of conspiracy is a criminal charge.

The seriousness of the charges defendants made against General Westmoreland is demonstrated by the laws covering the kind of conduct portrayed in "The Uncounted Enemy: A Vietnam Deception." Thus, section 2388 of Title 18, United States Code, which is part of Chapter 115, entitled "Treason, Sedition, and Subversive Activities," reads:

§ 2388. Activities affecting armed forces during war

(a) Whoever, when the United States is at war, willfully makes or conveys false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies:

* * *

Shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

(b) If two or more persons conspire to violate subsection (a) of this section and one or more such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided in said subsection (a).

Section 2388 demonstrates, moreover, that General Westmoreland would be criminally responsible for acts of others in furtherance of any conspiracy.

Title 10, United States Code (the Uniform Code of Military Justice), provides in section 907 (article 107):

§ 907. Art. 107. False official statements

Any person subject to this chapter [10 USCS §§ 801 et seq.] who, with intent to deceive, signs any false record, return, regulation, order, or other official document, knowing it to be false, or makes any other false official statement knowing it to be false, shall be punished as a court-martial may direct.

Section 881 (Article 81) reads:

§ 881. Art. 81. Conspiracy

Any person subject to this chapter [10 USCS §§ 801 et seq.] who conspires with any other person to commit an offense under this chapter [10 USCS §§ 801 et seq.] shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

Each of the above acts is punishable by dishonorable discharge and confinement at hard labor up to one year. 10 U.S.C. § 856.

In 1972, Adams tried to have the Army court-martial General Westmoreland. (JX 12, Adams CBS Int. Tr. p. 16696) He wrote a memorandum to the Inspector General of the Army citing some of these very same provisions in seeking to have General Westmoreland court-martialed:

I would respectfully point out that the allegations in the 8 December memorandum, if true, raise the possibility that infractions have occurred of the Uniform Code of Military Justice. These might include a failure to obey orders or regulations (Section 892, Article 92), false official statements (Section 707, Article 107), and conspiracy (Section 881, Article 81). Since the allegations are serious, specific, and supported by what

appears to be good evidence, I think you will agree they are important enough to warrant a full investigation. (JX 436, p. 06359)

Charges of illegal and unethical acts are not protected opinion. To suggest, for example, that a soldier would allow political considerations to interfere with his clear duty is itself libelous *per se*. *Sharon v. Time, Inc.*, 575 F. Supp. 1162, 1165-68 (S.D.N.Y. 1983) (statement that former Israeli defense minister had conversations regarding need for revenge prior to massacre held libelous *per se*); *see, e.g., Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980) (charge of rape); *Buckley v. Littell*, 539 F.2d 882, 896-97 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (defamatory to call journalist a libeler even in context of attack on political views); *Rinaldi v. Holt, Reinhart & Winston, Inc.*, 42 N.Y.2d 369, 379-82, 397 N.Y.S.2d 943, 949-51, 366 N.E.2d 1299, 1304-05, 1307, *cert. denied*, 434 U.S. 969 (1977) (defamatory to call judge "probably corrupt"); *November v. Time, Inc.*, 13 N.Y.2d 175, 179, 244 N.Y.S.2d 309, 312, 194 N.E.2d 126, 128-29 (1963) (defamatory to suggest that an attorney sought influence with his client "by methods inconsistent with his professional obligations"); *Hellman v. McCarthy*, 10 Med. L. Rep., 1789 (N.Y. Sup. Ct. 1984) (defamatory to call author "dishonest").⁸⁴

When used in their ordinary sense, as in the Broadcast, charges that General Westmoreland engaged in unethical and criminal activity are not protected expressions of opinion.⁸⁵ "Accusations of criminal conduct, even in the form of opinion, are not constitutionally protected." *Rinaldi, supra* ("probably corrupt" and "suspiciously lenient"); *Cianci, supra* ("rape");

⁸⁴ Moreover, the Broadcast is obviously capable of a defamatory meaning under South Carolina law:

It seems to be well settled in this State (South Carolina) that any words which falsely or maliciously charge the commission of a crime, or which distinctly assume or imply one has committed a crime, or which raises a strong suspicion in the minds of hearers or readers, that one has committed a crime, or which plainly and falsely charge the contraction of a contagious disease, adultery or a want of chastity, or unfitness in the way of a profession or trade, or any written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous are actionable *per se*. [Citations omitted]

Homes v. Curtis Publishing Co., 303 F. Supp. 522 (D.S.C. 1969), quoting *Lesesene v. Willingham*, 83 F. Supp. 918, 921 (E.D.S.C. 1949); *see also, Pierce v. Northwestern Mutual Life Insurance Co.*, 444 F. Supp. 1098, 1101 (D.S.C. 1978).

⁸⁵ Defendants spend four pages explaining that General Westmoreland "bears a responsibility because it was his command or 'watch'" (CBS Mem. 278-81). The Broadcast, however, did not accuse General Westmoreland of negligent supervision.

Kolikoff v. Community News, 89 N.J. 82 444 A.2d 1086 (N.J. 1982) (“conspiracy” and “cover-up”); *Brady v. Ottaway Newspapers, Inc.*, 84 App. Div. 2d 226 445 N.Y.S.2d 786 (2d Dept. 1981) (“accessories after the fact, if not before and during”). Indeed, *Rinaldi* held that statements that plaintiff judge was “probably corrupt” and that his sentences were “suspiciously lenient” did not constitute expressions of opinion because of “their strong overtones of *conspiracy* and illegality.” 42 N.Y.2d at 381 (emphasis added).

The holdings of the Supreme Court are consistent. In *Gertz*, the Court noted that the terms “Leninist” and “Communist-fronter” “are generally considered defamatory.” 418 U.S. at 331.⁸⁶ In both *Bresler* and *Letter Carriers* the Supreme Court took pains to distinguish between the figurative use of words like blackmail and scab and their literal use.

In the post-*Gertz* case of *Time v. Firestone*, 424 U.S. 448 (1976), a non-public figure plaintiff charged Time with erroneously reporting that her husband had been granted a divorce on the grounds of “extreme cruelty and adultery.” *Id.* at 452. Time, citing *Time v. Pape*, 401 U.S. 279 (1971), argued that a “rational interpretation of an ambiguous document is constitutionally protected.” *Id.* at 459 n.4; *id.* at 467-69 (concurring opinion). The Court disagreed and explained *Pape* as an application of the actual malice standard, not the opinion rule. *Id.* at 459 n.4. The Court in *Firestone* made it very clear that the jury could decide whether Time’s interpretation of the divorce decree was a “false” one and impose liability if it found that Time was at fault. *Id.* at 458-59.

⁸⁶ Most recently in *Hutchinson v. Proxmire*, the Court ruled that a U.S. Senator’s observations that a government-funded scientist’s animal research was “nonsense” and “transparent worthlessness,” that use of public money was “outrageous,” and that “the good doctor has made a fortune from his monkeys and in the process made a monkey out of the American taxpayer,” were not immunized by the Speech or Debate Clause, that the scientist was not a public figure, and sent the case back with no intimation that any of the allegedly libelous remarks were within the opinion privilege. 443 U.S. at 116. The Court in *Gertz* and *Hutchinson* obviously did not hold that the challenged statements were not opinion. However, in light of the Court’s willingness to reach the ultimate defamation issue, rather than continue litigation by remanding the cases, the dispositions must be viewed as indications that the statements were capable of supporting libel judgments. If these statements are not absolutely privileged opinion, then by comparison, the more specific CBS charges against Westmoreland must certainly be regarded as statements of fact.

b. *The Broadcast Relied on Undisclosed Facts and Is Therefore Not Protected Opinion.*

The existence of undisclosed facts further defeats CBS's claim to an absolute privilege. A statement of opinion is protected only when it is based "on facts truly stated and free from imputations of corrupt or dishonorable motives on the part of the person whose conduct is criticized, and is an honest expression of the writer's real opinion or belief." *Julian v. American Business Consultants, Inc.*, 2 N.Y.2d 1, 8, 155 N.Y.S.2d 1, 137 N.E.2d 1 (1956); accord, *Brady v. Ottaway Newspaper, Inc.*, 84 App. Div. 2d 226, 445 N.Y.S.2d 786 (2d Dept. 1981) Under New York law, insincerely-held opinions appear to be protected, but only when the facts supporting them are set forth. *Rinaldi*, 42 N.Y.2d at 381; see Sack, *supra*, at 163-66, 175-76. Only in this way can the reader or viewer draw his own conclusion as to whether the opinion was justified.

Recently, Chief Judge Robinson of the D.C. Circuit conducted a detailed review of Supreme Court opinion cases and attempted to synthesize a test to differentiate statements of pure opinion, entitled to absolute privilege, from all other statements, mostly hybrids mixing some fact and some opinion, which would be entitled to only a qualified privilege when made about a public figure:

I would conclude that a hybrid statement may claim absolute privilege as opinion only when it is accompanied by a full and accurate narration of the material background facts or, if material data are omitted or erroneous, when the factual omission or error is not traceable to actual malice in the case of a public figure If the author culpably fails to provide the requisite background, then the hybrid should be held to forfeit all claim to absolute privilege and be afforded only that quantum of protection accorded a purely factual misstatement in the circumstances.

Ollaman v. Evans, 713 F.2d 838, 849 (D.C. Cir. 1983).

The examples offered by CBS themselves demonstrate that it is not entitled to claim an absolute opinion privilege because of the presence of material undisclosed facts as well as the false statement of other facts. The Broadcast claimed that General Westmoreland blocked General McChristian's cable from being forwarded to Washington, in effect charging that evidence of a "far larger enemy" gathered at the Cedar Rapids and Junction City operations was not dutifully forwarded to the Joint Chiefs and the rest of the intelligence community. What CBS did not tell its viewers

was that all the documents from these operations were available throughout the intelligence community and were disseminated to Ambassador Komer, the Embassy's Mission Council, the CIA, CINCPAC and perhaps others. CBS offers as its other example the alleged Westmoreland-ordered "ceiling" of 300,000 at the August 1967 Langley conference. Again, what CBS did not tell its viewers was that General Godding and Colonel Hawkins had specifically denied receiving any such order and that MACV's Vu-Graph, presented to the conference by Gains Hawkins, reported an estimated enemy strength of over 400,000, including all categories, not under 300,000. CBS also did not tell its viewers, for example, that its most reliable sources refuted the existence of 100,000 to 150,000 infiltrators between September 1967 and January 30, 1968 and that the alleged erasure of the computer memory was fiction.

4. *Count IV Should Not Be Dismissed.*

a. *Defendants' Motion Is Barred by the Doctrine of Law of the Case.*

Defendants again ask this Court to dismiss Count IV, the Sauter Memorandum count, on the ground that the Sauter Memorandum is protected opinion and that it is not actionable as a matter of law. In their previous motion to dismiss Count IV, defendants made precisely these same arguments. In their Memorandum defendants actually repeat paragraphs verbatim. Memorandum in Support of Defendants' Motion for Judgment on the Pleadings Dismissing Count Four of the Complaint, filed January 27, 1983, pp. 9-16, 23-25. Although defendants fail to mention their previous motion or this Court's ruling, their contentions were rejected in this Court's order dated April 21, 1983. This Court concluded that Count IV stated an actionable claim for libel and that there was no merit

to the defendants' contention that Count IV must be dismissed in advance of trial because (a) it fails to plead special damages . . . ; (b) the Sauter Memorandum was a constitutionally protected expression of opinion . . . ; or (c) the Sauter Memorandum was no more than an exercise of the privilege of reply, . . .

Order of April 21, 1983, at 3-4.

All that has changed in the past fifteen months is that the Court's speculation regarding evidence of malice has been resolved. The Benjamin Report and the notes Mr. Benjamin compiled during its preparation contain abundant evidence of actual malice.

The law of the case doctrine bars relitigation of defendants' motion. *See, e.g., DC Comics, Inc. v. Powers*, 482 F. Supp. 494, 496-97 (S.D.N.Y. 1979); *New York Guardian Mortgage Corp. v. Cleland*, 473 F. Supp. 409, 420-21 (S.D.N.Y. 1979); *U.S. v. IBM*, 79 F.R.D. 412, 414 (S.D.N.Y. 1978); *U.S. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*, 75 F.R.D. 473 (S.D.N.Y. 1977).

b. *Defendants' Motion Is Without Merit.*

Defendants' motion is also without merit. There are two defendants in Count IV—CBS and Sauter.

The evidence against CBS is overwhelming and includes all the evidence on actual malice cited in Argument Section II. Obviously, the Benjamin investigation and report had been completed by the time CBS released the so-called Sauter Memorandum. Thus, among other things CBS was aware not only of what Crile had learned in the course of his duties as producer of the Broadcast, but what Benjamin learned from all sources. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Embry v. Holly*, 293 Md. 128, 442 A.2d 966 (1982).

Sauter, for his part, had seen the Broadcast, discussed its production with a number of people, including Mike Wallace, and, of course, read the Benjamin Report. The Benjamin Report said, among other things, that

A "conspiracy," given the accepted definition of the word, was not proved (PTX 2, p. 57).

While he had received a number of letters from people who had good things to say about the show, he had also received detailed communications condemning the show from General Davidson, MACV J2 and from Walt W. Rostow, President Johnson's Special Assistant for National Security Affairs. Moreover, he was familiar with General Westmoreland's press conference, at which Ambassador Bunker, General Davidson, General Graham, Colonel Morris and George Carver attested to the fact that there was no conspiracy or deception. (Sauter Dep. Tr. 69)

Defendants also rely on Sauter's protestations of good faith at his deposition (CBS Mem. 366). But the jury would be free to conclude that he was testifying falsely at his deposition as he did in an affidavit he filed in this case. In their Memorandum, defendants quote Sauter's deposition testimony

that the Sauter Memorandum "reflects my opinion about the broadcast." Defendants then quote from his deposition:

"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." (Sauter Dep. Tr. 117) (CBS Mem. p. 366) (emphasis added).

Sauter said something different as part of his effort to prevent plaintiff from obtaining discovery of the Benjamin Report:

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 readings relevant to the broadcast and the issues it addressed. My judgment as to the substance of the broadcast *was not based upon Mr. Benjamin's retrospective report*. (Sauter Aff., 11/18/82, ¶ 10) (emphasis added)

Defendants cite the same cases in their Memorandum that they did in their motion to dismiss filed 18 months ago. The Court found more persuasive the cases cited by plaintiff, including *Dyer v. Mac Dougall*, 201 F.2d 265, 267 (2d Cir. 1952); and *Hartmann v. Time, Inc.*, 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948). See also Opposition to Defendants' Motion for Judgment on the Pleadings Discussing Count Four of the Complaint, filed February 8, 1983, at 7-9. Obviously, as plaintiff pointed out at the time, the Sauter Memorandum did more than merely "refer to" a prior defamatory publication. It constituted a separate defamatory statement.

C. The Libelous Publications Were "of and Concerning" General Westmoreland.

Defendants assert that, as a matter of law, certain of the publications that form the basis of this lawsuit and certain portions of the Broadcast were so remote from General Westmoreland that, as a matter of law, the Court should dismiss portions of this case. Defendants' arguments are devoid of merit.

1. *The Publications*

It is evident that a jury would be entitled, if not required, to conclude that the four publications that are the subject of this suit referred to General Westmoreland.

The first three Counts concern three contemporaneous publications: the CBS Morning News segment (January 21, 1982), full-page newspaper advertisements (January 22 and 23, 1982) and the Broadcast itself (January 23, 1982). On May 4, 1984, plaintiff advised the Court and defendants, "we intend to incorporate the allegations in each of the first three counts into each of the others of those counts."

Each of the three publications shares a common nexus to the theme of conspiracy, deception, and suppression presented in detail in the Broadcast. These publications were presented as part of a package and intended for the widest possible distribution. The advertisements and the CBS Morning News segment were intended to be absorbed in connection with the Broadcast, just as an introduction to a book, a magazine cover, or the initial piece in a series of stories. The basic purposes of the ads and the segment were to tease the public, to induce as many people as possible to watch the entire Broadcast, and to give a capsule presentation of the events that the Broadcast would describe in detail.

Similarly, each "scene" in the Broadcast was part of a seamless whole—individual acts that described a single conspiracy. In analyzing whether each of the publications is "of and concerning" General Westmoreland, they must be read together, in context, and in their entirety. Extrinsic evidence further demonstrates that defendants made General Westmoreland inseparable from each of the events depicted in the publications.

Defendants attempt to parse the Broadcast in order to make the argument that certain portions of the Broadcast were not "of and concerning" General Westmoreland. Their use of language is strained. In making their argument, moreover, they ignore the fact that they presented to those who saw the publications a wealth of material clearly and unmistakably identifying General Westmoreland as responsible for all the alleged misconduct and dishonesty described. Also, other actions by defendants make it unmistakably clear that they were charging General Westmoreland with playing a major role in a conspiracy to deceive the President, the Joint Chiefs of Staff and others. A portion of the evidence that demonstrates that defendants intended to relate all the charges in the Broadcast and other publications to General Westmoreland is summarized below:

a. *Pre-Publication Events*

(1) The Blue Sheet is convincing evidence that defendants intended the entire Broadcast to charge General Westmoreland with a broad

spectrum of misconduct. It acts as a prior consistent statement—indeed, a blue print—showing defendants' intent.

Thus, the summary of the proposed Broadcast clearly identifies General Westmoreland as one of the major conspirators:

The story of Sam Adams and the suppression of the CIA's intelligence findings is not widely known, but much of it can be found on the record. What is not known at all—and what would constitute the primary focus of this proposed documentary—is the story of how the U.S. Military Command in Vietnam entered into an *elaborate conspiracy* to deceive Washington and the American public as to the nature and size of the enemy we were fighting.

This is, of course, *the most serious of accusations, that a number of very high officials—General Westmoreland included—participated in a conspiracy* that robbed this country of the interests during a time of war. (JX 375, pp. 2-3) (emphasis added)

After the passage dealing with Hawkins' May 28, 1967 briefing of General Westmoreland and his senior staff, the Blue Sheet states that McChristian was "abruptly" relieved of his command after being asked to lower his figures.

McChristian and Hawkins leave with the clear impression that Westmoreland has asked them to lower their figures. But McChristian stood by his new estimates and two weeks later he is abruptly relieved of his command. It is at this point that the conspiracy to conceal the size and nature of the enemy in Vietnam begins. (JX 375, p. 3)

Crile tells the story of Parkins' supposedly presenting a report of 20,000 to 25,000 infiltrators a month.

He is astounded when Morris, in an office just 2 doors away from General Westmoreland, says the report can not be filed. Parkins demands to know why and finds himself shouting at Morris: such critical information has to be passed on to Washington. But the report is killed, and *Parkins, like McChristian before him, is promptly reassigned*. He is charged with insubordination and given a bad fitness report, his career in the army destroyed. (*Id.* at 7) (emphasis added)

The Blue Sheet next discusses the alleged erasure of the computer memory. Crile then presents the denouement:

With this act the conspiracy came to a close. But there was the outstanding question yet to resolve: what to do with the conspirators?

* * *