of their manpower situation that we could have in '67 as opposed to '66.

Q. The Special National Intelligence Estimate 14367 went to President Johnson, did it not?
A. Automatically, yes, sir.

Q. Speaking of things that went to President Johnson, is it the case that MACV's order of battle reports also went to President Johnson?
A. Yes, sir.

Q. And went to you as well?
A. Yes, sir.

Q. Did you have any reason to believe during the time that you were National Security Adviser to President Johnson that SNIE 14367 was intentionally deceptive or misleading in any way?
A. I did not have that impression then or now.

Q. With respect to MACV's order of battle reports, did you have any evidence or indication during the time that you were special assistant to President Johnson as National Security Adviser that the people who prepared those MACV order of battle reports believed them in any way to be intentionally deceptive or misleading?
A. No, sir.

Q. Did you during the period of time that you were National Security Adviser in November of 1967 see a MACV
press briefing that MACV put out to discuss the resolution
of the intelligence debate?

A. As I suggested in our deposition, I remembered
that it came in, but I don't remember the briefing. A

National Security Adviser is not an expert on the press.

Q. Did you send that briefing on to President
Johnson?

A. Oh, yes. Yes, sir.

Q. Did you ever have any discussions with President
Johnson about that MACV press briefing?

A. No, sir.

Q. Did you ever have any discussions with President
Johnson about SNIE 14367?

A. A discussion? No. But I sent, as you know, a
rather detailed covering memorandum, introducing Mr. Helms'
submission, which was the important part of it, and I, as
you know, on that occasion put in writing a suggestion we
had been working on as to how the briefing might take place.

I did that because President Johnson's overall
instruction was don't send anything without your
recommendation. I made my recommendation, which had been
considered for some months in our little group, but he
never discussed it with me.

Q. Did you ever have any discussions with President
Johnson about how this intelligence debate, as we have
described it, was ultimately resolved, other than that
cover memo that you sent?

A. I don't remember any discussion of it.

Q. Were you ever present when anyone else discussed
with President Johnson how that intelligence debate had
been resolved or the reasons for it?

A. I don't remember any such -- my being present at
such discussion.

Q. I think that we saw in some of the cables that
were handed to you some reference to political or public
relations implications concerning enemy strength estimates.
Do you recall that?

A. I do indeed, sir.

Q. Did you ever have any discussions with President
Johnson concerning the extent to which, if any, the
estimates of enemy strength that were being prepared were
affected in any way by concerns about the press or the
public or political implications?

A. No, sir. The only palpable element, political
element, was the concern about the misinterpretation of
revised figures that was possible if they were formally
included as part of the order of battle for the
self-defense corps and the secret self-defense corps.
That's part of the public record.

Q. You're not suggesting that you discussed that
with President Johnson?

A. I never discussed it with President Johnson, although I made my recommendation as to how that dilemma might be resolved in writing. I don't ever remember discussing it with him, sir.

Q. Did President Johnson ever indicate to you in words or in substance any view on his part as to whether it was appropriate to take press and public relations considerations into account in formulating enemy strength estimates?

A. He never discussed this with me. I never heard him address himself to it. I am confident, so far as the formulation of the estimates are concerned, that he would have most rigidly excluded from the formulation of the estimates any political element.

Q. And by any political element do you mean to include any element of considering the press or the public relations impact?

A. In formulating the estimate for professional military purposes.

Q. In drawing up the estimate?

A. In drawing up the estimate. I know him well enough to guarantee, Mr. Boies, that he would have been angered and furious if he thought that a political element had been introduced into the making of the estimate itself.
Q. Did you in terms of your work as National Security Adviser ever reach a judgment one way or the other as to whether or not political or public relations considerations had in fact affected the actual making or formulating of enemy strength estimates?

A. It was my best judgment at the time that they had not entered into the making of the estimates.

Q. Did you ever discuss that with anyone?

A. No, because my not unsophisticated colleagues with whom we worked on this matter and I never had any doubts about the good faith of everyone involved, including those who argued against the estimates.

Q. When you say you never had any doubts about the good faith of the people involved, and that this was shared by your sophisticated colleagues, who are the colleagues with whom you discussed enemy strength issues in 1967?

A. There were two major figures, General Ginsburgh and later Ambassador Jordan, William Jordan.

Q. These would have been members of your staff?

A. Who were members of my staff. On the technical side, I brought in Arthur McCafferty, who was head of the situation room and had a heavy operational responsibility. But he was a serious intelligence officer and I enjoyed having him get into matters of substance with us. And occasionally perhaps the fourth member of the team who
worked -- but he would have been less -- would be Marshal Wright, foreign service officer. But the core of those with whom I discussed these matters on my staff were General Ginsburgh and William Jordan.

Q. Did you discuss enemy strength issues or estimates with anyone in 1967 outside of your staff?

A. As I say, certainly at the beginning with George Carver.

Q. This was back in January of 1967?

A. That's right. And I somehow feel, but without evidence, that it's most unlikely that we didn't chat about this among other things, although most -- once the process of confrontation and negotiation was started I wouldn't have given that very high priority in conversation with Carver, but it's possible, although I do not have a record that I discussed it with him.

Q. During the period of October and November and December of 1967 -- do you need a refill?

A. I'm doing fine.

Q. Okay. During the period of October and November and December of 1967, subsequent to the Saigon September conference at which this debate was resolved, did Mr. Ginsburgh or anyone else prepare estimates for you or give you estimates of what the size of the enemy's self-defense and secret self-defense forces were?
A. Yes, sir, he did, and -- I can explain the context if you wish. But the answer is yes, he did.

Q. Let me be sure I understand. Are you saying that after the September Saigon conference in 1967 Mr. Ginsburgh provided you with estimates of self-defense and secret self-defense forces?

A. Let me see. I am trying -- there are two Ginsburgh memoranda. I am trying to get them dated. Perhaps you will help me.

One of them is one in which he presents as a supplement a DIA retrospective estimate, and I think that one is still in the summer, and then there is one a bit later in which he presents his own retrospective estimate, and the DIA estimate -- I mean, the one that had attached to it the DIA retrospective estimate has a table in which he foreshadows the kind of statistical agreement which appeared to be shaping up actually at the McLean meeting, and if I remember that document correctly, the left column is the old figures and the right column are the new figures which he thinks might be agreed after further interagency discussion, and that -- those figures are figures that add up to a total which I recall was the one that Saigon had agreed to, if you were going to put in self-defense corps and secret self-defense corps, about 100,000 self-defense corps, 20,000 VC. That's my best memory.
Q. Do you recall the date of that memorandum?
A. Not precisely. I believe it was August.
Q. Now, my question was focusing on the period of
time subsequent to the September 1967 Saigon conference.
A. I got it. Okay.
Q. Okay?
A. Right. The one where the resolution took place?
Q. Yes. This debate was resolved in September of
1967 in Saigon?
A. Right.
Q. What I want to know is after that resolution,
which was a resolution that says we're not going to list
the self-defense and secret self-defense forces in the
order of battle --
A. Right.
Q. -- did Mr. Ginsburgh or anyone else provide you
with an estimate of what the numbers for those forces, the
current numbers for those forces, were?
A. In that particular period, I don't remember the
provision of such an estimate.

(Continued on next page)
BY MR. BOIES:

Q. At any time, subsequent to September of 1967, during the entire period that you were National Security Advisor to President Johnson, did Mr. Ginsburgh or anyone provide a current estimate of self-defense or secret self-defense forces?

A. I don't remember any such and of course after Tet with the very grave casualties suffered by the VC, a progressive change in their structure, the whole estimation altered in character. The short answer is I don't remember any numbers, no, sir, or any estimates.

Q. How did the Tet offensive affect the self-defense and secret self-defense forces?

A. Over the balance of the year I believe it led to a diminution of those forces because after the second offensive in May the South Vietnamese and U.S. forces went on to a very systematic offensive that radically reduced the population under Vietcong control.

As you know, by definition, the secret self-defense forces were the forces who were more or less loyal to the Vietcong in the contested areas. The contested areas narrowed very sharply in the second half of 1968 and the areas controlled by the Vietcong unchallenged narrowed and it was inevitable under those circumstances that the Vietcong self-defense and secret self-defense
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forces would be attenuating which is what I believe
happened and I believe subsequent intelligence confirmed.
I mean including articles by former VC, now in Paris and
writing about that period.

Q. This was something that happened in 1968 after
the Tet offensive, correct, sir?

A. That's right.

Q. Now, my question goes not to that period but to
the effect of the Tet offensive itself on the self-defense
and secret self-defense forces and you have said that the
Tet offensive itself had a profound effect on the
self-defense and secret self-defense forces, have you not?

A. Yes, sir, and it affected the whole rest of the
year. I must make clear this exception to the way you
formulated it. Tet as we all know was a maximum effort,
like the Ardennens offensive, indeed like the battle of
Gettysburg. If a maximum effort where you have mobilized
everything you have does not succeed, then you fall back
quite far. That is what happened after Tet.

The effects of Tet on the position of the
Vietcong in 1968 over the whole balance of the year and
indeed in 1969 and many believe down to the present day was
very radical. It reduced the whole foundation for the
Vietcong effort.

Mr. Crile and I, when I was being taped,
discussed the hypothesis -- this was at his initiative -- that the Vietnamese had instigated the Tet offensive in part to destroy the Vietcong so they would be masters of the south without any assertiveness of the southerners. The south is ruled by them on a carpetbaggers basis now.

In fact, the next big battle was 1972, a battle of conventional forces, with much reduced guerrilla and self-defense force et cetera, component.

Q. When you say the next big battle, you mean the next big battle after when?

A. After the second wave of April. There was a third wave at the time of the democratic convention in August of 1968.

But talking in terms of major efforts like Tet, I would say the next great effort by the communists was the effort of 1972 to defeat the south.

Q. The major waves of the offensive consisted of what, sir?

A. The major waves of what, the Tet offensive?

Q. Yes.

A. My best memory, the first wave came at Tet; that is, the end of January and was very intense. We always envisaged, from documents we captured, a second wave. That came in May and typically it came just as the conference was opened, the negotiation conference, which they had
accepted in April and they had done this systematically, 
that is, put on a military demonstration to enhance their 
bargaining at the conference and this was a third wave, 
hardly worthy of being called that, but a third effort to 
capture the newspapers, at least, in August of 1968. 
That's my memory and I'm not a military historian. That's 
how I recall it. There may be others who can give you a 
more vivid picture of what went on in 1968.

Q. In the Tet offensive itself, the great many of 
the self-defense and secret self-defense forces had been 
taken up into Vietcong units that went into the cities to 
fight and suffered great casualties, had they not, sir? 

A. I believe that is the general view. Yes, I 
believe that's the general view.

Q. That is a view you subscribe to, correct, sir? 

A. May I try to clarify that a bit? At the time 
there was a view, which is reflected in the intelligence in 
February, that we had suffered great losses in everything 
that we had built in the countryside, because a lot of 
people came into the towns. When we finally got back into 
the countryside we found a lot of their countryside people 
had come into the cities and never returned and been killed 
and captured, et cetera. And so at the time I was inclined 

to believe that some of the SD, self-defense forces, secret 
self-defense forces, had come into the towns. But I am not
It may be that a certain number of the draft age people were taken not into the self-defense but right into the guerrillas.

We did know that in addition to the infiltration that we discussed at such great length there was a major effort before Tet to mobilize manpower down to 11 and 12 year olds.

Now, the question, bearing on yours, is were they -- and we found them in the cities, tragically killed as boys. But the question I'm raising is whether they were recruited into the self-defense corps or the guerrillas and I don't know the answer to that.

Q. It is clear whatever you call the units in which they fought that a substantial number of enemy who prior to the Tet offensive had been in the self-defense and secret self-defense forces participated in the Tet offensive and suffered very severe casualties in that offensive; is that correct, sir?

A. As I say, I would like to check the historical estimates of that, because I have been told and I cannot vouch for this directly and perhaps -- this is the reservation I have, that some have argued that there were not many that came directly from the self-defense corps and secret self-defense. What had happened was the guerrillas
Rostow - cross

were beefed up. What happened some males of appropriate age were drawn from the self-defense corps, guerrillas. I do not know.

One, our initial impression was, that, yes, some of the self-defense forces had been thrown into these numerous attacks in the cities and been rolled up. But that initial impression may not be the historians' verdict.

Q. By initial impression, you mean the impression back in 1968 when you were National Security Advisor?

A. That's right. Let's say in the interval between the first two waves. We took stock of the first wave in February, March, before the April, May offensive. I think our view was that probably quite a few of them who were not women, out of age and so on, may have been in that. I am not sure now.

Q. Is there anything that has happened in the last few days to make you unsure of that?

A. No, nothing in the last few days. It's our -- I have not followed the history of the war systematically. But I do remember reading in some military journal somewhere that a reevaluation was skeptical about this.

I am not qualifying myself as an expert on this, Mr. Boies. On the other hand, I am not prepared to say that it's my present judgment that many of them participated. I can tell you it was our impression at the
time that some of those that were captured, killed in the
cities, had been drawn up into that affair from the
self-defense corps, that's right.

Q. Let me see if I understand what you are saying.

You are saying that in 1968--

A Right.

Q. -- it was your initial impression at that time

that some self-defense and secret self-defense forces had
been drawn up into units that participated in the Tet

offensive?

A. Correct.

Q. And which suffered casualties?

A Along with the guerrillas and others, political
cadres, et cetera.

Q. But today you are not sure of that?

A. That's right.

MR. BOIES: Your Honor, could I show Dr. Rostow
his deposition of a couple of days ago?

THE COURT: Yes.

MR. BURT: Mr. Boies, would you tell us what

page you are referring to?

MR. BOIES: Page 300.

A. What page should I turn to?

Q. I would like you to turn to page 300, sir, and

you may wish to read the portion that precedes and the
portion that follows the portion that I am going to direct
your attention to. But the portion that I am particularly
interested in is the portion that begins at line 7 of page
300; do you see that?

A. Yes.

Q. In which I am asking you a question and I'm
picking up from your statement in the previous answer and I
say: "How did what happened at Tet affect, as you say, it
profoundly did, the self-defense and secret self-defense
forces?"

And you answer: "Well, in several ways. First,
a great many of them were people who were drawn up from
there into units that went into the cities and they
suffered very severe casualties as did the whole VC
structure."

Do you see that?

A. I see that, yes.

Q. Is that still your view?

A. Well, I was conveying to you the view that I
felt at the time and I will tell you what I thought of
afterwards. It was not new information--

Q. The time of this deposition was what, sir?

A. The time of the deposition -- was this in Paris
or here?

Q. That was here.
A. As we talked I thought of the testimony of Colonel Dac.

Q. You have my copy which has the date on it.

A. It's October 13th, last Saturday.

Q. That would have been this past Saturday?

A. Yes. When you asked me, I gave you the conventional view which may be right. What I thought of as I was here today is testimony that I have seen back in Austin of the most serious defector that we ever had I believe, that is Colonel Dac, who cast some doubt on this and that is the only reason. It was not in recent days. It was sometime ago that I -- I think you will find his testimony in the book called Tet by Oberdoff and he casts some doubt on the role of the self-defense forces and the secret self-defense forces and what I am giving you here is, you know, the view that I held at the time when I had some reason for it at the time.

The only thing that I have been trying to do in this is to indicate, as you spoke, I thought of Colonel Dac's evidence, which just puts a question mark over it. But I'm prepared to leave this evidence as it is because I have not made a serious effort to track down the foundations for his view and -- but what you get here accurately is my view short of Colonel Dac's observations on the secret self-defense corps and so on.
THE COURT: When you come to a convenient place
to stop for the day.

MR. BOIES: This is a convenient time, your
Honor.

THE COURT: Let me just ask one question before
we stop. This is going back to the definitions of
infiltration.

If I understood correctly, sir, you spoke of
their being two different definitions of infiltration, one
being the LBJ definition?

THE WITNESS: Right.

THE COURT: And the other being the conventional
definition that was used across the board for reporting
purposes; would that be a correct statement?

THE WITNESS: That is correct and I believe Mr.
Boies, subject to his comment, introduced a third. He said,
suppose you took the criteria that you only registered
someone as an infiltrator if he crossed the frontier, your
intelligence criteria meant there was an inherent lag.

But suppose you ask yourself the question how
many have crossed the frontier, using all forms of
intelligence with less rigor than you did in the
professional definition -- and he threw at me a perfectly
legitimate question -- did I agree with those who by that
definition, using all intelligence and making some guesses,
came up with higher figures than the current professional definition.

    Do I have it right, Mr. Boies? So there were three definitions used.

    THE COURT: You proposed that there were two definitions, right, the Lyndon Johnson definition and an official reporting definition?

    THE WITNESS: Correct, sir.

    THE COURT: The question I simply want to ask is: Would you state as clearly as you can what is the definition that is the official, non-Lyndon Johnson, the official definition, what is that definition?

    THE WITNESS: My understanding is the following: That is the infiltration for a given month that has been verified by what I believe was called collateral sources of intelligence, that is to say, by documents or prisoner of war interrogations or other direct evidence of human beings who had come down the trails and crossed the south Vietnamese frontier.

    These were added up and the figure published but with the common understanding that it was probable underestimate because there was a time lag in acquiring that kind of intelligence.

    THE COURT: All right. We will adjourn. The witness may step down. The jury sent me a couple of notes
that I would like to deal with briefly. There are two
notes. One has to do with whether a trial will be
c Conducted on October 26th. The answer is no. No trial on
Friday October 26th.

I might as well tell you at the same time there
will be no trial this Friday, October 19th. No trial on
either of those Fridays. That does not mean that all
Fridays will be off necessarily, although there will be
quite a few that will be taken off.

I have a note signed by the foreman of the jury
reflecting questions from unnamed jurors concerning their
salary. I am not going to answer this question. If any
individual juror has such a problem, and there is one juror
who I spoke to on Friday about that, if any juror has their
own personal problem, that juror should write me a note
about what your personal problem is and I will take it up
with you and see if there's any need for me to call your
employer, whatever the case may be.

The jury is excused. I am going to give you a
couple of further words of instruction before I excuse you.
The first one is that you are not to discuss the case with
anyone. Please always bear that in mind. That is a firm
instruction of the court. It's a court order. You are not
to talk about this case with anyone, any of your friends or
your family. You are simply not to get into discussions.
about it.

The second one is to repeat the cautions that I expressed to you about reading matters in the press or on TV or whatever. It is best that you protect yourself from those. It is best that you do not allow yourself to hear or peruse or read matters that are reported in the press, particularly, all the more so when those matters -- when those are in the nature of commentary that expresses a point of view. That is particularly dangerous for you to expose yourself to any kind of discussion that takes a point of view and argues a point of view about this trial or what it's about. Obviously that is of more concern than something that says the trial met today and the jury heard the testimony of Dr. Rostow. That would not be of as great concern.

Remember at all times you are the ones who are hearing what the evidence is. You are the ones who have, so to speak, the front row seat. There is no proceeding that takes place involving the presentation of evidence in this case without you being right there on top of it.

So you don't need to look at what anybody else has to say about the evidence in this case or the issues that are discussed. You hear every argument by the lawyers which will be made on frequent intervals during the trial pointing out to you what they think is important, pointing
out to you what inferences they suggest you should draw from the evidence.

So don't go looking to inform yourself from any other source as to what the issues are in this trial or what the trial is about or what the evidence shows. You are the ones who know. You must decide that based on the evidence in front of you. Thank you. Have a pleasant evening. 10 o'clock tomorrow morning. You are excused.

(Jury not present; in open court)

THE COURT: Anything else before we adjourn?

MR. BURT: No, your Honor.

MR. BOIES: No, your Honor.

THE COURT: Counsel have had numerous and lengthy discussions with me that were not on the record, in the sense of being transcribed, in chambers. I want to make sure some of these things, which have been said in a rather abbreviated fashion in discussion of the record, I want to be sure that the record doesn't create any misleading impression, that is, has to do with the types of evidence that may be received and may not be received, the types of issues that are in dispute.

I have talked to you about our not receiving evidence involving reports and matters to which General Westmoreland was not privy.

Now, I just want to make clear that there is a
limit to that. Where what is under discussion is proof
that's offered as to what the true facts were on some
subject like say the volume of infiltration or the size of
the enemy, obviously, there is no such restriction.

I sure you understand it and I understand it. I
want to make sure that the record doesn't create any
misleading suggestion.

If you offer any proof whatsoever, whether he
was privy to it or not, as long as it meets the
requirements of the rules of evidence, it is to be received
on the subject of what the size of the infiltration was,
the volume, what the size of the various components of the
enforce and so on.

Where we get into that subject of being limited
to what General Westmoreland and his command were privy to
is a narrow area that we are simply not going to get into
of whether the President or the Joint Chiefs of Staff were
not deceived because they had information that did not come
from General Westmoreland.

Is that clearly understood?

MR. BURT: May I address that, your Honor?

THE COURT: Yes.

MR. BURT: I am still in some confusion.

I have excluded for the first day certainly any
evidence that was from say the CIA, which I would consider
a collateral source. It's a bad word in this context.

However, the way the chains of command function I would want to introduce evidence that was provided through CINCPAC, for example, as to what the estimates of the intelligence command were, as to what the estimates of the J-2, General Davidson or General McChristian were.

We also have evidence that we will want to introduce tomorrow that came up from cables through the CIA and in that case we can identify a member of General Westmoreland's command as having either originated it or having been involved in it. My problem is trying to understand how the chain of command bears upon the evidence that we want to introduce.

General Westmoreland himself often wouldn't have sent it direct. He would have sent it through Ambassador Bunker. If he talked to Ambassador Bunker, as he did on a regular basis, and Ambassador Bunker sends a cable presenting information then we feel certainly that's admissible.

If I may continue just more one second? General Abrams sent a cable which was used in the broadcast in that he sent to it to Earl Wheeler, Chairman of the Joint Chiefs of Staff on August 19th. We would think that would clearly be admissible.

THE COURT: I don't think anyone would disagree.
MR. BURT: Thank you, your Honor. I have no further questions.

THE COURT: It's a matter of not mixing apples and oranges.

If the subject to which you are addressing the proof is what was the volume of the infiltration -- if what you are seeking to prove, for example, is that General Westmoreland's estimates were correct and CBS' contentions on the program were wrong, you can use any qualified source of evidence to prove what the volume of infiltration was.

As I recall, the CBS program suggested that there was a number somewhere in the range of 25,000 per month during a several month period while General Westmoreland's command reported between 5 and 8,000 men a month. You can use any numbers that are qualified numbers. Anything that you can substantiate and within the rules of evidence to show what that volume in fact was.

But that has nothing to do -- well to say it has nothing to do is perhaps a little bit of an overstatement -- but that is a different issue from the question of whether anyone was deceived or misguided by MACV estimates and while the plaintiff is contending that the program was false in attributing to General Westmoreland an attempt to deceive, we are not going to get into a question, which is not part of the alleged libel, of whether his superiors in
the chain of command were or were not deceived, taking into account all the different sources of information available to them.

The issue is not whether they were deceived. The issue is whether General Westmoreland attempted to deceive them, acted in a manner to deceive, promulgated figures that he didn't believe were accurate, right?

MR. BURT: Your Honor, may I address that?

THE COURT: Yes.

MR. BURT: There are two issues. One, infiltration. I think that's an easier thing to determine, what evidence was there, what the number was and what was CBS told.

The second issue is whether or not the command, whether COMUSMACV and its intelligence personnel, advised their superiors of the -- of its best estimate of all categories and whether then the -- whether there was a debate over whether within that best estimate that MACV had some of the categories should be taken out.

The CBS program as we understand it, your Honor, said the best estimate of -- I won't put a number on it to avoid getting back to that Ginsburgh memorandum -- but whether the best estimate was ever communicated of over 300,000. There was a ceiling ostensibly posed, so the program says of 300,000. We wish to introduce evidence,
that members of General Westmoreland's command, in this case, his deputy, General Abrams, sent a cable to the chairman, General Wheeler, stating what the total number was.

We of course have that cable and it was used in the broadcast, but parts of it were taken out. And so the problem is introducing evidence of what MACV said its best estimate was as opposed to whether MACV was right.

I don't believe that anyone will ever know whether the right number in total was 430 or 500. All that I think we can determine with certainty is whether the 430 number went up and then there was open discussion about removing certain categories from the order of battle.

THE COURT: I don't understand why we are having a discussion. No one has ever suggested that a number promulgated or disseminated by MACV will not be received in evidence. You have never heard any suggestion to that effect, have you?

MR. BURT: No, your Honor.

THE COURT: Secondly, if you want to prove by the analyses of other analysts whether made contemporaneously or made today, based on historical retrospective analysis, if you want to prove by such evidence that the estimates made by MACV were correct, if you want to call Rostow to say I think that 5,000 a month
in September was the right figure, that's what the
infiltration was, there's no question of your right to do
that.

If you want to show documents from other
agencies, contemporaneous documents, which reflected the
same figures or generally consistent figures to support the
accuracy of General Westmoreland's numbers, there's no
question of your right to do that.

The problem is when you use unidentified numbers,
if your purpose in doing it -- let's say higher number --
you use the numbers that are higher than the numbers that
have been attributed to General Westmoreland, say higher
infiltration numbers or higher total enemy strength numbers,
and you have not proved where those numbers come from -- if
those numbers come from MACV and you can prove they come
from MACV, no question that they are admissible.

If they come from someplace else, if they come
from the CIA or some other agency and they reflect higher
numbers than MACV I don't suppose that you would want to
offer them.

If they tended to show that MACV's numbers were
wrong, showing higher numbers, I don't know that you would
want to offer them, unless it was to show that superiors in
the general's chain of command were correctly aprised of
all the numbers under discussion and, therefore, were not
That's where we have the problem because the issue is not whether anyone was in the end deceived. The issue is whether there was an attempt to deceive, an attempt to use knowingly bad numbers.

What I have said is if you can show that General Westmoreland was aware of the communication of those other competing numbers that would bear on his intention to deceive. It can be argued -- it isn't necessarily a persuasive argument -- that if he knew the CIA was telling the President a higher number he can't have been hoping to fool the President by giving a lower number. That's a possible argument.

There are a lot of things that could be said about it and where it can be said that those higher numbers were known by General Westmoreland to have been communicated to the Joint Chiefs of Staff and then to the President, then they may be offered for their bearing on his intentions, whether he had an intention to deceive.

We are not going to open up the issue of whether the Joint Chiefs or the President were, in fact, deceived by any report or whether they were correctly informed by the numbers drawn in other sources.

My concern about that is that that kind of issue, first of all, opens up a tremendous can of worms in a very
broad area and also opens up extremely emotional issues. It has to do with was President Johnson surprised or not surprised by Tet. Were we prepared with adequate manpower for Tet? Did we win or did we lose Tet? A number of issues like that that simply are outside the examination in this trial, which was whether there was an attempt on General Westmoreland in his orders to his intelligence officers to understate the numbers.

Now, are we in agreement? Do we have any doubts?

MR. BURT: I certainly heard your Honor and understood and all we are trying to prove with respect to the order of battle debate is that a total number of 420 to 430,000 went from Westmoreland's command up the chain during the period of the summer of 1967.

THE COURT: I think it's absolutely clear that you have the perfect right to show that, if you have the evidence to show it.

MR. BURT: We will introduce it.

THE COURT: There's no doubt about that.

Do you perceive any doubt or any disagreement with anything that I have said? Do you have any disagreement with my statement of what are the proper lines of proof and which are outside?

MR. BURT: No. We have not introduced or did not attempt to introduce today. We hope any evidence that
was from the CIA or someone else --

THE COURT: On the Ginsburgh summary, if I am
recalling what it was correctly, that thing that was
labeled Annex A that went from Ginsburgh to Rostow and I
think was mentioned in Mr. Boies' questions. The only
reason that was not admitted at the time was because you
have not shown that shows figures came to the author of
that memo from MACV.

If you can show that MACV gave those numbers to
be advanced to the President there's no question that that
would be admissible. I don't think you disagree with that,
do you, Mr. Boies?

MR. BOIES: No, your Honor. I think with
respect to the Ginsburgh memorandum, as opposed to some of
the Rostow materials, there is a question as to not only
where it came from but where it went. I agree that if you
have the chain there's no problem.

THE COURT: You say where it went.

MR. BOIES: That is whether it went to the
President.

THE COURT: Why are we concerned? That's just
the point that I have been trying to make, is that it
doesn't matter for purposes of this trial whether it went
to the President, when one reason that I would be reluctant
to use the Ginsburgh memo at all even if it were shown to
have come from General Westmoreland, is I I would prefer to
use the prior evidence to show that MACV promulgated those
figures, simply not to get into the emotional and beside
the point area of whether the President had the right
information or didn't have it.

But if you can show that MACV sent that
information up it's to be received in evidence.

The reason I excluded it up to now is you have
not shown it. There was mere speculation as to whether
Ginsburgh got that from MACV or some completely different
source.

MR. BOIES: Could I raise one question with
respect to exhibit 896.

THE COURT: Yes.

MR. BOIES: That was one of the documents that
was admitted this morning. Here is an extra copy. We have
a number of extra copies that were handed out to the jury.

(Continued on next page)
THE COURT: Yes.

MR. BOIES: As I understood, when the court admitted this it was because of paragraph 2 and the implications in paragraph 2 as to what was or was not passed on from MACV.

The court will recall that in dealing with this document with the jury Mr. Burt read, with great emphasis, paragraph 3, and I think there is simply no basis at all for which paragraph 3 is admissible.

I don't suggest that that one instance does any great harm or causes me any significant prejudice, but I do think that it is important that when documents are being argued for admissibility based on one criteria that they not be used for another purpose, particularly when, as I say, there is no basis for the admissibility of this document for the truth of the matters asserted in it.

THE COURT: Well, when I admitted this document I did not, as to this document, I did not rule that only a limited portion of it was admitted. On some of the other documents I ruled -- on one of them only two sentences were admitted. In fact, another one, all but one of the subparagraphs of paragraph 8 were admitted. The paragraph 8 was the only one Mr. Burt said was pertinent to the inquiry. It goes without saying that where only a portion of a document has been admitted only that portion may be
read to the jury.

But what I strongly recommend once again, as I recommended many, many months ago, and thought had been done many, many weeks ago, is that you get together with your lists of evidence, which I understood to have been exchanged a long time ago, and with the lists of documents, and that you hammer out exactly which portions of the documents are being offered and for exactly which purposes.

You have an hourglass with the sand dribbling out on you or a candle burning down to its end. You have a limited number of hours. If you want to spend those hours ticking away, which will probably not be extended absent awfully good cause, if you want to spend those hours sitting and haggling over whether paragraph 4 or paragraph 5 or two sentences of paragraph 3 are to be received and for what purposes, it's your case. It will come out of your time that could have been spent much more profitably for some other purposes.

You know, I just don't understand why long ago everybody's documents weren't shown to the other side with a statement as to what purpose they are being offered for, a clear marking of which paragraphs, which sentences of the documents are being offered for those purposes.

I would think that if you set your minds to that and undertook it there really shouldn't be a very extensive
dispute. There is an awful lot of this that is clearly admissible for a number of different purposes and if you sit down and go over it I would think you would resolve almost all of it. But if you don't sit down and go over it it's absolutely clear that there are going to be just dozens and dozens of hours spent arguing, haggling about which sentences in a 12-page cable should be received. I don't think the limited amount of time that you have before the jury should profitably be spent that way.

MR. BURT: I am going to invite Mr. Boies to meet with me this evening and work that process through, your Honor.

THE COURT: Okay. See you at 10 o'clock tomorrow morning.

MR. BOIES: Thank you, your Honor.

(Adjourned to 10 a.m., October 16, 1984)