"Q. I believe you testified a little while ago that in the fall of 1967 you recall producing estimates of enemy infiltration that were higher than the estimates that went into your monthly report.

"A. That is correct.

"Q. How did you derive the higher estimates of enemy strength?

"A. From a methodology which I colloquially referred to as the Parkins pickup chart and from SI sources.

"Q. Can you describe for me the method that you referred to as the Parkins pickup chart?

"A. Lieutenant Colonel Parkins, who is referred to in that last exhibit you had there, when I got in country, that was when OB study section was still split up. There was parts of it down at CICV and shortly thereafter they were consolidated and Parkins came down with it, and he had a little chart that basically showed, based on historic trends, because of the levels of fighting during wet and dry season and the historic data, the first month after the end of any one month, what you could -- if you got 500 in any given month, how many probably came down, based on some of these historic trend patterns. It had a bunch of slopes and lines and means. It was a statistical type thing based on some things where you projected outward based on a small quantity. I referred to it as the Parkins
pickup chart. That was how he felt that he would pick them up if you had all the available data there.

"I made some mathematical changes to his methodology by plugging in some of the SI stuff I had available. After a couple or three months I felt I had a pretty good handle on it. If you, between SI and collateral sources, had this month in a given month then you could probably say that the true infiltration had probably been somewhere around X.

"Q. The process you have just described is not one that relies on hard sources for its numbers, is that correct?

"A. It relies partially on hard sources.

"Q. You say partially on hard sources. Do you mean the hard sources in your hypothetical that told you that in the current month you had, say, 500 infiltrators?

"A. That is correct.

"Q. But beyond that, it does not rely on hard sources?

"A. That's correct. Wait a minute. It does not rely on collateral hard sources. It relies on SI and a projected estimate.

"Q. Can you tell us what the special intelligence sources are that you relied on?

"A. Precisely or in general, sir?
"Q. Let's start with in general.

"A. In general, they had to do with mechanical and electrical gathering devices and/or personnel. Beyond that, I will respond to any question with the disclaimer that I politely decline to answer any precise questions until such time as I am able to get a more definitive judgment from the Department of the Army whether that is or is not still classified. They have tended to indicate to me that anything beyond that still is considered classified and they would object to my talking about it.

"Q. Did you report the results of the analysis you derived using what you call the Parkins pickup chart in any documents for MACV J-2?

"Mr. Boies: May I inquire if you mean the analysis based only on that or the analysis based partly on that or the SI?

"Mr. Murry: Well, I understood him to testify that as he worked with the Parkins methodology he incorporated the SI material. So I'm referring to his variant, if you will, the Parkins methodology, and ask him if he reported the results of his analysis of enemy infiltration in any documents that were for the MACV J-2.

"A. I really wasn't charged with doing that. But when I was playing around I prepared some informal documentation that I provided to Colonel Parkins. I know
that part of it was reported up to as far as Colonel Morris, who was the DIP, Director of Intelligence Production, but I reported it in some drafts of certain documents that was later taken out. But to the best of my knowledge, it never went out in any official channel MACV J-2 documents.

"Q. Do you remember what those documents were to which you inserted this analysis?

"A. Well, colloquially we called it the Wheelergram, but it was a document that was prepared as a result of a back channel message from General Wheeler to General Westmoreland concerning infiltration. Not only infiltration, but certainly other subjects. And a special group got together to respond to a series of questions that General Wheeler had proposed. I was charged with getting all the information together and preparing a draft message, back channel messages, which means a personal message. In fact, it has a salutation in it and it closed 'With warm regards, Westy,' was how it was proposed to be closed. I put some of the initial projections in the original draft of that message.

"Q. Do you recall whether in that draft your initial projection was clearly labeled as such?

"A. You mean that it was projected material versus the confirmed and the other sources I put out?

"Q. That's correct.
"A. Yes, it was.

"Q. Was there also in the message the hard source data, such as what was put in Exhibit 197 L?

"A. Yes. What it did was where from collateral hard sources we have confirmed yea many, from our projections we figure that there are probably this many more, that kind of comparison. To that extent, the last few months were in there, in the original draft.

"Q. Do you recall the names of any other persons who were part of the special group that got together to respond to General Wheeler?

"A. Well, everybody in the office was working on pieces of it.

"Q. Everybody in what office?

"A. OB studies. In addition, we sent a -- I prepared a back channel message, a Davidson-sent message that went to all the S-2's, in other words, all the intelligence personnel assigned to friendly units in country, asking that they provide back channel SI messages. It was an SI message went out through that channel to provide input. I don't know the names of all those folks.

"Ultimately, Colonel Danny Graham and some of his folks were indirectly involved in it. I say colonel. I guess to be precise it was a colonel then, but he's probably known to you all in this as Lieutenant General
Danny Graham, who retired as director of Defense Intelligence Agency. He was a colonel down in CIIED when I knew him.

"Pieces of it Parkins was involved in and Halpin, Colonel Halpin, I think, who was the head of CICV at that time, I believe. It would pass through him and, of course, Ponder and Morris, as well as Gattozzi and McArthur and the folks working for me. So a lot of people had little pieces of it.

"Q. Do you remember when this report was prepared?

"A. Not precisely.

"Q. Give me your best approximation, please.

"A. It's colored by what I have seen in there, and that time frame seems about right, but if you were to ask me what month two days ago I would have said hell, I don't know.

"Q. It was colored by what you see in Plaintiff's Deposition Exhibit 122?

"A. Sure, because he was giving a fairly precise time frame.

"Q. Can you think of any other draft or report into which you put your projected figures used your variant of the Parkins methodology?

"A. A precise example, no. It's quite
possible that responding to some informal question I said something to somebody or brought it up during other discussions. But as to a precise document, no, I can't think of any others.

"Q. Can you tell me where, physically" --

THE COURT: Come up for a second.

I don't need the reporter.

(At the bench)

(Discussion off the record)

(In open court)

THE COURT: Members of the jury, the witness' voice seems to be giving out. So we are going to put a new actor in the witness' place.

Miss Flickenger, will you take the witness' role?

Come up to the witness stand, please.

MR. DORSEN: (Reading):

"Q. Can you tell me where, physically, in your office at OB study section Lieutenant Gattozzi sat in relation to yourself?

"A. Most of the time from about here as far as that wall, kind sir. We had a big square room and you couldn't see all of it on the other side because it had a little cutoff where Parkins had his office, but you could see substantially all of it. We were all kind of jammed up in there. We tended to kind of float around. You got
"Hankins

tired of where you were setting sometimes. I moved two or three times until I finally staked out a corner and sort of defended against the world. People tended to float their desks around if they got bored, but very close proximity.

"Q. Did Lieutenant Gattozzi ever have occasion to ask you for estimates of enemy infiltration in the course of fulfilling his own duties at the order of battle studies branch?

"A. Well, Bernie, like everybody else, got a copy of the one message. We chatted informally about what I was finding and such and I assumed that he probably used some of it to base some of the stuff he was doing on, but I couldn't swear to it for certain. We didn't make formal reports to one another when we were talking about things.

"Q. Do you recall telling Officer Gattozzi in the fall of 1967 that you thought infiltration was in the magnitude of 20,000 men per month?

"A. Again, I have the same objection to precise numbers that I had earlier. I don't know. I talked to a large number of people along about that time that I felt infiltration was quite a bit higher than I was able to document on the official report I put out. I'm reasonably certain that included Mr. Gattozzi.

"Q. You say you felt infiltration was higher than you could document on the official report. Do you
mean by that you felt infiltration was higher than you had

enough hard sources to document?

"Mr. Boies: By hard sources do you mean
collateral hard sources?

"Mr. Murry: Collateral hard sources.

"A. Collateral hard sources that I was allowed
to use in Exhibit 197 L or whatever.

"Q. That's it?

"A. That's what I mean.

"Q. Did you attempt to bring to the attention
of any of your superior officers your beliefs about enemy
infiltration in the fall of 1969?

"A. I think I've already answered that. Yes,
I, in fact, brought it to Lieutenant Colonel Parkins'
attention, who was my superior at that time.

"Q. Did you do this on more than one occasion?

"A. Oh, yes.

"Q. Do you recall how often?

"A. No. We had several discussions about it
up to and through the time that we were preparing the
Wheelergram, as I call it, in response to General Wheeler.

"Q. Do you recall an individual named James
Meacham?

"A. Oh, yes. At that time he was a commander
or lieutenant commander in the United States Navy, who was
deputy to Parkins at that time. We were a joint staff agency. So we had Army and Navy personnel in CICV."

"Q. Did there come a time when Lieutenant Commander Meacham took over Lieutenant Colonel Parkins' job?

"A. I suspect there was a time when he was in charge after Parkins left before one of the new guys got in, yes. You asked me precisely the time frame. I can't answer it.

"Q. Did you ever tell Lieutenant Commander Meacham your views about the level of enemy infiltration in the fall of 1967?

"A. I'm relatively certain he was in on one or more of the discussions that Parkins and I had along about then. I'm not exactly the quietest kid on the block. I think everybody in the building knew about it. In fact, I'm relatively certain that everybody in the building knew about it.

"Q. How did they know about it?

"A. Because I screamed bloody murder.

"Q. How?

"A. By telling everybody that I felt that our data was misleading because of the constraints on how we could report it. I proposed that we do away with my job down there basically in its entirety and move the whole
thing up to SI and do it all out of there, that I felt it was counterproductive to put out a document that was limited primarily to collateral hard sources and to have the estimates folks doing something else, so that you got disparity numbers. I felt it was counterproductive.

"Q. You say it would be counterproductive to have the estimates people doing something else and produce disparity numbers. I take it from that answer that the estimates people were doing something else that contained more sources than what you were reporting in your monthly cable?

"A. That was my assumption.

"Q. Is it just an assumption?

"A. Well, again, I did not read their finished products going up the chain. I was involved with some discussion with them, and I know they were doing something, but precisely what it was I really didn't get involved in the details of. That really wasn't my job.

"Q. Do you recall what General Wheeler asked of General Westmoreland in this message that we were talking about a few moments ago?

"A. You mean specifically?

"Q. Yes.

"A. No, I do not.

"Q. Do you remember generally?
"A. Generally it had to do with infiltration and enemy strength and infantry strength and patterns. There was a series of questions and we broke it down even further.

"Q. Do you remember what General Wheeler wanted this information for?

"A. No."

Line 19.

"Q. The thing that I'm trying to understand is, Mr. Hankins, are you testifying that in the fall of 1967 you thought infiltration was higher than was being reported anywhere in MACV J-2 or did you think it was higher than was being reported in your monthly message or both?

"A. I felt it was higher than it was being reported in my monthly message. I wasn't sure whether it was higher than was being reported otherwise to the J-2 and on up.

"Q. And that's because you didn't know everything that was being reported to the J-2, is that correct?

"A. That is correct.

"Q. And the reason that infiltration was higher than what you were allowed to report in your monthly message was because your monthly message was limited to collateral hard source intelligence, isn't that correct?
"A. The reason it was my opinion that the infiltration was higher than what I was reporting in that monthly message was because I was limited in the monthly message to collateral hard source intelligence.

"Mr. Boies: By monthly message we're referring to Exhibit 197 L and the documents like it?

"Mr. Murry: That is correct.

"Q. You say it's your opinion that infiltration was higher. Did you mean to imply that this belief of yours was subject to disagreement by or from other persons working on infiltration?

"A. Oh, certainly.

"Q. Did you ever discuss your opinions as to the level of enemy infiltration in 1967 with analysts in CIIED?

"A. I did.

"Q. Do you recall the names of any of those analysts?

"A. With the exception of Colonel, or whatever we're going to call him -- I guess we should call him Lieutenant General Danny Graham -- I don't remember any precise names of who I discussed it with.

"Q. But you recall discussing these views on infiltration with Lieutenant General Graham?

"A. And his folks, that's correct.
"Q. When you say his folks, you mean --

"A. People that worked for him down there in that --

"Q. Do you recall approximately when you discussed infiltration with Graham and his folks?

"A. Well, I discussed infiltration with them from the time I was granted an SI clearance to the time I closed out my SI clearance on a periodic basis. I certainly discussed my feelings before Tet that I felt it was higher than I was able to report on this. And thereafter we had periodic discussion, but precise dates, I can't give you any.

"Mr. Boies: And 'this' refers to Exhibit 197 L and documents like it, correct?


"Q. Can you recall anything at all about the magnitude of the difference between what you were reporting in documents like Exhibit 197 L based on collateral intelligence sources and what you felt ought to be reported using all source intelligence and the Parkins methodology?

"A. Well, during the time before Tet the range approximately 20,000 to 30,000 is probably reasonable, but I had some fairly precise numbers that I arrived at statistically and were rounding them off to nearest thousands. And shortly after that time frame I really
stopped doing too many of those because later events led me to the conclusion it was not worth my time.

"Mr. Boies: May we be clear that when reference is made to 20,000 to 30,000 that is 20,000 to 30,000 a month.

"The Witness: Yes.

"Q. Earlier today you said that you couldn't remember specific numbers. Is there some reason why you are now willing to say that 20,000 to 30,000 a month infiltration is a number you can recall?

"A. Earlier today you were asking me if I remembered precise monthly numbers of infiltration and I assumed your question had to do with hard infiltration sources like in Exhibit 197 L, and I don't remember any of those. I remember the general parameters of what my estimates were coming up with.

"In the time I was playing around with them, pre-Tet, as being in the range of 20,000 to 30,000. Probably the reason I remember that differently than the others is that that was a game I played for a couple, three months and then sort of let drop. And I wasn't worried about disremembering it like I needed to do on those because, you know, at the end of every month they wanted to know what the current month's figures were the last two or three months. I tried to keep those on my mind. Every new
month's report that changes and I had to temporarily
remember a group of new numbers.

"When you try to remember temporarily a group of
a series of numbers you really don't want to remember what
you reported for that month three or four months ago. All
it does is clutter up your mind with numbers that no one is
really worried about any more.

"Mr. Boies: There was a reference in that
answer, again, to 20,000 to 30,000. I take it, again, the
reference is to 20,000 to 30,000 per month.

"The Witness: Per month, that is correct.

"Q. Did Lieutenant Colonel Parkins agree with
your opinions as to the level of enemy infiltration?

"A. Lieutenant Colonel Parkins indicated to me
that he felt that the methodology -- that he had initially
felt it was valid for making projections and that he
thought it would be improved upon. So he kind of started
me on the path to begin with.

"And yes, in general, he agreed that my
projections were probably accurate, as I did, and did try
to support changing the methodology by which we reported
infiltration in Exhibit 197 L and related such documents."

Page 62, line 8.

"Q. Mr. Hankins, before our lunch break we
were talking about enemy infiltration into South Vietnam in
the period of the fall of 1967, and what I'd like to ask you now, and I believe you've answered this, at least in part, but I want to be absolutely clear on this, did you tell anyone besides Everette Parkins, in the fall of 1967, your views on the level of enemy infiltration into South Vietnam at that time?

"Mr. Boies: Except as he's already testified?

"Mr. Murry: Except as he's already testified.

"A. I think I've mentioned already by name whom I can remember having told.

"Q. And can you recall the responses of the people, other than Mr. Parkins, to your analysis of the level of enemy infiltration in the fall of 1967?

"A. Colonel Morris and Graham, those folks felt it was, I believe, unreasonably high. Most of the folks who worked at CICV and worked with me felt it was reasonable. I think you can generally characterize them, but exactly how the other parts of the intelligence community outside of either of those two sections reacted, I really don't know.

"Q. Do you recall why the people working with Graham thought your projections of enemy infiltration were unreasonably high? And I mean by that can you recall what they told you was their reason for thinking that your projections were unreasonably high?
"Hankins

"A. They had some concerns about the reliability of the methodology involved in projecting, because it differed from theirs, and I'm not precisely sure what theirs was. And they just felt from their analysis of the stuff that the enemy was not infiltrating at that level and to some extent didn't have the capability to infiltrate personnel at that level for any extended period of time.

"Q. Did you have any reason to believe that the analysts who disagreed with your projections of enemy infiltration were disagreeing with you in bad faith?

"A. No.

"Q. Would it be possible for you to tell me in any more detail how your projection of enemy infiltration worked?

"A. My methodology involved an historic pattern of what the infiltration had been in historic months, the first month after the particular month and the second month after the particular month and the third month after the particular month, and so on in the categories. And then after a period of nine or ten months you got to a point where the data for a given month did not change. And that was basically all there was or all that you were going to capture based on this, so that there was a known progression of a relationship, if you will, between what the data for, say, the month of October was going to be in
November and what it was going to be nine months later.

And there were also some patterns that were evident, or appeared to be evident to me, anyway, and I think everybody agreed to this. There were patterns of wet and dry seasons in Vietnam, so there were patterns of peaks and valleys in infiltration now and then. And I also fed in some things based upon the volumes of certain electronic hard intelligence, which I really can't define further than that, to give me some idea of projection, about how many units might be coming down. And I had an average means of what size packets normally were within certain things. So now I had some weighted average that I used.

Beyond that, I really can't tell you anything more precisely after all these years.

Q. Now, as I understand your description of this projection that you used, in its simplest form, if you had hard evidence that a certain number of NVA personnel had infiltrated in month one you would be able to try to project what the level of infiltration would turn out to be somewhere down the road?

A. Correct.

Q. Can you tell me approximately how many infiltrators you would have to have collateral evidence of in month one in order to project that six months from now or whenever infiltration in the magnitude of 20,000 had
occurred for that month?

"A. No, I cannot.

"Q. Have you deleted a description of the nuts and bolts of the analysis that went into making up the basis for your projection from collateral intelligence on infiltration to what may have been the actual level of infiltration? Would it be fair to say that having X number of infiltrators in month one, multiplied by a certain factor, would give you your projected number of infiltrators?

"A. That's sort of a simplification of the process, but yes.

"Q. It was purposefully simplified, but you'd say yes to it?

"A. Basically, yes.

"Q. Given that simplification, can you tell me any magnitude of the multiplicative factor that you would need in order to get from your hard intelligence in month X to your projected infiltration?

"A. No, I cannot, because once I start playing around with SI things I put too many other variables into the situation, and I don't remember what's in the basic original pickup chart that was developed by Colonel Parkins.

"Q. Can you recall when Colonel Parkins first explained to you what you've called the pickup chart
methodology?

"A. Shortly after I arrived."

Page 68, line 13.

"Q. Here again, I may have asked you this question, but I'm not sure. How many times in the fall of 1967 did you use the Parkins pickup chart methodology to estimate or project enemy infiltration into South Vietnam?

"A. Well, I did it concurrently with doing my regular one, but also during that time I was playing around with his methodology and trying to go back to historical points in time to feed in other variables, such as SI stuff. And so I played around with the methodology and was trying to validate the methodology based on going way back in history. And part of the time it would work and part of the time it wouldn't.

"I did computations several times, so the projections weren't really static. When I finally arrived at what I felt was a reasonable methodology, I did it for three or four months in such a manner.

"Q. Do you remember what three or four months you did it for?

"A. Not precisely, other than to say it was in the time frame prior to Tet, immediately prior to Tet.

"Q. Now, you were assigned the duties of producing the monthly message, that is, like the one that
"Hankins has been marked as Exhibit 197 L, is that correct?

"A. That is correct.

"Q. Were you also assigned the task of making the projections based on the Parkins pickup chart?

"A. I was asked by Colonel Parkins, who was a junior officer, although it almost makes it an order, to 'play around with it,' to see what I thought about it and whether it would be a useful tool in methodology to use. But as for being required on an ongoing basis to use that methodology to extrapolate projection figures on an ongoing monthly basis, the answer is no."

"Q. Was the methodology that we've referred to as the Parkins methodology or the Parkins pickup chart an extrapolative methodology?

"A. It involved extrapolations and projections.

"Q. Is it correct that the Parkins methodology could be tested over a time period by seeing if hard source collateral data was found in later months to substantiate the projections made at a given point in time?

"A. Not entirely, and that was part of the problem. And then there was a secondary problem about disagreements about what was considered in-country and what was considered out-country as far as OB, which could further distort that. So the answer is no, it could not be..."
fully validated.

"Q. What was the problem, the secondary problem, as you've described it? What was in-country versus what was out-country?

"A. Well, there were certain NVA units which were out country, and by out-country I'm referring to either North Vietnam and the close proximity to South Vietnam, or otherwise in Laos and Cambodia. And there were occasionally disagreements about whether those units would be considered as part -- if they were in close proximity to the border, whether they should really be counted in the in-country forces facing us along with those that were totally in-country or whether they should be considered support forces out-country.

"A further part of the infiltration that came down went to support other units because at the same time the NVA had operations in Laos against Laos forces and at certain points in Cambodia against other forces there. And there were also units that would come down and get so thoroughly broken up that they were never fully documented, or we felt there were such units."

Page 72, line 5.

"Q. Is it your testimony that" --

THE COURT: Shouldn't you be reading on the bottom of 71?
MR. DORSEN: No, your Honor. That was deleted as part of the discussions we had.

THE COURT: All right, fine.

MR. DORSEN: Page 72, line 5.

"Q. Is it your testimony that some of the personnel that were included in your projection of enemy infiltration could have remained outside of South Vietnam?"

"A. It's highly probable if some did. But again, I don't know, because I did not attempt to validate anything on a long-term basis.

"Q. Can you give an estimate of the average number of personnel in your projection that stayed out of country prior to the Tet offensive and what percentage came into South Vietnam prior to the Tet offensive?"

"A. No.

"Q. Now, you say that you never validated the methodology. Do you know whether there was ever hard source confirmation of the infiltration into South Vietnam of the magnitude that you say you projected in the fall of 1967?"

"A. I don't know.

"Q. Do you know how long the criteria for exclusion of personnel" --

THE COURT: Just a second. I think you read that wrong.
MR. DORSEN: I did, your Honor.

"Q. Do you know how long the criteria for inclusion of personnel into the reports like Exhibit 197 L had existed in use at MACV?

"A. No.

"Q. Do you know who set up those criteria?

"A. No.

"Q. Were they in use when you arrived at MACV?

"A. Yes.

"Q. Could you tell, using your variant of Parkins' methodology, to which corps tactical zones your projected infiltration would be directed?

"A. To some extent, I probably could have, but I made no such attempt.

"Q. Did Colonel Parkins make such an attempt, to your knowledge?

"A. Not to my knowledge.

"Q. You said a little bit earlier that you inserted figures based on your projection, figures for infiltration based on your projection into a draft of the report going to General Wheeler in the time frame prior to the Tet offensive, correct?

"A. That's correct.

"Q. You said those figures were taken out, is that correct?
"Hankins

1 "A. I don't believe I said that. I think all
2 I said was -- is that I put them in the draft."
3
4 Then, your Honor --
5
6 THE COURT: You want me to rule on that now and
7 then just read through?
8
9 MR. DORSEN: If you could, your Honor.
10
11 THE COURT: Why don't you come to the side bar,
12 because I think the objections in the four or five passages
13 objected to are all the same.
14
15 (At the side bar)
16
17 MR. DORSEN: In this case the objection is
18 hearsay, your Honor.
19
20 THE COURT: Why should you be permitted to
21 elicit this testimony, Mr. Boies?
22
23 MR. BOIES: I think there are two or three
24 reasons.
25
26 THE COURT: Let's let the record be clear that
27 although Mr. Dorsen is the person who is playing the role
28 before the jury of reading the questions, this pertains to
29 testimony that's offered by the defendant, and the
30 objection is the plaintiff's objection based on hearsay.
31
32 MR. BOIES: That is correct. The portion is on
33 page 74, lines 9 through 18.
34
35 I think there are two or three reasons, your
36 Honor. First, the plaintiff has elicited here already
testimony concerning conversations between the witness and other people in the witness' section.

The court has permitted, at some times over my objection, witnesses here to testify as to oral communications that were made to them by either a subordinate or a superior officer.

In this case what we are talking about is a communication by Colonel Parkins, this witness' superior, to the witness. We are talking about Colonel Parkins telling this witness what estimate was or, in this case, was not included in a particular message to General Wheeler. And so I think it is admissible for that reason.

Second, one of the issues in this case is what was communicated to the intelligence officers at MACV in the period prior to Tet. While I think this passage is admissible for the truth of the matters asserted herein, even if it were not, it would be admissible to show that that communication was made from Colonel Parkins to the witness. It affects not only the witness' understanding of what the estimates were, but also the witness' understanding of the directions and pressures that existed within the MACV J-2 intelligence operation at the time.

So that I think this portion, in which Colonel Parkins tells the witness that the witness' projection of infiltration has been removed from a message to General
Wheeler, is admissible both for the truth of that assertion, consistent with rulings that the court has previously made, and even if it were not, would be admissible for the fact that that statement was communicated to the witness.

THE COURT: Why don't we go on and discuss all the objections. I think they are all pretty closely related. I think several of them have to do with Colonel Parkins' report to the witness as to why he got fired.

MR. BOIES: Yes, your Honor. That would certainly be true with respect to the portion on page 75, lines 1 to 9 and 16 to 22, and the portion on page 76, lines 1 to 3.

Again, your Honor, this is a report to the witness from his superior officer concerning the reasons why the superior officer was relieved. I think that it goes both to the truth of the statements and to the state of mind, if you will, of the witness and others in the MACV intelligence offices.

One of the things that is at issue is whether there was, as it has sometimes been put, a message sent that higher figures were not going to be accepted. If this witness and others are being told that someone is being fired for trying to get higher infiltration numbers through that is relevant to whether that message was sent.

I think it is relevant to that issue whether or
not that happens to be true. I think it does happen to be true and I think it's admissible for that purpose, but I think it's admissible for the purpose of showing that that was communicated.

I also think that with respect to this particular segment, where Colonel Parkins is said to have come back to his office and told his subordinate that he had been fired, I think that is admissible as a spontaneous statement that would take it outside the hearsay rule in any respect or in any event. That is something that distinguishes this from the prior statement.

THE COURT: Why don't you go on through them, because they are all pretty closely related.

MR. BOIES: With respect to 86, this has to do with what the witness discussed with Officer Gattozzi. The evidence is that Officer Gattozzi and the witness worked very closely together. The evidence also is that Officer Gattozzi was responsible for preparing gains and losses estimates with respect to which infiltration was one element and that Officer Gattozzi got that element from Officer Hankins.

Again, I believe that this is admissible both for the truth of what is asserted and for the fact that the communication was made. Again, you have the communication of information concerning estimates made from one officer
to another in the course of performing their duties.

MR. DORSEN: Your Honor, the portion on 89 is basically something that we want to offer. The objection may be different. It's not a hearsay objection or one relating to hearsay.

THE COURT: Let's go on to 99, which I think is the same kind of stuff.

MR. BOIES: I think the issue with respect to 99 is the same as the issue with respect to the portion previously dealt with, Colonel Parkins explaining to Officer Hankins the reasons why he was fired, your Honor.

THE COURT: What about 89?

MR. BOIES: 89 is a portion to which we object, your Honor.

THE COURT: Yes.

MR. BOIES: The basis of the objection is two-fold. One, we have an objection to the form of the question, which was preserved here.

As the court will see at lines 4 and 5 of page 89, I expressly attempted to get the question clarified as to whether reference was being made here to a computer readable record or not and the plaintiff's counsel declined to so clarify.

I think that the question is ambiguous and misleading when it talks about erasing MACV's historical
record. What was going to be erased, if anything, related to the computer's memory, which is the computer readable records to which I directed plaintiff's counsel's attention and to which I tried to get the question refined to relate to.

THE COURT: Then he says down on line 12, Mr. Murry says, "To remove from MACV's records in a permanent way its historical computations of enemy strength." What's wrong with that?

MR. BOIES: Down at line 12 the historical computations can refer either to the computer's memory or it can refer to written hard copy elements, and I was trying to get it clarified as to what the reference was to.

THE COURT: Then he says on line 18:

"Q. Do you recall any meetings in which someone proposed erasing MACV's computerized records of enemy strength computations?"

"A. No.

MR. BOIES: That is closer to what I think the proper question is. Again, your honor, the computerized record can be a hard copy printout or it can be a computer readable record, such as the computer's memory, and the distinction that I think is of importance here is a distinction between going in and erasing or altering the machine readable memory in terms of what is in the
computer's memory in an electronic form and changing or
altering or removing the hard copy printout from that
memory or perhaps other hard copy reflections of what the
computer either had done or was going to do.

I would not feel strongly about this if I had
not attempted to make that distinction at the time of the
deposition. The reason I did is because I think this is an
area that is subject to confusion and with respect to which
people can be misled unless the questions are precise as to
what is being testified about.

THE COURT: Well, as to this objection on page
89, the plaintiff, particularly if the plaintiff expected
the witness to answer no, as he did to each of these
questions, had an interest in asking the broadest question
possible, the most all-inclusive question, as to whether he
recalled any meeting in which there was a discussion of
hanky-panky with the historical record.

It seems to me that if you were concerned about
the possibility that the witness' answer no to that
question might have not been addressed to the particular
form of erasure that you were concerned about, that is to
say, the erasure of computer readable record, there was
nothing that prevented you from asking him whether his
answer no included any discussion of the erasure of
computer readable record.
So I think on this objection as to form I think that I might have been inclined to rule in your favor if it had been limited to the first question that was asked. But then it was asked further with greater precision in two different forms by Mr. Murry, the last one being a reference to erasing MACV's computerized records of enemy strength computations.

I think that's close enough to what you say the question should have been pointed at, but even more important, I think under the circumstances you had the full opportunity for clarification if you were concerned that the witness might have given another answer with respect to the erasure of computer memory.

So I will overrule the defendants' objection there.

Now, as to the series of other objections --

MR. DORSEN: Your Honor, can I be heard on those?

THE COURT: Yes. Just wait a second.

MR. DORSEN: I am sorry.

THE COURT: As to the series of other objections, the part of Mr. Boies' argument that seems to me to be the most persuasive is the part that has to do particularly with the passage on page 74, for example, where the witness reports Parkins telling him that the figures were taken out, and the argument that seems to me to be the strongest is
the part where Mr. Boies says this is evidence of a message filtering down the line within MACV, it's the communication from above to below, according to him, of a suppressive message, a message whose content is don't include big figures, they are going to get taken out, et cetera. What's your answer to that justification?

MR. DORSEN: Your Honor, this is a libel case brought by General Westmoreland against CBS and we allege that the broadcast accused him of doing certain things, including suppressing intelligence. What a colonel who is five or six levels down in the chain of command may have said to a lieutenant or what a lieutenant says the colonel said to him, lieutenant colonel said to him, I think is so far removed as to be just irrelevant.

I do not think that this broadcast said anything about messages being discussed between lieutenant colonels and lieutenants or majors and lieutenants. It accused, we contend, General Westmoreland of suppressing things. I just don't believe that the connection is sufficiently clear or apparent at all, and the possible prejudice or inflammatory nature of having lieutenants say "We discussed this amongst ourselves and the message we got was such and such" is potentially quite prejudicial.

Your Honor, it doesn't say anything very specific, and yet it is subject to being argued by Mr.
Boies, aha, this shows a message. The witness' testimony is quite vague, and I think the combination of the remoteness from General Westmoreland plus the lack of specificity, either one alone would exclude it.

MR. BOIES: I don't think it is not specific, your Honor. It specifically addresses the fact and it says that Parkins told Hankins that projections of higher infiltration were taken out of the message to General Wheeler. The question is:

"Q. Do you know what happened to those figures?

"A. According to Colonel Parkins, they were substantially taken out."

Yesterday, or not yesterday, but our last day of court, the court permitted, over my objection, the plaintiff to elicit for the truth of the matters asserted testimony from Commander Leverone or Captain Leverone what Captain Leverone, who is certainly no higher than Colonel Parkins, was told by some of his lieutenants.

THE COURT: Well, all right. I am going to rule in favor of the plaintiff on this issue, for the following reasons. There are several different reasons.

First of all, as to the last thing that you mentioned, Mr. Boies, I don't think it's analogous. The issue on which I permitted evidence of oral communication from people who worked for Leverone with Leverone had to do
with the information collection process.

And we are going to discuss further, indeed, we already did discuss further in something that's not on the record, a discussion that you and Mr. Dorsen and I had at the side bar at the end of trial on Thursday, whether all such estimating evidence should properly be received only for the fact that it existed and was communicated rather than for the truth of it. We have not finished that discussion and there will be quite a bit more said on it.

But passing that point for the moment, the issue there was whether the intelligence collectors of MACV possessed and tried to pass on information showing a much larger enemy than was being reported, and I permitted the plaintiff to elicit proof that the evidence being collected at the lower levels of information collection didn't include these larger numbers.

Now, this peripherally relates to the same subject. It relates to Hankins using Parkins' methodology, creating estimates of larger numbers. However, you're offering this passage on page 74 not on the subject of whether Hankins was trying to send up a larger number. That's already been included in this evidence. There is no question that it's in the evidence. But it's a hearsay report from Parkins that those numbers were not accepted somewhere up the line.
I think on this issue the plaintiff's objection is well-taken. If it is true that the numbers were not accepted up the line, the question is whether that is in any way attributable to General Westmoreland or the higher levels of the command. What you have here, although it is true that you have Parkins communicating a message down the line saying figures were taken out, the issue is whether General Westmoreland did anything to prevent higher estimates from being accepted, not whether somebody immediately superior to Colonel Parkins didn't accept those numbers, unless that action is related to General Westmoreland.

Now, if it is related to General Westmoreland, if General Westmoreland gave orders that resulted in these things being taken out, the fact that he gave the orders is the evidence that confirms CBS' position on this, not the fact that Colonel Parkins told Lieutenant Hankins that the numbers had been taken out. Indeed, if General Westmoreland gave the orders, whether the numbers were taken out down the line is of relatively small significance.

But we can't infer that the orders were given by General Westmoreland from the fact that they were taken out. Furthermore, there is a hearsay objection here as to what happened to those numbers which I think is appropriately taken.
Now, when we get to Parkins telling Hankins what were the reasons why Parkins was fired there is a double problem, because Parkins is not necessarily competent to say for what reasons he was fired. Parkins would be testifying to the operation of Colonel Morris' mind in telling Hankins what were Colonel Morris' reasons for firing him.

That would not prevent Parkins from testifying that words were said, as I think he did do to some extent, what words were said, and allow the jury to draw their own inference as to what were Colonel Morris' reasons, whether they were the reasons that Colonel Morris gave or whether they were the reasons that CBS contends.

I think Parkins was on still a third wavelength, wasn't he, on this?

MR. DORSEN: I think there are certain similarities between different positions, but I think what your Honor says about what people were permitted to testify about was correct, and Parkins was not permitted to testify as to why he thought he was being fired by Morris.

THE COURT: In any event, I can't see any reason why Hankins should be allowed to testify as to what Parkins told him Parkins' speculations were as what were Morris' reasons for firing him, especially when this isn't related to General Westmoreland.
MR. BOIES: Your Honor, could I just interrupt for just one moment on that particular point?

THE COURT: Yes.

MR. BOIES: The fact that it is not related to General Westmoreland is precisely the point I have raised with the court about this Parkins firing incident before. I objected to evidence about this, as I have objected to evidence on the erasure of the computer data base, on the grounds that it's not something that relates to General Westmoreland. I think these issues don't belong in this case.

But if the court is going to rule that they stay in the case, which I state to the court I think is not the right ruling, but if that's going to be the court's ruling, then I just honestly don't see how you can put restrictions on our bringing things out on the grounds that they don't relate to General Westmoreland.

If what was happening down at that level is in the case, then I have got to be able to bring out in testimony what was happening down at that level and what people down at that level believed their instructions and pressures were.

The court says on the one hand, well, what happened between a colonel and a lieutenant doesn't have anything to do with General Westmoreland, and yet when the
broadcast talks about what happened between a colonel and a lieutenant the court rules that that is something that belongs in the case.

THE COURT: I only ruled so, that is a jury question, because it seems to me that the broadcast is subject to the interpretation that CBS was laying this on General Westmoreland's doorstep. It's not simply because it's something that happened at MACV.

You're argument there is the of and concerning argument, right, you say that's not of and concerning General Westmoreland.

First of all, my ruling is that I believe it is a jury question whether the broadcast should be understood to be blaming General Westmoreland for having given orders that caused these things to happen.

Secondly, I believe you're incorrect in saying that I am not permitting you to offer evidence on these matters. The problem here is that it's hearsay evidence.

You certainly would have been permitted to question Colonel Morris as to what his reasons were for firing Parkins. The problem was that his evidence on that was against you, favored the plaintiff.

I am forbidding this because it's double hearsay removed.

MR. BOIES: Your Honor, with respect, -- I am
probably not making myself clear -- you're looking right
now at page 86, and to the extent that conversations
between intelligence officers about what one is finding is
hearsay, then it's got to be hearsay when the plaintiff
tries to elicit it as well as when I try to elicit it.

THE COURT: I would not rule that it was hearsay
if you put on -- let's say you put on Leverone and his
testimony had been contrary to testimony that he gave.
Supposing you put on Leverone. He said something like "My
people had these big numbers, they had much bigger numbers
than the numbers that were being reported by MACV." You
can put that on. It's the same hearsay, hearsay to the
same extent as the plaintiff, and you can put that on to
the same extent as the plaintiff could.

MR. BOIES: Could I put on one of Leverone's
people to say "I told Leverone the numbers were bigger"?
Could I do that?

THE COURT: I don't want to give you a ruling
without having heard from the other side, but as it strikes
me now, without having heard argument from the plaintiff, I
don't see why not.

MR. BOIES: I think that is exactly what you
have before you on the bottom of page 86. You have Hankins
testifying to what he told Gattozzi.

THE COURT: The basis of my sustaining the
objection is not that it's Hankins telling what he told Gattozzi, but it's Gattozzi's answer that I am sustaining the objection to.

I have no objection to the part where Hankins tells what he told Gattozzi. The part that's objectionable is where Hankins undertakes to tell what Gattozzi's views were.

MR. BOIES: Your Honor, you allowed Leverone to testify what the views were of the intelligence officers who told him.

THE COURT: But that was a matter of Leverone as the chief of that section testifying to his information collecting. "I went from desk to desk," he said, "I went from desk to desk and asked for an oral report as to the size fixes of the various units that we know about," and he testified to what information filtered up to him in that information gathering undertaking of his.

Now, this is a conversation. We don't know much about what the conversation is. There is nothing that tells me what this conversation is.

MR. BOIES: One thing it tells you --

THE COURT: Hankins says that he chatted with Gattozzi and he tells what Gattozzi's views were.

MR. BOIES: With respect, your Honor, I don't think the word in there is chatted.
THE COURT: Hot topic of discussion.

MR. BOIES: That's right, and I discussed. The reason that I push the court on this is because I think what you're doing here is just not consistent, and I want to be sure that I make as clear to the court as I can that while I think there is a wide range of judgment --

THE COURT: What was the relationship between Gattozzi and Hankins?

MR. BOIES: They were co-workers. They worked as close together as the desks that Mr. Leverone was discussing yesterday or Thursday. Hankins was the infiltration analyst, Gattozzi was the gains and losses analyst, who took the inputs from the infiltration and recruitment analysts and computed gains and losses.

The testimony from both Hankins and Gattozzi is that they were in constant communication and discussing their work together. Some of that testimony has already been read in. I think that is also consistent with what other witnesses have testified here.

If Leverone can get on the stand and testify that some of his intelligence officers told him that the figures were not higher after Tet, I just don't see how Hankins cannot testify that one of the intelligence officers with whom he worked told him that the numbers were higher.

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THE COURT: I will reserve for the moment on this particular passage on 86, because my ruling on that would depend on foundation that one may have to search through this and other testimony for.

It's a little more difficult when you're reading a deposition because the foundation questions that might have been asked and that were asked -- I asked Leverone several foundation questions that were designed to find out whether this was just casual talk. If you recall, the questions I asked him were whether he had made some kind of systematic undertaking to go from man to man. His answers were to the effect that he had.

MR. BOIES: His first answer was he did not.

THE COURT: And I pursued it further and I think there was a miscomprehension as to whether it was something he had been ordered to do or whether he was doing -- I forget what word it was, but I think there was a miscomprehension there.

I was satisfied after hearing his answers to the foundation questions that the plaintiff put and that I put that he was making a systematic information gathering undertaking.

If this conversation here between Hankins and Gattozzi is also part of systematic information sharing among related analyst functions I would agree with you and
will rule to permit it.

The problem is that the foundation here is very weak. Hot topic of discussion it indeed says, but it does not establish that one was relying on the other to form a professional opinion as part of their work, as opposed to what might have been a hot topic of discussion people were all interested about and were all talking with each other about in conversation that was not their professional work, but about their professional work.

I will reserve on this passage right here at the bottom of page 86 and the top of page 87. I will rule in favor of the plaintiff's objections on the other ones that we discussed.

MR. DORSEN: There is one last one, your Honor, page 99.

THE COURT: I think --

MR. DORSEN: You may have done that implicitly.

MR. BOIES: I think 99, probably the ruling is the same as the prior Parkins --

THE COURT: Yes, that's really the same. That's completely covered by what we talked about before.

So the objection is sustained there as to Hankins' statement of what Parkins told him about Parkins' speculation as to why Parkins was fired by Morris.

MR. BOIES: Thank you, your Honor.