AFTERNOON SESSION

2:20 p.m.

Q. Do you recall whether you agreed with the draft?

A. Yes, I do.

Q. Were you involved at all in the preparation of any of the drafts?

A. The preparation of the drafts? I was involved, as I think I told you, in reviewing and passing on the contributions to the draft made by the various offices that contributed to that estimate. One of them would be the Office of Economic Research, which produced a large section on logistics on Communist supply capabilities.

Q. Do you recall whether you agreed with the early pre-first conference draft of the SNIE?

A. A pre-first conference -- what conference do you mean?
Q. The conference, I think the record reflects, on or about June 23, 1967. Do you recall --

A. Go ahead.

Q. Do you recall whether you agreed with the draft, any drafts that predated that conference?

A. I recall telling the DDI that the draft which was sent out to the field around -- it must have been early June, 1967 -- I told the DDI that that draft was satisfactory. By that I must have meant that I had read it, that I was satisfied that it had what was supposed to have it in as a first draft.

Q. You testified, I believe, that you saw a number of later drafts; is that correct?

A. I would have seen every draft that was done subsequently.

Q. Do you recall whether at some point, or at any point, you found yourself disagreeing with drafts of the SNIE?

A. I can remember in July seeing a very rough draft that was being prepared in George Carver's office. At that time there was a -- some changes had been made in some of the figures. I can't at this moment tell you precisely what those figures were. I remember the order of magnitude of the changes were, oh, in the area of, say, 5,000 decrease in an order of magnitude 60,000, that kind of
thing. But they were changes. And I asked George Allen what had occurred to make that -- for them to be drafting these changes.

I have to explain something here. In June 1967 something else happened that temporarily deflected my attention from Vietnam.

Q. If we can stick with the drafts of the SNIE, please. Was it is it your recollection that the draft that was sent out to the others in June of 1967, early June of 1967, consisted of two parts in terms of enemy forces, a military order of battle and a non-military order of battle, do you recall whether that was the case?

A. I can't assure you 17 years later that any specific draft made that separation. But it was the normal kind of separation to make and we had made such a separation in other studies of the subject.

Q. And when you say, "separation" who was in the military and who was in the non-military order of battle, if you recall?

A. In the military there would have been the main force elements. Non-military, I would have recalled the administrative services, but if you ask me specifically what that draft, how that draft organized them, I can't at this time tell you.

Q. Would the non-military also have included, as
you recall it, self-defense militia?

A. I can't recall what that draft said about the
self-defense militia. I know that the self-defense militia
didn't appear in the final draft.

Q. No mention of them?

A. They were taken out.

Q. What about the political cadre, do you recall
whether they considered in the military or non-military
order of battle?

A. Political cadre would have been in the
non-military, if such a division were made in that draft.

Q. I would like to show you, Mr. Kovar, a -- I
would like to show you what has been introduced as exhibit
377. I direct your attention to the signatory of that
document, George W. Allen.

It is a memorandum for the record, dated 5 July
1967. The question I have is, directing your attention to
the middle of page 2, do you have any recollection on or
about July 5, 1967 of discussing with Mr. Allen any
division of the order of battle into military and
non-military components?

A. I think I better -- are you asking me have I
seen the document before?

Q. Not specifically. Although you are free to look
at it. I am asking you if you recall whether on or about
July 5, 1967 you had any discussions with Mr. Allen as to the division of the order of battle into military and non-military components?

A. The discussions I had with Mr. Allen, at least those portions that I recall, had to do strictly with numbers. I shouldn't say strictly, but they had to do with numbers; what I recall about had to do with numbers. I don't recall specifically whether we discussed the categories. Perhaps if I read this document it will refresh my memory.

Q. Could you take a look at it then, please.

A. All right.

(Pause)

A. I can't say that I saw the document, but I did have a discussion with George Allen.

Q. Do you recall whether George Allen ever told you on or about July 5, 1967 that the self defense should be separated from the guerrillas because they are largely unarmed?

A. I don't recall George explaining that to me, no.

Q. Now, do you recall whether any of the drafts of the SNIE —

A. This is not a draft SNIE.

Q. That's correct. I didn't mean to give that impression?
A. All right.

Q. Mr. Kovar, do you recall whether the draft of the SNIE that was sent out described the self-defense militia as poorly armed and trained personnel?

THE COURT: What draft are you asking him about?

MR. DORSEN: The draft that was sent out in or about early June 1967.

A. I don't recall that description, no, I do not.

Q. Mr. Kovar, I believe you testified that you last visited Vietnam in 1958; is that correct?

A. I ended my tour in 1958, that's correct.

Q. And is it accurate to say that you had no firsthand knowledge of any of the conferences that took place on the subject of the SNIE during the summer of 1967?

A. My knowledge of those conferences would have come in the way I told you, from people who attended the conferences, from memoranda, by participants, memoranda addressed to the DDI. The conference took place right down the hall from my office.

Q. You didn't --

A. I did not attend the conference.

Q. You didn't go in there even for one minute?

A. I don't recall going into any of those conferences, no, I do not.

Q. And haven't you referred to a -- the information
you received as corridor talk, Mr. Kovar?

A. I have used that term. It's a term that is used at things like a UN debate, UN sessions; at SALT conferences. It's governmentese. It's the kind of discussion that goes outside a formal conference among the participants and among the people who are interested parties.

In this case, it was almost literally true, because I've said the corridor leading to the conference room was right outside my office. My office door was normally open.

Q. People would drop in and talk to you?

A. Drop in and talk.

Q. It's true, is it not, that you did not talk to any of the military people in 1967 about the SNIE?

A. That's true.

Q. You were talking strictly to CIA people; is that correct?

A. I might have talked to Don Blascak, who was a military personnel. I did not talk to any of the military participants, that's correct.

Q. You testified just a minute ago that your recollection was -- excuse me. You've never spoken to General Westmoreland in your life, have you?

A. No, I have not.
Q. I believe you testified a minute ago, Mr. Kovar, that your recollection of SNIE is that it did not mention the self-defense militia; is that correct?

MR. BARON: Objection.

THE COURT: Overruled.

A. What is the question?

Q. The question is, I believe Mr. Kovar that you testified a minute ago that the SNIE 14.3-67 did not mention the self-defense militia?

A. You're talking about the June 1967 draft?

Q. I'm talking about the final version as published.

A. What I recall 17 years later most vividly about the estimate are the total figures. I know that the MACV command wiped out a whole category of guerrilla-type fighters.

Q. Would you turn, Mr. Kovar, to exhibit 273, and I would like to read first --

A. Is that the SNIE?

Q. That's the SNIE. I would first like to read paragraph 23?

"For the purpose of this estimate, we consider the following elements of the Communist organization in South Vietnam: the Regular Forces, NVA and VC Main and Local forces, the administrative service units which support them, the VC guerrilla forces, the political cadre,
the self-defense forces, the secret self-defense forces and
the assault youth."

A. Those we considered, right.

Q. "The contribution of these diverse elements to
the Communist effort in South Vietnam differs widely in
value. Their capabilities and missions are set forth in
the following paragraphs."

Will you turn, Mr. Kovar, to paragraph 32.

"Other Communist organizations. The Communists
make a deliberate effort to organize most of the people
under their control into various work forces and semi-military
organizations. Among the more significant of these
organizations are the self-defense forces, secret
self-defense forces, and groups such as the assault youth.
Moreover, when occasion demands, almost every able-bodied
person under VC control may be called upon to support the
war effort.

"33. The self-defense force is described by the
Communists as a military organization. It is clear,
however, that its organization and mission differ from that
of village and hamlet guerrillas. Self-defense forces
include people of all ages and a substantial percentage of
them are females. They are largely unarmed and only
partially trained. The duties of self-defense units
include the maintenance of law and order, the construction
of bunkers and strong points, warning against the approach of allied forces, and the defense of villages and hamlets in VC-controlled territory. Self-defense forces do not leave their home areas and members generally perform their duties part-time. Their existence poses an impediment to allied sweeps and pacification, however, and in their defensive role, they inflict casualties on allied forces.

"34. Another element, the secret self-defense forces, operates in government controlled and contested areas. They provide a residual Communist presence in such areas and support the Communist effort primarily by clandestine intelligence activities.

"36. Our current evidence does not enable us to estimate the present size of these groups, self defense, secret self-defense, the assault youth, or other similar VC organizations, with any measure of confidence."

A. Will you stop there.

Q. I would like to continue. "Some documents suggest that in army 1966 the aggregate size of the self-defense force was on the order of 150,000. This force and the other groups however have unquestionably suffered substantial attrition since that time as well as an appreciable decline in quality because of losses, recruiting of some of their members into the guerrillas or other VC military components, and particularly the
shrinkage in VC control of populated areas. Though in aggregate numbers these groups are still large and constitute a part of the overall Communist effort, they are not offensive military forces, hence, they are not included in the military order of battle total. Nevertheless, some of their members account for a part of the total Communist military losses."

Mr. Kovar, you appeared here today and testified without having read SNIE 14.3-67?

A. I read this. I told you in my testimony before I read this.

Q. You did not --

A. Let me read you the one sentence in there that I particularly remember and which is the central point of this discussion.

Q. Mr. Kovar, you testified a minute ago, did you not, that you did not remember that self-defense militia were even mentioned in SNIE 14.3-67.

A. I didn't.

MR. BARON: Objection.

THE COURT: Overruled.

A. I beg to differ. The -- let's go back.

MR. DORSEN: Your Honor, I believe he's answered the question.

THE COURT: You may answer the question in our
own words but limit yourself to answering the question.

THE WITNESS: All right. What is the question?

Q. The question was, you testified, did you not, that SNIE 14.3-67 did not mention the self-defense militia?

A. I've got to explain that in context.

THE COURT: You may explain your answer to his question as long as you limit yourself to answering his question.

Q. Let me ask you this, Mr. Kovar --

THE COURT: No.

MR. DORSEN: Excuse me.

Q. Please answer the question.

A. I do not find the self-defense militia included in the table that I am looking at on page 11. I told you I'm talking about numbers. When you asked me were they included, I am looking -- I am remembering the tables, and does that explain my answer?

Q. Mr. Kovar, do you recall testifying at your deposition, page 115, if you would look at it, line 17.

A. 115?

Q. Line 17.

"Q. Is there any reference to the self defense and secret self-defense in the SNIE?"

"A. To the best of my knowledge, in that SNIE there was no reference to those groups, although I'm sure
there must have been in previous SNIEs."

A. To the best of my knowledge at the time that was
my answer.

Q. And you did not read the SNIE between the time
of your deposition and the time you appeared today for your
testimony under oath?

A. No, I did not.

MR. DORSEN: No further questions.

REDIRECT EXAMINATION

BY MR. BARON:

Q. I just have a few questions, Mr. Kovar. I
believe you have the special national intelligence estimate
in front of you?

A. Yes, I do.

Q. Could you turn once again to page 15, and I
believe you indicated that you wanted to address yourself
to one sentence in particular on that page of the estimate?

A. That sentence leaped out at me.

Q. What sentence leaped out, Mr. Kovar?

A. "Our current evidence does not enable us to
estimate the present size of these groups, self defense,
secret self-defense, the assault youth or other similar VC
organizations, with any measure of confidence." And that
sentence is not true. And that is what is wrong with this
estimate.
We had measured these organizations and units, and we had considerable confidence in them.

MACV put that sentence in -- MACV created the circumstances that resulted in that sentence being put in there.

MR. DORSEN: I move to strike the last answer, your Honor.

THE COURT: Sustained. The jury will disregard that answer.

Q. Is there any estimate of the current size of the self-defense forces in this national intelligence estimate, Mr. Kovar?

A. I could not find it in these -- in this -- what are we, past the first half of the estimate? What was your question?

Q. I asked you if the estimate contains a current estimate of the size of the self-defense forces?

A. It does not.

Q. When you spoke to Mr. Adams in the late 1970s did you discuss with him the treatment of the SD and SSD, the self defense and secret self-defense forces in the national estimate?

MR. DORSEN: Objection. Beyond the scope.

THE COURT: Isn't that right, Mr. Baron? Mr. Dorsen objects that it's beyond the scope of his
cross-examination. Do you contend otherwise?

MR. BARON: He has been examined on cross-examination, it seems to me, about his views on the treatment of the self-defense forces.

THE COURT: Sustained.

MR. BARON: Could I have just a minute, your Honor?

THE COURT: Yes.

MR. BARON: Can I approach the bench?

THE COURT: Yes.

(At the sidebar.)

MR. BARON: It seems to me that Mr. Dorsen has suggested in his cross-examination that Mr. Kovar has recently fabricated his view on self defense treatment and self-defense forces in SNIE 14.3-67, and I would submit that Mr. Kovar's discussions of the subject with Mr. Adams in the 1970s would rebut Mr. Dorsen's assertion.

MR. DORSEN: I don't think that was the thrust of my examination at all.

THE COURT: Explain to me why do you think that was the thrust of the examination. What was it about Mr. Dorsen's cross that you argue went to just recent fabrication?

MR. BARON: It seems to me that he asked whether he said you haven't read the thing, the estimate since 1967,
and at the time of your deposition, which is recent, you thought there was no mention. Here you -- and I believe he misstated the witness' testimony to that fact, the witness said they were taken out and made reference to the treatment of them and the fact that there was no number supplied, and it seems to me Mr. Dorsen is arguing that as of the time of the deposition that there was no mention of them and that he had only, it seems to me by implication, recently come to the conclusion that there was something wrong with the treatment of these people in the estimate, and that at the time that the estimate was written he presumably would have been aware of this, but now --

THE COURT: I understood Mr. Dorsen's examination to be directed to a different kind of a point, to convey that he didn't know what he was talking about, that he had said both now and at his deposition that the SNIE did not include any reference to the SD and the SSD, and Mr. Dorsen demonstrated by referring to the text that there were six paragraphs, or five paragraphs that discussed the SNIE.

I thought the examination was not designed to demonstrate recent fabrication but designed to undermine the witness' competence to show that this is a witness who doesn't really know his subject matter and who doesn't know what he's talking about.
MR. BOIES: Your Honor, if I may, I think if
that were the purpose, and I think the jury could interpret
the examination in multiple ways, and we are entitled to
respond to those multiple ways that the jury could
reasonably interpret the cross, but I think that if Mr.
Dorsen's examination was, as the court interprets it, we
are still entitled to show that in the late 1970s when he
was discussing this with Mr. Adams he did know what he was
talking about.

If the assumption of the court is correct that
the thrust of the examination was to show that he had a
lapse of memory, that he did not know what was mentioned in
the SNIE when his deposition was taken --

THE COURT: I didn't say a lapse of memory.
What I thought it was designed to show was that he simply
was not well informed now or ever on this subject.

MR. BOIES: In that case I think we are entitled
to show that it was a lapse of memory and that he was
informed of it in the 1970s and demonstrated that in his
discussions with Mr. Adams.

THE COURT: How would it show that? I don't
understand. What do you expect him to answer in response
to this question?

MR. BOIES: The first thing, your Honor, is I
do think, with respect, that some of Mr. Baron's objection
to the form of the question were well stated, in the sense that I do not believe this witness ever said that there was no reference to the --

THE COURT: I have equally often overruled your objections when you have objected on that basis and the point is not that I agree or disagree with what the witness said. The point is that it's asking the witness a question, was it your testimony that this X was true?

MR. BOIES: My point, your Honor, is that I think that assumption was built into the question. It was not asking did you say this, it was saying, you did say it, and then building that assumption into the question.

THE COURT: In that respect I think you are wrong. I have overruled numerous of your objections, Mr. Boies, on just that point where you objected because you thought the question, where the witness is asked, didn't you testify earlier that X was true, and you've stood up to object because you disagree with the characterization without passing one way or the other --

MR. BOIES: That wasn't the objection I was talking about, your Honor. But, in any event, I think that given the thrust of the examination, this is something that we ought to entitled to inquire about.

THE COURT: What is he going to say?

MR. BOIES: I believe he is going to say -- and
I don't know, your Honor -- but I believe he would say that he talked with Mr. Adams about the self defense and secret self-defense forces, and the extent to which they were treated differently in SNIE 14.3-67 than he thought they ought to. And he will reveal the extent of his knowledge at that time and as to their treatment.

I'm not one hundred percent sure what --

THE COURT: He has been examined very fully on what he said to Mr. Adams, very extensively what he said to Mr. Adams, and Mr. Dorsen didn't touch on that, and I understood Mr. Dorsen's cross-examination to be a direct undermining as to whether this witness, as a truth witness, is somebody who knows what he's talking about.

How successful it was is something for the jury. But I just don't see that Mr. Dorsen opened the door to a redirect on going back over what he said to Adams, to which he has testified very fully.

I don't see that it's appropriate to do that at this time.

(Continued on next page)
BY MR. BARON:

Q. Mr. Kovar, in your judgment was it important to provide a current estimate of the strength of the enemy's self-defense forces in the Special National Intelligence Estimate 14.367?

MR. DORSEN: Objection, your Honor.

THE COURT: The grounds?

MR. DORSEN: It's already been answered both I think on direct and on cross — I mean redirect.

THE COURT: Overruled.

You may answer.

THE WITNESS: Would you ask the question again?

Q. I asked you whether in your judgment it was important to provide a current estimate of the strength of the enemy's self-defense forces in SNIE 14.367?

A. Yes, it certainly was important. These people had always been part of —

MR. DORSEN: Your Honor, the question I think has been asked and answered.

Q. If I may, Mr. Kovar, let me put a question to you.

Why did you believe it was important?

A. I believed it was important because these were an important part of the capabilities of the Vietnamese
communists for fighting in South Vietnam. They have always
been including in the "our estimates of that capability.
They killed people. We counted them when they were dead.
We should have been counting them when they were alive.
This estimate cut them out. Removing them from the
estimate gave an improper picture of what we set out to do.
It resulted in an underestimation of the enemy's capability.

MR. BARON: I have no further questions.

MR. DORSEN: No further questions, your Honor.

THE COURT: All right. Thank you.

MR. BOIES: Your Honor, the next evidence is the
deposition of Bernard Gattozzi.

THE COURT: You left me a couple of disputes on
that. I'll send the jury out for a couple of minutes to
look this over and see what my ruling is.
The jury may take a short recess.

(RECESS)

(IN open court; jury not present)

THE COURT: Counsel, the passage on page 107 "

have you got this?

MR. DORSEN: I just put mine away, your Honor.

107.

MR. BOIES: Yes, your Honor.

THE COURT: I don't know what he means. First

of all, have I got it straight?
Which part are you offering now, the part that's in dotted lines or the part that is in solid lines.

MR. BOIES: The part that is in dotted lines is the part that plaintiff has made and is accepted.

THE COURT: The part that is in solid lines is in there?

MR. BOIES: No. The part that is in dotted lines is the part that the plaintiff offered which the court as accepted previously.

The part that is in solid lines is the defendant's offer based on what is now in the record from the manufacturer.

THE COURT: All right.

I have trouble with one aspect of it, which is the tendency to communicate hearsay, where he says that Major Cooley told me, remembers things that are kind of distasteful to me and it's not clear what he means. It's not clear whether the last sentence "He remembers things that are really kind of distasteful to me" is offered as an explanation that's asked for by the question "Why have you blocked it out of your head?" It's not clear that he means because of the distasteful nature or whether he means what he said in the first words "I don't know" but then goes on to say as sort of a rambling addition that Major Cooley remembers things that are kind of distasteful to me.
MR. BOIES: Is it clear, Honor, that the witness is at least saying that in response to the question "why have you blocked it out of your head?" the things that he has blocked out of his head really are kind of distasteful to me. That at least, it seems to me the witness is clearly saying and is responsive to why he has blocked something out.

THE COURT: If that's what he meant it would be responsive. It's not clear to me whether it is responsive. It may well be. It may well be that what he means by this whole answer is that the distastefulness of Cooley's memories is the explanation of why he's blocked it out of his head.

But it may be, since, after all, he's talking about something that he said he blocked out of his head and you asked him why he blocked it out of his head and he said I don't know. He goes to say he's clear on the first half and not on the second half and he's talked to Major Cooley and remembers things that are kind of distasteful to me. It's not clear he's saying that as an explanation for simply as an additional fact about the & about the things that he can't remember.

MR. DORSEN: Your Honor, the next couple of pages I believe make it fairly clear what the context is and that is he had a telephone conversation with Major
Cooley and a lot of the deposition testimony conducted by defendants was about his recollection of that conversation with Major Cooley which had just occurred and he talks about when did you last speak with Major Cooley about enemy strength figures in January or February of this year.

I think it's quite clear from the context, your Honor, what he is doing is commenting on Major Cooley's hearsay statement to him.

THE COURT: Where that is?

MR. DORSEN: Right on the same page, 107.

THE COURT: It's the part that's been blocked out.

MR. DORSEN: I'm sorry. Could I hand that up to the court, your Honor?

(Handing)

THE COURT: I don't understand. What argument do you draw from what follows?

MR. DORSEN: That he is commenting on things that he was just told by Major Cooley and he's just saying that Major Cooley remembers things that are distasteful to me. In other words, if Major Cooley said he ran over somebody last week, Bernard Gattozzi is saying that is something that is distasteful to me. He's commenting on Major Cooley's hearsay statement to him.

MR. BOIES: Except that that testimony follows, not precedes the testimony that is at issue here.
THE COURT: I agree with you that what follows, unless it purports to explain, is not very useful to make clear what was meant by something earlier.

I think what I would permit is, if you want it you may not care about it limited in this fashion I would allow all but the last sentence, all but the "he remembers things that are that really are kind of distasteful to me."

First of all, the competence of a witness to testify as to why he doesn't remember something is certainly questionable. When you ask somebody for information about something he says he doesn't remember, it's certainly very debatable whether he is in a position to say anything about something that he just told you he doesn't remember.

If what he means by it is that he remembers indistinctly and he remembers enough of it to know the repugnance of the memo that makes it more difficult for him to remember the details that would probably be all right.

But it just is so unclear that that's what he means. It may be that he means that. It seems to me he's just saying that Major Cooley has mentioned to me things that he remembers that are distasteful and I think that's hearsay and I guess the answer is you could have worked harder during the deposition at getting it in an admissible
form at that time. The form in which it is now I would allow the question and answer up to that sentence but not including that.

I don't know whether you want it without that.

You are welcome to it without the last sentence.

MR. BOIES: I think we will take it, your Honor and I think the record **I think we will take it.

THE COURT: Okay.

The other one, what you want to add is in dotted line here?

MR. BOIES: This is in. These two things are already in. The court has ruled that this is in.

THE COURT: Okay.

MR. BOIES: And the questions and answers that are at issue is the first question and the second question.

MR. DORSEN: Page 128 to 129.

MR. BOIES: From line 22 on 128 to line 10 on page 129.

THE COURT: Let me look at it.

Yes. Let me hear your views on this. Who is the proponent?

MR. BOIES: I am the proponent and I say this is where we did get what we were talking about before in a nonhearsay form.

THE COURT: What's your argument against it?
MR. DORSEN: Again, it's the same idea that he
doesn't remember why he doesn't remember. It's also just
to speculate on things that might be, including loss of
friends' lives and things like that are not probative and
possibly prejudicial, your Honor.

THE COURT: I think this one falls on the side
that I was describing a moment ago where he does remember
enough about it to speculate as to why he doesn't remember
it better and he says, "The mad scramble to readjust
figures that I think I just put out of my head totally.
There was a lot going on in post-Tet."

I read this as being sufficiently within his
command and not hearsay and I think it's admissible.

MR. BOIES: Thank you, your Honor.

THE COURT: Do you want to go ahead now or take
a break?

MR. BOIES: I think this is probably only going
to take about 45 minutes and if we go ahead we can stop
early if that's convenient with the court.

THE COURT: Is this all that's left for this
afternoon?

MR. BOIES: This is all that is left for this
afternoon.

THE COURT: Let's call the jury.

(Jury present)