

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

WILLIAM B. TUTTLE, JR., RAYMOND J. : VOLUME II
JOHNSON, GEORGE H. KUCHEN, JOHN E. :
STRAIT, RICHARD SIROIS, WILLIAM :
MENKINS and JAMES A. TAYLOR :
vs. :
DANIEL MARVIN, TRINE DAY, LLC : 2:04 CV 948

Trial in the above-captioned matter held on Tuesday,
January 24, 2007, commencing at 9:07 a.m., before the
Hon. David C. Norton, in the United States Courthouse,
Courtroom II, 81 Meeting St., Charleston, South Carolina.

APPEARANCES:

BOBBY G. DEEVER, ESQUIRE, 3760 Bald Mountain Rd.,
West Jefferson, NC, appeared for plaintiffs.

BENJAMIN W. DEEVER, ESQUIRE, 705 Princess St.,
Wilmington, NC, appeared for plaintiffs.

CHRIS OGIBA, ESQUIRE, 205 King St., Charleston,
SC, appeared for defendants.

BARRY A. BACHRACH, ESQUIRE, 311 Main St.,
Worcester, MA, appeared for defendants.

REPORTED BY DEBRA L. POTOCKI, RMR, RDR, CRR
Official Court Reporter for the U.S. District Court
P.O. Box 835
Charleston, SC 29402
843/723-2208

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1 (Jury not present.)

2 THE COURT: Who's going to complain first?

3 MR. COLLINS: Since my complaint is the smallest,
4 I'll go first, I guess. Judge, I just want to reiterate what
5 we talked about yesterday. As I told you yesterday, there
6 is -- our complaint, we had alleged that they had -- publisher
7 had a duty in this case to accurately vet, investigate and
8 publish only truthful and nonlibelous statements. That
9 statement was admitted in the answer.

10 THE COURT: Under the negligence cause of action.

11 MR. COLLINS: Sir?

12 THE COURT: Under the negligence cause of action.

13 MR. COLLINS: Nonetheless, an admission.

14 THE COURT: Under the negligence cause of action.

15 MR. COLLINS: Yes, sir, but since we have a
16 negligence standard in your charge, I'd like some sort of
17 affirmative statement from the Court as to the admission of
18 that duty.

19 THE COURT: I have great respect for you as a lawyer,
20 and there is a great respect for the common law, but unless
21 you give me some judge that has said that before you thought
22 that up today, or some case that says that, you know, I'm not
23 going to do it.

24 MR. COLLINS: I didn't think it up, actually, I
25 thought it up yesterday, in all candor. It just makes sense

1 to me that if there's an admission in the record, that it
2 could go to the jury.

3 THE COURT: Well, there's an admission in the record,
4 because y'all admitted it.

5 MR. OGIBA: Well, I think, Your Honor, you hit on the
6 point. We admitted it, I believe, on the negligence cause of
7 action that they asserted. I think you can draw a clear
8 distinction between a negligence cause of action and a
9 negligence standard under a defamation cause of action.

10 THE COURT: Okay. If you can find a case that
11 supports what you want, I'll be glad to listen to it. I mean,
12 I think the negligence standard under the defamation cause of
13 action is classic, you know, what would a reasonable man do
14 under the same or similar circumstances, and I think that's in
15 the charge.

16 MR. COLLINS: Okay.

17 THE COURT: All right. Anything else from the
18 plaintiffs?

19 MR. COLLINS: No, sir.

20 THE COURT: Okay.

21 MR. OGIBA: Your Honor, we have a few comments on the
22 jury instructions.

23 THE COURT: Just give me pages so I can take a look
24 at it.

25 MR. OGIBA: Page 13, under actionability of

1 statement?

2 THE COURT: Is it in here? All right.

3 MR. OGIBA: Your Honor, respectfully, we would
4 request that additional guidance be given to the jury that the
5 actionability of statement is simply an element of the
6 defamation claim. And we have a few suggestions on how to do
7 that, within the confines of what you already have down under
8 (d).

9 We would respectfully request that to begin --

10 THE COURT: The whole thing, three pages before that,
11 says it's an element.

12 MR. OGIBA: Correct, Your Honor, but if you read this
13 in and of itself, especially the last sentence, we believe
14 that it may unduly confuse the jury into thinking that they
15 have established a defamation claim, based on that last
16 sentence.

17 THE COURT: Well, the last sentence says, therefore,
18 I instruct you that each plaintiff has met this element as a
19 matter of law.

20 MR. OGIBA: And that the statements are actionable.
21 We would simply request additional, you know, conditions in
22 that sentence.

23 THE COURT: Such as?

24 MR. OGIBA: Such as, okay, we have just -- and we've
25 drafted up a conditional statement in here -- just because a

1 statement is actionable, does not mean that -- does not
2 necessarily mean that it is defamatory, nor does it make any
3 other element of plaintiffs' defamation claims more or less
4 proven.

5 THE COURT: You start out on page eight saying in
6 order to recover under action for defamation, each plaintiff
7 must establish four essential elements by the preponderance of
8 the evidence. So they can't find any defamation unless they
9 find all four.

10 MR. OGIBA: Correct, Your Honor. I think where we're
11 having problems is with the last sentence in particular, where
12 it talks about the statements being actionable. I think the
13 term actionable may imply to a jury, a lay jury, that the
14 defamation cause of action, as a matter of law, has been
15 established.

16 THE COURT: What you propose makes me more confused
17 than what we had to begin with. So say that again.

18 MR. OGIBA: Okay. We have just at the very end of
19 this, just because a statement is actionable, does not
20 necessarily mean that it is defamatory, nor does it make any
21 other element of plaintiffs' defamation claims more or less
22 proven.

23 THE COURT: What I think probably would be -- is
24 after (d), right before it says damages, I'm just going to
25 repeat the introduction on page eight, something to the effect

1 that remember, in order to recover under cause of action for
2 defamation, each plaintiff must establish each of these four
3 essential elements by the preponderance of the evidence. Does
4 that solve your problem?

5 MR. OGIBA: I think it does, Your Honor.

6 THE COURT: Any problem with that?

7 MR. COLLINS: No, sir.

8 THE COURT: And I can understand there may be some
9 confusion, but I think that distills it, if you bracket it
10 with that.

11 MR. OGIBA: I think it does. Also in that same
12 paragraph, Your Honor, where -- and we understand your ruling,
13 we're not disputing your ruling on this issue.

14 THE COURT: At least not in this court.

15 MR. OGIBA: Not in this court. But where it
16 indicates that defendants' allegedly defamatory statements
17 about plaintiffs Johnson, Kuchen, Strait, Sirois, Menkins and
18 Taylor --

19 THE COURT: Menkins is leaving.

20 MR. OGIBA: -- are actionable because they allege
21 crimes of moral turpitude. Now, we think an aspect of this
22 case is that each of these plaintiffs needs to establish
23 that -- that there were specific crimes alleged about each one
24 of them in particular. We believe that some of these
25 plaintiffs may or may not be able to establish that the book

1 alleges crimes against them.

2 THE COURT: Okay. Well, bring that up at the end of
3 the case when the evidence is not in.

4 MR. OGIBA: Okay.

5 THE COURT: I mean, if there's not evidence to
6 support the element, then a judgment as a matter of law, then
7 we'd have to throw that plaintiff out.

8 MR. OGIBA: Okay.

9 THE COURT: Okay?

10 MR. OGIBA: Thank you.

11 Our next issue that we'd like to address is on page 14.

12 THE COURT: Okay.

13 MR. OGIBA: Under the actual damages for the
14 negligence standard under the defamation claim.

15 THE COURT: Um-hum.

16 MR. OGIBA: We would request that the jury be
17 instructed that each plaintiff bears the burden of proving
18 actual damages under the negligence standard, and that such
19 damages are not presumed.

20 THE COURT: Any problem with that?

21 MR. BEN DEEVER: Yes, sir, Your Honor, it's my
22 understanding that if it's a negligence per se -- excuse me --
23 a defamation or libel per se, then damages are presumed.

24 THE COURT: The word libel per se is not even in this
25 instruction, okay? I remember law school where we talked

1 about libel per se and libel per quote and all that kind of
2 stuff.

3 MR. BEN DEAVER: If it goes to --

4 THE COURT: But actual damages, they've got to prove
5 just like everybody does, even in a car accident, right?

6 MR. BEN DEAVER: It's my understanding under the law,
7 Your Honor, since they're not public figures, officials, that
8 the damages are presumed and they don't have the burden to
9 prove the damages.

10 THE COURT: From what my lawyer said, and what your
11 letter that you got ten days ago says, under the Gertz case,
12 unless there's actual malice, there are no presumed damages.
13 I think. My lawyer thinks. Hold on a second.

14 MR. BEN DEAVER: So if actual malice is shown, or
15 reckless and knowingly, then we would ask that the damages be
16 assumed, and presume that damages are there.

17 THE COURT: We're talking about two different things.
18 On page 14 we're talking about if you conclude that one or
19 both damages were at fault by being negligent, but did not
20 have actual malice, then each plaintiff is entitled to recover
21 actual damages for the statement the injury caused him. And
22 then that's the elements of actual damages, but there's really
23 nothing in here that says that they have to prove it.

24 MR. BEN DEAVER: Yes, sir, Your Honor.

25 THE COURT: I mean, if you look on page four of the

1 letter I sent y'all.

2 MR. OGIBA: Respectfully, Your Honor, on this issue
3 under Gertz, I have a direct quote from Gerts. It said the
4 Court holds, "We hold that states may not permit recovery of
5 presumed or punitive damages, at least when liability is not
6 based on a showing of knowledge of falsity or reckless
7 disregard for the truth."

8 THE COURT: Also, my lawyer tells me that South
9 Carolina has interpreted Gertz in Holtzscheiter and Thomson --
10 footnote eight, which is 506 Southeast 2d 497 at footnote 513,
11 says, "Where a plaintiff in a constitutional defamation case
12 relies on conduct less than constitutional malice, she may not
13 rely on presumed damages, but must demonstrate actual injury."
14 Okay. So that's even though South Carolina doesn't recognize
15 the Supreme Court sometimes, it does in this case. Actual
16 injury means not only out-of-pocket losses, but includes
17 injury to reputation, mental suffering, anguish and personal
18 humiliation. So we'll add a burden of proof paragraph in this
19 portion of the damages, okay?

20 MR. OGIBA: Also, Your Honor, dovetailing into that
21 argument, we, on the very next page, page 15, you address
22 special damages. If we could get a similar instruction as to
23 special damages, that the plaintiffs need to prove special
24 damages in order to recover them, and that they're not
25 presumed, that section, as you can see, falls directly after

1 the actual malice analysis, in which you talk about presumed
2 damages. And so we just request an instruction here that
3 those damages are not presumed for special damages, under
4 any -- under negligence or actual malice.

5 THE COURT: And this is Ogiba on what? Where do you
6 find that, except it's better for your clients to put that in
7 there.

8 MR. OGIBA: Well, we would maintain it would be under
9 the same -- under the same analysis, same Gerts analysis, that
10 actual -- that pursuant to the Court, the Court maintains that
11 you cannot establish -- that you may only establish actual
12 damages -- presumed damages under actual malice standard, but
13 punitive damages -- and we would maintain special damages --
14 do not fit within that presumed damage rubric.

15 THE COURT: We'll think about that, but it seems to
16 be inconsistent for you to take the position that Gerts says
17 if you have negligence and not actual malice, then you don't
18 presume damages, but if you do have actual malice, you don't
19 presume damages. Okay?

20 MR. OGIBA: Well, we concede that Gerts says that you
21 can presume actual damages in an actual malice -- from an
22 actual malice standpoint, but there's no case that maintains
23 that you presume special or punitive damages under any --

24 THE COURT: There's nothing in here that says you
25 presume punitive damages.

1 MR. OGIBA: Correct.

2 THE COURT: I don't believe.

3 MR. OGIBA: Correct. We're just addressing special
4 damages.

5 THE COURT: So we'll look at that and we'll let you
6 know.

7 MR. OGIBA: The next point we'd like to address is on
8 page 20.

9 THE COURT: All right.

10 MR. OGIBA: About two-thirds of the way through the
11 large paragraph on page 20, a sentence begins -- where you --
12 and we understand this is part of the ruling that you rendered
13 before, that -- finding that Marvin and Trine Day are limited
14 purpose public figures. We would just request that the
15 statement that reads both Marvin and Trine Day, LLC, are/have
16 injected themselves into this particular issue, that that be
17 stricken.

18 THE COURT: I'll strike the are for sure, okay?

19 MR. OGIBA: Okay.

20 THE COURT: Why?

21 MR. OGIBA: We think it's sufficient just to indicate
22 that they're limited purpose public figures, instead of
23 asserting that they've injected themselves into this dispute.
24 We would argue that it's repetitive, and perhaps prejudicial.

25 THE COURT: I'll take a look at that, too.

1 MR. OGIBA: Okay. And finally, Your Honor, and this
2 again dovetails into the damages discussion that we had
3 before, but on page 22, the very last sentence, the last
4 paragraph before abuse of process, where it reads, "Each
5 defendant is prohibited from recovering any damages for
6 defamation without clear and convincing proof the statement or
7 statements were made with actual malice." We would request
8 that that similar statement be made under the plaintiffs'
9 instructions for -- not for all damages, but for special and
10 punitive damages.

11 THE COURT: Page 17 says punitive damages must be
12 proven by evidence which is clear and convincing, so that's in
13 there, there, I believe.

14 MR. OGIBA: Correct. I guess this kind of plays into
15 the special damages aspect.

16 THE COURT: So if I understand correctly, on page 22,
17 you have no problem with the last paragraph right above abuse
18 of process, you just want it applied to the plaintiffs' causes
19 of action?

20 MR. OGIBA: Exactly.

21 THE COURT: And it is applied to the plaintiffs'
22 causes of action, or plaintiffs' punitive damages request,
23 because I just pointed that out. And so where do you get the
24 requirement that the plaintiffs prove special damages by clear
25 and convincing evidence? Where does that come from?

1 MR. OGIBA: Well, we are simply arguing that under --
2 given that the plaintiffs -- you have found that the
3 plaintiffs are private figures, that they are allowed to
4 establish -- establish liability on the basis of negligence.
5 And that under that analysis, they can only -- that for their
6 negligence cause of action, they can only -- they must prove
7 their actual damages. However --

8 THE COURT: They don't have a negligence cause of
9 action.

10 MR. OGIBA: I'm sorry, the negligence standard under
11 their defamation cause of action.

12 THE COURT: Now, you see why I wanted you to say who
13 all's telling the truth? Okay.

14 MR. OGIBA: But when we're talking about presumed
15 damages under the actual malice standard, the only presumed
16 damages you can presume, are the -- are the actual damages,
17 general -- the actual damages, but not any other damages.
18 That's the position of the defendants.

19 THE COURT: Let me -- if they're presumed damages,
20 okay?

21 MR. OGIBA: Yes.

22 THE COURT: Why do you have any burden of proof, once
23 they're presumed?

24 MR. OGIBA: That's -- we agree, Your Honor, but that
25 presumed damages only applies to the actual damages. But

1 there's no presumption of special or punitive damages under
2 actual malice. And, therefore, we would request an
3 instruction that they're -- that the plaintiffs must prove
4 that special and punitive damages by clear and convincing
5 evidence.

6 THE COURT: I agree with you on punitive damages,
7 it's in there. Where do you get the requirement that they
8 prove special damages by clear and convincing evidence?

9 MR. OGIBA: I think we're reading it as an exclusion.
10 It's not specifically excluded, but given that only -- only
11 actual damages may be presumed, pursuant to the case law,
12 given that special damages are not specifically mentioned as a
13 presumed element of damage, we would maintain that there needs
14 to be a clear and convincing standard for proving special
15 damages.

16 THE COURT: I mean, it's a nice theory, and again,
17 treating you like I treated Mr. Collins, I have great respect
18 for you and your legal training also, but you're making this
19 clear and convincing standard of proof out of whole cloth. I
20 mean, I don't see any court that's ever said that.

21 MR. OGIBA: Well --

22 THE COURT: Because, you know, under every case, you
23 know, you have -- you prove actual damages by a preponderance
24 of the evidence, you prove punitive damages by clear and
25 convincing evidence, okay? Special damages aren't punitive

1 damages. I don't see where we find an additional burden of
2 proof on the special damages.

3 MR. OGIBA: So just for clarification's sake, Your
4 Honor is ruling that special damages may also be presumed? If
5 they prove actual malice? The plaintiffs?

6 THE COURT: I'm not -- I've given you what the jury
7 charge is, okay? I'm not being put in that box. All right?
8 What I'm saying is that you've got to find some court
9 somewhere somehow that says that the plaintiffs have a burden
10 of proving special damages by more than a preponderance of the
11 evidence. And if you find one, that's fine. But, you know, I
12 mean, special damages -- I mean, they're similar to actual
13 damages elements anyway, I mean, it's the same type of thing.
14 Right?

15 MR. OGIBA: Correct.

16 THE COURT: And so if it's the same category of
17 damages, it would seem to me that logic is that the same
18 category of proof as to actual and special damages, whereas
19 punitive damages, which are, you know, extraordinary damages,
20 require a higher burden of proof.

21 MR. OGIBA: Well, Your Honor, I guess that would --
22 that would just be inconsistent with the paragraph that you've
23 included for the defendants, in which all of our -- actual,
24 special and punitive damages must be asserted by a clear and
25 convincing standard. Pursuant to your instructions.

1 THE COURT: Would you show me in there where I say
2 that when you ask for damages, you have to prove actual
3 damages by clear and convincing evidence?

4 MR. OGIBA: Well, I guess I'm -- I guess I'm reading
5 that last paragraph before abuse of process. Each defendant
6 is prohibited from recovering any damages for defamation
7 without clear and convincing proof the statement or statements
8 were made with actual malice. Now, if that's simply referring
9 to the standard of proof under the defamation that's
10 applicable to the defendants, the actual malice standard,
11 which we concur would need to be proven by clear and
12 convincing evidence, then we have no problem with that. But
13 to the extent that it establishes that damages must be
14 established by clear and convincing evidence, we -- then all
15 damages would be.

16 THE COURT: I don't think that paragraph says that.

17 MR. OGIBA: Okay.

18 THE COURT: In order to -- I think we're going to
19 change that last paragraph that you talked about. We're going
20 to delete clear and convincing. So what we're going to say is
21 each defendant is prohibited from recovering any damages for
22 defamation without proof the statement or statements were made
23 with actual malice as defined in pages something like that.
24 So that refers them back to what actual malice is. And, of
25 course, actual malice back there says clear and convincing

1 proof.

2 MR. OGIBA: Okay. That's fine.

3 THE COURT: Any problem with that? All right. So
4 we'll change it to that.

5 MR. OGIBA: Okay. And that was all -- that was the
6 only problem we had, was that paragraph was a little
7 confusing, the standard.

8 THE COURT: I agree. So anything else?

9 MR. BACHRACH: Yes, Your Honor.

10 THE COURT: Okay.

11 MR. OGIBA: Nothing further with jury instructions.

12 MR. BACHRACH: A situation came up, I found out last
13 night, and I apologize for bringing it to the Court this late.
14 When my client went back to -- after trial, and compared the
15 tapes that he heard John Strait, and listened to the tapes he
16 had, he realized he had one more ten-minute tape of John
17 Strait. I alerted the defendants to this fact this morning.
18 I only heard it quickly this morning. And I just felt
19 obligated to bring this to the Court's attention.

20 THE COURT: So I mean, this is something that hasn't
21 been revealed anywhere?

22 MR. BACHRACH: Yes, we had -- my client had not --
23 didn't discover it or realize he had it until last night.

24 THE COURT: Okay. And so what do you propose to do
25 with it?

1 MR. BACHRACH: Well, if we were allowed, I think we'd
2 use it. But I talked to my brothers, who -- I think they
3 would say they object. So --

4 THE COURT: I assumed you would, but I mean, I didn't
5 know whether there was some -- on those tapes sometimes
6 there's good stuff for both people and they want them in.
7 Have y'all listened to it?

8 MR. BEN DEEVER: Your Honor, we have not heard the
9 tapes yet. We just object to them coming in at such a late
10 time.

11 THE COURT: You might want to listen to it, it may
12 have some --

13 MR. DEEVER: At this late date, Your Honor, and after
14 we've already completed our examination of Mr. Strait, I
15 appreciate their bringing it to our attention, but without
16 understanding what's in the tape, we prefer not to have it.

17 THE COURT: Okay. I mean, I think I would probably
18 sustain that objection, since it comes at the middle of trial,
19 and this case has been going on three years and, you know.
20 But I assume that you're bringing that to the attention that
21 there's nothing on that tape that Mr. Strait says now,
22 Dangerous, this is a fiction thing and I'm just giving you a
23 bunch of war stories so you can put it in a fiction book. You
24 probably want that one in, right?

25 MR. BACHRACH: No, in fact, the tape would impeach

1 several of the things he said, and that's why we'd like it.

2 THE COURT: I think if you want, I'll sustain the
3 objection to something that's been discovered in the middle of
4 trial, after the trial has been tried for the second time,
5 Mr. Strait's been on the stand the second time, and so -- but
6 if you want to take an exception to that and take it to
7 Richmond, that's fine with me. Mark it for the Court's
8 exhibit, that's fine.

9 MR. BACHRACH: I'll just mark it for --

10 THE COURT: Identification only?

11 MR. BACHRACH: Yes. Just to protect the -- preserve
12 the --

13 THE COURT: That would be fine.

14 I've got more paper for you. Each one of those verdict
15 forms represents one of 14 verdict forms.

16 MR. COLLINS: They looked pretty good to me
17 yesterday.

18 MR. OGIBA: And we had no objection.

19 THE COURT: But they're changed. So we refined them
20 some. So we thought you didn't have a complaint about the
21 first set, so we got another set so you can complain about it.

22 MR. OGIBA: Thank you, Your Honor.

23 THE COURT: All right. Anything else, Mr. Bachrach,
24 Mr. Ogiba?

25 MR. COLLINS: The last thing is we were told

1 yesterday by our court reporter that we never moved all of
2 this stuff into evidence.

3 THE COURT: Okay.

4 MR. COLLINS: So I think we want to do that now, as a
5 joint motion.

6 THE COURT: Y'all each move all your exhibits that
7 are in those books into evidence? Okay. Without objection.

8 MR. OGIBA: Without objection, except we don't want
9 that to constitute a waiver of the introduction of future
10 exhibits into evidence.

11 THE COURT: That's fine. So all -- and whatever
12 numbers are in these books, Gail, do you have those?

13 THE CLERK: Yes, sir.

14 THE COURT: So everything that's in these books is in
15 evidence without objection. Any other exhibits you need to
16 add to, do it the old-fashioned way or either agree to it or
17 object to it and I'll make a ruling.

18 MR. DEEVER: The book itself, Your Honor.

19 THE COURT: The book itself is in evidence, too, no
20 problem?

21 MR. OGIBA: No problem.

22 THE COURT: All right. Anything else?

23 MR. COLLINS: That's it.

24 THE COURT: Is the jury here? Ready to go?

25 MR. OGIBA: Yes, Your Honor.

JOHN STRAIT - CROSS-EXAMINATION

1 (A recess was held at this time.)

2 (Jury present.)

3 THE COURT: Ladies and gentlemen of the jury, welcome
4 back. We'll continue with the trial of this case. All right.

5 Mr. Bachrach, Mr. Strait, do you want to come on back up
6 here, please, sir.

7 CROSS-EXAMINATION

8 BY MR. BACHRACH:

9 Q. Good morning, Mr. Strait. How would you like me to
10 address you?

11 A. Any way. I left my rank at home, so --

12 Q. Okay, I just wanted to make sure. Now, Mr. Strait, you
13 prepared a questionnaire for the Special Forces, correct?

14 A. I believe I did, yes, sir.

15 Q. Who asked you to do that?

16 A. Pardon?

17 Q. Who asked you to do that?

18 A. I believe the Special Forces Association, I think Jimmy
19 Dean sent them out, I'm -- I'm pretty sure he did, but I can't
20 positively say that, that he did it personally, but --

21 Q. Now, you weren't drinking when you filled out that
22 questionnaire, correct?

23 A. I'm not sure. I doubt it, because at home I don't drink
24 at home very much, so --

25 Q. And so -- and you wanted to be truthful in that

JOHN STRAIT - CROSS-EXAMINATION

1 questionnaire, correct?

2 A. As far as it went -- as far as I'm concerned, it was.

3 Q. And if I may, I have a few things I'd like to point out to
4 you that you indicated in the questionnaire.

5 MR. BACHRACH: Jury members, it's Exhibit 22 of
6 defendants' exhibits.

7 Q. If you turn to the sixth page, you can follow along with
8 me.

9 Showing you what's been marked as Exhibit 22, is this your
10 handwriting?

11 A. Can't read it; it's my handwriting.

12 Q. And in this you were answering specific questions that
13 were posed to you by Mr. Dean?

14 A. I think that's the case, yes.

15 Q. In here you wrote, "Yes; General Quang was in An Phu for
16 the victory celebration. I cannot give dates. He was there
17 along with a score of other officers, both Viets and U.S."

18 A. That's true.

19 Q. That's true. The second question, you wrote, "A male
20 and -- I think it says a female -- did come to An Phu. I was
21 told they were reporters. The team, as far as I know, never
22 got a briefing on a mission like this any time."

23 A. That is true.

24 Q. So there was a time when a male and female came to the
25 camp, and you met with the woman as a reporter, and Colonel

JOHN STRAIT - CROSS-EXAMINATION

1 Marvin met with the man?

2 A. She come in and sat at the table and we drank coffee and
3 that was about the end of that there, so -- yes, I'd say that
4 was true.

5 Q. And Colonel Marvin met with the man?

6 A. Yes.

7 Q. Turning to the next page, I want to get into the amnesty
8 issue, because the amnesty issue is true, correct?

9 A. Um-hum.

10 Q. And you wrote here, "The only thing I know about this is
11 that one time word came down that the CIDG --" The CIDG were
12 what?

13 A. Civilian Indigenous Group, the Strikers there, our
14 soldiers, Vietnamese.

15 Q. "-- had been given amnesty so the camp could be turned
16 over to regional forces and --"

17 A. MACV.

18 Q. MACV. And that was true, correct?

19 A. Um-hum.

20 Q. And turning to the next page, the final thing I'd like to
21 point out is you don't deny that the bunkers were all wired,
22 correct?

23 A. Oh, they were all wired.

24 Q. And, in fact, you wrote here, "The bunkers were wired for
25 destruction in case of the camp being overrun by the VC. Jim

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1 Taylor showed me this when I arrived in early March."

2 A. Yes.

3 Q. And so the camp -- and the camps -- and the bunkers were
4 wired at all times?

5 A. Yes, as far as I knew, they were, yes.

6 Q. Is there any time that the bunkers weren't wired?

7 A. Not to my knowledge.

8 Q. So those were all true statements.

9 A. Yes.

10 Q. Now, you were second in command of A-424 during the time
11 you were in An Phu, correct?

12 A. Yes.

13 Q. Now, you, on the tape, indicated, I think in two places
14 you described the situation of Khanh Bin as all hell breaking
15 loose, correct?

16 A. I didn't understand that.

17 Q. Do you recall, in listening to the tapes yesterday, that
18 you described the situation at Khanh Bin, the battle in May,
19 as all hell breaking loose.

20 A. Well, yes.

21 Q. And was that true?

22 A. To my knowledge, it was there. Any time that anything --
23 a place has been hit by combat is heartbreaking, seeing the
24 civilians and stuff like that and people, yes.

25 Q. So it was a true statement that all hell had broken loose

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1 in Khanh Bin.

2 A. Well, at the time, because this is my first time in combat
3 here, that I had any rifle fire over me or anything. So it
4 sounded a lot worse than I'm sure that it was there. But when
5 I got there, the vegetation and bamboo and stuff where the
6 rounds had gone through it, you could see that. And the
7 schoolhouse, a B-40 round hit the schoolhouse, corner of it,
8 and blew a big hole in it, and to me it looked pretty awesome
9 at the time here. But since then in other camps I've been, it
10 wouldn't have been so awesome.

11 Q. But 22 years later, when you made the tape in 1988, you
12 still described the situation on two occasions as all hell
13 breaking loose.

14 A. Yes.

15 Q. Now, in the tapes you mentioned on a couple of occasions
16 the Vietnamese Cross of Galantry. And on the tapes you
17 indicated what an honor it was to receive it, correct?

18 A. I thought it was at that time, because it's the first
19 award that I've ever gotten for a -- foreign award or even
20 American award for anything like that.

21 Q. And not everyone in A-424 received a Vietnam Cross of
22 Galantry for the battle at Khanh Bin, correct?

23 A. I'm not sure on that. I don't know how many got it in
24 there.

25 Q. Well, in your tape you said two of three -- two out of

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1 three.

2 A. I know that the three got it, I know I got it and I think
3 Marvin got it and I think that Woolley got it. But anybody
4 else, I'm not sure of that.

5 Q. And you displayed that citation, and you had -- you
6 display that citation, I believe, in your home, correct?

7 A. I -- that one, and also there was another one I got. And
8 the other one I got and this one I got, I don't feel that I
9 earned them because I wasn't that close to combat here. I was
10 with a -- I was about 100 -- between 50 and 100 yards from the
11 ambush site. And that's the only combat that I seen there.
12 Up at Khanh Bin itself, when I got there, there was no combat,
13 no firing coming in at that time.

14 Q. But you display the citation in your house, correct?

15 A. I've got a lot of Vietnamese stuff like that displayed.
16 I've got where Major Phoi had given the team a hand-to-hand
17 thing, I got that, it's souvenirs, what have you.

18 Q. And you indicated that you display that because it
19 impresses people, correct?

20 A. Well, whoever sees it, I guess it may, they may think it's
21 something. But personally, I don't think it's that much.

22 Q. But you do display it, as you've indicated previously,
23 because it impresses people, correct?

24 A. Okay, that's -- I'll buy that, yeah.

25 Q. Now, I want to just take you -- I'm not going to play the

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1 whole tape, because the jury heard it, but I want to take you
2 through certain portions of the tape just to reiterate things.
3 Okay?

4 A. Yeah.

5 Q. So if you can't hear, let me know.

6 A. Okay.

7 Q. I'm going to play the very beginning of the tape.

8 (Audio tape was played.)

9 Q. Was it too loud, too soft?

10 A. Just a high frequency, and I can't hear high frequencies.

11 Q. Tell me if you can hear this.

12 A. I can't hear that. I can't hear that either. I can hear
13 it, but I can't understand it.

14 Q. Well, let me -- does it refresh your memory that what we
15 just heard was the -- that you stated my first impression of
16 An Phu?

17 A. Um-hum.

18 Q. And that's how you started the tape.

19 A. The first -- when they were playing horseshoes?

20 Q. Correct.

21 A. Okay.

22 Q. And you started the tape, your very first words were, "My
23 first impression of An Phu," correct?

24 A. I believe that's what it was, yes.

25 Q. So you were telling the truth about what happened when you

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1 got there.

2 A. I didn't understand that.

3 Q. You were telling the truth about what you -- your first
4 impressions of An Phu were when you got there?

5 A. You mean on the tape there?

6 Q. Yes.

7 A. Yes, um-hum.

8 Q. So the very beginning of these tapes, you start off with
9 the words, "My first impression," and go on to discuss a true
10 incident.

11 A. Yes, I'd say that's --

12 Q. Now, do you recall listening to the tapes yesterday, and
13 in stating -- setting forth incidents you, on numerous
14 occasions used the words, another incident I can remember.
15 You used the word remember. Do you recall that, listening to
16 the tapes?

17 A. I don't recall that, what that would refer to there.

18 Q. Bear with me, I'm somewhat technologically incompetent,
19 but I'll try to make this pointed.

20 (Audio tape was played.)

21 A. I can't understand that.

22 Q. Can you hear this?

23 A. No, I couldn't understand it. Why don't you just tell me
24 what I said on there and we'll go from there.

25 Q. Well, what you said, what I just played, you said, "At Phu

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1 Hiep there's one incident I can remember." You used the word
2 remember.

3 A. Okay. I don't know what that refers to now, but --

4 Q. You then went on to say, "I'm not sure if it was John
5 Eleam or Woolley or Sirois, I'm not sure. Anyway, one night I
6 went to fire H and Is there, and I set the fuses, dropped one
7 down and the damn thing no more than cleared the muzzle and it
8 fired off. And whoever it was came out, there was like a
9 god-darn mad bull, and shouted, 'What the hell are you trying
10 to do, kill me?' I couldn't let on I was as scared as he was.
11 I made an excuse about faulty ammunition and let it go at
12 that. I don't know if it helped the situation any, but that's
13 the excuse I used."

14 Do you recall saying that on the tape?

15 A. Okay, yes, that incident with Sergeant Gore was the
16 sergeant that was there. And that's a time that -- first time
17 that I used a proximity fuse. Now, a proximity fuse is
18 radioactive, you fire it, and if it hits a bird or within a
19 sight of a bird or ground, it will explode, so -- And
20 that's -- and I fired, I think, three rounds on that. And
21 that was early in the evening, and when those rounds went off,
22 just about tree top level, it just woke everything up. Just
23 shook. And that round that he got mad at, just cleared the
24 compound and exploded there. And it scared him as well as
25 scaring me there.

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1 Q. And you used the word, I can remember. So that's a true
2 story.

3 A. Yeah, um-hum.

4 (Audio taped was played.)

5 Q. Now, you referred to Martha Raye as Colonel Maggie.
6 Correct?

7 A. Oh, yes.

8 Q. And even though she wasn't a commissioned officer, she was
9 known as Colonel Maggie to the troops, correct?

10 A. Yeah, she was quite respected by that, and most everybody
11 called her Colonel Maggie.

12 Q. And she was a very respected woman.

13 A. Yes, she was.

14 (Audio tape was played.)

15 Q. Well, there you're describing how you were out at the FOB
16 while Colonel Maggie came, and you indicated that -- you
17 insinuated that Colonel Marvin did this on purpose, because
18 she liked second lieutenants.

19 A. This -- this -- I was not on the FOB when Colonel Maggie
20 come in, because I wasn't at An Phu when Colonel Maggie come
21 in. Where -- I was out on an operation and Colonel Maggie
22 came into our camp, was over at Kin Quan Tu (phonetic) over by
23 Muc Wa area here. And yes, it was kind of a rumor that Maggie
24 liked -- Colonel Maggie liked lieutenants. Whether she did or
25 didn't, I don't know.

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1 Q. But the point is that Colonel Maggie was someone you
2 respected; you referred to her as Colonel Maggie.

3 A. Yes, I did.

4 Q. Is it louder or softer that would help you?

5 A. What's that?

6 Q. If I play it louder or softer?

7 A. I couldn't hear anything. It's got a frequency in there
8 that I just cannot understand here, that -- kind of a tinny
9 sound comes out of there.

10 (Audio tape was played.)

11 Q. Now I'll stop it there. Were you able to hear that?

12 A. I couldn't understand it, no.

13 Q. That discusses another -- it said, "Another incident I
14 went on. As a result of an H and I fire mission with the
15 four-deuce mortar one night, a short round hit a house in a
16 village west of the camp, and we got word that it killed a boy
17 up there." So is that -- That was a true story, correct?

18 A. As far as going on a med cap on a short round there, it
19 was. But I can't tell -- I don't know if it was from a
20 four-deuce or if it was from artillery. I don't know what it
21 was, it's been so long ago. But I did go out on a med cap.

22 Q. And it was a short mortar shot, correct?

23 A. Well, a short round, I don't know what it was there.

24 Q. And if you also recall on the tape you indicated, "Another
25 incident I remember, a small girl up at the Phu Hiep FOB, you

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1 always favor a child." Now, you remember that incident and
2 you remember that child, correct?

3 A. Yes, I do.

4 Q. And that's true.

5 A. (Witness nodded affirmatively.)

6 Q. So throughout this tape, you're using the word remember
7 and my first impressions, you're recounting memories, correct?

8 A. I think so, yes.

9 MR. BACHRACH: Sorry for the short delay, I'm just
10 trying to move this along.

11 BY MR. BACHRACH:

12 Q. Well, maybe, if you're not able to hear the tape, I can
13 accurately cut through this. Do you recall saying on the
14 tape, "I'm aware of that Ninth Division regiment that was
15 going to come in and take the camp." Do you recall saying
16 that on the tape?

17 A. I remembered that, that I -- regurgitated back that
18 tape -- that statement that he made there, but I didn't know
19 anything about that regiment or anything like that till 1988,
20 after I made contact with him. So all I was doing is I
21 didn't -- I didn't accept it or didn't deny when he made this
22 comment to me, no.

23 Q. But you said the word, I'm aware.

24 A. I'm not sure; I probably did.

25 Q. Would you like me to play it? Well, you agree you

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1 probably did. I'm just trying to make it easier. Correct?

2 You said I'm aware.

3 A. I'm not sure what I said there, but it was after -- the
4 only information I had at that time is what I got from him,
5 and that was after we got back from Vietnam. Years.

6 (Audio tape was played.)

7 Q. Were you able to hear that?

8 A. I could hear that, but that is -- I said it, but that's a
9 bunch of crap, because I didn't -- I wasn't even aware of it
10 until I got the information from him.

11 Q. But you did, and I don't mean to belabor the point, but
12 the tape says, I'm aware.

13 A. Well, I --

14 Q. Correct?

15 A. I'll say so, yes.

16 (Audio tape was played.)

17 Q. Now, you just heard yourself state, I remember --

18 A. I didn't understand a thing. If you want to tell me, if
19 you would.

20 Q. On the tape you just indicated that, "I remember when he,
21 General Quang, came down and gave them amnesty." You used the
22 word I remember.

23 A. When I found out -- I don't -- I said that, I believe, but
24 I don't -- when -- they got their amnesty, the only time I
25 heard about that is when Captain Marvin, just a passing

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1 comment there, they got their amnesty today. But I don't
2 recall any general coming down there giving it to them.

3 Q. Well --

4 A. I may have said it. If it's on the tape, I did, but I
5 don't -- never happened, as far as I know.

6 Q. Well, just to make it clear for the jury, I want them to
7 hear your language that you remember.

8 A. Okay.

9 (Audio tape was played.)

10 Q. Were you able to hear that?

11 A. No.

12 Q. Okay, well, I'll represent to you and to the jury that you
13 said, "General Quang, I remember when he came down and gave
14 them amnesty." And that's what you said on the tape?

15 A. I may have said that on the tape, but it never happened
16 there. This tape was made strictly for Captain Marvin's book,
17 that novel there. Was not made for anything else. And
18 there's a lot of stuff that I'm sure I've said in there that
19 was not accurate here, or from some other camp or what have
20 you here.

21 Q. But do you say inaccurate things when you tell someone
22 you're remembering something?

23 A. I don't know why I used that.

24 Q. When you tell someone that my impression is, are you
25 telling them something false?

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1 A. I can't answer that, because I don't know. If -- if I
2 used that, what can I say there, it's on the tape there, so I
3 can't deny it there, so --

4 Q. Now, yesterday you heard on the tape you attributed to
5 then Captain Marvin saving your life, correct?

6 A. Say again?

7 Q. You heard on the tape yesterday where you appreciated and
8 attributed to Captain Marvin saving your life during the Khanh
9 Bin incident, correct?

10 A. Yeah, that was for his book purposes only.

11 Q. Now, with respect to your counsel, when you were asked
12 about that incident, you testified that it could not have
13 happened because it was a recoilless rifle that was shooting
14 at you, and he shouted, and that it couldn't have happened,
15 because by the time he shouted, you would have been hit by a
16 recoilless rifle. Do you remember giving that testimony?

17 A. Yes, that incident there, he said it was a recoilless
18 rifle coming in, but I didn't hear any recoilless rifle.

19 Q. Is that how you described the incident on the tape?

20 A. How's that now?

21 Q. You didn't describe the incident that way on the tape.

22 A. No, I described it I got up there and I was talking to a
23 forward air controller, and that he hit me on the foot or
24 something like that, said recoilless rifle. Or recoilless.

25 Q. That's what you recall was on the tape?

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1 A. That's the way I recall it, yes.

2 Q. Let me play what's on the tape.

3 (Audio tape was played.)

4 Q. Now, I just want to stop it there just before I get to the
5 portion where you claim you saved his life. Again you used
6 the word you remember him coming up with the relief column.

7 A. I didn't understand that.

8 Q. You remember him coming up with the relief column. You
9 said that on the tape.

10 A. Yeah, in the morning.

11 Q. "We were on our way up there with the ambushed platoon. I
12 think it was a platoon. Maybe a little better than a platoon,
13 but we were there on foot. And then I remember you coming
14 with the relief column."

15 You said that, you remembered him coming with the relief
16 column.

17 A. I think I said that, but --

18 Q. Okay.

19 A. I don't understand what you're talking about there.

20 Q. You used the word remember.

21 A. I probably did, because I used that quite often.

22 (Audio tape was played.)

23 Q. Were you able to hear that?

24 A. I understood most of it there, but --

25 Q. Okay. So you understood, you indicated, and I remember,

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1 again, you used the word remember. You're testifying from
2 something you remember -- or stating. "I had the radio. And
3 I was talking to the air support. And you came up there and
4 all of a sudden you grabbed me and pulled my ass down, and
5 just about that time a mortar round hit just a few feet away."

6 So it was a mortar round --

7 A. No, no, that's what I said, I'm sure, but that's not what
8 happened.

9 Q. But that's what you remembered happened, you said you
10 remember --

11 A. I said I remember on it, but this is 20 years prior to
12 this.

13 Q. So when you were giving the tape, you remembered that it
14 was a mortar.

15 A. Any time I ever -- any time that I made this tape, it was
16 strictly for his book there. And I said a lot of stuff in
17 there, I remember this, I did this, did this, this, which did
18 not happen here. So --

19 Q. But I just, again, and I don't want to belabor the point,
20 but when you tell somebody you're remembering something,
21 that's something in your memory, a truth, correct?

22 A. Well, normally I'd say, but I mean, it depends, I guess,
23 the way you use it there.

24 Q. You don't tell people I remember something and you're
25 lying.

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1 A. Well, I don't know about that, I can't argue the point
2 with you here, so --

3 Q. And at least in the tape, you indicated that he saved you
4 from a mortar round?

5 A. I said I remembered that, yeah. I remembered the
6 incident, but I don't -- I said that I remembered the
7 incident, but the incident didn't happen like that. But there
8 was an incident similar to that, which made me remember it
9 here.

10 Q. There's an incident similar to that, that he saved your
11 life?

12 A. No, it's the same incident, but he didn't save my life
13 there. He didn't pull me down here. But I remember an
14 incident where he told me about this recoilless rifle, and
15 that I jumped in the mortar pit -- or the pit there that he
16 was in.

17 Q. And you told him on the tape that you appreciated his
18 saving your life.

19 A. I said that; that was strictly for the book.

20 Q. So you thanked someone for saving your life strictly for a
21 book?

22 A. That's right. In that case, yes.

23 Q. After telling him you remembered him saving your life.

24 A. Yeah. I remember the -- that -- the incident.

25 Q. I'm now going to go to the second tape, and we're nearly

JOHN STRAIT - CROSS-EXAMINATION

1 done.

2 (Audio tape was played.)

3 Q. What's an order of battle? What is an order of battle?

4 A. An order of battle? It's a list of units and equipment, I
5 believe.

6 (Audio tape was played.)

7 Q. There you state, they sure came after our asses, didn't
8 they?

9 A. Well, I probably said that, yes, sir.

10 Q. And that was true?

11 A. That I said that?

12 Q. Yes.

13 A. Yes.

14 Q. And it was true --

15 A. I can't deny I said it on the tapes there.

16 (Audio tape was played.)

17 Q. So you, there, indicated, "I didn't realize that there
18 were that many elements there. I knew there was a couple,
19 three battalions up to Khanh Bin. But looks like there was
20 four battalions, plus in all those places up there, almost
21 unbelievable. We was lucky we didn't take any more casualties
22 than we took."

23 A. That's what the order of battle that he'd sent me was.

24 But when I was over there, I didn't get to have that
25 information available.

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1 Q. You didn't have that information available, but all hell
2 had broken loose, and you were surprised that when you saw
3 this information --

4 A. All hell breaks loose there, when I was a second
5 lieutenant, that's the first time I was in combat, and when
6 they start firing, that's all hell breaking loose there.
7 Whether it's one or 10,000.

8 Q. Bear with me.

9 (Audio tape was played.)

10 Q. Could you hear that?

11 A. No.

12 Q. What you said was the -- CIA visit in June --

13 A. The what?

14 Q. "I thought it was kind of a flimsy cover."

15 A. I couldn't understand the beginning, what you said.

16 Q. Okay. At that point in the tape you stated, "About the
17 CIA visit in June, I thought it was kind of a flimsy cover,
18 because he came in and left her with me. And you said, you
19 can talk to her, she's a radio reporter. But she never asked
20 a damn thing, she just sat there and BS'ed with us. I thought
21 that was kind of crazy for a reporter. I kind of figured
22 something was up there, but just kind of let it go." Then you
23 used the word I remember, and went on to say, "If you need
24 somebody to back your story, damn it, I guess I could do it."

25 That's what you said on the tape, correct?

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1 A. I didn't get that last that you said.

2 Q. You then went on to say, "I remember this incident
3 happening, and if you need somebody to back your story, damn
4 it, I guess I could do it."

5 A. Yes, that's --

6 Q. And so that happened?

7 A. That happened. Well, that -- I said that, but that
8 incident didn't happen over there.

9 Q. Oh, that didn't happen?

10 A. Not the incident -- I had no knowledge of that guy being a
11 CIA agent or what, at that -- in Vietnam here. And the
12 information about a CIA and everything like that, that came
13 from Marvin here.

14 Q. Okay. But --

15 A. And I was just regurgitating more or less the information
16 that he gave me.

17 Q. But you indicated here, I thought it was a flimsy cover.
18 That's what you said on the tape.

19 A. Well, I thought that, any time like that, I thought it was
20 a flimsy cover. I had no knowledge.

21 Q. But you used the word thought.

22 A. Thought.

23 Q. And you used the word you remember these two people
24 coming.

25 A. I do remember two people, yes.

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1 Q. And so it's true that in -- and he didn't share the top
2 secret mission with you. He didn't share the mission with
3 you, correct?

4 A. No.

5 Q. But you confirmed that these two people came, and one --
6 and the man met with Colonel Marvin.

7 A. Yes.

8 Q. Now, the FOB at Khanh Bin, how close was that to the
9 Cambodian border?

10 A. Oh, that -- probably 100 yards, something like that, they
11 were just -- just a river, small river that went between Khanh
12 Bin and Cambodia. I don't know exactly what part of the river
13 or the bank was the border here, but it was close.

14 Q. And how far was the Phu Hiep FOB to the Cambodian border?

15 A. Two to 3000 meters, I guess.

16 Q. And you recall discussing on your tape yesterday, firing
17 back and forth between the FOB at Phu Hiep, and enemy on the
18 Cambodian side, correct?

19 A. I said that in the tape there, but this never happened.

20 Q. You said it in the tape?

21 A. I said it on the tape, yes.

22 Q. And you also said on the tape how you got angry that some
23 helicopter operators wouldn't shoot and give you protection
24 from the enemy in Cambodia.

25 A. I said that, but there was no fire coming at that time.

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1 Q. So you -- what you said on the tape was untrue?

2 A. I'd say that was, yes.

3 Q. And why was it that you said untruths on the tape?

4 A. Because I was -- anything I was given on that tape, from
5 the beginning to the end, was in support of his book that he
6 was writing about Bassac Bastards, which is supposed to be a
7 novel, and that was it.

8 Q. Do you recall reviewing any of the manuscripts?

9 A. Pardon?

10 Q. Do you recall reviewing the manuscripts?

11 A. The first one, he brought it down in June of '68. Fort
12 Bragg.

13 Q. And it was a thin one, you said?

14 A. It was a real thin one, yes.

15 Q. I want to show you and direct the jury to what's marked as
16 Plaintiffs' Exhibit 11. There's a thin manuscript entitled
17 the Bassac Bastards and the People of An Phu. Is this the
18 thin document that you saw at the convention?

19 A. The printing don't look the same, but I mean I can't --
20 and there's no -- there's no forward on it, that the one
21 that -- I think that he had first was Martha Raye here, but it
22 was -- I believe it was a full page there; I'm not sure.

23 Q. So you're not sure whether or not --

24 A. I can't say. That looks familiar here, but --

25 Q. It looks familiar?

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1 A. That. But that, I don't remember.

2 Q. And it has a copyright 1988.

3 A. I don't remember.

4 Q. Well, 1988. That's what it says here?

5 A. 1998 is when I seen it, but --

6 Q. And this says copyright 1988?

7 A. Yeah, I don't recall that being on the original -- on the
8 first manuscript.

9 Q. Do you recall reading on the second page, A True Account
10 of Independent Warfare?

11 A. No, I don't recall that, no.

12 Q. Do you recall reviewing the manuscript that said that --
13 Did it say a true account?

14 A. Say again?

15 Q. Do you recall, on the manuscript you reviewed, it said a
16 true account.

17 A. I can't remember that. That's been over 20 years ago.

18 Q. Did you review any other manuscripts?

19 A. He sent a second one back -- sent a second one that was, I
20 think the same name, Bassac Bastards, which is a little
21 thicker than that one. And that was the last one I read. He
22 sent one, I think, Acropolis (sic) of An Phu, or something
23 like that, and Snuff Crown, and I don't think there's any
24 more. I sent those right to Jimmy -- Jim Taylor, and didn't
25 even look at them hardly.

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1 Q. Did you look at them at all?

2 A. Pardon?

3 Q. Did you look at them at all?

4 A. The first -- the second one, I did, but not the other
5 ones. I just looked at them and then threw them. That was
6 about it. Didn't pay much attention to them here, so --

7 Q. In the second one it said on early on, a true account,
8 correct?

9 A. Not to my knowledge here.

10 Q. You don't recall?

11 A. I don't recall that, no.

12 Q. Now, you provided the tapes to Colonel Marvin, correct?

13 A. Yes.

14 Q. Who else, if anyone, did you provide the tapes to?

15 A. I don't think I sent them to anybody else there. These
16 tapes here.

17 Q. Did you have any discussions with Mr. Dean where you
18 indicated to him that the book was full of lies?

19 A. I think I did, yes.

20 Q. When did you have that?

21 A. Oh, God. Now, which book are you talking about? This
22 last book, or the -- or the manuscripts?

23 Q. Let's go to the Expendable Elite, the last book.

24 A. Okay.

25 Q. Did you ever tell Jimmy Dean that it was a lie?

JOHN STRAIT - CROSS-EXAMINATION

1 A. I think I probably did, yes.

2 Q. And did you tell -- and Jimmy Dean is with the Special
3 Forces, correct?

4 A. Yes.

5 Q. And the Special Forces are paying for this lawsuit?

6 A. Yes.

7 Q. Expenses, correct?

8 A. Yes.

9 Q. And do you know what he did with your information after
10 you told him it was a lie?

11 A. Not really, no.

12 Q. Are you aware of him putting in The Drop, that the book
13 was proven to be 100 percent lies?

14 A. I've read something in there, but numbers and stuff like
15 that, and specifics, I can't remember that.

16 Q. How many meetings did you have with Mr. Dean where you
17 indicated to him the book was full of lies?

18 A. How many years?

19 Q. How many meetings.

20 A. I don't think I met with him hardly any.

21 Q. Did you ever share your tapes with Mr. Dean?

22 A. Share my tapes?

23 Q. Yes, the tapes you made.

24 A. These tapes here, I don't think I did. I sent him some
25 tapes about when -- that I got on the History Channel, and

JOHN STRAIT - CROSS-EXAMINATION

1 some of these assassinating -- other problems that Captain
2 Marvin's in, but --

3 Q. I just want you to please focus on the question. These
4 two tapes, did you give them to Mr. Dean?

5 A. I didn't give them to him there, because the only copy
6 that I made, I sent to Captain Marvin.

7 Q. So you told him it was full of lies, but you didn't
8 provide him these tapes?

9 A. I didn't give him those tapes, no.

10 Q. I'd like to direct the jury and you to Exhibit 34.

11 THE COURT: Defendants' 34?

12 MR. BACHRACH: Defendants' 34.

13 THE COURT: Thank you.

14 BY MR. BACHRACH:

15 Q. Do you recognize this document?

16 A. Yes.

17 Q. And what is that?

18 A. That's a dollar bill I gave him for good luck. I have one
19 in my pocket here that I gave to a Sergeant Major Bass when I
20 got first commissioned, the first salute, and all it is, is
21 good luck. Meant nothing else.

22 Q. And you gave that to Colonel Marvin?

23 A. Yes.

24 Q. Directing your attention one last time to Plaintiffs'
25 Exhibit 11, page one, at the very bottom. Do you recall

JOHN STRAIT - CROSS-EXAMINATION

1 reading the last sentence that says, "About the good and the
2 bad and the gruesome of that far-off involvement, it is a book
3 of many revelations, but above all, it is a book of truth."

4 Do you recall reading that?

5 A. I do not remember that, no.

6 Q. You don't remember one way or the other?

7 A. I don't remember that, no.

8 MR. BACHRACH: I have no further questions, Your
9 Honor.

10 REDIRECT EXAMINATION

11 BY MR. BEN DEAVER:

12 Q. Morning, Mr. Strait.

13 A. How are you doing.

14 Q. I just want to touch base very briefly on some of the
15 things you mentioned earlier.

16 A. I didn't hear you.

17 Q. I'm just going to touch briefly on some of the things you
18 just mentioned earlier --

19 A. Okay.

20 Q. -- with Mr. Bachrach. Basically earlier you said that you
21 were regurgitating on these tapes what was provided to you.

22 A. Yes.

23 Q. All right. Who provided you the information that you
24 regurgitated?

25 A. Captain Marvin.

JOHN STRAIT - REDIRECT EXAMINATION

1 Q. And that was stuff that was given to you prior to you
2 making the tapes?

3 A. Yes.

4 Q. All right. Do you know what type of stuff that was sent
5 to you?

6 A. Well, it was telephone calls, he sent several tapes, I
7 believe, and newspaper clippings, stuff like that.

8 Q. So I guess that goes back to what you said yesterday, as
9 far as the tapes are -- the stories you provided on the tapes
10 made for a good read, a good story?

11 A. Good story, that's all. Most of -- a lot of stuff in the
12 tapes was a combination of -- I was in four different camps
13 over there, two different years, and everything kind of runs
14 together. So you have an incident here and you just kind
15 of -- relate to one another here. And he was writing a book,
16 and I thought he had a good novel coming here.

17 Q. He told you -- Did he tell you that he was writing a
18 novel?

19 A. Pardon?

20 Q. Did he tell you that he was writing a novel?

21 A. Yes.

22 Q. Okay. Did he tell you what the name of the novel was?

23 A. Bassac Bastards.

24 Q. All right.

25 MR. BEN DEEVER: Your Honor, may I approach the

JOHN STRAIT - REDIRECT EXAMINATION

1 witness, please?

2 THE COURT: Sure.

3 BY MR. BEN DEAVER:

4 Q. This is something I believe Mr. Bachrach showed you a
5 little while ago. Is this what he showed you?

6 A. Yeah.

7 Q. All right. Now, is this right here the novel, the Bassac
8 Bastards, or is this --

9 THE COURT: Mr. Deaver, how about giving me an
10 exhibit number.

11 MR. BEN DEAVER: No. 11 Plaintiffs'.

12 BY MR. BEN DEAVER:

13 Q. Could you read what the title of this is?

14 A. What now?

15 Q. Would you please read what the title is?

16 A. It says Bassac Bastards and The People of An Phu.

17 Q. So it's not just the Bassac Bastards novel that he said,
18 it's the Bassac Bastards and The People of An Phu.

19 I believe he also asked you to turn to the third page in
20 there, correct?

21 A. Yes.

22 Q. And he mentioned in there that it's a true account,
23 correct? At the top?

24 A. That's what it says in there, but I don't recall on the
25 first manuscript.

JOHN STRAIT - REDIRECT EXAMINATION

1 Q. Would you mind reading a little bit more into it, like
2 starting right down here, in 1978?

3 A. Okay. "In 1978 I began putting together a military diary,
4 a chronological record of events structured as a teaching
5 vehicle - and hardly -- and hardly exciting reading, but
6 important in my mind. I queried Department of Army to
7 determine their interest in my book as I referred to some of
8 the Special Forces (sic) soldiers and was told to clear my
9 manuscript with the Central Intelligence Agency and the
10 Special Operations Office of the U.S. Army."

11 Q. Keep reading, please, sir.

12 A. "In my judgment, that would have resulted in a watered-
13 down version, a distortion of the facts with --" I have
14 trouble reading "-- that would have resulted -- or have --"
15 Lost track here now.

16 Q. I understand it's kind of single spaced and it's hard to
17 read.

18 A. Yeah. That would --

19 Q. "In my judgment, that would have resulted in a watered-
20 down --"

21 A. "-- watered-down version, a distortion of the facts with
22 few revelations of high-level subterfuge, the majority of the
23 real truth of covert operations regulated (sic) to the editing
24 room floor. No longer a --" I can't pronounce that word.
25 Despite.

JOHN STRAIT - REDIRECT EXAMINATION

1 Q. Yes, sir.

2 A. "-- despite (sic) the unconventional warfare aspect of
3 that far-off conflict. Thus, in 1981, called the Bassac
4 Bastards, a three-year -- 1981 I began rewriting it as a
5 fictitious (sic) based on the facts, a novel."

6 Q. A novel.

7 A. Called the Bassac Bastards.

8 Q. So that's what he told you he was writing was a novel --

9 A. Yes.

10 Q. -- when you provided the tapes?

11 A. Yes.

12 Q. And right there he says that it was a novel?

13 A. Yes.

14 Q. All right. But it was actually the novel the Bassac
15 Bastards.

16 A. Yes.

17 Q. And the title that you just showed this was Bassac
18 Bastards and The People of An Phu?

19 A. Yes.

20 Q. All right. Well, let's read on a little bit after he said
21 that the Bassac Bastards, "I began rewriting it as fiction
22 based on fact. A novel."

23 A. Um-hum.

24 Q. And you can keep reading.

25 A. "And called the Bassac Bastards. Three years of

JOHN STRAIT - REDIRECT EXAMINATION

1 rejections helped me to realize that presenting the truth as a
2 novel betrayed the trust --" I'm having a hell of a time
3 reading that. "-- the trust of the people we had abandoned in
4 South Vietnam."

5 Q. That's fine right there. So in that, he actually said it
6 was a novel, didn't he?

7 A. Yes.

8 Q. And that's what you relied on when you made these tapes?

9 A. That's what I relied on when I was making the tapes there.

10 Q. And as you said earlier, you also relied on information
11 that he provided you.

12 A. Yes.

13 Q. I believe also a little while ago you said something that
14 one of the incidents that you provided to him in the tape
15 about happening in An Phu, actually didn't happen in An Phu,
16 it happened in another camp that you were assigned to later?

17 A. There was several incidents. One was where I -- I take my
18 hat off in pagoda, that was in -- there was Cambodians down in
19 Tre Thuan, that incident happened.

20 Q. Was Tre Thuan in An Phu?

21 A. No, Tre Thuan was the next camp, two camps south, that was
22 two years later.

23 Q. And that's when you were a more experienced soldier --

24 A. I was more experienced at that time, yes.

25 Q. So all hell breaking loose, as a second lieutenant, your

JOHN STRAIT - REDIRECT EXAMINATION

1 first gun fight, anything, any fire was that what you said was
2 all hell breaking loose?

3 A. Yeah.

4 MR. BACHRACH: Objection, Your Honor.

5 THE COURT: Sustained.

6 BY MR. BEN DEAVER:

7 Q. Mr. Bachrach asked you a little while ago if you provided
8 tapes to Jimmy Dean.

9 A. Yes.

10 Q. And I believe your answer was, you didn't provide these
11 tapes, but you provided tapes of lies that Mr. Marvin had
12 on -- told on the History Channel?

13 A. Yes.

14 Q. Can you tell us what those tapes are?

15 A. I think one of them that I remember was the assassination
16 of --

17 MR. BACHRACH: Objection, Your Honor.

18 A. -- President Kennedy.

19 MR. BACHRACH: Your Honor, they opened the door, they
20 asked the question, he answered that he provided these tapes,
21 we're just allowing him the opportunity to explain.

22 THE COURT: I don't know what relevance that has to
23 this lawsuit.

24 MR. BEN DEAVER: It goes to the credibility of
25 Mr. Marvin.

JOHN STRAIT - REDIRECT EXAMINATION

1 THE COURT: The fact that he gave some tapes to Jimmy
2 Dean, has to do with credibility of Mr. Marvin?

3 MR. BEN DEEVER: Yes, sir, Your Honor, it does.

4 THE COURT: I'll sustain the objection.

5 (Brief interruption in proceedings.)

6 BY MR. BEN DEEVER:

7 Q. Mr. Bachrach asked you earlier about an incident where a
8 helicopter arrived and there was some people that were
9 portrayed to be reporters.

10 A. Yes.

11 Q. Is it uncommon for a reporter to visit a Special Forces A
12 Team?

13 A. No, there was people coming in quite frequently.

14 Q. Do you know if a reporter ever did visit the An Phu A-424?

15 A. I can't recall any specifics that reporters was there,
16 that -- I couldn't name if it happened. Other camps, I can,
17 but on there I -- that was so far along ago, I can't remember
18 any specific incidents, other than this one here.

19 Q. Do you ever remember reading an article that took place
20 that was written on An Phu?

21 A. When was that now?

22 Q. Well, I'm asking you if you've ever read an article that
23 was based on --

24 A. I read some that Captain Marvin had given me.

25 Q. Can you tell us what those articles were?

JOHN STRAIT - REDIRECT EXAMINATION

1 A. Pardon?

2 Q. Can you tell us what those articles were?

3 A. I can't -- I couldn't tell you.

4 Q. All right. You also mentioned that when you got there,
5 Sergeant Johnson gave you a tour of the camp and showed you
6 that some of the areas were wired.

7 A. I didn't understand that.

8 Q. That some of the areas with inside the camp were wired.

9 A. The ammunition bunker was.

10 Q. Is that common practice?

11 A. Yes.

12 Q. Every camp --

13 A. Every camp has it. Destroy it in case they get overrun by
14 the enemy, they can destroy it and they can't use the
15 ammunition against you.

16 Q. Can you tell us how this book's affected your life?

17 MR. BACHRACH: Objection, Your Honor, beyond the
18 scope of cross.

19 THE COURT: Sustained.

20 MR. BEN DEEVER: That's all we have, Your Honor.

21 THE COURT: Thank you.

22 RECROSS-EXAMINATION

23 BY MR. BACHRACH:

24 Q. I just have a few a couple questions.

25 You were shown a Plaintiffs' Exhibit 11, correct?

JOHN STRAIT - RECROSS-EXAMINATION

1 A. Yes.

2 Q. And when I showed it to you, you weren't -- didn't recall
3 whether or not you had read this.

4 A. Yeah, I still don't recall reading it other than -- just
5 now.

6 Q. And if I could publish to the jury, I think -- I don't
7 want to take their time, because they can all read, but I'd
8 like them to read the entire page. Because by 1988, which is
9 the copyright of this, correct?

10 A. Yeah.

11 Q. So that's --

12 A. On the original -- on the original manifest, I don't think
13 it was copy written there.

14 Q. Well, by the time of this manuscript in 1988, Colonel
15 Marvin had written the history of his book. And if the jury
16 reads the history of the book, it will indicate how at one
17 point he intended it to be fiction, but at least by 1988, he
18 had decided that it would be a nonfiction.

19 A. Not -- not 1988. 1988 is when I first seen the manuscript
20 here.

21 Q. And it's your testimony -- but you don't recall whether
22 the manuscript that you saw, said it was a true account.

23 A. It said a novel. If I can remember right, it said that it
24 was a novel about An Phu.

25 Q. And you saw this manuscript when?

JOHN STRAIT - RECROSS-EXAMINATION

1 A. In June of 1988.

2 Q. You saw something in June of 1988, and you distinctly
3 recall, your testimony, that the one you saw, said it was a
4 novel?

5 A. I assumed that there. I can't testify 100 percent, no, I
6 can't say that.

7 Q. You assumed, but you don't know?

8 A. I've always assumed all that time that I read it there,
9 and I'm pretty sure I did here.

10 Q. And then you get a subsequent draft in 1989, correct?

11 A. Did I what?

12 Q. Got a subsequent draft in 1989.

13 A. That would be the second copy?

14 Q. Yes.

15 A. Yeah, that -- I believe was about that time.

16 Q. And you don't recall whether that said on it that it was a
17 true account?

18 A. I could not say 100 percent, because that's -- 20 years
19 ago? 10 years ago? Long time ago here.

20 Q. So you just don't recall?

21 A. I don't recall now.

22 Q. And as I directed to the jury, what Mr. Deaver had you
23 read was a history of the book, leading it from at one point
24 in 1978, being a fiction, up until he decided to make it a
25 nonfiction, correct?

JOHN STRAIT - RECROSS-EXAMINATION

1 A. I assumed that.

2 Q. Okay.

3 MR. BACHRACH: No further questions, Your Honor.

4 THE COURT: Thank you, Mr. Strait. Who's your next
5 witness?

6 MR. COLLINS: George Kuchen, Your Honor.

7 THE CLERK: State your name for the record.

8 A. My name is George Kuchen.

9 GEORGE KUCHEN, a witness called by the plaintiffs, first
10 having been duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. COLLINS:

13 Q. How are you, George?

14 A. Excuse me?

15 Q. I said how are you?

16 A. I'm fine.

17 Q. All right. Where are you from?

18 A. I'm living in Fayetteville, North Carolina now; originally
19 from Jersey.

20 Q. I got you. What exits? How long have you been living in
21 North Carolina?

22 A. I came to North Carolina in the 60s, and didn't come back
23 till about 1993. In and out.

24 Q. How about tell the jury about some of your life story,
25 your education and your Army background.

GEORGE KUCHEN - DIRECT EXAMINATION

1 A. Well, graduated high school in '55 up in Jersey, went in
2 the Air Force for four years, took a break in '59 for about
3 six months, then went in the Army. Went Special Forces in
4 1963 as a medic.

5 Q. What kind of training do they put the medics through?

6 A. Very extensive training; about a year.

7 Q. What kind of stuff do they teach you?

8 A. Everything. You're a doctor. Almost.

9 Q. Almost.

10 A. You don't get a license, but you do a lot of stuff.

11 Q. After you got your training, where did the Army send you?

12 A. My Special Forces training?

13 Q. Yes, sir.

14 A. I went for about a year in the Sixth Special Forces Group
15 on Fort Bragg, North Carolina.

16 Q. Did they eventually send you overseas?

17 A. Oh, yeah. Common practice at the time. About a year
18 later I went to Vietnam.

19 Q. Okay. Did you --

20 A. November '65.

21 Q. Did you eventually end up at a place called An Phu?

22 A. An Phu was my first camp, I got there very very late,
23 November 1965, maybe the first of December.

24 Q. What kind of setting was An Phu?

25 A. It was my first camp. It was okay. Just a typical

GEORGE KUCHEN - DIRECT EXAMINATION

1 Special Forces A camp in Vietnam, in that part of the country.

2 Q. Did you see a lot of action while you were over there?

3 A. I didn't see any action while I was over there.

4 Q. Were you there when Colonel Marvin arrived?

5 A. Yes, I was.

6 Q. All right. Describe for me how the camp was operated.

7 Was it efficient before he got there?

8 A. Well, I think it was. I never saw any fallacy in it or
9 something like that. Again, you have to remember, it was my
10 first A camp when I went to Vietnam. But we functioned. And
11 as a medic, I don't want to say -- I may use the wrong word --
12 you're not so much that you're on a pedestal or something like
13 that, but you have your own drill, you're doing medical
14 patrols, you're doing sick calls, you're very busy on a
15 day-to-day basis, and so that's your main concern.

16 Q. What did you do on a day-to-day basis at An Phu?

17 A. Conducted sick call in our little dispensary, went out on
18 what we call med caps, medical patrols, almost -- probably
19 five times a week, either both medics -- a Special Forces A
20 Team has two medics. At that time I was with what was
21 considered the junior medic. And you just go out and you go
22 to hamlets, villages, and you conduct in-the-field sick call
23 for the people.

24 Q. Okay.

25 A. You take care of the people.

GEORGE KUCHEN - DIRECT EXAMINATION

1 Q. How long were you there?

2 A. I was there until early March of 1966.

3 Q. Okay. Did you get the opportunity to treat a lot of
4 Americans that were wounded in combat at An Phu?

5 A. I never treated an American that was wounded at An Phu.

6 Q. All right. Now, I'll ask you about the atmosphere in the
7 camp prior to Colonel Marvin's arrival. Did that
8 significantly change when he arrived?

9 A. No. It was no change.

10 Q. So it was pretty much business as usual?

11 A. What we did before he got there was what we did after he
12 got there.

13 Q. You're familiar with the book Expendable Elite, aren't
14 you?

15 A. I've read the book.

16 Q. I guess mercifully for you and I and the jury and the rest
17 of the court staff, you aren't mentioned very often in this
18 book.

19 A. Just short of the first half I'm mentioned a few times,
20 yes.

21 Q. Okay. I want to call your attention to page 40 of the
22 work. Are you there?

23 A. Yes.

24 Q. I guess in the interest of saving a little bit of time I'm
25 going to try to paraphrase a little bit of it and see if you

GEORGE KUCHEN - DIRECT EXAMINATION

1 agree with me.

2 As I understand it, this page recounts a meeting that was
3 held with the staff at the camp, regarding possibility of
4 firing into VC havens in the Nation of Cambodia. Is that
5 correct?

6 A. Along those lines, yes.

7 Q. Okay. And I believe about two-thirds of the way down the
8 page it says, "Cheers of airborne and all the way, Dai-uy,
9 erupted around the table. 'What does that mean, Dai-uy,'
10 Sergeant Kuchen asked, 'do we invade Cambodia?'"

11 Now, I assume that Sergeant Kuchen that is mentioned there
12 is you?

13 A. I think so.

14 Q. How about tell the jury your recollection of this meeting?

15 A. There is no recollection. That meeting didn't occur.

16 Q. All right. Did you ever have any discussions with Colonel
17 Marvin or anyone else at An Phu about firing into Cambodia?

18 A. No, I did not.

19 Q. Are you aware that the language in this book says that you
20 and your fellow soldiers fired into Cambodia?

21 MR. BACHRACH: Objection, Your Honor.

22 THE COURT: Basis?

23 MR. BACHRACH: Leading.

24 THE COURT: Overruled.

25 BY MR. COLLINS:

GEORGE KUCHEN - DIRECT EXAMINATION

1 Q. You can answer the question.

2 A. I didn't fire into Cambodia.

3 Q. But the book says you did.

4 A. I'm not aware of any firing going on into Cambodia.

5 Q. Does the book say you and your fellow soldiers fired into
6 the Nation of Cambodia?

7 A. It does say things like that, yes.

8 Q. All right. I believe you stated you did not fire into
9 Cambodia?

10 A. No, I didn't.

11 Q. Are you aware of any of your fellow soldiers firing --

12 A. No, I'm not.

13 Q. Were there strict orders or regulations to prevent you
14 from firing into Cambodia?

15 A. I actually don't remember. Okay? And why I'm saying that
16 is you have to understand or they have to understand that most
17 of us went back over for other tours and stuff like that. A
18 little later on, and I'm not trying to make a story out of
19 this, I kind of go -- I'm a slow talker. Anyway, as -- they
20 more emphasized staying away from Cambodia, okay, that it was
21 a sovereign nation and all that. I don't actually remember
22 being briefed when I went to my first camp and said hey, don't
23 shoot into Cambodia. You just never thought about it. You
24 did your job.

25 Q. Right.

GEORGE KUCHEN - DIRECT EXAMINATION

1 A. And that subject just never came up to do that.

2 Q. Okay. Did you subsequently learn that it would have been
3 improper for you to fire into Cambodia?

4 A. Yes, that's what I'm trying to express is that, you know,
5 I'm going to mix up what I knew in 1965 versus what I knew in
6 '67 when I went back over and stuff like that? No. I don't
7 know. But we know that, in retrospect, that later on there
8 was a little more emphasis on that kind of stuff, and then
9 later on they actually invaded Cambodia.

10 Q. Correct.

11 A. So what are you going to say.

12 Q. Okay.

13 A. But at that time, the thought never entered my mind, I
14 didn't even think about it. But I was never told that we were
15 going to do that.

16 Q. Right. But it certainly entered your mind since that
17 time.

18 A. I thought about it, yes. Especially since reading this
19 book.

20 Q. All right. The fact that you're being accused of
21 violating the sovereignty of another nation, does that bother
22 you?

23 A. Sure it does.

24 Q. In what way?

25 A. Okay. I won't drag this out. This whole situation

GEORGE KUCHEN - DIRECT EXAMINATION

1 bothers me, and maybe a little less than the others, because I
2 left before a lot of this stuff, okay? In the book. Is that
3 it's a -- I'm very proud of having been Special Forces, okay?
4 It took me eight years to find my life, four years in the Air
5 Force and four years in the Army before '63 I decided to go to
6 Special Forces.

7 And I happened to have a deep feeling about Special
8 Forces. And what bothers me about this whole situation is it
9 is embarrassing and it's nauseating that a person that even
10 has a Special Forces background would even write stuff like
11 that in this book. And that's what really bothers me. It's
12 just derogatory, embarrassing, it's a pride thing, esprit de
13 corps, a military term meaning proud of your unit and all
14 that, and that's what bothers me.

15 Q. George, do you feel like what Colonel Marvin has done here
16 has sullied your reputation that you've done so much to build
17 up over the years?

18 A. I think so. I can give you a couple examples.

19 Q. I wish you would.

20 A. Okay. When the book came out, I went and got a copy of it
21 and I read it. It turned me off. I didn't get all excited
22 about it, but it turned me off. And I gave it to my daughter;
23 she read it. And then she started to try to put me on a
24 pedestal. Then she showed one of her children, one of the
25 older children. By the way, I have three kids and 12

GEORGE KUCHEN - DIRECT EXAMINATION

1 grandchildren. Anyway, the book. And they're starting to
2 come to me and telling me how great this is and all that. And
3 wait a minute, sit down, let me tell you about this. And that
4 did embarrass me to a certain extent and I started to get a
5 little ticked off about this whole situation.

6 And in another situation that bothered me was a few times
7 a month some of the old SF retiree guys in Fort Bragg area get
8 together for breakfast and stuff like that. And one retired
9 NCO came up to me and said, George, I read this book, you're
10 in it. Here, let me get your signature on it and all that
11 stuff. And it -- I got so mad, I said, don't even give me
12 this book, I'm not going to sign my name in it, because it's a
13 bunch of crap. I'm sorry, but that's what I said. Okay?

14 And then I started to get riled up about the whole
15 situation. And a couple other guys mentioned the thing about
16 oh, we didn't know you were involved in it, we didn't know you
17 were with Jim Taylor or we didn't know you were with Sirois.
18 Me and Sirois have known each other for years and stuff like
19 that.

20 And I guess what I'm saying here is, I did get agitated
21 over it and I am agitated and you can see, I'm kind of a
22 relatively calm guy, but I'm starting to get ticked off right
23 up here now. Because it's crap; that's why.

24 Q. Well, George, at the end of this trial the jury is going
25 to be asked to put a monetary value on the diminishment of

GEORGE KUCHEN - DIRECT EXAMINATION

1 your reputation and the amount of your embarrassment at the
2 printing of this book. What has all this been worth to you?
3 Is there a way that you can put a dollar value on it?

4 A. No, I can't put a dollar value on it, okay? I don't care
5 about money. I just think the book should go in the trash
6 can, and the guy should give us an apology.

7 MR. COLLINS: That's all I have.

8 THE COURT: Okay. We'll take a morning break at this
9 time, go to your jury room and start again about 15 minutes.

10 (Jury excused.)

11 THE COURT: We'll start again at 11:15.

12 (A recess was held at this time.)

13 THE COURT: You can throw those verdict forms away;
14 we're going Plan C. So we'll get you some more after the
15 break, all right? Anything before I bring the jury in?

16 MR. COLLINS: Not from the plaintiff.

17 MR. BACHRACH: Your Honor, there's -- we've
18 introduced, and it's an objected to exhibit, the book of
19 General Westmoreland, which is a historical document, under
20 the hearsay rules. And I just wanted to be able to quote to
21 him from something General Westmoreland said that goes -- that
22 he opened the door to.

23 THE COURT: Well, just --

24 (Jury present.)

25 THE COURT: Read it to him and then I'll listen to

GEORGE KUCHEN - CROSS-EXAMINATION

1 the objection and then I'll rule on it.

2 CROSS-EXAMINATION

3 BY MR. BACHRACH:

4 Q. Good morning, Mr. Kuchen.

5 A. Good morning.

6 Q. Now, does the book anywhere indicate that you personally
7 fired into Cambodia?

8 A. No, it doesn't.

9 Q. So the book never accuses you of firing into Cambodia.

10 A. I don't think it does.

11 Q. And you had left An Phu by March 12th of 1966, correct?

12 A. Early March, yes.

13 Q. And I believe it's your -- on direct testimony you
14 indicated that what agitates you about the book is that people
15 have come up to you and said, you're in this book, you're a
16 hero.

17 A. Something like that.

18 Q. And, in fact, your daughter thought you were a hero
19 because you were in the book.

20 A. Something like that, yeah.

21 Q. Now, you're familiar -- You know who General Westmoreland
22 is?

23 A. Sure do.

24 Q. And he was the commander of all the American forces at
25 that time, correct?

GEORGE KUCHEN - CROSS-EXAMINATION

1 A. Yes.

2 Q. And are you familiar with the book, A Soldier's Report?

3 A. No.

4 Q. He wrote the book, A Soldier's Report, over 20 years ago.

5 And on your direct testimony you indicated that it was your
6 understanding that you were supposed to stay away from the
7 Cambodian border, correct?

8 A. What I indicated was that somewhere in the 60s, okay, they
9 did come out with some kind of guidance about staying away
10 from Cambodia, and then a little later in the 60s, they opened
11 Cambodia up, the First Cav and some other people actually went
12 in there, okay? Alls I said was that I don't remember in
13 1965, whether we were directed not to go in there; we just
14 never thought about it. As a medic on an A Team in that area
15 of Vietnam, that didn't concern me. What concerned me was
16 doing my job.

17 Q. What about in 1966?

18 A. '65, '66 is the same.

19 Q. I just want to refer you to what General Westmoreland says
20 in his book at page 222.

21 MR. COLLINS: Your Honor, I'll object to that on the
22 hearsay.

23 THE COURT: I'll sustain that unless you have an
24 exception.

25 MR. BACHRACH: It's a historical document, Your

GEORGE KUCHEN - CROSS-EXAMINATION

1 Honor, under the hearsay rule, the book is older than 20 years
2 old, it's his personal memoirs.

3 THE COURT: Can you show me under Rule 803 exception
4 to the hearsay rule which subsection you're talking about?

5 MR. BACHRACH: If I can have my --

6 THE COURT: Subsection (16)?

7 MR. BACHRACH: Yes.

8 MR. COLLINS: Your Honor, I think we need a little
9 more of a foundation on, I guess the subject matter of this
10 book. And I'm not sure that there's a bright line test as to
11 what qualifies under 803 under that exception as far as how
12 old it's got to be, who the author has to be.

13 THE COURT: It says 20 years. I've never had this
14 raised before. Section (16), statements and ancient
15 documents, and whoever drafted these saying that something
16 over 20 years is ancient, I really get mad about that, but
17 statements in a document in existence 20 years or more, the
18 authenticity of which is established. When was it published?

19 MR. BACHRACH: It's ancient, because it's falling
20 apart. Sir, I'm looking for the copyright here. It was
21 copyright 1978. 1976, I'm sorry, Your Honor, I misread.

22 THE COURT: Okay, well, read the statement, then
23 I'll entertain a relevance objection.

24 BY MR. BACHRACH:

25 Q. I just wanted to read you from what General Westmoreland

GEORGE KUCHEN - CROSS-EXAMINATION

1 said. He wrote, on page 222 of his book, "I received
2 authority in 1966 to conduct air and artillery strikes, if
3 fired on from across the border, but only if essential to
4 preserve the integrity of American or South Vietnamese forces,
5 as I had pursued the enemy across the border into Cambodia."

6 A. Okay.

7 Q. And so were you aware of that?

8 A. How would I be aware of that?

9 Q. You were a medic.

10 A. I was a medic, but how would anybody on an A Team be aware
11 of something what a general says? And you didn't even say
12 when in '66.

13 Q. Well, you indicated though there was no order to stay away
14 from Cambodia, not fire on Cambodia.

15 A. I indicated that somewhere in the mid 60s I remember
16 hearing direction from somebody, maybe through our C Team or
17 somebody like that, that you stayed away from Cambodia, yes.

18 Q. And I'm just reading from what General Westmoreland said,
19 who is a very well respected general, that in 1966 he received
20 authority to fire into Cambodia.

21 A. Fine.

22 Q. Now, did you talk to Jimmy Dean about the book, Expendable
23 Elite?

24 A. Yes.

25 Q. And what did you tell him about the book?

GEORGE KUCHEN - CROSS-EXAMINATION

1 A. There's a lot of BS in it.

2 Q. Did you tell him it was lies?

3 A. Yes.

4 Q. And did you tell him -- were you -- did you have any
5 involvement with him in connection with the publication of The
6 Drop?

7 A. No.

8 Q. But you have seen in The Drop, as we've indicated, that it
9 was published in The Drop that the book was proven to be
10 100 percent lies, correct?

11 A. I don't even remember reading that. I get The Drop. I'm
12 very active in the association. I happen to be secretary of
13 the chapter in Fort Bragg, in Fayetteville. I just don't
14 remember that article word for word.

15 Q. You don't remember it word for word.

16 A. No.

17 Q. Do you recall The Drop publishing information that the
18 book was false?

19 A. No.

20 Q. I just want to see if you recall receiving this
21 Defendants' Exhibit 20. Do you ever recall reviewing this in
22 The Drop?

23 A. What are we looking for? No, I don't even recall seeing
24 that. It's only about two lines.

25 Q. But you don't recall, "Jimmy also briefed Chapter 1-18 on

GEORGE KUCHEN - CROSS-EXAMINATION

1 LTC(R) Dan Marvin and his book Expendable Elite, which has
2 been proven to be 100 percent lies."?

3 A. I vaguely remember once or twice a representative from the
4 national, that's Jimmy Dean or the current representatives,
5 saying something about the book at one of our meetings. I
6 don't -- I don't remember the term 100 percent lies. I have
7 never remembered that term.

8 Q. But you had told people from the Special Forces that it
9 was full of crap, I think you said?

10 A. Yeah, that's a good term.

11 Q. Did you say it was full of lies?

12 A. I don't use that term.

13 Q. So you said it was full of crap?

14 A. Yeah, or BS.

15 MR. BACHRACH: I have no further questions, Your
16 Honor.

17 MR. COLLINS: Very brief follow-up.

18 REDIRECT EXAMINATION

19 BY MR. COLLINS:

20 Q. George, you worked in a team at An Phu, didn't you?

21 A. I was on the team.

22 Q. And Special Forces soldiers very much adhere to the team
23 concept of things, don't they?

24 A. Well, the whole military does.

25 Q. Okay.

GEORGE KUCHEN - REDIRECT EXAMINATION

1 A. Okay. But it's a little stronger in Special Forces;
2 you're a team, you work together.

3 Q. Right. So when Mr. Bachrach asked you if you personally
4 fired into Cambodia, you didn't do that, did you?

5 A. No.

6 Q. And nor did your team, did it?

7 A. Not that I'm aware of.

8 Q. Okay. The quote that he attributed to General
9 Westmoreland, George, was, "I received authority in 1966 to
10 conduct air and artillery strikes, if fired upon -- if fired
11 on from across the border, but only if essential to preserve
12 the integrity of American or South Vietnamese forces, was I to
13 pursue the enemy across the border into Cambodia."

14 Was your team at An Phu ever fired on from Cambodia?

15 A. Not that I'm aware of.

16 Q. Okay.

17 MR. COLLINS: That's all I have, thank you.

18 MR. BACHRACH: No further questions, Your Honor.

19 THE COURT: Thank you, Mr. Kuchen. Next?

20 MR. COLLINS: Your Honor, we want to publish the
21 depositions of Colonel William Tuttle next.

22 THE COURT: Sure.

23 MR. COLLINS: I believe we can get it in before
24 lunch.

25 THE COURT: Like I said in the opening charge,

1 Colonel Tuttle can't be here because of health reasons, so the
2 lawyers went and took his deposition, which is a procedure
3 where you sit down and you have a court reporter. I think I
4 described a deposition earlier in trial. So they took his
5 deposition, and it can be read as evidence in this case and
6 you can consider it as evidence in this case, and you judge it
7 as to its credibility the best you can. Okay? So we're going
8 to have responsive reading. We'll show you at least two of
9 these lawyers know how to read. All right?

10 (Deposition of Colonel Tuttle was read at this time.)

11 MR. BACHRACH: And so the deposition was done, and,
12 Your Honor, I'd just like to just publish Defendants'
13 Exhibit -- I tabbed it here -- 26 for the jury.

14 THE COURT: Okay.

15 MR. BACHRACH: Defendants' Exhibit 26 is a statement
16 by Colonel Tuttle, "How the truths have affected me. Since
17 the book has been published recently I feel no immediate
18 follow up. As time marches on however as more people read the
19 book I can expect many readers will have questions as to my
20 military professional integrity. Particularly when Marvin
21 stated I ordered him to assassinate Prince Sihanouk of
22 Cambodia, a neutral country."

23 THE COURT: Go to lunch right now. We'll start again
24 at 2:00 o'clock. See you all at 2:00.

25 (Jury excused.)

1 THE COURT: We'll see y'all at 2:00 o'clock. Who
2 else do you have this afternoon?

3 MR. COLLINS: We have Mr. Johnson, Mr. Sirois and
4 Major General Overholt. I cut Johnson's testimony down
5 tremendously last night. And we're not going to go through
6 all the book with him, just the two or three things that we
7 think constitute defamation. He does have tapes.

8 (Discussion held off the record.)

9 (A recess was held at this time.)

10 THE COURT: More handouts. This is latest iteration
11 of the jury charges and the changes have been made -- we've --
12 highlighted where the change has been made, okay?

13 MR. OGIBA: Thank you.

14 THE COURT: One per side.

15 (Jury present.)

16 THE COURT: Thank you. Ready to call your next
17 witness?

18 MR. DEAVER: Yes, Your Honor, the plaintiff would
19 call Hugh Overholt.

20 THE CLERK: State your name for the record.

21 A. Hugh R. Overholt.

22 HUGH OVERHOLT, a witness called by the plaintiffs, first
23 having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. DEAVER:

HUGH OVERHOLT - DIRECT EXAMINATION

- 1 Q. Would you tell the Court and the jury your name, please?
- 2 A. Hugh Overholt.
- 3 Q. Where do you reside now, Mr. Overholt?
- 4 A. In New Bern, North Carolina.
- 5 Q. What do you do there?
- 6 A. I'm with a law firm, a practicing attorney.
- 7 Q. Prior to going with that Smith and Ward law firm in
- 8 New Bern, did you practice law with the military?
- 9 A. Yes, sir.
- 10 Q. When did you -- what branch of the service was it?
- 11 A. I was in the Army.
- 12 Q. When did you go into the Army?
- 13 A. In 1957.
- 14 Q. And what was your rank at that time?
- 15 A. First lieutenant.
- 16 Q. Was this after you completed law school?
- 17 A. Yes, sir.
- 18 Q. What branch of the Army did you go into?
- 19 A. The Judge Advocate Generals Corps.
- 20 Q. And did you retire from the Army?
- 21 A. I did.
- 22 Q. When did you retire?
- 23 A. 1989.
- 24 Q. What was your rank at the time of retirement?
- 25 A. Major General.

HUGH OVERHOLT - DIRECT EXAMINATION

1 Q. And are you a Major General in the reserve right on?

2 A. I'm just a retired major.

3 Q. Just a retired Major General.

4 A. I don't think you can call me back.

5 Q. Would you give us some background of what your education
6 was, where you went to school?

7 A. I went to law school at the University of Arkansas, got a
8 direct commission into the JAG Corps from there. I went to
9 the Judge Advocate Generals Corps basic class; later I went to
10 the Judge Advocate Generals Corps advanced class, which is a
11 one-year tour in Charlottesville, Virginia. Actually nine
12 months. And I went to the Army's Command and General Staff
13 College, and then to the industrial college of the armed
14 forces later on, and have a degree from National Defense
15 University.

16 Q. And what is that degree?

17 A. It's in military -- it's --

18 Q. It's a military degree?

19 A. Military, yes.

20 Q. What experiences have you had with application or the
21 practice of military law?

22 A. Well, when I originally came in the Army I was a trial
23 counsel, defense counsel, claims officer. I spent my years,
24 early years trying courts-martial, either in the United States
25 at Camp Chaffee, Arkansas, Fort Rucker, Alabama or with the

HUGH OVERHOLT - DIRECT EXAMINATION

1 Seventh Army Support Command in Europe.

2 Q. Now, with the offices of trial counsel and/or defense
3 counsel, what portions of the military law did you primarily
4 deal with?

5 A. Criminal law.

6 Q. And how is the criminal law in the military handled?

7 A. Well, we operate under the Uniform Code of Military
8 Justice, which is the Punitive Articles and the proceedings of
9 courts-martial and these cases are tried before
10 courts-martial, are governed by the Manual for Courts-Martial,
11 which are the rules for governance of the trials. So most of
12 the military procedure is set forth in the Manual for
13 Courts-Martial, as well as the Punitive Articles. There's the
14 same type of appellate process that you would see in Federal
15 Court, except it goes through a military court chain to a
16 civilian court, the Court of Appeals of the Armed Forces. But
17 there is not a lot of difference between criminal law as you
18 might know it in the state or federal courts, and in the
19 military. There are some differences.

20 Q. The prosecution of the case is by the trial counsel?

21 A. That is correct.

22 Q. And you served as trial -- you served --

23 A. Trial and defense counsel.

24 Q. And the defendants are represented by the defense counsel?

25 A. By military defense counsel, or they can obtain a civilian

HUGH OVERHOLT - DIRECT EXAMINATION

1 counsel, if they want to, at their own expense.

2 Q. How long were you in the -- in this realm of the military
3 practice?

4 A. Well, five years trying cases, six years trying cases,
5 pretty much on a full-time basis. And then I went to graduate
6 school, as I said, at Charlottesville. After that, I came
7 back to the Judge Advocate Generals School, which is an
8 accredited law school in Charlottesville, Virginia, and I was
9 the chief of the criminal law division there, and taught or
10 supervised that department for four years.

11 Q. During your time with the military, did you have any
12 responsibilities or opportunities to work with any type of
13 legislation about the military law?

14 A. Later in my career, certainly. We -- I was independent,
15 and we were responsible for subsequent editions of the Manual
16 for Courts-Martial. The Uniform Code of Military Justice is a
17 law passed by Congress, the Manual for Courts-Martial is the
18 implementing version which sets forth how you try cases and
19 the rules of evidence, et cetera. So I, at one time or the
20 other, would have been working in revising the Manual for
21 Courts-Martial.

22 Q. Let me show you what has been marked as Exhibit 33, and
23 ask if you can identify that.

24 A. That's the Manual for Courts-Martial, United States, 1951.
25 And this was the Manual for Courts-Martial that was in effect

HUGH OVERHOLT - DIRECT EXAMINATION

1 until 1968, when there was one -- a new one was promulgated.
2 Yes, I'm very familiar with it; it was the one I used in
3 trying courts-martial.

4 Q. The criminal law in the military is governed by the
5 Punitive Articles of the Uniform Code?

6 A. Those are -- yes, those are the offenses, if you will, and
7 they're codified under 18 United States Code.

8 Q. Are they set out -- where the article is stated, are there
9 any explanations -- any explanations of it?

10 A. Yes, there's an analysis of each one of the offenses,
11 starting with the first punitive article through the last one.

12 Q. And do they have the specifications of what is required to
13 constitute --

14 A. There are a variety. If you're charging a case, there are
15 draft specifications in the manual that you follow.

16 Q. The entire military court is governed by the Manual for
17 Courts-Martial, is it not?

18 A. That is correct.

19 Q. And they all apply equally throughout the military?

20 A. Well, to -- as long as they're subject to court-martial
21 jurisdiction, which are the uniformed services and some
22 peculiar situations in the coast and geodetic survey and
23 things like that.

24 Q. But primary they're directed at the members of the
25 military?

HUGH OVERHOLT - DIRECT EXAMINATION

1 A. Most primary.

2 Q. After you left the Judge Advocate School in
3 Charlottesville, Virginia, what did you do then?

4 A. I've been a member of a law firm, one or another, since
5 then.

6 Q. I'm sorry, after you left the Judge Advocate Corps at the
7 school in Virginia, at Charlottesville?

8 A. I went to the Pentagon in Washington.

9 Q. What did you do at the Pentagon?

10 A. I was the -- well, I was at Department of Defense as a
11 special assistant for personnel matters for a short period of
12 time, and then I was the Assistant Judge Advocate General for
13 Military Law, which would include the criminal law division of
14 the Judge Advocate -- Army Judge Advocate Generals Corp.

15 Q. Did you have opportunity during your career to serve as
16 judge advocate of military units --

17 A. Oh, yes.

18 Q. -- that were active, like the A Team --

19 A. Yes. I served with -- as the deputy staff judge advocate
20 of the 101st Airborne Division, as the staff judge advocate of
21 the Seventh Infantry Division in Korea, as the staff judge
22 advocate of the 18th Airborne Corps at Fort Bragg, North
23 Carolina.

24 Q. Now, what were some of the units, within the 18th Airborne
25 Corps and Fort Bragg, that you had the responsibility for in

HUGH OVERHOLT - DIRECT EXAMINATION

1 the legal end?

2 A. Well, the 82nd Airborne Division, first COSCOM support
3 command, the JFK Center for Special Warfare. And the lawyers
4 that worked for the special ops groups there would have come
5 under my supervision.

6 Q. And you're talking about special operations, special ops,
7 are you referring to Special Forces?

8 A. Yes.

9 Q. And that headquarters for Special Forces was at Fort
10 Bragg?

11 A. Fort Bragg, North Carolina, that is correct.

12 Q. You're familiar with the Special Forces operations and
13 with their duties, their missions and where they operate and
14 all of this?

15 A. Yes, sir.

16 Q. And how long did you serve as the Judge Advocate General
17 of the Army?

18 A. Four years.

19 Q. Four years at Washington?

20 A. Um-hum.

21 Q. And did you continue having supervisory authority over all
22 of the administration of military justice?

23 A. I did.

24 Q. How many lawyers were in your firm then?

25 A. This is kind of embarrassing; 2400.

HUGH OVERHOLT - DIRECT EXAMINATION

1 Q. And you had responsibility directly for them, did you not?

2 A. Unfortunately, yeah.

3 MR. DEAVER: Your Honor, I would submit -- offer
4 General Overholt as an expert in military justice, military
5 law.

6 THE COURT: Any objection?

7 MR. OGIBA: No, Your Honor.

8 THE COURT: Okay, sure enough.

9 BY MR. DEAVER:

10 Q. Have you been retained by these plaintiffs?

11 A. Yes, I have.

12 Q. And they are paying you, or you're being paid through the
13 attorneys for whatever your consulting services are?

14 A. That is correct.

15 Q. Have you read Expendable Elite?

16 A. I have.

17 Q. Are you generally familiar with it?

18 A. Generally familiar with it.

19 Q. At the time you were reading it, were there certain issues
20 that the plaintiffs were asking that you look into and advise?

21 A. Yes.

22 Q. Would you look at -- Let me give you a -- page 11 of the
23 book, Expendable Elite. Sir, let me, if you don't mind, give
24 you another one that doesn't have all of those papers in it.

25 A. I'm there.

HUGH OVERHOLT - DIRECT EXAMINATION

1 Q. Would you read that first paragraph on page 11, please? I
2 don't mean read it out loud, and the members of the jury may
3 read it, but if you would read that paragraph just to refresh
4 your recollection of the book.

5 A. I have.

6 Q. All right. That paragraph represents a conversation that
7 Mr. Marvin has written in his book, a conversation between him
8 and Colonel Tuttle, the C-4 commander. And it essentially
9 states that he wants -- they're talking about wanting
10 Mr. Marvin to take the war into Cambodia, to start doing
11 his -- taking his team into Cambodia, across the border?

12 A. Yes, sir.

13 Q. Was it -- at that time was it -- was there a general order
14 that prohibited going into Cambodia?

15 A. There was a prohibition on going into any of the other
16 countries, and Cambodia would have been included in that. I
17 made an inquiry of the Pentagon to make sure that I was
18 correct, and talked to the chief of the international law
19 division. And he affirmed that at this time it was not legal
20 to go into Cambodia.

21 Q. But this discussion that they're having there is -- is
22 concerning an agreement to violate the international law?

23 A. Well, it's a standing order not to go into Cambodia. And
24 in the general sense of international law, to invade other
25 countries is -- would be a violation of a customary law.

HUGH OVERHOLT - DIRECT EXAMINATION

1 Q. I'm going to show you what is labeled in the trial
2 notebook Plaintiffs' Exhibit No. 4.

3 A. Okay.

4 Q. Now, Plaintiffs' Exhibit 4, is it not an itemization of
5 some of the Punitive Articles of the Uniform Code of Military
6 Justice?

7 A. Yes.

8 Q. Look at the Article 80, I believe it is, the first one?

9 A. It's Article 90.

10 Q. 90?

11 A. Article 81, excuse me.

12 Q. 81.

13 A. Yeah, I apologize.

14 Q. And that's conspiracy, is it not?

15 A. Yes, sir.

16 Q. Does this conversation and this planning that is related
17 on page 11 of the Expendable Elite, constitute a violation of
18 that article?

19 A. In my opinion, it does.

20 Q. And what is the article that we're relating to there?

21 A. Well, we're talking about conspiracy, two or more people
22 agreeing to commit an offense. Also, you have a -- if I might
23 add -- a solicitation on the part of Colonel Tuttle to commit
24 an offense, because he's asking the captain to do something
25 that's improper.

HUGH OVERHOLT - DIRECT EXAMINATION

1 Q. That's illegal?

2 A. Illegal.

3 Q. It doesn't matter whether this is true or not, but the
4 statement in the book --

5 A. All I'm going by is the statement.

6 Q. And you're not trying to testify as to the truth of it,
7 are you?

8 A. No.

9 Q. Just what it contains. Now, without going specifically to
10 places in the book, but let me just state, and it's already
11 been read into the record or testified to by other of the
12 plaintiffs, that they had military combat operations into
13 Cambodia, and they fired their weapons into Cambodia and
14 actually crossed the border.

15 Each time that there was a border crossing or firing into
16 the country, into Cambodia, was there a violation of one of
17 the Articles of Military Justice?

18 A. Well, in this case the order that we're talking about, and
19 which is admitted to in the book, that they were not supposed
20 to do that, that would be a violation. Each occurrence.

21 Q. And the violations that you're referring to, the violation
22 of that order, is a serious violation in the military, isn't
23 it?

24 A. Exactly. In my opinion.

25 Q. And it's punishable --

HUGH OVERHOLT - DIRECT EXAMINATION

1 A. The conspiracy?

2 Q. Yes.

3 A. Is punishable by --

4 Q. Imprisonment or --

5 A. Well, there is a table of maximum punishments that are in
6 the -- that are in the Manual for Courts-Martial, and in this
7 case it would be -- for conspiracy it is for the offense of
8 which you are conspiring to commit, so you would go to that
9 offense and --

10 Q. That would be the penalty?

11 A. That would be the penalty.

12 Q. And it would be -- the --

13 A. For example, if violating the order was confinement at
14 hard labor for two years, then that would be the punishment
15 for conspiracy.

16 Q. And to this accusation or this provision in the book or
17 these -- those situations that are described in the book,
18 would be constituting a serious violation against these men
19 who have -- who were mentioned in there or who were accused of
20 this, would it not?

21 A. Let me put it this way. They could have been
22 court-martialed for those offenses, had they occurred or been
23 brought to the attention of someone who wanted to prefer
24 charges.

25 Q. Would -- had they been -- had charges preferred against

HUGH OVERHOLT - DIRECT EXAMINATION

1 them, would it have affected their military careers?

2 A. Most certainly.

3 MR. OGIBA: Objection, Your Honor, foundation.

4 THE COURT: Lay a foundation for that, I guess.

5 MR. DEAVER: Yes, Your Honor.

6 THE COURT: Okay.

7 BY MR. DEAVER:

8 Q. If, for instance, Sergeant Taylor had been charged with
9 firing a 4.2 mortar into Cambodia and being charged with it
10 and court-martialed, would that have affected his military
11 career?

12 MR. OGIBA: Same objection, Your Honor.

13 THE COURT: Same ruling. That's the same question.

14 Q. Okay. Had he been -- Would this evidence or this -- if
15 this were true, what was alleged in here, would that provide
16 sufficient evidence to take the case to a court-martial?

17 A. In my opinion, it would.

18 Q. Now, if we would turn to page 280 -- 280 -- Let's, if you
19 will, please, let's start with 275 and the headnote part of
20 it, the italicized portion on page 275, if you would read
21 that, and members of the jury, please, what that states in
22 there.

23 A. Okay, I've read it.

24 Q. All right. Essentially this says that there was an order
25 sent from Colonel Tuttle to Marvin, secret, urgent, that

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1 ordering him and all of A-424 personnel to depart An Phu,
2 where they were, not later than 2000 hours today. And it's
3 signed Tuttle.

4 And then the following paragraph on that, it states, does
5 it not, that Marvin is refusing to obey the order, and that
6 John Strait agrees to -- with him to disobey it.

7 A. That's correct.

8 Q. Now, does that -- if you'll look on this Plaintiffs'
9 Exhibit 4 at Article 90, Subsection (2), which provides that
10 any person subject to the chapter who willfully disobeys a
11 lawful command of a superior officer -- superior commissioned
12 officer --

13 A. These facts would support a charge under Article 92,
14 and -- I mean, excuse me, Article 90, in this case, for
15 disobeying -- willful disobedience of order of a superior
16 officer.

17 Q. And what is the punishment that is prescribed for a
18 violation that is set out here?

19 A. Death, in the time of war.

20 Q. And was that -- was this in a time of war in the book?

21 A. Certainly. I might add, it was not a declared war; it
22 was, under all the facts and circumstances, clearly a war.

23 Q. Was it, to the extent that it would support a charge under
24 the -- the punishment under the time of war --

25 A. Yes, sir.

HUGH OVERHOLT - DIRECT EXAMINATION

1 Q. -- provision?

2 Now, if you will, let's go to page 281, where that same
3 part is read there. Paragraph three from the bottom on page
4 281, that relates to, I shook his outstretched hand?

5 A. Yes, sir.

6 Q. Read that, please, and members of the jury.

7 Does that constitute an offense under the UCMJ?

8 A. Certainly. It is a, number one, we've already talked
9 about a violation of the order, this would amount to a mutiny.

10 Q. And if you would look at Article 94 on Plaintiffs'
11 Exhibit 4, Subsection (a) -- excuse me -- (a)(1)?

12 A. Yes.

13 Q. And would you read how that -- what that -- what that
14 charge is? What the violation is, excuse me.

15 A. I have.

16 Q. Would you relate to the jury what that provision is?

17 A. That is the first of -- there are three elements for
18 mutiny. And this one involves the agreement, along with
19 another person, to not obey an order. And in this case, it is
20 to, in concert, which means with the other people that are --
21 we're not going to obey lawful authority.

22 Q. Is there any other -- is there any violation of
23 subparagraph (3)?

24 A. I think one part was the other in this case under these
25 facts, they've also not done their most as a unit to prevent

HUGH OVERHOLT - DIRECT EXAMINATION

1 and suppress a mutiny which is ongoing. Every member of the
2 unit, once he is involved in this, has a duty to report this
3 to higher headquarters and disassociate himself with this
4 agreement.

5 Q. Would you look on page 282, please, of the Expendable
6 Elite.

7 A. Yes, sir.

8 Q. The first full paragraph -- or I'll say the last full
9 paragraph on page 281.

10 A. Yes, sir.

11 Q. Does that constitute a completion of the mutiny?

12 A. Yes.

13 Q. And how does that do that, General Overholt?

14 A. They have -- they have, in concert, agreed to disobey the
15 orders to move their unit out, and they are now in the process
16 of planning, in the book anyway, taking action to further
17 that.

18 Q. And in this he's stating that each of his men --

19 A. Yes.

20 Q. -- has joined in the mutiny.

21 A. That would be the entire unit that was present during this
22 period.

23 Q. If you would, please, refer to page 286. And in that --
24 this, I would submit, has to do with the accusation or the
25 allegation or the presentation that the -- an ARVN regiment is

HUGH OVERHOLT - DIRECT EXAMINATION

1 coming to --

2 A. To root them out.

3 Q. And then on page 287, the first paragraph, if you'll -- or
4 the first paragraph and the two lines -- the next two lines
5 and the next paragraph, down through the provision concerning
6 Sergeant Taylor?

7 A. Yes, sir.

8 Q. And what is that saying that they're doing at that time?

9 A. They're getting ready to have combat with this relief
10 force that is coming to take them over. And, of course, you
11 get back to also there's -- this is an ongoing conspiracy to
12 commit this crime, that it's a lesser included offense of
13 mutiny. It's in furtherance of the mutiny.

14 Q. Is there any violation or is there an article that
15 prohibits the attempted murder of your own men?

16 A. Well, there's certainly an attempt, a punitive article,
17 and I think you could construe this as an attempted murder.
18 However, I would -- when you're charging people, there's so
19 many lesser included offenses, you probably got here violation
20 of the lawful general order, willful violation of an order of
21 a superior officer, a conspiracy to commit this offense, and a
22 mutiny itself, which has been put in process. The conspiracy
23 was complete when they agreed to do this and started their
24 action to, if you will, defend against the unit, and sending
25 the message that they were not going to leave. That is a very

HUGH OVERHOLT - DIRECT EXAMINATION

1 clear, based on the evidence in the book anyway, a very
2 clear --

3 Q. And there was -- it was presented that if they -- a patrol
4 was sent out from A-424 to intercept them, the --

5 A. That they may have to fire back.

6 Q. And that they were authorized to fire on them?

7 A. And to kill.

8 Q. And to kill.

9 There were other violations that were set out throughout
10 the book, were there not, without getting into --

11 A. On the part of Colonel Tuttle, the part of Captain Marvin,
12 Lieutenant Strait, that would be -- there's an offense,
13 conduct unbecoming an officer and a gentleman under Article
14 133, you could charge the officers with that. The enlisted
15 soldiers could also be charged under Article 134 for conduct
16 against good order and discipline of the armed services.

17 Though for sentencing purposes, all of that is generally taken
18 care of by instructions from the judge, and wrapped up for one
19 purpose for sentencing.

20 Q. So essentially these men have been accused of serious
21 crimes, is that correct?

22 A. That is correct.

23 MR. DEEVER: That's all I have. Thank you, sir.

24 A. Thank you.

25 MR. DEEVER: May I ask one? Only one, I promise.

HUGH OVERHOLT - DIRECT EXAMINATION

1 THE COURT: Okay. You get an extra one, too, we owe
2 you one.

3 BY MR. DEAVER:

4 Q. Is there a statute of limitations on the crime of mutiny
5 and willful disobedience of a direct order?

6 A. If it's punishable with death, there's not.

7 Q. Thank you.

8 CROSS-EXAMINATION

9 BY MR. OGIBA:

10 Q. General Overholt, how are you doing?

11 A. I'm doing very well; thank you.

12 Q. Now, you testified earlier, General Overholt, that -- and
13 is it okay for me to call you General Overholt?

14 A. Call me whatever you want; that's fine.

15 Q. Okay. You've testified that you were generally familiar
16 with the book at issue in this case.

17 A. Yes.

18 Q. Have you read the entire book?

19 A. I have. I found it fascinating.

20 Q. And you've kind of generally referred to crimes that the
21 plaintiffs committed in the book. Can you testify, sitting
22 here today, can you testify as to which crimes in particular
23 each plaintiff committed? According to the book?

24 A. Colonel Tuttle, when he solicited Captain Marvin to, if
25 you will, go on a secret mission that no one could know about

HUGH OVERHOLT - CROSS-EXAMINATION

1 and if-you-tell-anyone-I'll-kill-you type deal, that was a
2 solicitation to violate the general order.

3 Q. Where in the book is that?

4 A. I think it's right at the first when they met and had
5 their secret, I can't -- I'm not going to be able to go by
6 page, so you help me on that, you've got it so much better
7 than I have.

8 Q. We've got the -- so you've listed the secret meeting
9 between Colonel Tuttle and Captain Marvin.

10 A. The first meeting, yeah, the first meeting. And then he
11 said -- pulled him aside and said we're going to go into
12 Cambodia, or words to that effect.

13 Q. Okay. Were there any other crimes committed by Colonel
14 Tuttle in this book?

15 A. I am trying to recall. I do not recall any.

16 Q. How about Lieutenant Strait?

17 A. In which part of the book?

18 Q. Well, I just want to know what, if any, crimes Lieutenant
19 Strait allegedly committed.

20 A. He would have been part of the mutiny that I've testified
21 to. He was certainly -- there is a part of the book that we
22 didn't go into, where there's an effort by the CIA apparently
23 to assassinate Prince Sihanouk, and I remember that in great
24 detail. A CIA agent flies in and gives Captain Marvin the go
25 ahead and tells him to go kill Sihanouk. Plans are started to

HUGH OVERHOLT - CROSS-EXAMINATION

1 go to Cambodia and, if you will, murder Prince Sihanouk, and
2 then those are withdrawn later. That would be a conspiracy,
3 because there's certainly an agreement to kill Sihanouk, and
4 then there is some action taken to plan for that, though it is
5 not consummated.

6 Q. Which --

7 A. And I believe that Lieutenant Strait was involved in that.

8 Q. Any other plaintiffs involved in that?

9 A. As I recall, they -- we were talking about planning and
10 practicing, so I believe all of them were. All that were
11 present there at that time. Yeah.

12 Q. Okay. Can you point to the place in the book where --

13 A. No.

14 Q. -- that's set forth?

15 A. I can't go page by page in the book, it's a fairly
16 detailed reading, but if you'll go to the page, I'd be happy
17 to --

18 Q. I mean, you're making the allegations that these
19 plaintiffs have committed specific crimes, so if you can point
20 to the book where these particular plaintiffs have made --
21 have committed specific crimes --

22 A. I believe I've testified on the facts that have been given
23 to me. And I'll be more able if you'll tell me where in the
24 book it is.

25 Q. Okay. So from your own recollection and your parsing

HUGH OVERHOLT - CROSS-EXAMINATION

1 through the book --

2 A. That's my recollection.

3 Q. Any other crimes committed by Lieutenant Strait?

4 A. I would -- Did I mention the mutiny?

5 Q. I believe you did.

6 A. I mentioned the mutiny, okay.

7 Q. Any other crimes?

8 A. The solicitation to commit a crime, no, let's say the
9 conspiracy to commit a mutiny would be --

10 Q. And where does that come into play?

11 A. As part of the facts, oh, somewhere around the page 200
12 that we talked about, where the order comes down from Colonel
13 Tuttle to boot up the camp and leave, and an order to defend
14 the Hoa Hoas, the unit --

15 Q. The Hoa Hoas?

16 A. How do you pronounce that?

17 Q. Hoa Hoas.

18 A. Hoa Hoas. I'm pretty tough on that. And then they decide
19 that they're not going to follow that order, and they -- that
20 unit would be involved in that. That's disobeying the order.
21 They send a message back, as I recall, saying unless we get
22 amnesty for the Hoa Hoas, we're not going to leave. And then
23 that's a violation of the order, and a further and continuing
24 violation of the order and a mutiny.

25 Q. Okay. How about any of the other plaintiffs, what

HUGH OVERHOLT - CROSS-EXAMINATION

1 specific crimes did the other plaintiffs individually commit?

2 A. Well, let me talk generally, if I may. Because to
3 identify each one where they were at the time. If they were
4 there during the period of time I'm talking about, they would
5 have committed the offenses I've testified to.

6 Q. But sitting here today, you don't know whether or not they
7 were there?

8 A. I don't know that this happened, sitting here today, you
9 know, I cannot say.

10 Q. Okay. But you don't know, you know, as included in the
11 book, which plaintiffs were there at which times, correct?

12 A. No.

13 Q. Okay.

14 A. That's fair enough.

15 Q. Okay. Now, you've testified that you're being compensated
16 for your testimony today, correct?

17 A. My law firm is, yeah.

18 Q. Your law firm is?

19 A. The way that works.

20 Q. What is your consulting rate?

21 A. Wow. I -- I am -- I'm paid \$2500 for what amounts to
22 three trips now to Charleston, one which was aborted, and --
23 as you know, and then this one here, of which we're paying the
24 expenses to.

25 Q. By you say we're paying the expenses?

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. Yeah, this comes out of that.

2 Q. Okay. So you're paid a flat fee, and then you have to use
3 that flat fee, regardless of how much time --

4 A. We have an agreement for \$2500, and I suspect I'll send a
5 bill for this trip, too.

6 Q. Okay. So you'll send a bill over and above the \$2500?

7 A. Yes. Yes.

8 Q. Does that break down according to hour?

9 A. No.

10 Q. Does it break down according to travel time versus
11 testimony time?

12 A. No, huh-uh.

13 Q. Approximately how much time have you spent to prepare for
14 your testimony today?

15 A. It took me a day and a half to read the book, okay? And
16 then --

17 Q. And you charged for all that time?

18 A. No, well, it's all lumped up. I'm not getting paid very
19 much by the hour, if that's what you're getting at. But
20 reading the book, reviewing the Punitive Articles, and travel
21 down here, and then the briefest part would be the testimony.

22 Q. Okay. How many times have you testified at trial, having
23 been qualified as an expert in military law and military
24 justice?

25 A. This is the second time that that's happened.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. Second time. When was the first time?

2 A. In my -- in my memory, this is the second time. I
3 testified in a court-martial, but I don't know that I can say
4 that that was as an expert witness. It was about military
5 law. But I would say before a court of this nature, this is
6 the first time.

7 Q. Okay. This is the first time you've testified as an
8 expert?

9 A. Yeah, in a court in this type proceeding, because the
10 others were criminal; this is civil.

11 Q. Okay. Now, you work with a law firm, Ward and Smith,
12 correct?

13 A. That's correct.

14 Q. Out of North Carolina? What is your specific area of
15 practice?

16 A. I do government contracts, procurement, federal criminal
17 law on occasion.

18 Q. Do you do any lobbying?

19 A. Yes, I do some of that. We call it government relations.

20 THE COURT: Especially now.

21 A. Particularly now. I would not want to be a lobbyist. I'm
22 in government relations.

23 Q. So it's not fair to say that your primary area of practice
24 is lobbying?

25 A. That is fair to say, yeah.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. Are you a registered lobbyist?

2 A. Yes. For some, you know, you don't register as a
3 lobbyist, you register for clients that might have you
4 lobbying for various affairs. For the past two years I've
5 been mostly dealing with the base realignment and closure
6 process on behalf of the Marine Corps Air Station Cherry
7 Point, and on behalf of North Carolina military bases, and in
8 that process you're trying to save your bases in your state,
9 so you do register as a lobbyist, if you will, for
10 representation of those military bases.

11 Q. All right. Do you lobby on behalf of any private
12 entities?

13 A. I have. I'm not currently doing any, but I have.

14 Q. What private entities would those be?

15 A. First Citizens Bank and Trust Company. I had a client,
16 Unisphere, unfortunately which is bankrupt. Let me see. I
17 have lobbied for the State of North Carolina, of course, in
18 the Bragg process. There may be some others that maybe -- if
19 you pulled it off the lobbying list, which is easy to do,
20 you'll have them there, so you can go over them.

21 Q. Okay. Would it be fair to say that you've lobbied on
22 behalf of more than a dozen private entities?

23 A. I would say that would be the outer edge, yeah.

24 Q. I'm going to --

25 MR. OGIBA: If I may approach, Your Honor?

HUGH OVERHOLT - CROSS-EXAMINATION

1 THE COURT: Sure.

2 BY MR. OGIBA:

3 Q. I'm going to hand you what's been -- what we've marked as
4 Defendants' Exhibit 38.

5 A. Yeah.

6 Q. Do you recognize that document?

7 A. I certainly do. I did not write it.

8 THE COURT: I didn't say anything.

9 MR. OGIBA: I'm sorry.

10 Q. You did not write that document, correct?

11 A. No.

12 Q. Have you had an opportunity to read it?

13 A. I have.

14 Q. Is it correct that this document is entitled Shoe Shine
15 Boy, it's a Major General, Summary and Analysis of an Oral
16 History of Major General Hugh R. Overholt, United States Army
17 retired, 1957 through 1989, and it was written by Major George
18 R. Smawley? Is that correct?

19 A. Absolutely. Yeah.

20 Q. Did you -- were you interviewed by Mr. Smawley for this
21 article?

22 A. No, I wasn't. I was interviewed -- I gave an oral history
23 to the -- to two officers from the Judge Advocate Generals
24 School, which is typical once old ducks retire, they come and
25 you give them a tape of your military career. Those are

HUGH OVERHOLT - CROSS-EXAMINATION

1 generally just buried somewhere and go away, fortunately, with
2 time. Smawley got this oral history and decided to write an
3 article. With my permission, by the way.

4 Q. So you gave him permission --

5 A. I did.

6 Q. -- to use your oral history?

7 A. Um-hum.

8 Q. All right. And you've had a chance to review this
9 document. Can you testify today that any of these quotations
10 from you in this article are inaccurate in any way?

11 A. No.

12 Q. So they're all accurate?

13 A. Yeah. I'll have to live with them.

14 Q. All right. Are you familiar with the Military Law Review?

15 A. Yes.

16 Q. Is it your belief -- If you could flip to the second page,
17 page 310 on this document?

18 A. Yeah.

19 Q. And the header indicates that it is published in the
20 Military Law Review, Volume 176?

21 A. This comes from the Military Law Review. This is where it
22 was published.

23 Q. Okay.

24 A. You probably pulled it off the Internet, but it is in a
25 published volume.

HUGH OVERHOLT - CROSS-EXAMINATION

1 MR. OGIBA: At this time, Your Honor, we'd like to
2 introduce Defendants' Exhibit 38 into evidence.

3 MR. DEAVER: No objection.

4 THE COURT: Okay.

5 (Defendants' Exhibit 38 received.)

6 MR. OGIBA: I have some extra copies for the jurors,
7 if I might distribute them?

8 THE COURT: Sure.

9 BY MR. OGIBA:

10 Q. Now, General Overholt, if you could turn to the
11 second-to-last page in this article, page 362?

12 A. Yeah.

13 Q. And if you could publish for the jury the very last
14 paragraph in this, on that page that -- and that which runs to
15 the top of the next page.

16 A. After several false starts?

17 Q. Yes, please.

18 A. Yeah. "After several false starts in 1995, Major General
19 Overholt joined two former associates in the firm of Ward,
20 Smith and Hooper in North Carolina, leveraging his keen
21 negotiating skills, his primary actors -- involves law --
22 including on behalf of the State of North Carolina, on
23 military issues and for assortment of various commercial
24 interests."

25 Q. Okay. So where Mr. Smawley indicates that your primary

HUGH OVERHOLT - CROSS-EXAMINATION

1 area of practice now involves lobbying, that's an incorrect
2 statement, according to your testimony, correct?

3 A. No, you've got to put this in context of when I gave
4 the --

5 Q. Oral history?

6 A. -- the oral history, which was about five years ago. At
7 that time I was doing a lot more lobbying than I am now.

8 Q. Okay. Any reason why you don't do as much lobbying
9 anymore?

10 A. I don't have the clients. I would do more, yeah.

11 Q. Now, earlier in your testimony you made reference to
12 Plaintiffs' Exhibit 4. Do you still have that in front of
13 you?

14 A. Is that it? Or the book.

15 Q. That's right.

16 A. Okay.

17 Q. Do you still have the UCMJ in front of you?

18 A. I do. I have the manual.

19 Q. Okay. You can conclusively state that Plaintiffs'
20 Exhibit 4 is an accurate depiction of the depicted crimes, as
21 reflected in the UCMJ?

22 A. I'd have to compare them with each other.

23 Q. Okay. And you've testified that the UCMJ that you had
24 before you was applicable to these particular plaintiffs in
25 1966, correct?

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. Yes, it would have been.

2 Q. Because the UCMJ changed in 1968?

3 A. The manual's changed a lot more than the UCMJ has. It's
4 changed considerably. But the UCMJ, with the exception, I
5 think, of adding certain offenses which are not applicable
6 here, it's been pretty much the same.

7 Q. But the Punitive Articles did not change in the 1968
8 revision?

9 A. Not appreciably, no.

10 Q. All right. Any changes?

11 A. I'm sure there were some, yeah.

12 Q. Are you aware of what they are?

13 A. There were some dealing with, as I recall now, dealing
14 with drug offenses. And in the early -- historically, in the
15 late 50s, early 60s, we did not have the drug problems that
16 came into the Army in the mid 60s -- armed forces, not just
17 the Army -- and there were some adjustments made to punishment
18 for drug offenses, for one thing for sure.

19 Q. Now, you've testified about disobeying direct orders, and
20 that some of the allegations in Expendable Elite may have
21 constituted violating direct orders. Correct?

22 A. Some of the facts in the book.

23 Q. What are the elements to violating a direct order?

24 A. Well, you have to have a -- an order from the superior
25 of --

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. Any particular kind of order?

2 A. It has to have military -- relate to a military duty,
3 right.

4 Q. Does it have to be a legal order?

5 A. It certainly does.

6 Q. So there's no obligation to follow an illegal order?

7 A. No, sir. If you can sort that out.

8 Q. What do you mean by that?

9 A. If you're the recipient of the order, it's a -- to do
10 something very quickly, you have to make a decision, is this
11 legal or illegal.

12 Q. So the recipient of the order gets to determine whether
13 it's legal or illegal?

14 A. Well, generally it's going to be a court of law at a later
15 time that determines that.

16 Q. But at least initially --

17 A. Initially, right.

18 Q. Okay. What are the --

19 A. Do you want some examples? Well, you know, you're working
20 for me, and I ask you to go and take my wife to the grocery
21 store. That's an illegal order.

22 Q. And why is it an illegal order?

23 A. Because that is outside of the military duty. You don't
24 have no duty driving my wife to the grocery store. If I order
25 you to go paint my beach house, that is an illegal order.

HUGH OVERHOLT - CROSS-EXAMINATION

1 You've got no business painting my beach house. However, if I
2 order you to go pick up that gun and shoot an enemy that's
3 coming over the wall at you, that's a legal order.

4 Q. Okay. Are there any illegal orders which would be
5 applicable in a military context?

6 A. Oh, certainly. If I were to order you -- if we had a
7 prisoner --

8 Q. Yes.

9 A. -- and I were to order you to shoot him, that would be an
10 illegal order.

11 Q. Or if you ordered me to torture a prisoner?

12 A. That would be correct, yes.

13 Q. So there could be a plethora of scenarios where --

14 A. I think we could sit here and make up a whole bunch.

15 Q. Okay. But there are a lot of ways that -- certain orders
16 that could be handed down, could be considered illegal,
17 correct?

18 A. Yes.

19 Q. Do you have any reason to believe that the orders that are
20 included in Expendable Elite, were legal or illegal?

21 A. Which orders are you talking about?

22 Q. Well, you've testified that some of these -- or some or
23 all of these plaintiffs violated direct orders. So whatever
24 orders that you're referring to in making that allegation.

25 A. I do not believe the order to abandon the base, to return

HUGH OVERHOLT - CROSS-EXAMINATION

1 to camp, was an illegal order, if that's what you mean. That
2 was certainly an appropriate legal order. And if they
3 violated that or conspired to violate it, then it would be a
4 violation of the Uniform Code of Military Justice.

5 Q. Okay. So is that a judgment call --

6 A. Not --

7 Q. -- whether that's a legal order or illegal order?

8 A. It's a legal call. It's not a judgment call.

9 Q. Okay. Is it fair to say that to determine whether or not
10 an order is legal or illegal, you must know the full context
11 of how that order was made?

12 A. The order's usually plain and simple on its face, and
13 that's what you have to deal with. I don't know how --
14 different contexts could make a difference, I suppose. But
15 referring back to this book, it was pretty clear the unit was
16 asked to stand down, and they didn't, and they made plans to
17 fend off, if you will, an ARVN unit that was coming to relieve
18 them.

19 Q. According to the book, why did those individuals do that?

20 A. They believed that their friends --

21 Q. The Hoa Hoas?

22 A. -- the Hoa Hoas, should have amnesty. And, therefore,
23 they were defending the Hoa Hoas.

24 Q. Okay. Isn't it a bit stronger than that? Didn't,
25 according to the book, didn't these -- some of these

HUGH OVERHOLT - CROSS-EXAMINATION

1 plaintiffs and Colonel Marvin believe that Hoa Hoas were going
2 to be slaughtered if they left?

3 A. There is that statement in there, yes.

4 Q. Okay. So this order instructed the team to leave the Hoa
5 Hoas behind to be slaughtered, according to the book?

6 A. According to the book.

7 Q. And you're testifying here today that that judgment of
8 whether that order was legal or illegal, that that's not a
9 proper judgment, that your testimony is that that order was
10 legal despite the ramifications that followed that?

11 A. Absolutely.

12 Q. So despite the fact that these Hoa Hoas could have been
13 slaughtered --

14 A. I have --

15 Q. -- it doesn't matter?

16 A. They were ordered to relieve their post.

17 Q. Okay.

18 A. It was their duty.

19 Q. So what kind -- How do we draw that distinction? If I am
20 ordered to perform an act or not perform an act which could
21 lead to the deaths of what I consider to be thousands of
22 innocent people, is that a legal order that I should follow?

23 A. That's so out of context to me that I cannot answer it. I
24 have no opinion on that.

25 Q. You have no opinion on that?

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. No.

2 Q. Okay. But is there a line that you can draw in terms of
3 possible casualties resulting from following an order, that
4 would cause you to believe that an order is illegal or legal,
5 and, therefore, should be followed or should not be followed?

6 A. Absolutely. I suppose in the case -- this is what you're
7 looking for, I believe.

8 If these folks had arrived on the scene and started
9 shooting the Hoa Hoas, then they would have every right to --
10 well, I'll say every right -- we're building a fictional
11 pyramid here, I suppose -- to try to stop that. Because -- I
12 can put it better in context with something we've all dealt
13 with, and that's the massacre at My Lai, where our soldiers,
14 unfortunately, were shooting civilians, and other soldiers
15 came in and intervened and stopped that, and that was
16 certainly legal for them to do that.

17 Q. Okay.

18 A. But you weren't to that point here, I don't believe.

19 Q. Well, so what you're testifying to is that if this unit
20 had come down and started slaughtering the Hoa Hoas, as
21 Colonel Marvin believed that they were going to do, once they
22 started slaughtering them, they could disobey the order, but
23 not until then?

24 A. Well, how reasonable was his belief, I think would be one
25 thing you'd want to go to.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. So whether or not Colonel Marvin and his men violated the
2 order, depends -- violated a legal order, depends on the
3 reasonableness of his belief that the Hoa Hoas were going to
4 be slaughtered. Is that correct?

5 A. No, I won't go that far with you. No. I think that under
6 the context of this book, the Hoa Hoas would have a lot of
7 options. Number one, they could flee, they can go -- as I
8 recall, they were already disbanding. So there's no imminent
9 threat -- I'll put it like that -- to them.

10 Q. So your testimony --

11 A. And I would also add that there's no indication that the
12 ARVN, who are massing to come up the river, are going to harm
13 these people. They're basically going to take the -- as I
14 understand the book, they're going to take the camp back from
15 who they believe are folks that are walled up against them.

16 Q. So correct me if I'm wrong, but your testimony seems to go
17 to whether or not Colonel Marvin's belief was reasonable or
18 not, that the Hoa Hoa were going to be slaughtered.

19 A. No, I didn't say that.

20 Q. Okay.

21 A. I said that he had a direct order from a superior officer
22 to give his post up. He believed, according to the book, that
23 if he did so, that they would be deserting the Hoa Hoas; I
24 think that's the term used in the book. I don't think that
25 that was reasonable.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. And the statement in the book is that he thought they were
2 deserting the Hoa Hoas and leaving them to be slaughtered?

3 A. Yeah.

4 Q. Is that correct?

5 A. That is correct.

6 Q. But your belief is that despite his belief that the order
7 may have resulted in the slaughter of the Hoa Hoas, that he
8 still should have followed that order?

9 A. If -- you're making me sound like a killer now.

10 Q. I don't mean to do that. I don't mean to do that.

11 A. Would you repeat that question, please?

12 Q. Sure. Your testimony is that despite Colonel Marvin's
13 belief, reasonable or unreasonable, that by following the
14 order, he was going to lead to the slaughter of the Hoa Hoas,
15 he still should have followed that order?

16 A. He should have followed the order, yes.

17 Q. Okay. So I guess I'm struggling with the distinction you
18 draw between those orders that you can -- those orders that
19 you can consider to be illegal, because they can cause --
20 because following the order may cause the slaughter of
21 innocent people, and those orders which would be considered
22 legal, despite the slaughter of these people.

23 A. All you can do as an Army officer is put yourself in the
24 position that Captain Marvin was in at that time. And I
25 would -- I would opine that if I were in that position, I

HUGH OVERHOLT - CROSS-EXAMINATION

1 would have followed the order to go.

2 Q. Okay. And again, that goes to the reasonableness?

3 A. Yes. Well, reasonableness or the legality.

4 Q. Okay.

5 A. Remember, you obey all legal orders.

6 Q. But what we're talking about right now is whether the
7 order was legal or illegal?

8 A. Yes.

9 Q. Okay. Now, we kind of got a little sidetracked, but you
10 were talking about the elements to -- of proof to establish
11 disobeying a direct order. You've testified that one of those
12 elements is that there must be a legal order that was issued
13 by a superior officer. Correct?

14 A. There could be a general order and regulation, there can
15 be a direct order from a superior officer. The orders come in
16 all different forms. A general order or regulation is one
17 that another lawful order can be an order from one superior to
18 a subordinate, I think. Those are niceties, and the only
19 difference is actually in the maximum punishment for violating
20 the order.

21 Q. Okay. What are the other elements to the crime of
22 disobeying a direct order?

23 A. Well, that you receive the order and you didn't obey it.

24 Q. Okay. Is it fair to say that -- actually, if you could
25 flip in the UCMJ, which you have before you right there.

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. Yeah, this one?

2 Q. Yeah, if you could flip to page 321, and it's also
3 referenced again on 323, Articles 90 and 92, dealing with
4 disobeying direct orders.

5 A. Yeah, will do.

6 Q. Is it not fair to say that another element to proving that
7 a soldier violated or disobeyed a direct order is that the
8 superior officer must be authorized to give that order?

9 A. That would be true, yeah.

10 Q. Do you have any evidence that the officer in Expendable
11 Elite was authorized to give that order?

12 A. It is presumed that it is a lawful order. I have no
13 evidence that he was not authorized to give it.

14 Q. But if he was not authorized to give that order, then it
15 wouldn't be a crime, correct?

16 A. Then the presumption would prevail and you would presume
17 that he was authorized to give it.

18 Q. All right. But let's take away that presumption. What if
19 he wasn't authorized?

20 A. The presumption is part of the law.

21 Q. Okay. What if Colonel Marvin were to -- what if Colonel
22 Marvin were court-martialed, and he were able to prove that
23 the superior officer was not authorized to give the order?
24 Would he not have been considered to have disobeyed a direct
25 order?

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. Well, then that goes to the legality of the order and that
2 would be something that would be decided by the court-martial
3 under appropriate instructions from the judge.

4 Q. Okay.

5 A. And I don't mean to try to, you know, spar with you here.

6 Q. No, sure. I guess what I'm trying to get at is, doesn't
7 the violation of Articles 90 and 92, dealing with disobeying a
8 direct order, doesn't it depend on the context that the order
9 was given, and that the order was to be carried out?

10 A. Well, it depends, number one, is it a lawful order, and
11 we've already discussed that. And does the person that
12 received the order, does he have knowledge of it. And then
13 did he fail to follow the order. And then you can add the
14 other parts, was it his superior officer or not his superior
15 officer. Even if it's not his superior officer, it can be
16 another offense of failing to obey a lawful order.

17 Q. Okay. I guess going back to my question, does it depend
18 on the context of the issuance of the order and of carrying
19 out that order, whether or not a crime was committed under
20 articles 90 and 92?

21 A. I think that's fair, yeah.

22 Q. Now, are you aware of all of the crimes that the
23 plaintiffs have alleged that the book alleges they committed?

24 A. I'm not sure. I'm aware of the ones I've testified to and
25 have been presented to me by the plaintiffs' attorney, and the

HUGH OVERHOLT - CROSS-EXAMINATION

1 ones that you have presented me with. There may be others in
2 here. I believe we addressed the Prince Sihanouk
3 assassination part where the CIA asked an A Team commander to
4 kill the Head of State of Cambodia.

5 Q. Was any -- so you believe that either the issuance of that
6 particular order, or the receipt of that particular order,
7 constituted a crime?

8 A. Well, it would be hard to say if a CIA agent drops in on
9 your camp and tells you to kill someone, and is that a legal
10 order? I'd say it's not.

11 Q. Okay. Do you have any belief as to whether that order was
12 followed?

13 A. I have none. Other than what's in the book and what's
14 been relayed to me.

15 Q. So if there was an order to assassinate Prince Sihanouk,
16 given by a CIA officer, and that order was not followed, and
17 no action was taken to follow that order, and, in fact, the
18 order was rejected at that time, was any crime committed?

19 A. No, but as I understand it, as I recall from the book, it
20 was not rejected out of hand, and that there were preparations
21 and planning and looking at a route where Prince Sihanouk
22 would be available for assassination, and that would be a
23 conspiracy at least to commit an assassination.

24 Q. But no assassination took place.

25 A. None took place, that's exactly right.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. Can you point to the page in the book that addresses that
2 conspiracy?

3 A. The first here -- it's under the conspiracy articles.

4 Q. I apologize. I meant in Expendable Elite.

5 A. Oh, in Expendable Elite.

6 Q. Yes.

7 A. No, I can't, but you can, because you've got the book,
8 you've read it much more than I have. If you'll just go to
9 the part on Prince Sihanouk, where --

10 Q. But sitting here today, you can't point me to the place in
11 book where it alleges that?

12 A. No, but if you gave me awhile, much more time than this
13 Court's got, I could find it. I remember reading it.

14 Q. Okay. Are you aware that the plaintiffs have alleged that
15 the book makes the allegation that some of these plaintiffs
16 may have committed sedition?

17 A. Would you repeat that, please?

18 Q. Okay. That was pretty inartful question. Are you aware
19 that the plaintiffs in this lawsuit maintain that the book
20 alleges that they committed sedition? Or some of the
21 plaintiffs.

22 A. Well, sedition would be under Article 94 under mutiny, and
23 that is a -- trying to overthrow the civilian authority.

24 Q. Is that applicable in this case?

25 A. I don't recall sedition as being the high point. I think

HUGH OVERHOLT - CROSS-EXAMINATION

1 a mutiny is very clear.

2 Q. Is there any evidence in this book of sedition?

3 A. Not that I recall.

4 Q. Now, you testified earlier concerning a standing general
5 order that was in place in the 1960s, not to fire upon or
6 invade Cambodia. Correct?

7 A. Well, that would -- that would apply to any country that
8 we --

9 Q. Let's just talk about Cambodia.

10 A. Okay, yeah. That is correct.

11 Q. All right. So you are aware of a general order --

12 A. I could not name the general order that was in effect, but
13 it was generally believed in the literature that I have read
14 and the inquiries that I've made, informed me that I can make
15 an opinion that there was no order -- there was a prohibition
16 against going into Cambodia at that time, in that time frame.

17 Q. All right. Have you seen --

18 A. I have not.

19 Q. -- any general order?

20 A. Not that I can remember.

21 Q. Did the plaintiffs or plaintiffs' counsel provide you with
22 a copy of that order?

23 A. No.

24 Q. So you haven't had a chance to review that order?

25 A. No.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. You don't know if that order had any exceptions?

2 A. I would expect it would not have, but I do not know.

3 Q. Okay. So without that order in hand, and without an
4 ability to review that order, can you testify with certainty
5 that that order was violated?

6 A. Well, can I -- if there was an order, it was violated by
7 the -- in the terms of in this book.

8 Q. But again, you haven't reviewed that --

9 A. I have not reviewed the order, but there was -- it was
10 clear that -- from reading the book, that the unit believed
11 that it was illegal to go into Cambodia. I mean, that was
12 what the whole mess was about, was being called aside and say
13 we have a secret mission, and I will deny that I ever told you
14 this, and but you go ahead and go into Cambodia, even though
15 we aren't supposed to be there.

16 Q. Have you listened to any of the audio tapes that were
17 provided by the plaintiffs in this case?

18 A. I have not.

19 Q. All right. Would it surprise you to learn that some of
20 these plaintiffs have indicated on audio tapes that they did,
21 in fact, go into the Cambodia?

22 A. Did not know that.

23 Q. All right.

24 A. Would I be surprised? Nothing surprises me.

25 Q. Are you familiar with General William C. Westmoreland?

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. Yes, sir.

2 Q. Did you know him?

3 A. I do not. I have met him, I mean -- I think that's fair
4 to say, but he was a little bit ahead of me; put it like that.

5 Q. Have you ever read his book, A Soldier Reports?

6 A. I have not.

7 Q. Are you familiar with what General Westmoreland's position
8 was in Vietnam?

9 A. He was the big guy.

10 Q. He was the commanding general of all allied forces in
11 Vietnam?

12 A. Yes.

13 Q. What were you doing during Vietnam?

14 A. I was in Korea, sitting on a mountaintop up on the
15 38th parallel, freezing.

16 Q. During the entire Vietnam conflict?

17 A. Well, for 18 months of it. The part that I should have
18 been in Vietnam, where I'd have been a lot warmer. As a
19 lawyer, I wouldn't have got shot.

20 Q. Okay. But --

21 A. And I'm not making light of it, but I was in Korea.

22 Q. Sure.

23 A. Sitting up there. We didn't have -- all the fuel oil went
24 to Vietnam.

25 Q. So you never served in Vietnam?

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. No, I did not.

2 Q. According to the oral history that we marked as
3 Exhibit 38, you wanted to go to Vietnam, didn't you?

4 A. Well, yes, I asked to go to Vietnam.

5 Q. All right.

6 A. But that was because the unit I was with, the 101st
7 Airborne Division, was going. I -- I liked the people I was
8 working with.

9 Q. But instead you were sent to Korea?

10 A. I went to Korea. I was exiled, yes.

11 Q. So in terms of -- Can you tell me whether -- strike that.

12 Would General Westmoreland or you be more qualified to
13 testify as to what standing orders were in place in Vietnam in
14 the mid 1960s?

15 A. Clearly Westmoreland would be.

16 Q. I'm going to hand you what we've marked as Plaintiffs'
17 Exhibit 37, and I believe has been introduced into evidence.
18 I'm going to show you the top of page 222. If you could
19 publish that for the jury, it's been published before, but if
20 you could publish it again.

21 A. 222?

22 Q. Yes.

23 A. "I received authority in 1966 to conduct air and artillery
24 strikes, if fired on from across the border, but only if
25 essential to preserve the integrity of America's South

HUGH OVERHOLT - CROSS-EXAMINATION

1 Vietnamese forces, was I to pursue the enemy across the border
2 into Cambodia."

3 Q. Okay. And that's written in the first person, that's
4 General Westmoreland, correct?

5 A. That's General Westmoreland speaking, yes, in memoirs.

6 Q. Do you have any reason to doubt what General Westmoreland
7 includes in that?

8 A. None whatsoever. And he doesn't say when in 1966, and he
9 doesn't say what he did to fulfill that, but that's -- he says
10 he received authority.

11 Q. Okay. So if General Westmoreland was authorized to go
12 into Cambodia, to fire across the border if fired upon, and to
13 pursue the enemy across the border into Cambodia -- I believe
14 that would be considered hot pursuit -- does that change your
15 opinion as to what the standing general order was in place --

16 A. No.

17 Q. -- in 1966?

18 A. Well, we're talking about '65 and early '66. It was
19 pretty clear that the people in this unit, from reading the
20 book, which I have no opinion on, understood that they were
21 not to go into Cambodia. Regardless. And I guess
22 Westmoreland had not come down and talked to them at that
23 time.

24 Q. Okay. So is it your testimony that what's important is
25 what their understanding was, rather than whether an order was

HUGH OVERHOLT - CROSS-EXAMINATION

1 in place?

2 A. Westmoreland may not have issued the order.

3 Q. Okay. But given what he wrote in A Soldier Reports, does
4 that suggest to you that there were situations in which they
5 could go into Cambodia in 1966?

6 A. If he authorized it.

7 Q. And are you --

8 A. And I do not know whether he authorized it or not.

9 Q. Okay. And you don't know whether or not any communication
10 from General Westmoreland authorized any of A-424 to go into
11 Cambodia, correct?

12 A. I do not know, that's correct.

13 Q. Okay. So if General Westmoreland authorized anybody, and
14 in particular, A-424, to go into Cambodia, then there wouldn't
15 be a violation of a general order, correct?

16 A. That's right.

17 Q. And so some of your testimony concerning disobeying direct
18 orders would then be --

19 A. Questionable.

20 Q. -- questionable. Okay.

21 A. Or could be questionable, I'll put it like that. I think
22 that sounds better.

23 Q. While you were in the JAG Corps --

24 A. Um-hum.

25 Q. -- was it common knowledge that our troops engaged the

HUGH OVERHOLT - CROSS-EXAMINATION

1 enemy in Cambodia?

2 A. There are some things I know that happened that were top
3 secret, and in a special compartmented context that I cannot
4 testify to. But I will say this, that it became knowledge
5 that we had gone into Cambodia and Laos at one period in
6 there. So I feel like I am -- because that has been written
7 and put out, that there was a time whenever President Nixon
8 authorized bombing in that area, as well as Laos.

9 Q. Okay. Well, I'd sure like to find out what this
10 classified information was, but I won't push that.

11 A. Pretty much what I told you.

12 Q. Okay.

13 A. Just talking around that, I'm not trying to be cute,
14 please, this is serious.

15 Q. Right. During your time at the JAG Corps, did you ever
16 prosecute anyone for firing into Cambodia or going into
17 Cambodia?

18 A. I was not in the courtroom at that time. I -- we had
19 people in the Judge Advocate General's Corps that were trying
20 offenses on a daily basis in Vietnam. And I -- I cannot tell
21 you all of the offenses they tried. But they tried many
22 violations of general orders, willful disobedience of orders,
23 murders, rapes, what have you.

24 Q. Are you aware of whether any of those -- any of those --
25 any of those JAG officers prosecuted anybody --

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. I -- Prosecuted anybody? Yes. Very much aware.

2 Q. If you'd let me finish.

3 A. I'm sorry, I apologize.

4 Q. Are you aware of whether or not any of those JAG officers
5 prosecuted anybody for firing into or invading Cambodia?

6 A. I am not.

7 Q. So sitting here today, you don't know whether or not
8 anybody has ever been prosecuted for invading Cambodia or
9 firing into Cambodia?

10 A. Do not.

11 Q. You're also not aware of what the military's policy was
12 concerning hot pursuit into Cambodia, correct?

13 A. I am -- at a later date, after -- two years later, their
14 policy was one of hot pursuit.

15 Q. Okay. Were you aware of whether that was the policy at
16 the time --

17 A. I am not.

18 Q. -- in 1966?

19 A. I am not.

20 Q. Does your opinion change, depending on General
21 Westmoreland's assertion in A Soldier Reports?

22 A. No.

23 Q. Are you aware of when this book was published?

24 A. The Soldier --

25 Q. Expendable Elite?

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. I have to look. I read it just this year. You can --
2 When was it published?

3 Q. Well, if you --

4 A. 2003.

5 Q. 2003?

6 A. Okay, that's good.

7 Q. So this book has been out for two and a half, almost three
8 years, correct?

9 A. Yes.

10 Q. To your knowledge, has any investigation been started into
11 whether or not any of the plaintiffs committed crimes as
12 alleged in the book?

13 A. Not to my knowledge.

14 Q. Your testimony is that some of these crimes have no
15 statute of limitations, correct?

16 A. I believe that to be true.

17 Q. And if you could, please explain to the jury what a
18 statute of limitations is.

19 A. Well, statute of limitations is that if you do not
20 prosecute an offense from -- within a certain period of time,
21 it could be three years, six years, and various offenses carry
22 various statutes of limitation. If you pass that period and
23 have not brought charges, then you're barred from doing so.
24 And the judge in this case can more artfully explain that to
25 you, if necessary.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. But your testimony is that some of these crimes, including
2 mutiny, have no statute of limitations?

3 A. Generally that's true.

4 Q. Are you aware of whether that's true in this particular
5 case?

6 A. To be practical about it, there's no one going to come
7 back and dig this up.

8 Q. Okay. So from a practical standpoint, these plaintiffs
9 are never going to be charged with any offense, correct?

10 A. But they're going to have to live with the thought that
11 they have done it. Or been accused of doing it.

12 Q. That's not my question though.

13 A. Well --

14 Q. From a practical perspective, they're never going to be
15 charged, correct?

16 A. Practically, yeah. And of course, a lot of that goes to
17 the evidence; did this really happen. If it didn't happen,
18 that's a perfect defense.

19 Q. But regardless, even if we had rock-solid proof that it
20 did happen, they still wouldn't be prosecuted, correct?

21 A. Well, what do you mean -- Rock-solid proof?

22 MR. OGIBA: I withdraw that question.

23 Q. If we could go back to this article by Smawley.

24 A. Yeah. Me.

25 Q. Yeah, about you.

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. Okay.

2 Q. And you've testified this is an authorized biography,
3 correct?

4 A. Well, yes.

5 Q. I want to -- and I'm not going to go through the whole
6 thing.

7 A. Okay.

8 Q. But --

9 A. The jury thanks you for that.

10 Q. I'm sure they do. If you could flip to page 319, and
11 specifically on the bottom of the page, I believe you're
12 quoted there.

13 A. Probably am. And -- where do you want me to start?

14 Q. Yeah, right there, and praise the Lord.

15 A. "And praise the Lord, at the last minute they called down
16 and said they were so short of lawyers in the field that for
17 this class we're going to cancel your infantry basic training
18 and you're going to go directly to your assignments. We
19 expect you on your own to learn to do all the things we
20 expected you to know. I think the first watershed event of my
21 career was missing infantry basic. I'm still convinced, had I
22 gone, I'd have gotten kicked out."

23 Q. So you never made it through infantry basic training?

24 A. I did not go to infantry basic training, but I didn't get
25 kicked out, either.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. Okay.

2 A. Make the record straight on that.

3 Q. All right. Further down on page 320 --

4 A. Um-hum.

5 Q. -- if you could -- well, page 320 references your service
6 at Fort Chaffee, correct?

7 A. Chaffee.

8 Q. Chaffee, I'm sorry. If you could begin reading in the
9 second full paragraph, beginning, a critical mission.

10 A. "A critical mission of the Fort Chaffee legal office, of
11 Captain Vick Harvey in particular, was support they provided
12 to General Walker, commander of the 101st Airborne Division,
13 sent by President Eisenhower to enforce immigration of Central
14 High School in Little Rock. The riots, the suppression of the
15 rights, the troops escorting the little children to school
16 with bayonets, that sunk in big time. General Walker received
17 a very unfavorable newspaper article about the brutality of
18 his troops in Arkansas Gazette, the main paper in Little Rock.
19 He gave an order to one of his battalions to go seize the
20 newspaper. Walker would have done it, I'm sure, but Captain
21 Harvey stepped in the door and said, 'You can't do that, you
22 won't do that, and if you do, I'll report you.' That was
23 pretty gutsy for a captain. Walker was absolutely crazy, and
24 that was proven later in Germany when he was relieved."

25 Q. And that's far enough. That par -- where it's indented

HUGH OVERHOLT - CROSS-EXAMINATION

1 there, that's your -- those are your words, correct?

2 A. That's a quotation from the oral history, yes.

3 Q. That's a quotation. Do you recall that incident, sitting
4 here today?

5 A. Do I recall Vick Harvey? Absolutely.

6 Q. Okay.

7 A. Great American.

8 Q. Isn't it fair to say that given this narrative that you
9 set forth where General Walker had ordered his battalion to
10 seize the newspaper, and then Captain Harvey stepped in the
11 door and said you can't do that, you won't do that, and if you
12 do, I'll report you?

13 A. Yep.

14 Q. Isn't Captain Harvey violating a direct order there?

15 A. No.

16 Q. Why not?

17 A. What has Harvey done? He has stopped a general officer
18 from doing something that's so totally illegal and out of
19 bounds, it was a very courageous thing for him to do. Walker
20 was a nut.

21 Q. I see. I see on the next page he was crazy.

22 A. And his only thing between him and, you know, he's going
23 to take a battalion of troops and go and seize the Arkansas
24 Gazette?

25 Q. But that, according to you, that's an illegal order,

HUGH OVERHOLT - CROSS-EXAMINATION

1 correct?

2 A. To seize the Gazette? No, it's illegal activity, not an
3 order. Just like committing murder. You don't do it.

4 Q. Well, in your quotation here you said he gave an order to
5 one of his battalions to go seize the newspaper.

6 A. Yes, it would have been illegal order.

7 Q. So that's an illegal order?

8 A. Yes, sir.

9 Q. And your testimony is that it was heroic for Captain
10 Harvey to violate that order.

11 A. Yep.

12 Q. Was Captain Harvey ever court-martialed for this?

13 A. Nope. In fact, nobody knew about it except the judge
14 advocates.

15 Q. But, with the judge advocates knowing about it, he could
16 easily have been court-martialed, if you considered it to be a
17 legal order, correct?

18 A. Well, he answered to another authority, not -- not to
19 General Walker.

20 Q. Are you aware of whether Captain Harvey -- I assume it's
21 not Captain Harvey anymore?

22 A. He is deceased.

23 Q. Okay. Are you aware of whether or not he ever sued
24 anybody for defamation for this statement, or for this story?

25 A. Defamation?

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. I mean --

2 A. No.

3 Q. There's an allegation that he violated the order.

4 A. There was never even published in the paper.

5 Q. Okay. So he was --

6 A. But I could not make something like this up, if that's
7 what you're getting at. It happened.

8 Q. But -- so your testimony is that it was heroic for Captain
9 Harvey to violate this order, because it was illegal, but it
10 was criminal for Colonel Marvin to --

11 A. What Captain --

12 Q. If you could let me finish, please.

13 A. Okay.

14 Q. -- but it was illegal for Colonel Marvin to violate orders
15 that he considered to be illegal in Vietnam. Correct? That's
16 your testimony.

17 A. You're mixing apples and oranges on me.

18 Q. Okay. You've testified that Captain Harvey was heroic for
19 violating this illegal order set forth in this --

20 A. For an event that is happening right in front of him,
21 where he is the legal officer, and steps forward and tells him
22 it's illegal what he's doing.

23 I suspect if Captain Marvin had had a lawyer with him in
24 the A Team, and which we do have a lot of lawyers out in
25 Special Forces now -- we didn't then -- they would have

HUGH OVERHOLT - CROSS-EXAMINATION

1 advised him not to do what he did.

2 Q. Okay. But I guess my point is, your testimony is that it
3 was heroic for Captain Harvey to do what he did. And I think
4 you say it was pretty gutsy for a captain to do what he did.
5 It was heroic to --

6 A. Heroic -- Did I use the term heroic?

7 Q. I believe you did; maybe I'm wrong, but --

8 A. Well, that's, you know --

9 Q. But there was an order issued by General Walker, and he
10 violated the order, or he instructed --

11 A. He advised against the -- he advised the general to
12 withdraw the order, and he did.

13 Q. If that was a legal order, he could have been in some
14 trouble, couldn't he?

15 A. It -- well, he knew it wasn't, because he was there for
16 just such a purpose, to advise on what was legal and not legal
17 to do, under the terms of the occupation of Little Rock.

18 Q. But if it was a legal order, he would have been in
19 trouble.

20 A. In a general context, yes.

21 Q. So you're drawing a clear distinction between what Captain
22 Harvey did and what Colonel Marvin and his men did, correct?

23 A. And the whole scenario is totally different, yes.

24 Q. But there's sometimes where it's okay to violate an order
25 and sometimes where it's not okay.

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. I wouldn't say that.

2 Q. Depends on if --

3 A. I said it depends on whether the order is legal or not.

4 Q. And again, that depends on the context. Correct?

5 A. Well, it depends on the order, yes.

6 Q. Now, I hate to get into this with you, but if you could
7 flip to page 327.

8 A. Doesn't bother me.

9 Q. The very bottom, very last paragraph, beginning, it was a
10 different army.

11 A. Yeah.

12 Q. It reads there, "It was a different Army. A commandwide
13 midnight curfew was imposed which Overholt -- you -- and a
14 fellow JAG, Bill Bell, missed at least once." And this is a
15 quotation from your oral history. "I remember one night when
16 we were just irretrievably caught. There was no way. So we
17 got in the trunk of the car and our wives drove us back to
18 post to get us in the house."

19 Is that an accurate depiction of that incident?

20 A. My wife has subsequently corrected me. I did not get in
21 the trunk of the car, I got in the back of it and they threw a
22 blanket over me. But the -- the context, yes, in that sense
23 is the same.

24 Q. Okay. So --

25 A. So did I violate the curfew? Yes.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. Did you violate the curfew? Yes.

2 A. Yes, there's a statute of limitations run.

3 Q. Okay. The statute of limitations has run. But violating
4 the curfew, what was that -- what was a violation of a curfew
5 punishable by?

6 A. That would have been a misdemeanor at that time. In my
7 opinion, it was failure to obey an order. Would be a failure
8 to obey an order to be in my bed by midnight.

9 Q. But you were never court-martialed for that offense?

10 A. I was never investigated.

11 Q. Okay. Because of the blanket?

12 A. That's exactly. And I suspect you could testify to some
13 things like that.

14 Q. Luckily I'm not on the stand.

15 A. I understand.

16 Q. If you could turn to page 332. And I'm referencing the
17 footnote, and again, it appears to be a quotation attributed
18 to you.

19 A. Yeah, I'm there.

20 Q. Okay. And this quotation -- in this quotation you talk
21 about rice bills, and this is during your service in Korea.

22 A. Yes.

23 Q. And we're not going to -- I mean, the jury, I assume, can
24 read this for themselves, and I'm not going to make you read
25 through this, but suffice it to say that rice bills were -- it

HUGH OVERHOLT - CROSS-EXAMINATION

1 implies kind of nefarious conduct, correct?

2 A. Whatever you call nefarious. It was living off base with
3 an indigenous girl. Yeah.

4 Q. About halfway down this quotation it indicates that
5 "Adultery was still a big offense, so any of the married guys
6 that were paying rice bills were very careful not to let you
7 know about it."

8 Were you aware of any married guys that were paying these
9 rice bills?

10 A. Actually, and unfortunately, yeah, we had to give Article
11 15s, that's punishment, to those that we did know and found.

12 Q. Okay. So in --

13 A. Yes, we knew of some, and when we did, they were punished.

14 Q. Okay. But is it fair to say that -- Well, strike that.

15 This says that a lot of these, the married guys who were
16 committing adultery, that they did their best to keep it from
17 people like you. Correct?

18 A. Well, people like the authorities, sure.

19 Q. Because it was punishable under a court-martial?

20 A. Yeah, well, generally Article 15, nonjudicial punishment.
21 Or reprimands, written reprimands that would go in the
22 officer's file.

23 Q. And if you knew about those, you were under a duty to
24 report those, correct?

25 A. Yeah. That would be correct.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. Now, next, page 335. We talked a little bit before about
2 how the UCMJ was changed in 1968. Now, your quotation here,
3 the parenthetical quotation on page 335 in the main text,
4 talks about the Military Justice Act of 1968. If -- and about
5 half of the way down starts talking about, after the ellipses,
6 says, "We also had started having -- we had started having all
7 of these magazine articles written about military justice.
8 You know, quote, 'military justice is to justice as military
9 music is to music,' end quote. Front page of Time Magazine
10 and the front page of Newsweek about how atrocious military
11 justice was. How unfair it was. Then we had the O'Callahan
12 versus Parker decision which was highly critical of military
13 justice. There was doom and gloom throughout the military
14 justice business, back channel criticisms by General
15 Westmoreland, the My Lai cases --" which you testified about
16 briefly "-- and a lot of that revolved around the instruction
17 in criminal law at the JAG school. It took front and center."

18 Is that an accurate depiction of your quote from the oral
19 history?

20 A. Yes, absolutely.

21 Q. You attribute some of the disparaging comments concerning
22 military justice to Time Magazine and Newsweek, and you also
23 cite the O'Callahan versus Parker and the My Lai issues.

24 A. Yes.

25 Q. What was -- Does this accurately reflect your opinion of

HUGH OVERHOLT - CROSS-EXAMINATION

1 military justice at the time?

2 A. Absolutely not. We were rock solid in believing we had
3 the best justice system available, comparable to anything you
4 would find in State Court or in Federal Court.

5 And in context -- there's some of this that's been taken
6 out of context for this article -- we say a lot of that
7 revolved around the instruction in criminal law at the JAG
8 school.

9 We were given the mission of rehabilitating the military
10 justice system in the public's eye, in view of all of this
11 adverse publicity we were getting. So we set about to writing
12 articles, explaining the military justice system in any venue
13 that we could. Entering into debates. I debated several
14 civilian attorneys in various forums on comparing the
15 court-martial system to the state criminal law systems.

16 Q. All right. Now, you referenced the Military Justice Act
17 of 1968. In your opinion, did that do a lot to help out the
18 system of military justice?

19 A. I think the biggest thing it did for -- since the -- Up
20 until 1968, the Army used special courts-martial. You have
21 summary courts-martial, special courts-martial and general
22 courts-martial. The Army used special courts-martial a lot.
23 And you could get a fairly severe punishment of -- hundreds of
24 those were tried, but you were not permitted to have an
25 attorney or to have a military judge present. And, therefore,

HUGH OVERHOLT - CROSS-EXAMINATION

1 you had line officers representing accused in these cases.

2 The Military Justice Act of 1968 provided for attorneys at
3 these courts-martials. And I think that that was the thing.

4 And that was one of the reasons that all the military
5 services, Army lawyer, Air Force lawyer, Navy lawyer base
6 increased dramatically. We had to bring in 500 more new
7 lawyers into the Army, just to do the special courts-martial.
8 Then it got so they became easier to do general
9 court-martials. That's the context that's in.

10 Q. The Act of 1968, in your opinion, served the ends of
11 military justice?

12 A. Oh, certainly, yes. It enhanced the rights of the
13 soldier.

14 Q. Next, on page 348, and this is in the context of what
15 appears to be a list of 16, I guess you could call them tenets
16 that you adhere to. Is that correct?

17 A. Yes. Whatever. Let's see.

18 Q. I don't know what you would call it.

19 A. Personal leadership in the practice of military -- Okay,
20 yes.

21 Q. If you could turn to number 11, you are quoted as saying,
22 "Do what is right and look at the big picture." Correct?

23 A. Yeah.

24 Q. And it says, "Because something is legal, doesn't mean it
25 is right. Integrity is the hallmark of everything we do."

HUGH OVERHOLT - CROSS-EXAMINATION

1 What does that mean?

2 A. It means exactly what it says.

3 Q. Okay. So just because something is legal, does not mean
4 that it is right. I guess you're drawing a distinction
5 between what is legal and what may or may not be moral?

6 A. I'm not drawing attention to what is between legal and
7 illegal, but you can hide behind legal niceties very often,
8 and not do what is right, not really help someone. If you
9 find someone, for example, that has got a drug problem, but
10 it's not serious, of course you can hammer him down, you know,
11 you can send him to prison and do that. I believe that we
12 should set up a rehabilitation system where we would give
13 soldiers at least one shot. It was not awfully successful,
14 I'll be honest, but that was one of the foundations for that
15 statement, to try to bring a little bit of, if you will,
16 judgment into the system. That was my personal opinion; I'm
17 not saying that anyone else would adhere to it.

18 Q. Okay. Would it be fair to apply that statement, because
19 something is legal, doesn't mean it is right, you testified
20 that, you know, that means you don't hide behind legalities
21 and that you do what is right. Would that also apply to
22 violating a standing order?

23 A. Depends.

24 Q. If it's doing what you think is right?

25 A. Nope.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. No?

2 A. Not in that context.

3 Q. Okay.

4 A. That would be a violation of the law. I'm not talking
5 about violations of the Uniform Code of Military Justice
6 there. I'm using legal more in the general context of
7 morality.

8 Q. Okay. But if I were --

9 A. Maybe I was inartful.

10 Q. If I were to come in and say, well, yeah, these 30
11 innocent people died, but I was just following orders, that
12 doesn't fit within number 11 here?

13 A. No.

14 Q. No?

15 A. No.

16 Q. Okay.

17 A. No, that's stretching it.

18 Q. All right. Are you familiar with Colonel Marvin's
19 allegations in his book that he was leading an unconventional
20 group in Vietnam?

21 A. That is the texture of the book, yeah.

22 Q. That he was engaged in covert operations?

23 A. Yeah, based on what he believed that his orders were from
24 Colonel Tuttle.

25 Q. So your understanding of this book is that Colonel

HUGH OVERHOLT - CROSS-EXAMINATION

1 Marvin's allegations are that he was leading an unconventional
2 and covert unit. Correct?

3 A. I believe that he thought he was.

4 Q. Okay.

5 A. I don't know whether I know on that.

6 Q. Are the rules different for unconventional or covert
7 units, than for conventional units?

8 A. No, sir.

9 Q. No, they're not?

10 A. No, the Uniform Code of Military Justice applies across
11 the board. Now --

12 Q. So you don't cut breaks to covert units, under the UCMJ.
13 Is that your testimony?

14 A. Don't cut breaks in what way? Give me a scenario.

15 Q. Your testimony is that you would treat a member of a
16 covert unit exactly the same as a member of a conventional
17 unit, under the UCMJ, is that correct?

18 A. It would depend on the mission, on the classification of
19 the mission. I mean, I'm sure there are examples that I don't
20 have access to, where if you had a courts-martial, for
21 example, it might compromise an entire operation, and those
22 matters are probably handled in a different way.

23 Q. Okay. So because of the nature of a covert or
24 unconventional mission, you may treat that differently under
25 the law, than you would a conventional unit.

HUGH OVERHOLT - CROSS-EXAMINATION

1 A. You might use different judgment.

2 Q. Okay. And by that, you mean you might not prosecute a
3 member of a covert unit for something that you would prosecute
4 a member of a conventional unit for?

5 A. I think it would depend on the offense. If you want to
6 start --

7 Q. Are there any --

8 A. Well --

9 Q. -- situations in which --

10 THE COURT: Mr. Ogiba, getting two lawyers to talk to
11 each other, you can't keep talking over each other.

12 MR. OGIBA: I apologize.

13 THE COURT: Go ahead.

14 A. And I apologize to the jury. I'm sorry.

15 THE COURT: Ask a question now.

16 BY MR. OGIBA:

17 Q. So I guess my last question was whether there were crimes
18 that you would not pursue via a court-martial against a covert
19 or unconventional warrior, that you would pursue against a
20 conventional warrior. Is that correct?

21 A. I would have to have the scenario, the classification, the
22 mission, the offense, to answer that.

23 Q. Okay. Are there any situations in which that would be
24 true? Any?

25 A. There's always an exception.

HUGH OVERHOLT - CROSS-EXAMINATION

1 Q. I would like to draw your attention to page 354 of your --
2 of this Exhibit 38. Starting in the first full paragraph,
3 I'll read it for the jury here and for you.

4 "Army special operations were maturing in this active
5 operational environment, a community that, until now, had
6 minimal judge advocate visibility. Conventional legal issues
7 relating to misconduct, acquisitions, ethics and federal law,
8 were often challenged by the necessities of unconventional
9 missions and mission units." And now a direct quote from your
10 oral history. "There is always the yin and yang. Are you
11 willing to tolerate a certain amount of misconduct in order to
12 keep an operation covert, if it is doing the thing it is
13 supposed to do for the country? I will tell you the answer in
14 my mind is absolutely yes. You can do far more damage to the
15 country by blowing one of these operations, than you can
16 ever -- than you ever can by finding other ways to handle
17 misconduct. Now, I would never do that with a murder or a
18 rape or something like that, though I thought a time or two
19 the murder part was going to get tested. It never was."

20 A. That's true.

21 Q. That's true.

22 A. The murder part.

23 Q. The murder part. Okay. Is the rest of it true? Does
24 that reflect your opinion?

25 A. Depends on the -- again, if I have a scenario. I will

HUGH OVERHOLT - CROSS-EXAMINATION

1 give you one, if that's what you're looking for.

2 Q. Sure.

3 A. We'll say you have an unauthorized absence from a unit
4 that is employed to a very secret place, maybe for 24 hours,
5 you know, how do you handle that? You make the guy run around
6 the perimeter 100 times, rather than give him an Article 15,
7 and make something a matter of record. It generally involves
8 minor misconduct; certainly not major misconduct.

9 I am certain that there are covert activities way beyond
10 my classifi -- what I'm cleared for, or cleared for currently,
11 certainly, where you have to make those judgments just exactly
12 how you're going to help the country move along.

13 If you're referring back to the book, you could put it in
14 that context and I can answer it.

15 Q. Okay. I guess my question is, pursuant to this quotation
16 from you --

17 A. Yeah.

18 Q. -- is it fair to say that under certain circumstances the
19 rules are different for a covert unit or unconventional unit
20 versus a conventional unit?

21 A. That is possible.

22 Q. Give me one second.

23 A. Sure.

24 MR. OGIBA: I have no further questions, thank you
25 for your time.

HUGH OVERHOLT - REDIRECT EXAMINATION

1 A. Thank you.

2 THE COURT: He may want to go home, so I figure I'll
3 get him done, then we'll take our break. Are you spending the
4 night with us or heading home?

5 A. I think I'll go back.

6 THE COURT: Let's go then.

7 A. Thank you, sir.

8 REDIRECT EXAMINATION

9 BY MR. DEAVER:

10 Q. Do you feel like you're getting rich in compensation from
11 these men for this time that you're spending?

12 A. This is a watershed event. Memorable.

13 Q. And I do appreciate it, and I know that it is, in part,
14 because of our prior friendship that I called on you, and I
15 apologize, I didn't know it was going to take this long a time
16 as it did.

17 A. There's absolutely no problem.

18 Q. There was -- there were questions asked you about the
19 statute of limitations, and you answered me and to Mr. Ogiba
20 that certain penalties that are -- or certain articles of the
21 UCMJ that carry the death penalty do not have a statute of
22 limitations.

23 A. That is my recollection, yes.

24 Q. And that you didn't think that these men would be
25 prosecuted, because they denied that it ever happened.

HUGH OVERHOLT - REDIRECT EXAMINATION

1 A. I believe I said that there was a defense that it never
2 happened, yes.

3 Q. That there was an offense alleged against them --

4 A. Yes.

5 Q. -- but that the possibility of prosecution was nil.

6 A. After all of these years, probably.

7 Q. And after their denial that it even happened.

8 A. Right.

9 Q. Mr. Marvin has admitted under oath and in a deposition,
10 that he committed these offenses. And the statute of
11 limitations has not run. Would it be possible for him to be
12 prosecuted?

13 A. Possible.

14 Q. Now, these -- you were asked again about prosecution of
15 unconventional or covert operations. And there is a
16 classification of information that is -- that requires
17 clearance and certification that a person is entitled to, say,
18 clearance for top secret, for secret and so on.

19 A. And beyond that, what's called special compartmental --
20 compartmentaled information.

21 Q. But it doesn't go outside that compartment.

22 A. Does not. Cannot. And that compartment can be as small
23 as five people.

24 Q. Does the secrecy oath that is required for this, say, for
25 top secret, permit someone who is party to it, to testify

HUGH OVERHOLT - REDIRECT EXAMINATION

1 about it?

2 A. No.

3 Q. And if such an event occurred and they were summoned, they
4 could rely on the disclosure protections that they have, could
5 they not? And it would require an order -- the judge would
6 have to determine in chambers whether it would be --

7 A. That's extremely true. That's particularly true when
8 you're using highly covert FBI agents or CIA, bringing them
9 into court.

10 Q. Now, I think you might have answered this on that
11 statement by General Westmoreland that was read into the
12 record from his book. There is nothing in that book or in
13 that statement that was read -- I hadn't read the book
14 either -- but in that statement, the statement that's in
15 evidence, on page 222 of that book, that states that he
16 utilized the authority that was given him in 1966, to follow
17 hot pursuit.

18 A. I just read it, Mr. Deaver, and it said I was authorized,
19 but it did not say that I implemented it.

20 Q. He did nothing in furtherance of that authorization.

21 A. As far as that statement was concerned.

22 Q. I hope you make your flight.

23 A. Thank you.

24 MR. DEEVER: Thank you.

25 MR. OGIBA: I have one follow-up question.

HUGH OVERHOLT - REDIRECT EXAMINATION

1 THE COURT: Mr. Deaver, do you have another question?

2 MR. DEEVER: Excuse me?

3 THE COURT: I didn't know whether you had another
4 question.

5 MR. DEEVER: Yes, I did.

6 THE COURT: Based on the consultation, all right, go
7 ahead.

8 BY MR. DEEVER:

9 Q. If you would refer to the tab 20, I believe it is, on page
10 42. And I'm going to show you, I believe, that portion of
11 that book.

12 THE COURT: What exhibit?

13 MR. DEEVER: Page 42 of Exhibit 20, is it?

14 MR. BEN DEEVER: Begins on page 42 of book, it's --
15 of Expendable Elite.

16 THE COURT: Page 42 of Expendable Elite, okay, go
17 ahead.

18 BY MR. DEEVER:

19 Q. The last -- the last couple paragraphs. And these are the
20 words of Mr. Marvin in that book. Would you read those,
21 please, out loud?

22 A. "I told my man that we had to be prepared to deny having
23 taken any action that would have been the basis for reports we
24 would receive coded Nantucket, the code word for all reports
25 relating to violation of neutral territory, and we would have

HUGH OVERHOLT - REDIRECT EXAMINATION

1 to deny them fast. 'I'll prepare some canned responses and
2 give them to Eleam to keep handy in the commo bunker. Eleam,
3 I want you to make sure our commo men know where they are.'

4 "'Will do, Dai-uy,' Eleam answered.

5 "'Unless you want to go to Leavenworth,' I warned, 'and
6 take me with you, you'll all keep quiet about everything we do
7 here except civic action and medical patrols. That way you
8 aren't apt to slip and say something wrong -- or say the wrong
9 thing.'"

10 Q. Is this what you were referring to when you said that
11 Mr. Marvin had indicated his knowledge of the neutrality
12 violations?

13 A. Yes. As well as the conversation with Colonel Tuttle at
14 the start of his --

15 Q. That started it. Okay.

16 A. It was clear to me from reading the book that at least
17 they understood they were not supposed to go into Cambodia.

18 Q. And there was an incident in there that Mr. Marvin
19 referred to of a captain of an A Team that had a man killed,
20 and then he fired back over into Cambodia, and ended up
21 court-martialed and put in Leavenworth? Now, Leavenworth,
22 that's something more than the command in general --

23 A. It is the principal military prison.

24 Q. That's what Leavenworth they're referring to there?

25 A. Yes.

HUGH OVERHOLT - RECROSS-EXAMINATION

1 MR. DEAVER: That's all I have then, thank you, sir.

2 RECROSS-EXAMINATION

3 BY MR. OGIBA:

4 Q. General Overholt, I just have one quick follow-up
5 question, in light of your testimony that Colonel Marvin could
6 face a court-martial based on his admissions in the book and
7 otherwise. Have you had a chance to review any other
8 material, aside from the book itself, concerning the
9 allegations made in the book?

10 A. Any other materials? I have -- I read the complaint in
11 this case. And that's pretty much it. Yeah.

12 MR. OGIBA: Okay. Thank you.

13 THE COURT: Thank you, sir.

14 A. Thank you.

15 THE COURT: Ladies and gentlemen, we'll take a break
16 at this time, we'll start at 25 after.

17 (A recess was held at this time.)

18 THE COURT: Anything before we bring the jury in?

19 MR. COLLINS: Judge, we have a stipulation, whenever
20 the judge wants to hear that.

21 THE COURT: I love to hear about stipulations of
22 dismissal.

23 MR. COLLINS: We've agreed to two stipulations; one,
24 that Colonel Marvin is the author of the book.

25 THE COURT: Okay.

1 MR. COLLINS: And two, that Trine Day, LLC, is the
2 publisher of the book.

3 THE COURT: Okay.

4 MR. COLLINS: I don't know how you want to handle
5 that, but figured we'd cut down on our proof time.

6 THE COURT: You can stand up and just announce that
7 to the jury. I'll tell them that y'all stipulated; how does
8 that sound?

9 MR. COLLINS: Seems rather simplistic.

10 MR. BEN DEEVER: Your Honor, then we have one other
11 issue I'd like to bring before the Court, is -- which we're
12 probably going to get to tomorrow -- is Mr. Sirois' testimony,
13 there's two tapes that the defense is moving to move into
14 evidence. I believe one, we don't have an objection to, but
15 the other one is one called The Dog Lab, it's one we have an
16 objection to based on relevancy. And since we're not going to

RAYMOND JOHNSON - DIRECT EXAMINATION

1 THE COURT: Bring the jury in.

2 (Jury present.)

3 THE COURT: Ladies and gentlemen of the jury, I told
4 you at the outset, certain things are evidence, and one of the
5 things I said was evidence was stipulations or agreements by
6 the lawyers. The lawyers have come to two agreements in this
7 case. Number one, that this book was written by Mr. Marvin,
8 Colonel Marvin, and number two, that it was published by Trine
9 Day. So those are stipulations in this case, they don't
10 disagree on that, and so you can accept that as evidence in
11 this case. Okay?

12 MR. COLLINS: Thank you, Your Honor.

13 THE COURT: Next?

14 MR. COLLINS: Call Mr. Raymond Johnson.

15 THE CLERK: State your name for the record.

16 A. Raymond J. Johnson.

17 RAYMOND JOHNSON, a witness called by the plaintiffs, first
18 having been duly sworn, testified as follows:

19 DIRECT EXAMINATION

20 BY MR. COLLINS:

21 Q. Good afternoon, Ray.

22 A. Good afternoon.

23 Q. How are you doing?

24 A. Hanging in there.

25 Q. All right. That's all we can ask this late in the day,

RAYMOND JOHNSON - DIRECT EXAMINATION

1 right?

2 A. Yep.

3 Q. All right. Let's start this off by having the jury learn
4 a little bit about you. Where are you from?

5 A. North Carolina. Franklin, North Carolina. I was born in
6 Worchester, Massachusetts.

7 Q. Worchester, Massachusetts; home of Mr. Bachrach, I
8 believe, right?

9 A. He comes from Lester.

10 Q. Okay. Did you go to high school up in Worcester?

11 A. Yep.

12 Q. And went in the Army after that?

13 A. Yeah. No, I went in the Navy first.

14 Q. All right. What did you do in the Navy?

15 A. I was a clerk.

16 Q. What did you do as a clerk in the Navy?

17 A. I worked in a place where you had to get tags for your car
18 to go in and out of the gate.

19 Q. How long did you stay in the Navy?

20 A. Five years.

21 Q. What did you do when you got out of the Navy?

22 A. I went to work for four months, and I couldn't work for 75
23 cents an hour, so I went back in the service.

24 Q. Did you go back in the Navy?

25 A. No, went in the Army.

RAYMOND JOHNSON - DIRECT EXAMINATION

1 Q. Why didn't you go back in the Navy?

2 A. I didn't like it.

3 Q. Did you find you could make more than 75 cents an hour in
4 the Army?

5 A. Well, paratroopers were getting \$55 extra a month; that
6 helped.

7 Q. All right. So let's talk a little bit about that. What
8 kind of training did you get when you went in the Army?

9 A. I went to Fort Dix, New Jersey, for 16 weeks, for infantry
10 training.

11 Q. Okay. And then what did you do?

12 A. I went through the 82nd Airborne Division, and I went in
13 G-2 section, I stayed there just a couple months, and I went
14 to the 325 infantry battalion. From there, I went to the
15 376th field artillery, and I stayed there until I went
16 overseas, and then I went to Special Forces.

17 Q. Okay. Now, what kind of training did you get when you
18 went into Special Forces?

19 A. Well, all kinds. Light weapons, heavy weapons,
20 demolition, E and E, escape and evasion, map reading, compass
21 reading.

22 Q. Where did they do all this training?

23 A. In the field.

24 Q. In the field? Where?

25 A. 1957.

RAYMOND JOHNSON - DIRECT EXAMINATION

1 Q. Where?

2 A. Fort Bragg, North Carolina.

3 Q. North Carolina?

4 A. Yeah.

5 Q. Okay. Now, did you eventually come to have a specialty?

6 A. A commo. Communications.

7 Q. Now, as a commo, what were your duties and obligations?

8 A. I took messages, sent them out, encrypted them, decrypted
9 them, and that's about it.

10 Q. Okay. Now, after your training at Fort Bragg, did the
11 United States Army decide that they needed you somewhere else
12 in the world?

13 A. Yeah, they needed me in -- first, before I went to Nam,
14 Vietnam, I went to Panama Canal with 8th Special Forces, they
15 just opened up a new camp there in '61. And I was there until
16 '65. When I got out of there in '65, I came back to the
17 States, and then that's when they gave me my orders to go to a
18 good place where it's actually warm, Vietnam.

19 Q. Okay. Where did they send you in Vietnam?

20 A. I went to Saigon -- No. Yeah, I went to Saigon; from
21 Saigon I went to Nha Trang; from Nha Trang I went to Can Tho;
22 from Can Tho I went to A-424.

23 Q. Okay. And A-424 is --

24 A. An Phu.

25 Q. -- An Phu, right?

RAYMOND JOHNSON - DIRECT EXAMINATION

1 A. Yep.

2 Q. Now, when you arrived in An Phu, were the plaintiffs
3 there?

4 A. No. None of them. They came in after me. Strait and
5 Sirois came in after me. The only one that was there that I
6 know of was Sergeant Taylor.

7 Q. How about Mr. Kuchen?

8 A. No, he left -- I got there, I think in April sometime, and
9 he left in March.

10 Q. Okay. How about Colonel Marvin?

11 A. Oh, yeah, he definitely, he was there.

12 Q. He was already there by the time you got there?

13 A. Oh, yeah, he was there.

14 Q. Did you take over for somebody else that was --

15 A. No.

16 Q. -- in communications?

17 A. We had one communications sergeant, and he was just a
18 sergeant, and I was an SFC, sergeant first class.

19 Q. Right.

20 A. And I took over -- well, he stood there, and I took over
21 the -- to be the honcho.

22 Q. I got you. So he stayed there?

23 A. Oh, yeah, he stayed there. I think he left before I did,
24 or something like that.

25 Q. Okay. Now what was his name?

RAYMOND JOHNSON - DIRECT EXAMINATION

1 A. Eleam.

2 Q. Okay. How long were you in An Phu with Colonel Marvin?

3 A. I think about four months or three months, something like
4 that.

5 Q. Okay, when you left was he still there?

6 A. Oh, yeah, he was there.

7 Q. Okay. Now, you've read this, right?

8 A. Oh, yeah. A bunch of -- well, just a bunch of --

9 Q. Okay. How did you find out about the book?

10 A. Captain Marvin sent it to me. I read some of it, and then
11 when I got to my story, my -- I read mine, I got sick of it,
12 and I put it in an envelope and I sent it to Jim Taylor.

13 Q. Okay. Did you have any communication with Colonel Marvin
14 before the book came out?

15 A. Oh, yeah. Yeah. I called him up about twice, I think.

16 Q. Okay. Tell me about those conversations.

17 A. Well, the first one that -- when I went -- when I went
18 back and joined the Special Forces Association -- I got out of
19 it for awhile and then I went back to it. And that's when
20 Marvin, we had just a little booklet, BBTs, blind broadcast
21 transmissions. And he -- they put my name in there, the come
22 back kid of the year, or something like that. And Marvin sent
23 a letter to Jimmy Dean, and Jimmy Dean forwarded it to me, and
24 he had a list in there that -- write down some stuff in there
25 what we did in An Phu and all that other stuff. And I didn't

RAYMOND JOHNSON - DIRECT EXAMINATION

1 want to make it up, so I called him up, and I told him that --
2 he said he was going to put it on a tape; I said put it on a
3 tape.

4 Q. So Colonel Marvin sent you some sort of questionnaire?

5 A. Yeah, there you go.

6 Q. Right? And you didn't want to bother with it?

7 A. No. So I --

8 Q. So you called Colonel Marvin?

9 A. So I called him up and he put it on the tape.

10 Q. Okay. Now, did he eventually call you and tape that
11 conversation?

12 A. No, I called him.

13 Q. You called him?

14 A. Yeah, because I didn't see him since '65.

15 Q. You were in North Carolina at this time?

16 A. No, I had just came from Panama -- Oh, yeah, I was in Fort
17 Bragg.

18 Q. So you called him and he taped the conversation?

19 A. Yeah.

20 Q. So it was your long-distance bill?

21 A. Oh, well, just --

22 Q. All right. We're going to get to the tape in a minute,
23 but first thing I want to do is go over just a couple things
24 in the book --

25 A. Okay.

RAYMOND JOHNSON - DIRECT EXAMINATION

1 Q. -- that mention you. Have you got your copy of the book
2 there? All right. Now, I went through the index and I found
3 13 or 14 mentions of your name in the book.

4 A. Okay.

5 Q. All right? In order to kind of cut to the chase in this
6 thing, I only want to cover three of those with you today.

7 A. Okay.

8 Q. Okay? The first one is I want you to look at page 210.
9 Are you with me, Ray?

10 A. I've got you.

11 Q. All right. Next-to-last paragraph on that page. It
12 reads, "On return to camp I met with Taylor, Johnson, Brown
13 and Sirois, while --"

14 A. You -- Go ahead. I'm sorry.

15 Q. That's all right. "-- while Eleam held down the commo
16 bunker. After bringing them up to date on our meeting at
17 subsector, I asked Jim to request an SLR mission on the latest
18 day they could make the run and get the photos to us by
19 morning of the 17th. 'Shoot for that, Jim,' I emphasized.
20 'You'll have the afternoon to go over the photos with a fine
21 tooth comb and then brief Major Le and me that evening.'"

22 Now, do you know what he's talking about there?

23 A. No.

24 Q. Did you ever have any need while you were in An Phu, to
25 request SLR or other photo recon missions or anything like

RAYMOND JOHNSON - DIRECT EXAMINATION

1 that?

2 A. Never. Never.

3 Q. Okay.

4 A. It was a quiet area. Pacified area. It was nothing going
5 there, it was like an R and R area.

6 Q. Did you ever play horseshoes with the guys?

7 A. Oh, I imagine I did. I can't remember, that's been quite
8 awhile ago, 40 years ago.

9 Q. Okay. Let's go to the next one, on page 244.

10 A. Okay.

11 Q. Now, this is in the chapter Hell's Fury Unleashed at Khanh
12 Bin, which I believe you heard testimony is the fire fight, is
13 that correct?

14 A. Where's that on 244?

15 Q. The part that I want to ask you about is right in the
16 middle of the page. It's a paragraph that starts, I had Ray
17 Johnson --

18 A. Oh, yeah, okay, go ahead.

19 Q. You see that?

20 A. Yeah, I see it.

21 Q. All right. That paragraph goes on to say, "I had Ray
22 Johnson put in an urgent request for helicopter gunships to
23 attack the VC who had settled in near AP III. 'Have the lead
24 ship pick me up to guide them to the target, Ray.' And you
25 respond, 'I'll take care of it, Dai-uy.'"

RAYMOND JOHNSON - DIRECT EXAMINATION

1 Now, do you remember calling in helicopter gunships in
2 the --

3 A. We didn't need no gunships.

4 Q. -- in the battle of Khanh Bin?

5 A. We didn't need no ships down there. The only aircraft we
6 got in there was a helicopter to bring our mail in, or bring
7 somebody in there and take somebody out. But no gunships.

8 Q. Okay. Did you ever see any gunships used when you were in
9 An Phu?

10 A. No. Maybe I did when they flew over.

11 Q. Right, but did you ever have any need to call them in to
12 support ground troops?

13 A. No, never. Never.

14 Q. Okay. All right. Now I want you to look at page 257.

15 Now, what's the title of that chapter? Can you see it there
16 in big black bold print?

17 A. Oh. Oh, yeah, go ahead.

18 Q. Is the title Mission: Assassinate a Prince? You see
19 that?

20 A. Go ahead.

21 Q. All right. First part I want to direct you to is down in
22 the second paragraph of that page, where it says, "The screen
23 door that opened into the operations center and briefing area
24 from our command and communications bunker slammed with a loud
25 noise as Ray Johnson rushed through the building to my office,

RAYMOND JOHNSON - DIRECT EXAMINATION

1 handed me a message and blurted out, 'From the B Team, Dai-uy,
2 it's a hot one.' Short and to the point it read, company man
3 en route to your location. ETA 0900. I glanced at my watch.
4 It was 0820.

5 "'Hot all right, Ray, but not the kind of heat I expected.
6 Wonder what they're up to.'

7 "'Got me, Dai-uy. Didn't you expect a monumental chewing
8 out by Colonel Brewer for telling the Navy to stay out of our
9 area?'"

10 Q. Now, let me ask you something. There's a reference to
11 something called a company man on page 257.

12 A. Yeah.

13 Q. And apparently you have told Dai-uy Marvin that the
14 company man is en route to visit them.

15 A. Yes.

16 Q. That's what this says, isn't that?

17 A. That's what it says in the book.

18 Q. Now, what's a company man?

19 A. The only one that I could think of would be a CIA agent.

20 Q. Okay. Did you ever rush in and tell Colonel Marvin that a
21 CIA man was en route to see him?

22 A. I never seen a CIA agent in camp An Phu in the four months
23 or three months I was there. I never seen one.

24 Q. Can you think of any reason why a CIA man would want to
25 come to An Phu?

RAYMOND JOHNSON - DIRECT EXAMINATION

1 A. No reason at all, I don't believe.

2 Q. Was --

3 A. I never seen one.

4 Q. Was your team involved in any top secret or covert
5 operations?

6 A. Not that I know of.

7 Q. Okay. One more thing, and then we'll put the book down.
8 Page 266.

9 A. Go ahead.

10 Q. Now, keeping in mind that the title of this chapter is
11 Assassinate a Prince, the middle of that page contains a
12 paragraph.

13 A. Yeah. Go ahead, I got it.

14 Q. All right. Follow me along to make sure I read it
15 correctly.

16 A. Go ahead.

17 Q. "At breakfast on the 13th, as Major Le stood up before his
18 assembled Strikers asking for volunteers, I briefed my men on
19 Operation Snuff Crown, and gave copies of the planning paper
20 to Lieutenant Strait, Sergeant Taylor and Sergeant Johnson."

21 Now, let me ask you something, let me stop right there.
22 When Colonel Marvin says he's briefing his men on Operation
23 Snuff Crown, who is he talking about as his men?

24 A. I imagine it's -- well, at that time I wouldn't know,
25 because we didn't have no meeting.

RAYMOND JOHNSON - DIRECT EXAMINATION

1 Q. Well, who was there on the team? Obviously Sergeant
2 Taylor was there, isn't that right?

3 A. Yeah, but they didn't have no meeting.

4 Q. Okay. I'm just trying to get us to the --

5 A. Okay.

6 Q. Okay? Strait was there?

7 A. He -- there was no meeting.

8 Q. Was Strait at the camp?

9 A. I believe so.

10 Q. Okay. Mr. Kuchen? Was he there?

11 A. No, he was gone. He was way gone.

12 Q. Mr. Sirois?

13 A. Yeah, he was there.

14 Q. Okay. You were there?

15 A. You know, I was there, but there was no meeting.

16 Q. Okay. I understand that. All right. Now let's go on a
17 little bit.

18 A. Okay.

19 Q. "Telling them the training must begin on the 14th, I
20 instructed John Strait to meet with Lieutenant Ba as soon as
21 we broke up and get squared away on LLDB cadre support and
22 scheduling. I asked Ray Johnson to get what was needed for a
23 sterile, unquote, operation."

24 Now, what is a sterile operation?

25 A. It's something that you can't identify the person that's

RAYMOND JOHNSON - DIRECT EXAMINATION

1 going in the area. You either give him a Chinese weapon or
2 something like that, or a Russian weapon and go in there. If
3 you're captured --

4 Q. Like we see in the movies?

5 A. Yeah, just like Rambo.

6 Q. Right. Did you ever have this meeting?

7 A. No. No such meeting.

8 Q. Okay.

9 A. No such meeting.

10 Q. So you were never part of a meeting in an attempt to
11 assassinate Prince Sihanouk?

12 A. I didn't know nothing about it. There was no meeting on
13 that. I didn't hear anything on that.

14 Q. So you never heard Colonel Marvin --

15 A. No.

16 Q. -- give the team a briefing on Operation Snuff Crown?

17 A. No. Never heard of that.

18 Q. Did you ever hear of Snuff Crown?

19 A. Yeah, he sent me a book on that, and I sent it to Taylor,
20 after I read about ten pages.

21 Q. Okay. Now, that's all I'm going to ask you about the
22 book. You've identified at least three parts in the book with
23 me --

24 A. Yeah.

25 Q. -- that you indicated to me are untrue.

RAYMOND JOHNSON - DIRECT EXAMINATION

1 A. Right.

2 Q. Is that correct?

3 A. Right.

4 Q. Do you consider yourself to have a good reputation?

5 A. I have a good one, but not now anymore, ever since the
6 book come out.

7 Q. All right. Let's visit that for a minute. How has the
8 publication of this book affected your reputation?

9 A. In money value, it didn't hurt reputation. You can't --
10 for your reputation, there's no money involved that could
11 do -- my reputation was good, my reputation is good now, but
12 when I go to Special Forces meeting, they ask me about that,
13 about the book, if it's true, if it's not true. They -- they
14 want to call you heroes, but you're not a hero, because
15 nothing happened at An Phu. It was a resort area.

16 Q. And do some of your friends kid you about it sometimes?

17 A. They kid me all the time.

18 Q. Okay. And that makes you mad, doesn't it?

19 MR. BACHRACH: Objection, Your Honor.

20 THE COURT: Sustained.

21 MR. COLLINS: All right.

22 BY MR. COLLINS:

23 Q. Now, let's talk about this tape for a second.

24 A. Okay.

25 Q. We have a tape here that I believe is a tape of a

RAYMOND JOHNSON - DIRECT EXAMINATION

1 telephone conversation between yourself and Colonel Marvin.

2 Is that correct?

3 A. Yeah. I believe it's the first one -- I believe I'm the
4 one that called him and he taped it. I told -- he told me he
5 was going to tape it and I told him go ahead, tape it, I
6 didn't care.

7 MR. COLLINS: Any objections to playing the tape from
8 you guys?

9 MR. BACHRACH: What?

10 MR. COLLINS: Any objections to playing the tape?

11 MR. BACHRACH: No, we want it in.

12 BY MR. COLLINS:

13 Q. Mr. Johnson, is your hearing better than Mr. Strait's?

14 A. Yeah, I believe so.

15 Q. If you have problems hearing this, please let me know and
16 I'll see what we can do.

17 MR. COLLINS: Can we play this, Your Honor?

18 THE COURT: Sure.

19 (Audio tape was played.)

20 MR. COLLINS: Judge, we have it digitized on
21 Mr. Ogiba's laptop. We think we have better sound quality.

22 THE COURT: Can't be a worse sound quality.

23 (Audio tape was played.)

24 BY MR. COLLINS:

25 Q. Okay. You remember that tape, right?

RAYMOND JOHNSON - DIRECT EXAMINATION

1 A. Yeah. Sure do.

2 Q. Let me ask you just a couple questions and then I'll turn
3 you over to the other side here.

4 A. Okay.

5 Q. There was some comments that were made by both you and
6 Colonel Marvin in that tape about being under siege. Did you
7 hear those?

8 A. Yeah.

9 Q. Do you ever remember being under siege at An Phu?

10 A. No. No. Never under siege.

11 Q. Okay.

12 A. I told him that.

13 Q. Okay. When you were issued standard equipment at the
14 camp, did you get some sort of vest, protective vest?

15 A. No.

16 Q. You never did?

17 A. No.

18 Q. Because there was -- I seemed to have recalled a reference
19 in the tape to some vest that you guys just didn't wear. Was
20 I mistaken in that?

21 A. Not that I know of. We didn't have no armorproof vest.

22 Q. Okay.

23 A. They didn't come out until after -- hell, I left, they
24 came back out with them when I went back the second time.

25 Q. I gotcha. All right. The last thing I want to ask about,

RAYMOND JOHNSON - DIRECT EXAMINATION

1 it seems like to me that you went to great pains to make sure
2 that Colonel Marvin knew that he was a good commanding
3 officer.

4 A. I thought he was a good team leader. I thought he was a
5 terrific team leader.

6 Q. And he was, wasn't he?

7 A. He was. I liked him. But not when the book came out,
8 when he wrote the book.

9 Q. Um-hum. Let me ask you something. When you made this
10 tape, was it to help Colonel Marvin write a novel?

11 A. I didn't even know --

12 MR. BACHRACH: Objection.

13 A. -- he was going to write a novel. I didn't know he was
14 going to write a book.

15 MR. COLLINS: That's all I have. Thank you,
16 Mr. Johnson. Answer any questions that defense may have.

17 CROSS-EXAMINATION

18 BY MR. BACHRACH:

19 Q. Good the evening, Mr. Johnson, how are you?

20 A. Hanging in there.

21 Q. That's good. I try not to try not take too much of your
22 time. On your direct testimony you discussed sterile weapons.
23 What did you mean by sterile weapons?

24 A. Well, like I said, AR-16, Chinese weapons, something that
25 wouldn't go back to the U.S.

RAYMOND JOHNSON - CROSS-EXAMINATION

1 Q. When were those used?

2 A. Hum? Well, he said that he wanted a sterile operation.

3 Q. How did you know what a sterile operation is?

4 A. Because I just knew what it was; I was a Special Forces.

5 Q. Are sterile operations part of Special Forces?

6 A. No, not that I know of.

7 Q. Well, then how did you relate sterile operations to
8 Special Forces? I asked you how you knew about sterile
9 operations, and you said because of Special Forces.

10 A. Well, yeah, it was Special Forces. It was like if
11 somebody was going to go into Cambodia, like he says we did,
12 he wanted something that if we were killed, wounded or
13 whatever, that when we got caught, it would be no American
14 weapons on you or no American radios or no uniforms, no
15 American uniforms.

16 Q. So you're aware that Special Forces do engage, from time
17 to time, in sterile operations?

18 A. Well, I imagine they did.

19 Q. Because you were aware of what sterile operations meant.

20 A. No. Sterile operation is sterile operations.

21 Q. Correct. And you know that through your service in the
22 Green Berets.

23 A. Yeah.

24 Q. Now, I wanted to draw your attention to the fact that you
25 recall me having a telephone deposition with you when you were

RAYMOND JOHNSON - CROSS-EXAMINATION

1 in the office of --

2 A. Oh, yeah, yeah, I remember that, yeah.

3 Q. Now, do you remember that that day was the first time you
4 had ever seen the complaint filed on your behalf?

5 A. Yep.

6 Q. You had never seen the complaint filed --

7 A. No.

8 Q. -- before?

9 A. No.

10 Q. To whom did you give permission to file the complaint on
11 your behalf?

12 A. I didn't.

13 Q. You didn't give anyone permission?

14 A. No.

15 Q. So the complaint was filed on your behalf without your
16 permission?

17 A. I guess -- I guess so. I just said that.

18 Q. Now, on the tape you heard, and I won't replay it unless
19 you --

20 A. No, no, go ahead.

21 Q. No, no, you recall discussing a mission or a trip into
22 Cambodia.

23 A. Yeah, but I just got in country. I just got there. If
24 they told me I was in Thailand, I would have thought I was in
25 Thailand. Because I didn't know where I was. I never got

RAYMOND JOHNSON - CROSS-EXAMINATION

1 briefed where I was, where Cambodia was or where anything was.

2 Q. But as part of a mission you, Colonel Marvin and some
3 others went into Cambodia?

4 A. No. I said I thought we went in Cambodia; we were still
5 in Vietnam. South Vietnam.

6 Q. It's your testimony that you didn't say on the tape that
7 you went into Cambodia?

8 A. I said that we went into Cambodia on tape, but we didn't
9 go in there. Like I just said, if they told me I was in
10 Thailand or Japan, I would have believed them, because I
11 didn't get no briefing where I was. Or where Cambodia was.

12 Q. At what point did you determine that you weren't -- didn't
13 go to Cambodia?

14 A. When we come back from that little escapade, I found out
15 that we did not go in Cambodia, that we just went on the
16 outskirts.

17 Q. You didn't say that on the tape though.

18 A. I'm saying it now.

19 Q. Well, let's play that portion of the tape so that we're
20 clear on what you said.

21 (Audio tape was played.)

22 Q. Now, that was your discussion on the tape, and nowhere --

23 A. That's right, that's my voice.

24 Q. Okay.

25 A. I said it, and it's got to be true.

RAYMOND JOHNSON - CROSS-EXAMINATION

1 Q. You discussed on the tape a big party with General Quang?

2 A. Yeah.

3 Q. And that was a victory celebration?

4 A. I don't know.

5 Q. You didn't know what was occurring at that point?

6 A. No, I thought it was just a party. A drunk party.

7 Q. But you do recall a victory celebration where General
8 Quang was present.

9 A. I didn't know it was a victory celebration.

10 Q. You do recall a celebration?

11 A. I recall a celebration. I think they were giving medals
12 out to somebody, but I didn't get one.

13 Q. Do you recall who got medals?

14 A. No, I don't remember.

15 Q. Do you recall if any of the plaintiffs got medals?

16 A. No, I -- no, I don't.

17 Q. Now, again directing your attention to the deposition that
18 I took of you by telephone.

19 A. Go ahead.

20 Q. Do you recall me asking you, "Question: And did you speak
21 to Colonel Marvin and ask him not to print that? No.

22 Question: Why not? Because it was a bunch of bullshit.

23 Question: Well, wouldn't that cause you to call someone and
24 said, don't print that, I don't -- Answer: No, I didn't.

25 Listen to me, please, I did not call Colonel Marvin about

RAYMOND JOHNSON - CROSS-EXAMINATION

1 that. Question: Did it bother you enough to call him?

2 Answer: No. Why didn't it bother you? I said it didn't

3 bother you. Question: I know. Why didn't it bother you?

4 Because I thought it was nothing but a bunch of bullshit.

5 Question: Does it bother you today? No, I laugh at it."

6 Do you recall giving that --

7 A. Yeah.

8 Q. -- testimony?

9 A. I recall giving that statement.

10 Q. And so you don't -- the book Expendable Elite, as I
11 understand your testimony, doesn't bother you because it's a
12 bunch of bullshit?

13 A. It's a bunch of bullshit.

14 Q. Excuse my language.

15 A. Excuse mine.

16 Q. I'd like to direct the jury's attention to Exhibit 30 of
17 defendants.

18 MR. BACHRACH: May I approach the witness, Your
19 Honor?

20 THE COURT: Sure.

21 Q. Now, Mr. Johnson, this is a letter that Dan Marvin wrote
22 to you, correct?

23 A. He wrote me that I was sending him The Drop. I was
24 sending him The Drop, but I didn't know that the book was
25 coming out. If I knew the book was coming out and it was

RAYMOND JOHNSON - CROSS-EXAMINATION

1 written this way, I wouldn't have sent him nothing.

2 Q. But at this point -- could you read -- Is this your
3 writing?

4 A. Yeah, I said that's my writing, I remember it. "Dan,
5 check page three. I have it underlined. Please don't say
6 anything to SF, Special Forces, about me sending you the BTB
7 and The Drop."

8 Q. So you didn't want him to let anyone know that you had
9 sent him that?

10 A. Yeah, because I didn't know the book was coming out. But
11 after I sent it to him and the book come out, I told Special
12 Forces about me sending him The Drop. The Drop is a magazine
13 that comes out every three months, and it gives information on
14 all the Special Forces Association all over the U.S., and even
15 in Thailand, Korea, Afghanistan. They just got one in
16 Afghanistan, I understand, from The Drop. But if I knew this
17 book was coming out, the way it's written right here, I
18 wouldn't have sent him nothing.

19 Q. But before the book came out, you sent him that, and you
20 didn't want him to tell the Special Forces?

21 A. Right, I didn't want him telling the Special Forces.

22 Q. Because you didn't want the Special Forces to know you
23 were communicating with Colonel Marvin.

24 A. Right. Because I knew he was thrown out of Special Forces
25 for doing something -- Never mind.

RAYMOND JOHNSON - CROSS-EXAMINATION

1 Q. Well -- Now, did you discuss the book at all with Jimmy
2 Dean?

3 A. No.

4 Q. Did you discuss the book with anyone at Special Forces?

5 A. Except Sergeant Taylor. We talked on the phone about that
6 book, and I told him it was a -- all a bunch of lies about me.

7 Q. Did you tell anyone else from Special Forces it was a
8 bunch of lies?

9 A. Not that I know of. If I did, I can't remember.

10 Q. Do you recall, in or about June 2nd of 2003, writing to
11 Captain -- Colonel Marvin, after you received the book?

12 A. I can't remember if I wrote him a letter or not.

13 Q. Do you recognize this document?

14 A. Yeah. I remember it.

15 Q. Is that a letter you wrote to Colonel Marvin?

16 A. I believe so. If it says to Colonel Marvin, it's Colonel
17 Marvin.

18 MR. BACHRACH: I'd like to introduce this into
19 evidence with the little -- have to redact the top because
20 there's some handwriting.

21 MR. COLLINS: Could we have a minute just to read it.
22 It hasn't been introduced into evidence, as far as I know,
23 it's not in the books that we've already agreed on.

24 MR. BACHRACH: Right.

25 THE COURT: Mark it for identification right now,

RAYMOND JOHNSON - CROSS-EXAMINATION

1 since we have to number it sooner or later anyway.

2 MR. COLLINS: Judge, may we approach, please?

3 (Discussion held off the record at side bar.)

4 BY MR. BACHRACH:

5 Q. Do you recall sending a letter to Colonel Marvin after
6 having read the book?

7 A. It's right there.

8 Q. Do you recall ever telling Colonel Marvin in a letter that
9 you gave the book to your brother?

10 A. Yeah. You know what he did with it, don't you? He sent
11 it back to me. He said it's a bunch of bull.

12 Q. Your brother said it was a bunch of bull?

13 A. Yeah.

14 Q. And you also asked -- ordered a book for your daughter, or
15 sister? If I recall in the letter.

16 A. Not that I know of. What would my sister want with it?

17 Q. Well, do you recall ordering a book?

18 A. No, I don't. If it's in the letter, I did then.

19 Q. And you paid \$35 for it, and asked that it be sent the
20 cheapest way possible?

21 A. I don't know. I may have. If it's in the letter, it's in
22 the letter. I must have said it then.

23 Q. Do you recall saying in the letter that the book was a
24 good read?

25 A. Yeah, I remember that, I said it right off the start.

RAYMOND JOHNSON - CROSS-EXAMINATION

1 Q. On page -- I just want to direct your attention, you have
2 been sitting here through the trial and you've heard the
3 testimony about that part of the book where the camp at A-24,
4 Colonel Marvin got orders to move in June of -- mid June of
5 1966 to go to B Team, correct?

6 A. That's been over 40 years ago.

7 Q. Well, let me show you page 276 and 277.

8 A. Okay.

9 Q. Now, in the middle of 277 it discusses, "Our meeting was
10 interrupted at approximately 1000 hours on the 17th as Marvin
11 Woolley rushed in and handed me a message saying, 'This looks
12 real important, Dai-uy, so I brought it to you right away.'

13 "I read it aloud. Secret. To Marvin. Urgent. Group HQS
14 received priority message from LLDB. Ky has withdrawn amnesty
15 from CIDG of An Phu. All will go before military tribunal
16 after conversion to regional forces. Do nothing until
17 advised. Sergeant Tuttle."

18 Do you see that? You saw me --

19 A. Yeah. Sergeant Tuttle?

20 Q. Signed. I'm sorry, signed, Tuttle. Now, you weren't in
21 An Phu at that time, correct? Because if I draw your
22 attention --

23 A. I don't believe so. I got it right here. I don't believe
24 so.

25 Q. Correct. You had received -- you had gotten a leave to go

RAYMOND JOHNSON - CROSS-EXAMINATION

1 to Saigon.

2 A. I don't know if it was Saigon. I went on a chow run.

3 Q. So you weren't there during the time period that you've
4 heard discussed with the -- Colonel Marvin received messages,
5 and there was -- the plaintiffs are claiming that there was a
6 mutiny -- they're being accused of mutiny?

7 A. No, I never heard of it.

8 Q. So you aren't being accused of mutiny in the book?

9 A. Well, if I was in the A Team and I was assigned to the A
10 Team, then I committed mutiny even though I was in South -- in
11 Saigon.

12 Q. Well, you weren't aware of the orders to return -- to go
13 to B Team, were you, because you weren't in the camp at the
14 time?

15 A. No, that's true.

16 Q. So you couldn't have been in violation of an order,
17 because you weren't present.

18 A. That's true.

19 MR. BACHRACH: I have no further questions, Your
20 Honor.

21 MR. COLLINS: Two questions.

22 REDIRECT EXAMINATION

23 BY MR. COLLINS:

24 Q. Mr. Johnson.

25 A. Yes.

RAYMOND JOHNSON - REDIRECT EXAMINATION

1 Q. You remember this group, you're a member of this group of
2 plaintiffs that filed suit against Colonel Marvin?

3 A. Right.

4 MR. COLLINS: Make that one question.

5 THE COURT: Anything else?

6 MR. BACHRACH: Nothing, Your Honor.

7 THE COURT: Ladies and gentlemen of the jury, time to
8 go home. See y'all at 9:30 in the morning. Don't discuss the
9 case with each other or allow anyone to discuss it with you.
10 See you tomorrow.

11

12 (Court adjourned at 5:56 p.m.)

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REPORTER'S CERTIFICATION

I, Debra L. Potocki, RMR, RDR, CRR, Official Court
Reporter for the United States District Court for the District
of South Carolina, hereby certify that the foregoing is a true
and correct transcript of the stenographically recorded above
proceedings.

S/Debra L. Potocki

Debra L. Potocki, RMR, RDR, CRR