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ORAL ARGUMENT
AGENT ORANGE APPEAL
June 18, 2007,

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New York, New York 10001
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Proceedings

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2 SPEAKER: Please be seated. Good
3 morning.

4 By my rough count this court has been
5 dealing with agent orange cases for 27 years.

6 This being the latest if not the last
7 installment. We did something which at least in

8 my experience is unusual, and that is that we
9 have set aside an entire day to hear these two

10 cases, two cases, I'm sorry, two sets of appeals.

11 They are in fact I guess 17 appeals, but in

12 coming to the argument and as you may know it's
13 pretty much a tradition for us not to sit down

14 and discuss these cases ahead of time, but it

15 seems to me that there are three principal issues
16 that we'll be discussing, I don't mean to suggest

17 there are more, with 16 or 17 appellates there

18 are of course more, one is the removability

19 question, one is the government contractor

20 defense, which we'll deal with this morning, and

21 the other one is essentially a -- whether we -- a
22 jurisdictional question, the question as to

23 whether we have the power to decide on the

24 merits, the assertions or whether the District

25 Court does the assertions under the Alien and

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2 Torts Claim Act and various other legal issues
3 associated with it.

4 By --

5 SPEAKER: Just to clarify, 20 years
6 ago we heard argument for two days.

7 SPEAKER: Two days, oh, really,
8 well, 20 years ago I was making more money than I
9 am now, I remember it well.

10 So in any event, we will begin
11 argument with the cases in the order in which
12 they're listed in the day calendar, beginning
13 with the (inaudible) and the associated cases
14 versus Dow Chemical Company.

15 I understand we have four separate
16 arguments that will be heard on behalf of the
17 appellants, and each one will -- wrong, two of
18 you will have reserved a total of 25 minutes of
19 rebuttal time and a total therefore of an hour,
20 and Mr. Frye and Mr. Rawfeld have the hour to
21 themselves.

22 Please.

23 SPEAKER: May it please the court,
24 the government contractor defense applies to
25 protect the innocent contractors to comply with

1 Proceedings

2 the government specifications, and it is closed
3 to the government any injurious or hazardous
4 properties of their product.

5 The government contract defense has
6 absolutely no application in the agent orange
7 case.

8 SPEAKER: Would you tell me if
9 perhaps again who you are, since there are a few
10 of you.

11 SPEAKER: I'm James (inaudible) and
12 I'm on behalf of --

13 SPEAKER: Please go.

14 SPEAKER: Thank you, Your Honor.

15 I read from the statement of Julius
16 Johnson, vice-president and director of research,
17 the Dow Chemical Company, accompanied by Ecto
18 Blair, the director of Dow agricultural chemical
19 research, V Kay Brows director of the Dow
20 toxicological laboratory and George Lynn director
21 of the government regulatory relations of the Dow
22 Chemical Company given before Senator Heart, in a
23 committee investigation conducted in April of
24 1970. This testimony occurs in Congressional
25 record, it also appears in the record of this

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court.

Dr. Johnson said, since 1950 we have been keenly aware of the possibility of a highly toxic impurity being formed in 2,4,5 trichlorophenol is the side result and the condition of elevated processing temperatures.

We also knew --

SPEAKER: What is the date on that?

SPEAKER: The date of this is April 15, 1970.

To put this into a context, on that very day, the United States made the further recent sale and production of 2,4,5-T illegal in this country, and it has been illegal in this country ever since because of the dioxin contamination and the committee was investigating Dow's -- Dow came forward as a witness to present this statement of the company's position. Dow said by May of 1965 we had the technology to establish a manufacturing specification of zero dioxin in 2,4,5 trichlorophenol. In addition, they said, we called a meeting which we held in March of 1965 to notify the other manufacturers of the 2,4,5 trichlorophenol of the difficulties

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encountered.

We described to you then the
nature of --

SPEAKER: Is that a reference to the
Boehringer or Boehringer process?

SPEAKER: He asked him about that,
Senator Heart said didn't you know all the way
back as long ago as 1950 and they acknowledge
that they did since 1950 we have been keenly
aware.

SPEAKER: But the Court's specific
question is is that a specific reference to the
Boehringer process?

SPEAKER: No, no, this is Dow.

SPEAKER: I am -- well, okay, I know
that.

No, I understand that, but the
Boehringer process is a particular process that
was being used by a German manufacturer at the
time. I know Boehringer is not a defendant here.

SPEAKER: What happened was in 1964,
Dow had 70 employees fell ill as a result of
exposure to the -- in the production of --

SPEAKER: That was a different kind

1 Proceedings

2 of -- a different kind of disease, chloracne,
3 they're all familiar with that.

4 SPEAKER: Chloracne is a systemic
5 disease, it affected the liver it caused
6 lethargy, rendered them totally incapacitated.

7 SPEAKER: That is what they were
8 aware of at that time.

9 SPEAKER: They were aware of at that
10 time, they were aware of it, they told the
11 other manufacturers --

12 SPEAKER: Was the government not
13 aware of it?

14 SPEAKER: The government was not
15 aware of it, your Honors, the government bought
16 the Agent Orange, bought 2,4,5-T in good faith
17 believing that there had never been an industrial
18 accident involving any injury to any workman,
19 that millions of gallons of this product had been
20 used in the United States without causing any ill
21 effect, and they bought it completely in good
22 faith, and innocent of knowledge of that include
23 the report in 1969 in front of this Court that
24 Agent Orange is safe.

25 SPEAKER: Let me continuing asking.

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I'm sure you would --

SPEAKER: Yes, sure.

SPEAKER: Is it your position that -- that Dow was capable -- I'm not clear, is it your position that Dow was capable of making Agent Orange without dioxin?

SPEAKER: That is absolutely correct. We have established a specification of (inaudible) dioxin, they say in April of 1965 to themselves, they say this will make life difficult for us, but we have on hand adequate and analytical and toxicological data to make certain we must follow this specification, in order to avoid presenting a serious health hazard to the public.

SPEAKER: Well, if that is so, why didn't in 1970 did they outlaw it? If it's possible to makes it without dioxin, why did they outlaw it? You'll get your chance.

SPEAKER: They did because they had not complied with their own zero, nil specification, they had on hand the government -- in 1970 when this committee investigation occurred, they had over 2 million gallons of

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2 contaminated dioxin, contaminated Agent Orange,
3 which we had to burn at sea at great tax payer
4 expense.

5 SPEAKER: Okay, thank you.

6 SPEAKER: Senator Heart --

7 SPEAKER: That is it, thank you.

8 Thank you. Your time is well up and your
9 colleague seems eager.

10 SPEAKER: I just walked through my
11 next counsel's time, there is three minutes left,
12 he'll go after me, actually that was supposed to
13 be two minutes, there is two other issues before
14 the Court besides the government contractor
15 issue and --

16 SPEAKER: You're Mr. Brownson?

17 SPEAKER: This is (inaudible).

18 Skip Mr. Brownson because of that --
19 his time was just spent.

20 SPEAKER: It's our time, it's not
21 your time.

22 SPEAKER: If he can still have his
23 three minutes --

24 SPEAKER: Yes, certainly, please.

25 SPEAKER: If it please the court, my

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2 name is Mark Brownson, I'm here on behalf of
3 plaintiff's Bower and Walker and I was going to
4 argue to you and present to you why Bower and
5 Walker have not been treated fairly or justly in
6 the District Court, but that is in our briefs,
7 and I think in light of the questions that the
8 Court has presented, I would like to give my
9 three minutes to Mr. Smoker.

10 SPEAKER: Thank you, Your Honor.
11 Well, I didn't know he was going to do that.

12 SPEAKER: Make it 30 minutes.

13 SPEAKER: Yes.

14 SPEAKER: He's got 33.

15 SPEAKER: Go ahead.

16 SPEAKER: Thank you.

17 First of all, there is two other
18 issues that I just want to say quickly, but
19 they're subsidiary issues, the first issue is a
20 question of the fact that Stevensons couldn't
21 amend their complaint, it was denied on the basis
22 of no reasonable -- there was no reasonable basis
23 that the government contractor defense could
24 never not be applied, so Stevenson only has two
25 defendants, Dow and Monsanto, who has filed pro

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2 se and there was an attempt to amend it as soon
3 as he got to the Supreme Court to add the other
4 defendants, Judge Weinstein denied that.

5 So we -- so we're taking that out,
6 the second one was request for discovery, there
7 has been substantial litigation that took place
8 throughout the United States, there was at the
9 Long Shore on American History there was Cannor,
10 there were 400 depositions, there is thousands of
11 pages of documents in Monsanto, every one of
12 these manufacturers has been sued by Wilkers and
13 people around the facilities, massive depositions
14 have been taken, there has been a lot of --
15 (inaudible) been taken, Judge Weinstein -- and
16 the U.S. Government is involved in the circuit of
17 litigation against all the manufacturers. Judge
18 Weinstein denied us to get any discovery outside
19 of the discovery that was in MDL-381 with the
20 exception of an artificial limit of six
21 depositions taken in one of the circle
22 litigations, and he said -- I said there is more,
23 he said you have to pick which six you want.

24 And that was -- also went to trial
25 and we were denied the trial transcript, and we

1 Proceedings

2 were denied all transcripts, and the discovery
3 was only requesting actual depositions taken,
4 documents produced in transcripts, it wasn't new
5 discovery, it was just one request to produce
6 that was all denied.

7 Now let me get to a general comment.
8 The government, the manufacturers would have to
9 believe -- would have us believe --

10 SPEAKER: Before you do that, can
11 you tell me, there is an issue of removal as well
12 as the government contractor defense, you're
13 going to deal with both of those?

14 SPEAKER: Yes, I am.

15 SPEAKER: And in which order do you
16 plan to --

17 SPEAKER: I'm going to integrate
18 them both because it's actual discussions that
19 cover, I'm going to try to do both otherwise I
20 would be backtracking myself.

21 SPEAKER: Okay.

22 SPEAKER: Plaintiffs of course
23 refused to spend the time and effort necessary to
24 bring this case to this Court's attention or any
25 Court's attention, and they portrayed the United

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2 States government as a callous heartless
3 enterprise willing to expose its own soldiers and
4 innocent civilians to toxic chemicals, nothing
5 can be further from the truth. The United States
6 government was always interested in protecting
7 both its soldiers and the civilians. We might
8 have been at war, but there is a large civilian
9 population, remember that we were Allies and
10 there was always an interest.

11 Judge Pratt in the first case denied
12 summary judgments to Dow and TH Agriculture.
13 Judge Weinstein then reaffirmed those denials,
14 went to trial against all defendants on May 1st.
15 So the initial decisions even under the old
16 standard was to go forward, it was only the
17 opt-out that we were -- when the opt-out came
18 about, it was only the opt-out that were
19 dismissed on summary judgment when this case --
20 and now look at Judge Weinstein's standard, one,
21 his standard at the time was that they merely
22 establish specifications, not that they
23 knew (inaudible) but just any specification and
24 the second is the government knowledge
25 requirement, it was the government who were

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2 recently -- should have known, so you say what
3 should the government have known? If -- and if
4 not known would the government have taken steps
5 to change it? That was the standard that the
6 court used at the time. Furthest is from Boyle.
7 Now this court then takes up two -- it has two
8 opinions and one of the opinions as always quoted
9 it's a final and impossible hurdle, that is not
10 the opinion but actually was the opt-out opinion
11 on summary judgement.

12 The opt-out opinion on summary
13 judgment based on the government contractor
14 defense, and I'm going to quote from the that
15 opinion says, "Our consideration of the
16 government contractor case has been greatly
17 impaired by the inexplicable and unjustifiable
18 failure of the opt-out counsels to brief the
19 issue." We are left in ignorance of appellant's
20 view of the legal contours of the defense, they
21 didn't brief it, they didn't discuss it, and so
22 the -- what was -- the documentation was entirely
23 as the defendants put it, all the briefings are
24 one-sided. So, you know, and then they said,
25 look what the government has done, it's only --

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2 it only admits to chloracne and PCT. Well later,
3 as of now, the United States government, the
4 Department of Veterans Affairs has given
5 compensation for numeral different chemical --
6 different conditions such as sarcoma,
7 Non-Hodgkins lymphoma, Hodgkins disease, chronic
8 lymphocytic leukemia are all compensated,
9 multiple myeloma --

10 SPEAKER: But we're not talking
11 about causation here.

12 SPEAKER: I'm not. I'm only
13 referring to that in the context of when the
14 basis for the opinion was the U.S. Government
15 wasn't recognizing diseases in that opinion, but
16 I agree, I'm not going to bring up causation
17 again.

18 Then this Court hears (inaudible) in
19 the IV case which is post-Boyle, the Court says
20 the scope of the government contractor defense
21 has been somewhat limited by Boyle. And I think
22 the quote, the Grisco case, and the availability
23 of the government contractor defense may not be a
24 forgone conclusion. Now we go to Winters in the
25 fifth circuit. What happens in Winters? Winters

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2 has again no independent records from the
3 plaintiff.

4 The plaintiff thought that they would
5 assert (inaudible) stopple (inaudible) just on
6 why because it was only a removal question, they
7 thought they would adopt Weinstein's, Judge
8 Weinstein's finding, so they put in no record.

9 In fact they couldn't get a record because at
10 that time Judge Weinstein had put the MDL record
11 into the national archives, so they only cite --
12 if you look to the briefings, the plaintiffs only
13 cite to the documents the defendants put in and
14 that is all that is before the Court so it an
15 entirely one-sided record. And they rely without
16 explanation in that record, they quote that there
17 has been a post-Boyle decision that has
18 determined the government contractor defense, but
19 the decision they pose is the IV case, where this
20 court said it was a forgone conclusion and the
21 government contractor defense wasn't even an
22 issue in IV, IV was an issue -- an issue of the
23 settlement and the second issue of IV was
24 the Lowitz act, and it wasn't briefed in IV. So
25 then you get to Miller, now Newark, in Miller it

1 Proceedings

2 says, which also in the fifth circuit it says,
3 quote, the plaintiffs do not dispute the factual
4 record without knowledge, again, the same
5 attorney who is the same attorney that handled
6 (inaudible) and IV put in no record, except this
7 time he put in one affidavit from (inaudible)
8 saying I didn't know about dioxin, that is it.

9 So again, the entire record, every
10 time has come up to every court of appeals has
11 been one-sided, there is nothing that is
12 presented.

13 SPEAKER: That is fine, but why did
14 you start arguing it on this record rather than
15 the record that wasn't before the other Courts?

16 SPEAKER: I felt compelled to do
17 this because courts keep on mentioning this in
18 context and I'll get to this record now.

19 And now you get to the Isaacson case,
20 judge Weinstein in Isaacson only quotes Diamond's
21 record, and he says, I'm going to quote one
22 defendant, and that will cover everybody.

23 On February 6th, which was our due
24 date to get our first set of materials in before
25 -- because he issued summary judgment, and then

1 Proceedings

2 he stated (inaudible) so our first due date we'll
3 start Friday night, February 6th, we put in
4 massive numbers of thousands of pages of
5 documents, deposition exhibits, only added three
6 -- we put in three experts affidavits. On
7 February 9th, Monday morning, at 8:00 a.m., four
8 decisions come down, not one of those decisions
9 mention any evidence or any affidavits that we
10 put into the record.

11 Now, the --

12 SPEAKER: And the affidavits you
13 contend demonstrate that the government didn't
14 have knowledge?

15 SPEAKER: The affidavits, it is hard
16 to say the government didn't have knowledge, the
17 affidavit said that the defendants had
18 substantially more knowledge than the government
19 ever had. The government --

20 SPEAKER: Is that the test?

21 SPEAKER: Hmm?

22 SPEAKER: Is that the test?

23 SPEAKER: Yes.

24 SPEAKER: That the defendants had
25 substantially more knowledge than the government?

1 Proceedings

2 If the government has 40 percent knowledge, and
3 the defendants have 60 percent, which I would
4 consider substantially more by a factor of 50
5 percent --

6 SPEAKER: That is sufficient. The
7 government has to --

8 SPEAKER: That is sufficient to
9 obviate the government contractor defense?

10 SPEAKER: The defendant have to make
11 the government aware of all of the information
12 known to the defendants if not known to the
13 government.

14 SPEAKER: Unless they already had
15 that information.

16 SPEAKER: But the defendants have to
17 know that they have the information. Here nobody
18 from the defendants inquires as to what the
19 government knew. So it is -- you go encircling
20 itself, they have to know in the first place to
21 know that the government had the information.

22 SPEAKER: Didn't you have a lot of
23 evidence in the record about the government
24 laboratories messing around with this stuff for
25 many, many years, even before the manufacturer,

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2 and the government being fully aware that at
3 least of the toxicity under certain conditions of
4 this Agent Orange?

5 SPEAKER: The -- the government was
6 not aware of the toxicity. Let me go through
7 what the government knew, I'm going to skip to
8 that, and -- since that is your question, the --
9 there is not a single person in the United States
10 government that knew that dioxin was created in
11 the manufacturing process and that it's
12 contaminated in the final particle release and
13 the 2,4,5-T with dioxin contamination went to
14 Vietnam, not a single person, there is no
15 document that says that, and there is no
16 testimony that says either of those three things.

17 SPEAKER: That is certainly the
18 finding of the District Court, though. The
19 District Court --

20 SPEAKER: The District Court ignored
21 everything we put in --

22 SPEAKER: No, what I'm saying is the
23 District Court in the (inaudible) recited how it
24 believed that the government had this knowledge.

25 SPEAKER: I think if the District

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2 Court wants to ignore all the evidence and all
3 the affidavits, that is what the District Court
4 can find. But you won't see a mentioned of
5 anything we put in. Let me just go specifically,
6 the crops division of Edgewood is the division
7 that actually decided which chemicals to use,
8 which herbicides to use, they were part of ARPA,
9 ARPA is in the District Court decision, that's
10 the Advanced Research Project Agency, so those
11 two made the choices.

12 The crops division at Fort Dietrich
13 was headed by Doctor Minarik, he testified that
14 he didn't know about dioxin until a March 7th
15 meeting with Dow, Doctor Dow, his assistant said
16 he didn't know about dioxin until 1970.

17 Doctor Minarik and Dow together wrote
18 a report in 1968, and this is the ones that
19 select Agent Orange, selected all the chemicals
20 the 2,4,5-T, there is Agent Purple, Green and
21 Pink. Minarik said toxicity of herbicide in
22 South Vietnam, on page eight 289 of our appendix,
23 personnel involved in manufacturing of these
24 herbicides have been singularly free from ill
25 effects attributable to these herbicides.

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2 Absolutely not true, we knew in every factory had
3 a problem, but the manufacturer said our workers
4 are fine, that is what Minarik and (inaudible)
5 thought.

6 Now ARPA goes on a mission, five
7 people, it's all in the decisions, they go on a
8 admission. And they said let's look at -- let's
9 look at South Vietnam and see what (inaudible).

10 Well General Belmar heads that mission, he
11 testified that he didn't learn about dioxin until
12 reading about it in the papers in the '70s,
13 General Minarik 1970, Doctor Shaw of the USDA
14 didn't know until late 1969, Doctor Witham, he
15 never heard of dioxin at the time of his
16 deposition, Doctor James -- Doctor Bertram who is
17 the fifth member of the commission, he didn't
18 know about it until after the (inaudible) report
19 in about November 1969. Then James Gardener who
20 worked -- who is the deputy director of defense
21 research and engineering, he found out about
22 dioxin in the popular president in the 1970s and
23 he reported back to Howard Brown and Doctor
24 Howard Brown, the Under Secretary For Defense and
25 Research and Engineering, in his deposition

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testified that he learned about it sometime --

SPEAKER: Is all of this --

SPEAKER: -- in 1969.

SPEAKER: Just as matter of
curiosity I read it, but is all of this in your
brief?

SPEAKER: Yes.

SPEAKER: Fine.

SPEAKER: I think it's important to
put this in context, now you take -- they take
these 2,4,5-T, they take it then --

SPEAKER: They is who?

SPEAKER: This is, this is this
group.

SPEAKER: The defendants.

SPEAKER: And ARPA.

SPEAKER: And ARPA. So ARPA, we're
going to go and give it to the specification
writers, the six specification writers were
headed by Anthony San Quitico.

San Quitico testifies, and he is the
chief of the department of -- of defense
division, he's the head of the specifications,
that he never heard of chloracne, worker problems

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2 or dioxin until he reads it in the news. Now he
3 is the one that headed the group that wrote the
4 specifications with the defendants.

5 Now we think the defendants actually
6 wrote them and there was -- the specifications,
7 he didn't know about dioxin, he didn't about the
8 industrial accidents, he didn't know about -- he
9 didn't know about chloracne.

10 SPEAKER: Now you're talking about
11 removability and the defense itself, correct?

12 SPEAKER: Yes.

13 SPEAKER: Let me focus you on
14 removability, let's say everything you say is
15 true, which might lead one in our position to
16 think, okay, there are disputed issues of
17 material fact that need a fact finder to address
18 and resolve, does that obviate, however, removal
19 jurisdiction?

20 SPEAKER: In part of the stronger
21 arguments I'm going to get to on removability, in
22 part there is a lack of knowledge, and there has
23 to be some knowledge on the causation problem,
24 because the defendant --

25 SPEAKER: If it is a disputed issue,

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2 if it is a disputed issue of fact where the
3 defendants have at least some contention based on
4 fact, which I'm sure they're going to point me
5 to, point us to, isn't that sufficient for
6 jurisdiction for the District Court and
7 ultimately for us to have jurisdiction over this
8 case?

9 SPEAKER: I don't think so.

10 SPEAKER: Tell me the law that you
11 rely on to essentially defeat the proposition I
12 just gave you.

13 SPEAKER: I am going to get into
14 some of the facts.

15 SPEAKER: Let's do it.

16 SPEAKER: There is, first of all,
17 there is multiple problems that you have to --
18 one I don't think that the government contractor
19 is a defense that allows removability, it has to
20 be an immunity defense.

21 SPEAKER: It has to be?

22 SPEAKER: It has to be an immunity
23 defense. Every Supreme Court case that take it
24 up has described it as an immunity defense,
25 because the primary protected person is the U.S.

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2 Government -- is the government officer and any
3 member acting under that officer.

4 SPEAKER: Is your basis for that
5 then or one of the basis for the argument you
6 just gave that a corporation isn't a person?

7 SPEAKER: Well, no, I mean that is
8 an argument that I raise, but it is not an
9 argument -- raised in the papers, and I'm going
10 to -- it has to be two things, it has to be
11 acting under that officer and acting under color
12 of law, courts often merge those two, and they
13 shouldn't, acting under that officer shows it, as
14 a Supreme Court recently said in Watson, has
15 guided -- is under the supervision and control,
16 now manufacturing of dioxin and in manufacturing
17 of these chemicals, they were never under the
18 supervision and control of the defendants.

19 Our --

20 SPEAKER: The specifications were
21 set?

22 SPEAKER: Specifications were
23 routine and I can go into that. With the
24 specification, not a single manufacturer had to
25 change the regular specification to produce

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2 dioxin, there is quotes from -- I can quote
3 Haldman, Abdell, he said he didn't have to change
4 the specifications he used dioxins also Monsanto
5 said he didn't have to change any specification,
6 so --

7 SPEAKER: So this is your
8 off-the-shelf argument? It's off the shelf and
9 therefore --

10 SPEAKER: That's part, they merge
11 into the off the shelf argument, and then
12 finally, which was mentioned before, which is the
13 Boehringer, which is the manufacturing defect and
14 both the government contractor defense has never
15 been held in the circuit to relate to a
16 manufacturing defect, they had the pure ability
17 to do -- to manufacture this in a way that dioxin
18 would not be produced or -- and certainly
19 produced at much lower levels. The decision --

20 SPEAKER: Which one? Which one?
21 I'm interested in the Boehringer process.

22 SPEAKER: The Boehringer process
23 will -- will get it down to non-detectable levels
24 by any method of detection at that time.

25 SPEAKER: At that time?

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2 SPEAKER: Yes.

3 SPEAKER: But does that mean that if
4 it was produced pursuant to the Boehringer
5 process irrespective of what happened afterwards
6 you wouldn't be here, there would be no
7 liability? If they had done -- used the best
8 science to create the lowest dioxin?

9 SPEAKER: If they used the best
10 science, there would be substantially less
11 possibility that anyone would be here because
12 they wouldn't be sick.

13 SPEAKER: Well, supposing the same
14 people were sick, but it came from --

15 SPEAKER: The question --

16 SPEAKER: The question is whether
17 you're saying that liability here in some sense
18 hinges on the fact that they had better science,
19 they had a Boehringer product and they could have
20 reduced it or doesn't that --

21 SPEAKER: Let me compare that to an
22 asbestos situation, if you massively exposed this
23 room in clouds of asbestos, you're dangerously
24 exposing the population -- everybody in this room
25 to asbestos, you know that if there is one

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2 particle of asbestos, that could cause
3 mesothelioma, but what you have done as well as
4 you can to eliminate the risk --

5 SPEAKER: So your point is it might
6 not have eliminated it, but it would have been
7 the best possible weigh?

8 SPEAKER: Yes.

9 SPEAKER: Did Dow ever use that
10 process?

11 SPEAKER: Dow -- we don't have -- we
12 never got discovery past '66. Before 1966, Dow
13 used the worst process in the history of any --

14 SPEAKER: But as far as you know, it
15 never used the Boehringer process or one like it?

16 SPEAKER: They used -- they had some
17 arrangement after '66, where they changed, but
18 it's proprietary, as all the manufacturing
19 processes were, they were all proprietary.

20 So they never released, they never --
21 they testified (audible) process to anybody, but
22 if you go before 1996, 1965 and before, Dow was
23 manufacturing between 212 and 225 degrees at 40
24 minutes and producing 1 percent TCCD, the Agent
25 Purple -- the Agent Purple that Dow sold to the

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2 government was the most toxic chemical that was
3 ever made.

4 SPEAKER: Do you know what the
5 Boehringer process came to the attention?

6 SPEAKER: 1955 or 1957 to the
7 manufacturers, so they all had plenty of time
8 while they're using domestic production before
9 the government ever bought it to change them.

10 SPEAKER: Do you know what I'm
11 referring to when I talk about Justice Scalia's
12 air conditioner?

13 SPEAKER: Yes.

14 SPEAKER: That is where he says you
15 can have specifications for an air conditioner
16 that is made according to those specifications,
17 but if they're not inconsistent with safety
18 features then you're responsible under State law
19 for whether those safety features do or do not go
20 into your product, right?

21 SPEAKER: I absolutely agree with
22 that. And that's --

23 SPEAKER: Is it your position that
24 this is that case?

25 SPEAKER: Yes. The government only

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-- see the government never asked -- there is no specification that ever uses the word dioxin, not ever.

SPEAKER: Of course not, it was a trace element that turned out to be terribly toxic, you wouldn't say, oh, and while you're making this, please include some arsonic because it would be nice to have it, I mean it doesn't happen.

SPEAKER: If you knew about it, which they didn't, which (inaudible) didn't, and I will get to the end of that too, then you will say limit it or let's test for it to a certain level.

Now the specifications --

SPEAKER: I mean you might be expected to say no dioxin.

SPEAKER: And you probably use it, and the effort would have been to not have it at all if they know about it. And there would be the specifications that they allow of 2 percent contamination, 2 percent dioxin can kill everybody in this room if you allowed it, if you really said the specification allows dioxin that

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would be 20,000 parts per million.

SPEAKER: The specification probably allowed arsonic, it didn't say no arsonic, did it?

SPEAKER: That is exactly the case.

SPEAKER: What is the case?

SPEAKER: The specification, it's basically looking for a pure -- for a product because they wanted to get what they paid for. It never went to impurities.

SPEAKER: That's right. That is the government's fault, that is not the producer.

SPEAKER: If the government didn't know about it, if -- the Air Force took the specifications in 1964, (inaudible_ who is the head of the air force command doesn't know about it until 1970 about dioxin's existence, Crawford, the other person doesn't know about it until 1970 either. They relied on the manufacturers to get the specifications. Now the Air Force did not have the technology to test impurities, there were 23 different impurities as the quote state, the Air Force couldn't -- the Air Force couldn't test for a single one of them.

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2 The Air Force had -- didn't know
3 about dioxin and didn't -- they're using infrared
4 analysis, they didn't have the equipment to test
5 for dioxin, that (inaudible) all of the
6 defendants were internally testing for dioxin,
7 and they had -- their faces are -- the appendix
8 shows all the testing that they did, but they
9 never told anybody in the Air Force that they're
10 testing the product for dioxin, and -- and there
11 is testimony from Egin, from -- who is the head
12 of the (inaudible) division and from Hercules
13 saying I never told them we were testing.

14 SPEAKER: Let me take you back to
15 removal jurisdiction though, I still don't
16 understand why -- or let me put it this way, you
17 haven't convinced me why there isn't removal
18 jurisdiction in this Court or in the Federal
19 Courts, based on the government contractor
20 defense, other than your argument that well it's
21 not a defense, it's --

22 SPEAKER: You mean -- that is one
23 problem. The government contract defense has not
24 effect on the acting under the code of
25 (inaudible) one is is it the person, one is it

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2 acting under that officer acting under the code
3 of law, and the final (inaudible) is the
4 (inaudible) of good defense.

5 SPEAKER: So whenever you got a
6 manufacturing process asked for by the government
7 as part of a contract, you never get the
8 government contract?

9 SPEAKER: I don't think the
10 government contract within itself is a sufficient
11 defense.

12 SPEAKER: You never get removal
13 based on the government contract.

14 SPEAKER: Not that alone.

15 SPEAKER: You may get a defense, but
16 you never --

17 SPEAKER: In fact, Justice Bower in
18 Watson said whether and when the government
19 contract -- government contractor can get removal
20 is something we'll take up another time, but he
21 uses the word whether and when.

22 SPEAKER: But to the language he
23 used strongly indicates the whether and when they
24 get to it, they're rather partial to the notion
25 that this is exactly what this removal is for.

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2 SPEAKER: It -- I can't read what is
3 in the decision but he expressly says he's not
4 going to discuss it.

5 SPEAKER: We all say that after we
6 say something else. But I mean --

7 SPEAKER: Well --

8 SPEAKER: -- after three pages of
9 dicta, yes, we say of course this isn't binding,
10 I agree with you, it doesn't decide the case, but
11 they're giving us a fairly sharp --

12 SPEAKER: He also at the same time
13 in a sharp focus say it only applies to the
14 immunity defenses, and there was an AMICUS brief
15 written by Mr. Waxman who will be next, asking
16 them to expressly say that the government
17 contractor defense will be included as a defense,
18 and that is not in on the defense problem.

19 SPEAKER: He went out of his way
20 to -- to talk about Winter with approval, saying
21 specifically that this is something that the
22 government would do itself if it weren't able to
23 utilize the manufacturers.

24 SPEAKER: I think that the
25 (inaudible) springs example, I mean there is

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2 no -- the government would never have produced a
3 product that they had known is contaminated with
4 dioxin itself, there are other available --

5 SPEAKER: We're talking about
6 removal now, and it seems to me that the
7 government planned to open a plant of its own at
8 one point, and even reinforcing what the Supreme
9 Court said about the government would do it
10 itself under those circumstances and
11 distinguishing the case from the Philip Morris
12 situation.

13 SPEAKER: Well, that was -- it says
14 for now, and when that comment is made, it says
15 arguable, it doesn't say that it (inaudible) the
16 record we put before Winters and what happened in
17 Winters, if you believe Winters the government
18 basically took over the facility, but that is on
19 one side. If the government -- there is not a
20 single government, look at all the documents, not
21 a single government person involved in
22 specifications ever (inaudible) the manufacturing
23 process, every piece of testimony is they
24 manufactured it, they were completely on their
25 own, why does that go to (removal) it goes to the

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2 causation problem. There has to be causation for
3 the acts that we're complaining about. The act
4 of creating dioxin and the act of -- the act to
5 sell product, which -- the fact that it was -- it
6 was commercially bought, even Alvin Younger of
7 the government in the 1984 brief against summary
8 judgment, they attached an affidavit saying we
9 got this off the shelf, (inaudible) briefing
10 saying we got it exactly -- we went for what is
11 available, we took it off the shelf.

12 SPEAKER: Well, it wasn't -- it
13 wasn't on the shelf for young farm boys up in
14 Vermont to use in Agent Orange form, was it?

15 SPEAKER: Well, let's -- I'm going
16 to -- I'm going to segment --

17 SPEAKER: That is a yes or no answer
18 to that, I think the answer to that is no,
19 correct?

20 SPEAKER: I'm --

21 SPEAKER: Agent Orange was a
22 concentrate that the government wanted for use in
23 Vietnam.

24 SPEAKER: Let me ask it -- let me
25 put it this way, agent -- the four agents, Agent

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2 Purple was a 50/50 mixture that at 20 percent
3 isobutyl, 30 percent ambutyl and 50 percent
4 2,4-D. That was the preferred mixture that Dow
5 used because it didn't crystalize in low
6 temperatures.

7 Agent Purple was available
8 commercially, it was patented and it in fact --
9 Dow actually sued -- sued Monsanto and Diamond
10 for violating its patent because that was a
11 specified product.

12 Dow then -- Hanson, who we quote then
13 says -- says this is a commercially patented
14 product that we sell, and it was only at that
15 point that they switched to a 50 percent ambutyl.

16 SPEAKER: Right, and the government
17 wanted that and that wasn't off the shelf to --

18 SPEAKER: Only the mix.

19 SPEAKER: -- to the public.

20 SPEAKER: Only that particular mix
21 because it crystalized but in (inaudible) in
22 Vietnam it didn't need it.

23 SPEAKER: That is what we're talking
24 about, isn't it?

25 SPEAKER: Well, if you sell ambutyl

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2 2,4-D all by itself, which was available
3 anywhere, and you sell ambutyl 2,4,5-T with was
4 available anywhere, the only thing that the
5 government did different was put them into one
6 package, but the 2,4,5-T was sold regularly.

7 SPEAKER: So the government is
8 telling the companies, put it in this package
9 because that is what we want, and essentially --
10 and we got a big demand for it, so stop doing
11 what you're doing and make this stuff for us.

12 SPEAKER: They never -- first of
13 all --

14 SPEAKER: Sorry, there is at least
15 an assertion, and a -- whether it's -- whether it
16 gets to be found as a fact by a fact finder,
17 there is at least an assertion that what I just
18 said is true, correct?

19 SPEAKER: They -- well, they --

20 SPEAKER: Start making this stuff
21 and keep it coming? Yes, there is.

22 SPEAKER: No. They bid for every
23 contract, and they solicited bids every single
24 contract for Agent Orange, Agent Purple, Green
25 and Pink was bid for, and it was a competitive

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2 bidding, and they were paid for every contract
3 and they made money on every contract, there is
4 findings in the Hercules circle case by
5 stipulation, it's admitted by Hercules that they
6 made money on every contract.

7 There is also a finding in the Maxis
8 case, which is also a circle case, that Diamond
9 made money on every contract, and we show in the
10 contracts for Dow, where there is telegraphic
11 correspondence going back saying we're accepting
12 your bid, your bid is okay. They were never
13 forced to make -- at no time, even though it was
14 a record, they were never forced to make a single
15 drop of anything that they didn't bid for,
16 contract for, make money on.

17 SPEAKER: But once they're in the
18 contract and once they're locked into the
19 contract with the government, the government
20 basically holds them --

21 SPEAKER: That is -- that is right.

22 SPEAKER: -- their feet to the fire
23 and tells them this is how we wanted it, do it
24 and keep on doing it to fulfill this contract.

25 SPEAKER: The government says we

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want 2,4,5-T and 2,4-D entered into a contract.

SPEAKER: Mixed in this fashion.

SPEAKER: Just put these two together, and because they wanted a broad spectrum.

SPEAKER: All right.

SPEAKER: They're two different things, see --

SPEAKER: Why isn't that the government telling them sufficient -- in sufficient -- with sufficient specificity what they want and to keep on making it, at least sufficient to give Federal -- to give jurisdiction to this Court?

SPEAKER: Because they don't -- because dioxin is not in there, and the government doesn't know about dioxin, not a single government person involved in that entire process from beginning to selecting, procurement, to specification knows there is dioxin, they never asked for that, and they never have knowledge of the causation (inaudible) requires that you take -- that the (inaudible) be specific of a Federal officer, that he is under the

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2 control, that he acts in the official function of
3 control of the Federal officer and under color of
4 law does the question (inaudible).

5 SPEAKER: The District judge said in
6 the 1950s, scientist at the chemical -- Army
7 Chemical Corp. Chemical Warfare Laboratories,
8 located in Edgewood Arsenal, Maryland, learned of
9 dioxin is a toxic byproduct in the manufacture of
10 2,4,5-T, the present science advisory committee
11 1963 recognized dioxin as an element of Agent
12 Orange. There is substantial evidence in the
13 record, is there not?

14 SPEAKER: No, they're both wrong.

15 SPEAKER: Both wrong?

16 SPEAKER: Both absolutely wrong.

17 Edgewood Arsenal had 10,000 people in it, the
18 crops division didn't associate (inaudible) in
19 1959 reference came from a chemical warfare
20 division where one scientist goes to Germany and
21 has a paper with preservatives causing a problem.
22 There is a footnote in the appendix to that one
23 article, it says, talks about an article about
24 2,4,5-T, nobody has testified they ever read the
25 notes at the library to find that one appendix,

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2 and it never talked about 2,4,5-T, it was Hoffman
3 who was fired under trip reports and
4 Robert (inaudible) who actually got the
5 government said -- who actually finally found the
6 materials from the government and said who in the
7 world would have looked for a trip report in
8 1959, filed under trip reports in 1962 to find
9 that they're using dioxin, so that is not -- that
10 is not the case.

11 As to (inaudible) of them not knowing
12 about it, Doctor Calvin was the -- was on the
13 board of directors and he's head of the
14 biological chemical warfare committee of PSAC,
15 Doctor Calvin testified that he said -- and this
16 is a quote, 15 times already I told you we never
17 discussed dioxin at PISA, how many times do you
18 want me to tell you that? And finally the most
19 important information is that PISA didn't know is
20 that Sporgen Keening, Sporgen Keening was the
21 technical advisor to PSAC, remember PISA only met
22 10 times a year for 20 people, but Sporgen
23 Keening was their advisor, he would set the
24 agenda and put everything together from 1958 to
25 1969, Sporgen Keening testified that PSAC -- that

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2 dioxin 2,4,5-T and the issue of herbicides never
3 came up on the PSAC agenda at any time. So we
4 get to --

5 SPEAKER: I would like to move you
6 away just for a moment from this argument,
7 something that concerns me, and that is whether
8 this panel can revisit the 2001 panel decision in
9 this case, on the issue of res adjudicata and
10 collateral attack on the 1987 settlement.

11 SPEAKER: Well, first of all res
12 adjudicata (inaudible) having been alleged in the
13 personnel who are not American servicemen in
14 either case and none of our clients who are
15 before those courts, the personnel were people
16 that cleaned up in one of the cases were people
17 that cleaned --

18 SPEAKER: I'm talking about the 2001
19 panel decision in this case, in the Stevenson
20 case, which said that there could be a collateral
21 attacked on the settlement because of the failure
22 of representation.

23 SPEAKER: No, this panel cannot
24 revisit that.

25 SPEAKER: Why not?

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SPEAKER: That is a final -- that is final before this panel. That is a final decision that --

SPEAKER: You're talking about law of the case?

SPEAKER: Yes, it is law of the case.

SPEAKER: How about exceptions to law of the case? There are many where it comes to the same court deciding an issue, are there not?

SPEAKER: I don't -- I don't see any in this situation and it wasn't raised in most -- most of the cases before you, it was Isaacson and Stevenson it came up in, it wasn't re-raised in neither of the other cases.

SPEAKER: Well --

SPEAKER: I don't -- this is a final -- this panel and when it --

SPEAKER: That is the issue that was affirmed or I guess divided, equally divided by the Supreme Court.

SPEAKER: Right.

SPEAKER: That was a four to four

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2 decision, so at least four justices of the Court
3 were of the opinion that the 1987 settlement in
4 this case was not subject to collateral attack.

5 SPEAKER: Even -- even to the extent
6 that the question was attempted to preserve by
7 the defendants coming before us, the defendants
8 had only said on the collateral attack that it
9 was for -- they wanted it preserve it for our
10 review. They accepted that this panel, that the
11 Second Circuit panel had already decided
12 unanimously and we haven't certainly briefed
13 that, and if you want to discuss it, we can
14 discuss it at length --

15 SPEAKER: I'm particularly concerned
16 about that, having participated in a 1987
17 settlement opinion and wondering whether that
18 determination of the panel is correct, and I'm
19 wondering at the outset as a threshold matter,
20 whether we have the ability to revisit it.

21 SPEAKER: I don't believe that this
22 Court does have the ability, and --

23 SPEAKER: Could you, please --

24 SPEAKER: And I certainly, if you
25 want to extend argument, I could argue and my

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time is up --

SPEAKER: I don't want to extend argument, I'm asking for the indulgence of my colleagues to ask you to brief that and have your opponent brief it also.

SPEAKER: Yes, sir, certainly.
We'll -- do you understand?

SPEAKER: I understand the question.

SPEAKER: And would you within two weeks file a supplemental brief and not to exceed, you know, not to exceed 3500 words.

SPEAKER: If this court tells me to do it, I will do it.

SPEAKER: We are -- I'm telling you.
And then --

SPEAKER: My son would like a little vacation --

SPEAKER: Sorry, this is such I don't want -- really don't want to -- three weeks better? How long is your son --

SPEAKER: There is also consideration.

SPEAKER: Well, why don't you do this, let me do this, why don't you --

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2 SPEAKER: He's going out of the
3 country tomorrow, I think it would be unfair.

4 SPEAKER: Why don't the two of you
5 consult and let us know what a reasonable
6 briefing schedule would be, and by reasonable I
7 mean so it's done within a month if possible, all
8 right, on this specific issue, nothing else.

9 Nothing -- and by the way, I thought which is,
10 you know, just on the issue of -- Judge Minor
11 raised, and let us -- if you can't come to a
12 conclusion as to what is reasonable, no reply,
13 just a brief 3500 words or less answering brief
14 in letter form is fine. Okay. Is that okay?

15 Thank you. Let's hear from Mr. Frye,
16 please.

17 SPEAKER: Thank you, Your Honor, I'm
18 going to argue the government contractor defense
19 issue, and my colleague Charles Rothsfield will
20 argue the removal issue.

21 Before I get into my argument on the
22 3500 page brief, it's addressed to the merits of
23 the issue of the prior Stevenson case, or the
24 question whether the panel has the power to
25 revisit.

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2 SPEAKER: Whether the panel has the
3 power to revisit I think would be enough for now,
4 no?

5 SPEAKER: If so -- if so what is the
6 proper outcome?

7 SPEAKER: Okay.

8 SPEAKER: Both.

9 SPEAKER: Well, in 3500 words or
10 less.

11 SPEAKER: I said 5,000 words.

12 SPEAKER: 5,000 words.

13 You do have the benefit of more
14 extensive briefing from the 2001 --

15 SPEAKER: Yes, of course.

16 SPEAKER: -- case, also, if you
17 want.

18 SPEAKER: Mr. Frye, I never thought
19 I would hear myself saying this, I'm having
20 trouble hearing you.

21 SPEAKER: You're having trouble
22 hearing me?

23 SPEAKER: Yes, can you pull that up
24 a little bit.

25 SPEAKER: Okay, I'll do the best I

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can.

SPEAKER: That is much better, thank
you.

SPEAKER: Let me began by saying
that in our view nothing has changed since 1987
of a material character that would justify a
different result from the result reached in 1987.

There are certain crucial elements
that under-guarded the 1987 decision and they
remain indisputably true today. The first is
that Agent Orange was an important instrument in
the war in Vietnam, and that it's -- then I quote
what the court said, it's successes as a
herbicide saved many, perhaps thousands of lives.
The second is that there is a long history of
safe and civilian use of the herbicide, over a
period of 15 years or more with no reported
complaints to the Department of Agriculture, with
only isolated instances of chloracne, a couple of
cases.

SPEAKER: You're talking about
specifically about Agent Orange?

SPEAKER: No, I'm talking -- I'm
talking now about herbicides containing 2,4,5-T

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2 and 2,4-D, not Agent Orange which I will argue is
3 different.

4 SPEAKER: It's different, right.

5 SPEAKER: But the classic herbicide
6 including 2,4,5-T and therefore including dioxin
7 had been safely used in civilian use.

8 SPEAKER: You say -- wait, I'm sorry
9 to interrupt you, you said including dioxin?

10 SPEAKER: Yes.

11 SPEAKER: It's known that dioxin was --

12 SPEAKER: It was not known at the
13 time that dioxin was in the commercial herbicides
14 because the testing methods -- the tests for
15 chloracnegen was a rabbit ear test up until 1965,
16 so that couldn't -- they suspected that dioxin
17 was the chloracnegen, but there was no way to
18 test for dioxin, and then gas tomography came
19 along in 1965 and you could test down to one part
20 per million, it was not until after 1970 that it
21 became possible to test below one part per
22 million, and when that testing was done it turned
23 out that even the manufacturers like Hercules and
24 Dow seemed to be producing product with no
25 detectable dioxin and had some dioxin in their

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product.

Okay, now the third point is that the herbicide that was being used in Vietnam was not dioxin, it was Agent Orange and dioxin is, as the court is well aware, is merely a trace contaminant, that is presumably why the government official were unconcerned when they learned of the presence of dioxin in 2,4,5-T now --

SPEAKER: Which they learned when, from your perspective?

SPEAKER: Well, I will get into it, but certainly by 1965 the government knew.

SPEAKER: Exactly.

SPEAKER: Yes, there was -- the (inaudible) and Schultz article which we believe they clearly knew about, it's clear that many people in the government referred to it, suggested that dioxin was the chloracnegen back in 1957 or '59, it was '57 I think that article was published. So dioxin was a suspected chloracnegen. But the question of when they knew that dioxin was in the finished product as opposed to the process seems to have been 1965,

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and I will get to the details on that.

But I want to quote what the Court said in 1987, because I think it bears importantly on this. It said, and I quote, of course the fact that dioxin (inaudible) does not prove the same as Agent Orange, which contain only trace element of dioxin, while the decision to use Agent Orange was being made the most relevant question was not what will dioxin do to animals, or even what will dioxin do to humans exposed to it in industrial accidents, the most relevant question was what will Agent Orange do to the personnel exposed to it.

Now the fourth point is that no one had any reason to believe that the spraying in Vietnam posed a danger to exposed person, the known hazard was almost entirely to production workers, which was immaterial to the government.

Again, the Court said in 1987, the nature of the danger to friendly personnel created by the hazard must be serious enough to call for a weighing of the risks against the expected military benefits evidence, otherwise the hazard would not be substantial enough to

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2 influence the military decision.

3 Now I think that means, and I think
4 it is still true today, that the failure to
5 disclose a hazard that is immaterial to the
6 decision to use a product is not, even if they
7 were an imbalance knowledge, does not defeat the
8 defense, and I can think of no reason why that
9 would still be the case.

10 So -- and that was the presence of
11 dioxin or with the presence a chloracnegen in
12 2,4,5-T --

13 SPEAKER: Is one thing to say that
14 the government knew that there was some dioxin
15 present, but that it would be worthwhile to --
16 for the war effort to use Agent Orange anyway,
17 and the idea that they knew that their
18 manufacturing process, if done in a certain way
19 would produce a whole lot of dioxin and cause a
20 whole lot of problem, and not advise the
21 government of that.

22 SPEAKER: Right. But, first of all,
23 the manufacturing process does not produce a
24 whole lot of dioxin, we're talking still about
25 trace contaminants, whether it's one part per

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2 million or 20 parts per million, we're talking
3 about --

4 SPEAKER: There is something in the
5 record about 40 parts per million at one point.

6 SPEAKER: 47 was in the 2,4,5-T, but
7 Agent Orange was a mixture of 50 percent --

8 SPEAKER: I understand.

9 SPEAKER: -- 2,4-D, which had no
10 dioxin.

11 SPEAKER: 23.

12 SPEAKER: Hmm?

13 SPEAKER: 23 or something like that,
14 there was a small percentage of other things in
15 the -- in the mix, but I use 20 as a number, I
16 don't know whether it's 20 or 25, but it really
17 doesn't matter, because nobody thought -- nobody
18 thought, the manufacturers didn't think and the
19 government didn't think that this was something
20 that they needed to be concerned about, and there
21 was no knowledge, which is what the Boyle test
22 requires, or even reason to suspect that this was
23 a serious problem at the time, even though dioxin
24 itself is known to be a highly toxic chemical.

25 We're talking about an era when

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2 people did not have a highly sophisticated
3 appreciation of these things, and we're talking
4 about -- I think it's -- I -- I feel comfortable
5 saying that it is inconceivable that the
6 government if you had said to them we measured
7 this and there is 20 parts per million dioxin in
8 the Agent Orange we're selling to you, I'm
9 confident the government would have said, and
10 I'll get to a little more about that in a minute.

11 SPEAKER: Why isn't that a triable
12 issue of fact?

13 SPEAKER: Whether they would have
14 said it or not? Well, it depends on whether a
15 reasonable jury can conclude differently.

16 It's not enough, it isn't just one
17 string to my bow, so, you know, even if you --
18 even if you disagree totally with me about that,
19 we still have the defense and -- and as you know,
20 Doctor Will of Edgewood was asked about this,
21 would you consider the fact that chloracne may be
22 associated with the manufacturer of 2,4,5-T to be
23 a significant fact? He said, For purposes of the
24 meeting, which is the April '63 Edgewood meeting,
25 it was not a significant fact, it was significant

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2 for the manufacturer but not for the army, the
3 army's purposes was to protect its own personnel.

4 And General (inaudible) who was in
5 charge of the (inaudible) springs process said
6 the same thing, and in addition he said, one
7 reason I wouldn't be concerned about the final
8 product, particularly, after having seeing over
9 in Vietnam the way the ranch hand bumped stocks,
10 that stuff all around and handling it all
11 themselves is the fact that they weren't having
12 any great problems. Now if there were problems
13 associated with the use of Agent Orange in
14 Vietnam, human health problems, it was the
15 government that exclusively would have had the
16 knowledge about that. I don't think there is any
17 indication that there were such problems but the
18 government would have known and not the
19 manufacturers.

20 Now fifth, and this I think can't be
21 denied, is that Edgewood conducted a toxicity
22 study which studied the relevant question which
23 is whether the herbicide as it was going to be
24 used in Vietnam posed a danger to human health.
25 That study included a literature search which was

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2 surely have turned up in the (inaudible) Schultz
3 article in consultation with the Department of
4 Agriculture and the public health service which
5 had extensive knowledge about chloracne in the
6 2,4,5-T manufacturing process, animal studies,
7 which were the gold standard for the day for
8 testing the toxicity of chemicals, and the
9 conclusion, and I quote, the committee stated in
10 summary and after careful review of toxicological
11 data related to 2,4-D and 2,4,5-T, plus the
12 knowledge of the manner that those materials have
13 been used for defoliation in military situations
14 in Southeast Asia, and parenthetically, I don't
15 think the manufacturers did not have this
16 knowledge, only the government did, the committee
17 concluded that no health hazard is or was
18 involved to man or domestic animals from the
19 amount or manner that these materials were used.

20 Now, six, as this Court said, the
21 knowledge of the government and the chemical
22 companies related to chloracne and certain forms
23 of liver damage, ailments now known to be very
24 rare among Vietnam veterans and not to the
25 numerous other ailment selection against

Proceedings

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(inaudible) in litigation.

There is a question here that is a standing or a legal causation kind of question, which is the thing that manufacturers didn't disclose the risk, if there was one that the manufacturers didn't disclose, and of course we contend there wasn't, was not the risk of material, suppose there had been a risk -- suppose that the manufacturers thought that the herbicide was potentially explosive and it might explode in the airplane while the soldiers were trying to spray it, and it didn't disclose that risk, what actually happens is people who were exposed claim to have gotten cancer, there is a disconnect between the hazard not disclosed and the hazard that materialized, which I think would also defeat this claim.

Now finally, there is still no evidence of causation, the court said in 1987, and it repeated in the IV case in 1993, that there was -- that science to that day had not yet established causation. We think the causation has not been established even today. But the court said causation --

Proceedings

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2 SPEAKER: Causation is not before
3 us, Mr. Frye.

4 SPEAKER: No, no, but it's germane
5 to the government contractor defense because of
6 what this court said, which was the chemical
7 companies therefore could not have breached a
8 duty to inform the government of hazards.

9 Now what is not before you is actual
10 causation based on today's scientific knowledge.

11 What is germane is the knowledge that
12 existed in the 1960s when the manufacturers were
13 selling Agent Orange to the government, and there
14 it is clear and in fact the affidavit of Doctor
15 Welsh, one of the plaintiffs own experts said it
16 wasn't until 1975 or 1985 that people began to
17 look at cancer in relation to dioxin, in relation
18 to Agent Orange.

19 SPEAKER: We're both aware of the
20 presence of some dioxin at the time it was used,
21 however much there was, there were each -- each
22 of the plaintiffs and -- and the companies, I
23 mean the government and the companies were both
24 aware that there was such a thing.

25 SPEAKER: Our position is that that

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is clearly established.

SPEAKER: All right. Now if that is so, were tests made at the point of receipt of the Agent Orange to see if there were any dioxin in the product received?

SPEAKER: No.

SPEAKER: There were never such a test made?

SPEAKER: Remember, this was not a concern to anybody at the time.

SPEAKER: Well --

SPEAKER: It was a production concern. Why --

SPEAKER: But they knew that dioxin was a poisonous material.

SPEAKER: Well, there were 23 different impurities, and I don't know how many of them --

SPEAKER: Well, what I'm getting at is your adversaries contention that the manufacturing process used, depending on how it was used could produce more dioxin under certain conditions, that is the heating process that they talk about, and that the companies used that

Proceedings

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2 process because they could make more of it faster
3 and knowing that more dioxin would be developed
4 but that the government didn't know that.

5 SPEAKER: Well, I would say that the
6 companies -- the timeframe of this is a little
7 complicated here, but by 1965 they learned that
8 dioxin was in the -- some small amount in the
9 finished product and think tested it, and they
10 found up to 10 parts per million.

11 SPEAKER: They being?

12 SPEAKER: Dow.

13 And there was a meeting and the
14 manufacturers went out and tried to reduce the
15 level of dioxin over the next several years, and
16 they succeeded to some extent, but they --
17 actually Dow and Hercules dioxin -- Agent Orange
18 did not have detectable levels of dioxin, Dow at
19 some point, certainly after the mid-'60S,
20 Hercules apparently never had detectable levels
21 of dioxin in it, Monsanto and Diamond did have
22 detectable levels of dioxin and they worked at
23 reducing it.

24 But the point is that nobody thought
25 these levels of dioxin were concern -- they

Proceedings

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2 thought it was primarily a concern for production
3 workers, not for people who might be subjected to
4 it.

5 SPEAKER: So your position is that
6 they could have, any one of them could have
7 produced Agent Orange with somewhat, I don't know
8 how much little -- you know --

9 SPEAKER: With less dioxin.

10 SPEAKER: -- with less dioxin but
11 there was no reason for them do so? That --

12 SPEAKER: I think that they were
13 aware of no reason, they were aware of no health
14 risk that was associated with the levels of
15 dioxin that might be found in the finished
16 product, other than possibly a rare case or two
17 of chloracne, which was not something that was of
18 concern.

19 SPEAKER: But the point is -- I mean
20 there is a great deal there in the -- a great
21 deal, there is stuff in this that talks about the
22 availability of a process that would have reduced
23 dioxin in -- in the final product and your point,
24 I take it is that there was no reason for -- that
25 they knew of for them to do that, is that right?

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SPEAKER: Right. And the government -- the government wants it run -- and I'll get to that in a minute about the presence of dioxin, didn't wish -- didn't choose to do anything about it.

SPEAKER: They said go ahead, it's kind of like a little bit like --

SPEAKER: They didn't say reduce the amount of dioxin, control the amount of dioxin, don't provide us with so much.

SPEAKER: That would be a little like our Lewis case, is that the point?

SPEAKER: This is a little like the Lewis case in certain respects, there is a distinction, but it's a lot like the Lewis case in that there was an exercise of discretion by the government not to change something that -- I don't think at the time the government thought was a hazard, and I don't think at the time the manufacturers thought it was a hazard as the product was being used in Vietnam. After all, Edgewater had tested that very question, and had concluded that there was no hazard associated with the use of Agent Purple, which actually had

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more dioxin.

SPEAKER: So do I understand you correctly that as time went by there was no indication by the government to the producers that steps should be taken to change the way it was made?

SPEAKER: There was absolutely none absolutely none.

SPEAKER: Even though they reordered it?

SPEAKER: They did reorder. And I want to get to the question of whether the government knew about the presence of dioxin in a second, but -- but I want to point out something which I think is important as an over-arching consideration here, which is that Agent Orange was a weapon of war, it was used in a unique environment and in a unique manner. It was totally different from the civilian uses to which the manufacturer's products containing trace amounts of dioxin have been put. To the extent that it turned out to be hazards associated with the herbicide program of Vietnam and of course we think there weren't and we refer the Court to the

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2 American Chemistry Council AMICUS brief, those
3 were unique risks created by the government's
4 military needs to deploy the herbicide in an
5 unprecedented concentration and unprecedented
6 quantities, it's grossly unfair to expose the
7 manufacturers to potentially enormous liability
8 based on these military decisions.

9 Now in particular the manufacturers
10 had little knowledge and no control over the
11 manner or the use of Agent Orange in Vietnam.
12 They were in no position to test for the risks
13 associated with such use and they were prevented
14 from putting on warning labels that might have
15 reduced the risk by counseling care and handling
16 the material, thus the normal responsibility of
17 the products liability law places on a
18 manufacturer to evaluate the risks and utility of
19 its products is one that the manufacturers could
20 not carry out in a case like this.

21 So if the over-arching policy of the
22 government contractor defense is to ensure
23 especially in war time unstinting cooperation
24 from government suppliers obtained at reasonable
25 cost, and that the government's exercise of

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2 discretion in selecting the character of its
3 weapons of war not be impeded by manufacturer
4 fear and perhaps ruinous liability, then the
5 government contractor defense should be upheld.

6 SPEAKER: But it is an essential
7 element that the manufacturer tell the government
8 of any hazard. You can't get around that, that
9 is part of the Boyle test.

10 SPEAKER: Known hazards.

11 SPEAKER: Known hazards.

12 SPEAKER: They don't have to tell
13 the government. They have to not know of any
14 hazards that are unknown to the government.

15 SPEAKER: Right.

16 SPEAKER: How did the government
17 learn of it doesn't matter. It's -- it's a
18 disparity of knowledge, by I emphasize known
19 hazards, at the time Agent Orange even with its
20 trace contamination of dioxin was not a known
21 hazard as it was going to be used in Vietnam to
22 people who might incidentally be swayed or
23 brushed by plants that had been sprayed or walk
24 on soil that had contamination from Agent Orange.

25 Now let me turn --

Proceedings

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2 SPEAKER: Just because it's an easy
3 way for me to think about what you're talking
4 about now, and that is Justice Scalia's air
5 conditioner.

6 The notion that -- is what you're
7 saying that -- what Justice Scalia says if I
8 remember correctly is what conflict there must be
9 between State liability under the State law and
10 the -- and the specifications, and you're saying,
11 I take it that there was no conflict because
12 there was -- under State law, I mean, there was
13 no -- they didn't know of the hazard and so put
14 it another way, they didn't know of the hazard
15 and therefore they didn't have to put a safety
16 device on the air conditioner, I mean how -- how
17 does the conflict work?

18 SPEAKER: No, no, I'm not saying
19 that. All -- we can pass by, if you want, I was
20 going to finish up on that point, but I'm happy
21 to take it up now.

22 SPEAKER: Why don't you -- while I'm
23 thinking about it, why don't you.

24 SPEAKER: Okay.

25 I was going to argue before I got to

Proceedings

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2 this that there were reasonably precise
3 specifications, there was an exercise of
4 discretion --

5 SPEAKER: But I didn't let you.

6 SPEAKER: And I'll come back to
7 those things if I have enough time.

8 The question that you raised is
9 whether the discretionary decision is enough when
10 combined with reasonably precise specifications
11 to satisfy the requirement of a conflict between
12 State law and Federal --

13 SPEAKER: Right.

14 SPEAKER: -- procurement needs.

15 Now I have to begin by acknowledging
16 that Grisco rule and I quote, (inaudible)
17 allegation proved only that the government made a
18 discretionary decision not to warn of the hazards
19 of asbestos, these allegations do not at all
20 indicate that the government controlled or
21 limited the ability of the contractors to warn.

22 The question here is whether that
23 really means that the mere possibility that the
24 contractors could have performed the
25 specifications in a way that would have been

Proceedings

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2 safer is enough to defeat the defense, and I have
3 a couple of things to say about --

4 SPEAKER: Remember, we're talking
5 about the first part of the defense, not the
6 failure to warn, but the -- but the
7 specifications, which is I think under which
8 Justice Scalia said there has to be a conflict,
9 is that right?

10 SPEAKER: Right. Well, I -- I think
11 there is a conflict here, but let me first say
12 that I don't think -- I think that the exercise
13 of discretion to accept whatever risk there may
14 be in the hazard that is known is -- is enough to
15 satisfy the first prong, that constitutes an
16 exercise of discretion, but if you need more I
17 guess I have a couple of things to say, but I
18 wanted to put Grisco out of the way first.

19 SPEAKER: Please do.

20 SPEAKER: And first I have to say
21 that I agree completely with Judge Minor's and he
22 won't be surprised to hear this, but I agree
23 completely with Judge Minor's analysis of this
24 issue.

25 SPEAKER: You mean you read

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concurring opinions too.

SPEAKER: Concurring, dissenting opinion masquerading as a concurring opinion.

First of all, the product in Grisco, which was asbestos -- cement made with asbestos, not only resembled commercial products, but it was used in the same manner as the commercial variance, that of course was not the case here.

The contract in Grisco specifically stated, quote, commercial packages are acceptable under this specification, close quote, all of which is required in the contract in Grisco was the same warnings that State law required of this commercial products, not some special change, there was no requirement, and I think there is still none today to have made the commercial products with less dioxin, but in any event, the giving of State law (inaudible) requires warnings that were virtually cost free, they would not require overhaul of the manufacturing process, and Grisco was a design warnings case, in other words the specificity was in the design but the issue was the adequacy of the warnings.

This is a design design case.

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2 And in fact in holding that -- the
3 holding of Grisco was specifically cast from the
4 following terms, in a failure to warn case where
5 no conflict exists between requirements proposed
6 under a Federal contract and State law duty to
7 warn, State law applies, so I don't think -- I
8 think Grisco is an example of words that should
9 not be lifted out of the context in which they
10 were uttered, and unthinkingly transposed to a
11 different, a quite different context.

12 But even if a more specific conflict
13 is required, I want to put forward several
14 reasons why that conflict exists in this case,
15 the first is by what the lower Court said, by
16 specifying 2,4,5-T, the government specified
17 dioxin in only some level. Now I know I'm not
18 sure I understood Mr. Smoker's answer to your
19 question, is he abandoning the claims against
20 defendants whose Agent Orange had less than
21 detectable levels of dioxin, is he admitting that
22 the government contractor defense applies to
23 those people, and that his challenge to it goes
24 only to people who manufactured with more dioxin
25 than was necessary, I'm not clear.

Proceedings

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2 SPEAKER: That would be with Dow
3 Hercules you're talking about?

4 SPEAKER: No, Hercules at all times
5 as far as we know --

6 SPEAKER: Just so we're clear.

7 SPEAKER: Dow after the mid-'60s,
8 sometimes in the mid-'60s, but Diamond and
9 Monsanto on the other hand, and of course, I
10 wouldn't even get into the problems of proving
11 whose Agent Orange somebody was exposed to, which
12 Judge Weinstein expressed some concern about, and
13 so did this court in the '87 opinion.

14 Now the claims themselves repeatedly
15 insisted that the reasons that the manufacturers
16 didn't change processes was that production would
17 be slowed and cost would be increased.

18 For instance, their expert Ensley in
19 his affidavit says, quote, higher temperatures
20 allow 2,4,5-T to be made more quickly which can
21 translate to more product being made. In the
22 brief for Bower, they say increasing the
23 temperature allowed 2,4,5-T to be made more
24 quickly, meaning more product being made at
25 greater profit. The Stevenson brief says

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2 manufacturers used higher temperatures in order
3 to reduce their production time.

4 This of course highlights the
5 conflict of Federal objectives, which were to get
6 as much Agent Orange as they could as quickly as
7 they could. So to require changes that would
8 slow down the production process and increase the
9 costs, creates the very kind of conflict that
10 Justice Scalia was talking about that underlies
11 the government contractor defense.

12 Consider what would have happened if
13 the government had suddenly announced that there
14 is a requirement that there be no detectable
15 dioxin in the Agent Orange, Boehringer had to,
16 and I quote again from the Ensley affidavit,
17 revamp its entire operational facility to deal
18 with dioxin. Dow built a new plant to
19 incorporate the Boehringer process.

20 Monsanto and Diamond tried but failed
21 to get dioxin down to non-detectable levels by
22 other means, this is not a change that could be
23 made overnight at the drop of the hat and --

24 SPEAKER: Why were they trying to
25 get it down if they didn't think it was harmful?

Proceedings

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2 SPEAKER: They thought it was
3 harmful to the production workers, they were
4 concerned about their workers, they were
5 concerned, and the occupational health authority,
6 and the public health service, the State
7 occupational health authorities were in there,
8 whenever there was an incident like the Monsanto
9 nitro incident, the Diamond Newark incident or
10 the Dow incident in late '64, public health
11 authorities were in there investigating what
12 happened, why it happened, and possibly imposing
13 regulations, so there was a concern for the
14 health of their own workers, that is what
15 motivated all of that.

16 They were there was also concern
17 expressed in some of the Dow documents that some
18 dioxin might find its way into the finished
19 product and might cause people, and I think we're
20 talking really about applicators and formulators
21 rather than people who might inadvertently get
22 sprayed as in Vietnam, that might cause people to
23 develop chloracne and might bring about
24 regulation that would restrict the ability to
25 sell the product, there was a concern about that,

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2 but it still focused on chloracne, and it still
3 primarily focused on the production process.

4 In any event, the fact is that you
5 could not at the drop of a hat just stop making,
6 you know, stop producing dioxin in the Agent
7 Orange.

8 Fourthly and more broadly I asked the
9 court to take a step back and consider the
10 consequences of the ruling that the defense is
11 unavailable in a case like this, to manufacturer
12 willingness to provide certain categories of
13 inherently risky products and I think
14 particularly chemicals, vaccines and
15 pharmaceuticals, which are somewhat different
16 than a helicopter door or something like that.

17 For example if, a helicopter door was
18 mis-designed and there were no government
19 contractor defense, the liability from the kind
20 of unusual accident that occurred in Boyle would
21 be limited, the manufacturer would not be facing
22 vast vistas of potential liability, that is not
23 true in our case.

24 Suppose the army decided today that
25 it needed anthrax vaccine in a big hurry to

Proceedings

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2 vaccinate thousands of troops in Iraq, the
3 vaccine manufacturer is contractors (inaudible)
4 this case, might be aware of some impurities that
5 it doesn't believe are serious problems for the
6 people who receive the vaccine but you never know
7 what will turn up 10 or 20 years later.

8 SPEAKER: I was under the
9 impression, of course that is not before us, that
10 that is precisely why it's so difficult to get
11 anthrax vaccine.

12 SPEAKER: Well, there are certain
13 problems with vaccines, and -- and this whole
14 issue of the chilling effect on contractor
15 cooperation is not totally theoretical either.
16 There's an article in the Baylor Law Review which
17 we cite at page 23 note 6 of the removal brief,
18 which reports on the refusal of Lilly and Dow to
19 sell herbicides to spray coca plants in Columbia
20 and Peru unless indemnified by the government
21 against huge product liabilities risks.

22 So if conflict is needed there is
23 conflict aplenty here of the kind that should in
24 my view clearly suffice to support the defense.

25 Now let me turn back, if I may, to

Proceedings

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2 the subject of comparative knowledge, if I can
3 find my place here.

4 And I want to mention, by the way, as
5 I talk a little bit about the facts here that
6 there is no statement of facts in the opening
7 briefs of the plaintiffs, they refer to briefs
8 that were filed in the District Court, but we
9 really had no sense of their concrete arguments,
10 the factual arguments that they wanted to present
11 to you. The reply brief is a long discussion of
12 facts which we really haven't had an opportunity
13 to respond to on which -- today is not the place
14 and I'm not sure I am capable of responding to
15 all of the things.

16 I will say that we believe there are
17 things that are inaccurate, things that are
18 carefully worded in a way that might be literally
19 true but potentially misleading.

20 If the Court has serious questions
21 about factual issues that may be important to us,
22 I ask that you write the parties and ask them to
23 give you focused information on that.

24 Now, the first thing is who had the
25 requisite knowledge, and the plaintiff want you

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to lose sight of the forest for the trees.

Agent Orange was a huge product and the government divided responsibility for it among several agencies. The people like Minarik and Darrel, from the crops division of Fort Dietrich were responsible in developing an effective herbicide, that was their responsibility; the responsibility for looking at human health issues was that of Edgewood Arsenal, Doctor Macnamara's toxicology group, and then the President's Scientific Advisory Council, those were the people who had the responsibility for considering human health effects.

Now, it's perfectly clear from this record that knowledge that the chloracne -- that a chloracne agent was present in the process of producing 2,4,5-T was wide spread, as was also knowledge of the toxic properties of dioxin, especially in relation to skin diseases.

Not only did the public health services investigate chloracne outbreaks at Monsanto and Diamond production facilities, and write and lecture on the subject, including at Edgewood, but more permanently there is

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2 compelling evidence in the military that
3 particularly Edgewood knew about this.

4 For instance, in 1952 there is
5 correspondence between Edgewood and Monsanto
6 asking for scrapings of the chloracnegen from the
7 Monsanto nitro plant explosion.

8 In 1957 there is correspondence
9 between Edgewater and a professor at Iowa State
10 regarding skin diseases from exposure to dioxin,
11 there is the Hoffman Trip report, and
12 notwithstanding what Mr. Smoker said, there is
13 evidence from Doctor Chandorf and others that the
14 Hoffman Trip report was widely discussed with
15 Macnamara and others at Edgewood at the time it
16 came back.

17 SPEAKER: What year are we talking
18 about?

19 SPEAKER: The Trip report was 1959.
20 So it was sometime in the late '50s, early '60s.

21 The Trip report doesn't mention
22 dioxin by name, but it diagrams dioxin which of
23 course would have been meaningful to the chemists
24 who would have been looking at it, and it cites
25 to the (inaudible) and Schultz article in 1957,

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2 that article talks about dioxin as the
3 chloracnegen in the process of producing 2,4,5-T.

4 And that article was found by
5 everybody that looked for it, Doctor Key of the
6 Public Health Service when he was investigating
7 the Ozark Forest Ranger chloracne experience,
8 Doctor Melville of the Air Force when he was
9 conducting a study about the environmental
10 effects of 2,4,5-T, as used in quasi civilian
11 uses in military basis, and the Institute For
12 Defense Analysis in January of 1963 reported in
13 this connection two groups of chemicals which
14 were particularly noteworthy for their
15 undesirable affects for the nitro and
16 chlorophenols, the latter caused respiratory and
17 skin irritation, and the IDA goes on to say they
18 would be unwise to set any toxicity limits for
19 any military agents.

20 So that's Edgewood.

21 Now let's come to the President
22 Scientific Advisory Council. The plaintiffs say
23 that it wasn't their responsibility to be
24 concerned about the safety of Agent Orange as it
25 was used in Vietnam.

1 Proceedings

2 The May 9, 1963 briefing that
3 Edgewood gave to PSAC is entitled, quote,
4 "Possible health hazard of phenoxiacitates as it
5 related to defoliation operations in Vietnam."
6 Clearly then PSAC was looking at precisely a
7 relevant topic for our purposes here.

8 Now, it's not clear that at that time
9 they knew about dioxin as the chloracnegen
10 although they knew that dioxin is carried in
11 2,4,5-T, the finished product, however the
12 evidence is clear that in 1965 this topic was
13 discussed at PSAC, and I want to quote from some
14 passages of the testimony of Doctor McDonald an
15 Doctor Horning.

16 Doctor McDonald said, I quote, The
17 issue of the use of herbicides and the presence
18 of dioxin in the herbicides was discussed. The
19 question of whether the material is potentially
20 toxic was discussed and the evidence relating to
21 the potential toxicity was discussed. Human
22 health defects were discussed.

23 Doctor Horning, and he was quite
24 positive about this, his testimony is found at
25 the defendants appendix 1814 to 1823, Doctor

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2 Horning testified that at some time between 1964
3 and 1966 he became aware of dioxin as an impurity
4 in 2,4,5-T, which he knew was being used in
5 Vietnam. He understood that dioxin, not Agent
6 Orange was a potential health hazard in human
7 beings, but that -- but he felt that the fact
8 that it was a toxic chemical does not, quote,
9 does not imply necessarily a hazard to humans,
10 close quote. He assumed, by the way, that it got
11 there during the manufacturing process.

12 He testified that PSAC had a
13 generalized concern for the health of both the
14 Vietnamese population and the exposed Americans.
15 And he summed up by saying that if we had
16 considered this was a significant, and he
17 emphasize a significant hazard we would have
18 responded.

19 Now all of this is compelling
20 evidence that PSAC exercised discretion regarding
21 whether dioxin was a significant health hazard
22 that required further measures.

23 Now they may not have known how the
24 measure the quantity of dioxin, and I'm not sure
25 that they knew at that time that the

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2 manufacturing processes would effect the levels
3 of dioxin, but these were smart guys, and if it
4 was a matter of concern to them, they could
5 easily have taken steps or order the taking of
6 steps to investigate those questions.

7 SPEAKER: Did the companies know?

8 SPEAKER: The companies knew in --
9 once gas chromatography was developed.

10 SPEAKER: Which was '60 --

11 SPEAKER: '65, early '65, late '64,
12 somewhere in there, Dow was able to test the
13 2,4,5-T that various people were using and come
14 up with levels. So that was the time when that
15 first became available information. When that
16 information, I wanted to get to the next actor in
17 all of this, which was Welding Springs.

18 The government planted Welding
19 Springs, as the court knows, because it was
20 concerned that it couldn't get enough dioxin from
21 ordinary commercial sources, and so it decided
22 that it would build its own plant because it
23 projected extremely high enough dioxin, not
24 dioxin, Agent Orange, projected extremely high
25 agent demand for Agent Orange in Vietnam, and the

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2 planners of Welding Springs clearly knew about
3 the chloracnegen, they clearly knew about the
4 presence of 2,4,5 -- of dioxin and 2,4,5-T in
5 trace amounts.

6 Dow informed the planners of, quote,
7 serious potential health hazard to production
8 workers in the production of 2,4,5-T, it said it
9 had combatted the problem through the design of
10 some plants and it offered the Edge -- the
11 Welding Springs people the technology to test the
12 levels of dioxin, that offer never got a
13 response.

14 The Welding Springs staff was aware
15 of Boehringer as a source for information re
16 dioxin. Dow said that it was a proprietary
17 European manufacturer's process, Montracon, which
18 was a consultant to the government advised it
19 about the Boehringer process.

20 There is a February '68 memo
21 from Edgewood's Jeffrey's to Welding Spring's
22 staff regarding dioxin information and potential
23 toxicity in making 2,4,5-T.

24 Now all of this shows that the
25 Welding Springs' planners knew about dioxin, it's

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2 toxicity, it's presence in 2,4,5-T and the
3 ability to control the extent of its presence in
4 certain manufacturing techniques.

5 Now they did not respond to this by
6 asking the manufacturers to do anything, as they
7 could well have done had there been a concern.

8 Now, the plaintiffs say, well, at
9 this point the responsibility had shifted to the
10 Air Force and the Edgewood people who were
11 overseeing Welding Springs were in the army, but
12 all of that nitpicking aside, the fact of the
13 matter is that these were people who were making
14 Agent Orange for use in Vietnam, they had the
15 relevant information, if it was a concern they
16 would have done something.

17 Now, with regard to this off the
18 shelf product, I would like to say a couple of
19 things about that. I don't view that as a
20 serious contention by the plaintiffs although
21 they certainly make it enthusiastically.

22 First, both T and D were originally
23 developed as herbicides during World War II by
24 Fort Dietrich personnel, it was developed by the
25 government.

1 Proceedings

2 The commercial products which then
3 came into use then included D and T were tested
4 by Doctor Brown in his mission to Vietnam in
5 October of 1961 to check out defoliation
6 possibilities for military use, and they were
7 found wanting.

8 The Edgewater or somebody in the
9 government screened 1,410 different chemicals
10 before they came up with the formulas for Agent
11 Purple and Agent Orange.

12 They specified an undiluted mix of
13 DNT, which was too viscous to be sprayed with
14 commercial sprayers, they had to design special
15 equipment to spray it.

16 Agent Orange lacked fit for
17 registration and labeling, no civilian can walk
18 into the store anywhere and buy Agent Orange.
19 They can buy things that had the same components
20 in diluted amounts, but they could not buy Agent
21 Orange.

22 Now, I will say, by the way, that the
23 defense will not be defeated even if it was an
24 off-the-shelf product. In the circumstance in
25 which the government cancelled studies products

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2 needs a specialized products for use in a
3 military operation and chooses to use it with
4 knowledge of a potential hazard or I guess not a
5 hazard in this case, but with knowledge of a
6 condition that some might think was a potential
7 hazard or that later on is claimed to be one.

8 There were reasonably precise
9 specifications here. The manufacturer involved
10 in the design of the specifications which there
11 was a little, if it does not defeat the defense
12 the Supreme Court made that clear in Boyle, so I
13 think it's clear that the government exercised
14 substantial discretion in formulating the use of
15 the precise specifications, choosing a
16 formulation that included 2,4,5-T and therefore
17 necessary included dioxin. Now --

18 SPEAKER: And the specs include the
19 manufacturing process?

20 SPEAKER: No.

21 SPEAKER: Or does it --

22 SPEAKER: But I don't think -- I
23 don't know any government contract defense cases
24 where the manufacturers didn't tell how it got
25 there, manufacturer in Boyle how to make a

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2 helicopter door that, you know, they did not --
3 they did not specify the process, and the Vertak
4 and Maxus cases that the plaintiffs talk about
5 are the cases of liability as an arranger or
6 operator of a facility under circle, completely
7 different issues, but we're not contending that
8 the government prevented us from using a
9 different process, we are contending that the
10 conversion to a different process would have been
11 antithetical and would have raised a conflict
12 with governmental interest.

13 Now maybe if someone had thought the
14 question important enough, there would have been
15 a decision, but this is not a concern, we're not
16 going to anything about it, but that is basically
17 what I think quite clearly happened here.

18 Let me see, I see my time is running
19 short, let me see if there is anything else that
20 is worth bothering you with.

21 One other thing, Mr. Smoker mentioned
22 that the contractors made money from the sale of
23 Agent Orange, which I don't think is a crime in
24 our system yet, and that they voluntarily entered
25 into the contracts, but the fact is that at some

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2 point in 1967 or thereabouts, the government
3 exercised complete control over the supply of TCB
4 which was the critical ingredient that it was in
5 short supply, you could not get it to make a
6 civilian products, so if you didn't -- you could
7 go out of the Agent Orange business I suppose, or
8 out of the herbicide business, rather, but you
9 couldn't make 2,4,5-T herbicides for any but
10 military uses at that -- at that juncture.

11 SPEAKER: Even though it was bid on?

12 SPEAKER: Excuse me?

13 SPEAKER: Even though each of these,
14 your adversary says, was a bid contract and --

15 SPEAKER: Yes, but there were
16 orders, they had to be given priority, there
17 were -- I think -- I don't want to get bogged
18 down in a detailed discussion of, you know,
19 Professor Nash's testimony on this, affidavit on
20 this subject, but I think the question is a legal
21 one, and I think the facts surrounding it are
22 pretty clear.

23 Thank you.

24 SPEAKER: Mr. Rotho?

25 SPEAKER: Thank you, Your Honor, may

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2 it please the Court, I'll briefly address the
3 removal issues that are in the case, and as was
4 discussed earlier this morning, a Supreme Court,
5 just a week ago, in the Watson versus Phillip
6 Morris case restated the principals that
7 controlled the Federal officer removal statute
8 and that compelled the defendants in this case.

9 The Court there said that the statute
10 is designed to guard the United States against
11 the interference with its activities that might
12 occur among people who are performing functions
13 for the United States might find themselves
14 before a hostile State Court, and the Supreme
15 Court reemphasized that the statute is designed
16 to provide protection to private parties who
17 assist Federal officers in carrying out their
18 Federal functions, that describes precisely the
19 situation of the defendants in this case. They
20 produced Agent Orange and provided it to the
21 United States to assist Federal officers carrying
22 out vital governmental responsibilities, that
23 makes removal here essential.

24 There are three particular elements
25 that are necessary for removal under this

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2 statute, all of them are satisfied here. The
3 first, which was briefly discussed this morning,
4 is that the defendant seeking to remove must be a
5 person within the meaning of the statute, and
6 that issue was resolved in favor of the
7 defendants by this Court less than a month ago in
8 the MTBE decision in which the Court held that
9 the corporations are persons within the meaning
10 of section 242 A-1 that disposed of the
11 plaintiffs' argument to the contrary here.

12 The second issue, the second
13 prerequisite for removal under the statute is
14 that private parties seeking to remove must be
15 acting under a Federal official, the courts have
16 used slightly variant formulations of the degree
17 of Federal involvement that is necessary to
18 satisfy that test, but again this Court's
19 decision in MTBE provides very helpful guidance.

20 The court there expressly adopted the
21 standard used by the Fifth Circuit in its Agent
22 Orange Winters decision, and there in the very
23 government contractor context that we have here
24 before the Court today, the Fifth Circuit
25 indicated that the contractor acts under the

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2 Federal officer when it produces a product
3 according to precise government specifications
4 when it's directed by the government to provide
5 the product to conform with those specifications
6 and when there is some degree of government
7 supervision over the activities of the defendant.

8 In this case, Judge Weinstein
9 actually applied a stricter test, he required a
10 demonstration of direct supervision and control
11 of the operations of the defendants by the United
12 States, and he found that that requirement was
13 satisfied here in the series of findings that are
14 not subject to serious dispute he found that
15 Agent Orange was developed by the United States,
16 that it was a product that was produced according
17 to the strict governmental specifications, that
18 as Mr. Frye was describing it was not a product
19 that was subject to commercial use, there was no
20 commercial market for it, it was used exclusively
21 by the government. They found that the Federal
22 officers provided close supervision over the
23 product that was delivered by the contractors
24 here. There is of course no question that Agent
25 Orange was produced by these defendants to assist

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2 Federal officers in carrying out vital
3 governmental responsibilities.

4 SPEAKER: But as I understand the
5 plaintiffs' argument here, in response to what
6 you just said, is likely to be but it did not
7 specify that it was to be -- that it was to
8 contain dioxin and dioxin is the source of the
9 evils, at least as alleged that we think we ought
10 to get a chance to get to the jury on.

11 SPEAKER: Well, I think that --
12 that's what cuts it much too fine, and this
13 actually goes it a question --

14 SPEAKER: All right. And tell me
15 what you rely on to say it cuts it too fine?

16 SPEAKER: A number of things. First
17 of all the Supreme Court has clearly indicated in
18 cases like the Jefferson County decision, that at
19 the removal stage, the defendants' theory of the
20 case should be accepted, that the defendant is
21 not required to establish entitlement to judgment
22 on the merits in order to show it was entitled to
23 remove, and in fact this Court's decision in MTBE
24 provides substantial confirmation of that. The
25 Court there indicated that the judges' review at

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2 the removal stage should really be confined to
3 the jurisdictional allegations in the notice of
4 removal and here of course the notices of removal
5 state unequivocally that the product, Agent
6 Orange, was produced under government compulsion
7 according to precise government specifications.

8 If that were not the case, if you
9 have to kind of slice it down and determine
10 exactly what step of the process which was the --
11 resulted in the alleged injury, you would have a
12 very detailed factual determination in every case
13 involving removal, which is clearly contrary to
14 what the Courts --

15 SPEAKER: Which would even go all
16 the way to the merits.

17 SPEAKER: And in many cases, as in a
18 case like this, there clearly is some degree of
19 overlap, substantial overlap between the
20 governmental contract defense on the merits and
21 the removal arguments, because the policy of the
22 government contractor defense --

23 SPEAKER: You used the term
24 supervision here, what supervision did the
25 government provide, it makes specifications, and

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2 the manufacturers manufactured according to those
3 specification, where does supervision come in?

4 SPEAKER: Well, if you closely
5 review the quality of the product to make sure it
6 was getting what it asked --

7 SPEAKER: Well, I asked about
8 reviewing the quality, and evidently no tests
9 were made, product was delivered and applied, and
10 nothing happened in the interim to -- for any
11 kind of test to be made as to quality.

12 SPEAKER: Well, I think that there
13 was no concern at the time on the part of the
14 government as to the nature of --

15 SPEAKER: So they relied on what was
16 delivered to them, and didn't look into it any
17 further, so there was no real supervision, there
18 was just the promulgation of specification.

19 SPEAKER: Well, they knew what they
20 wanted. They wanted Agent Orange, they wanted a
21 herbicide that had certain characteristics and
22 that had certain -- was composed of certain --

23 SPEAKER: But they didn't supervise
24 the manufacture of it.

25 SPEAKER: No.

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2 SPEAKER: They didn't supervise the
3 delivery, they didn't supervise any testing at
4 the scene.

5 SPEAKER: Well, they did not
6 supervise production in the sense that they
7 didn't dictate or require the particular
8 production methods used, but for the removal
9 purposes, and again I think it's important to
10 keep separate the removal and the decision on the
11 merits, for removal purposes the concern is that
12 private parties who are asked to do something by
13 the government will be discouraged from doing it
14 and the government operations will be obstructed
15 if there is concern that ultimately the person
16 who is doing this is going to find themselves
17 before what was might be an unfriendly State
18 Court, and that will interfere with government
19 operations, that is the entire justification that
20 Congress in the early 19th century, when it first
21 enacted a Federal office and removal statute had
22 in mind and continued through as this statute has
23 been broadened over time. So clearly here the
24 government has asked the defendants in this case
25 to produce a particular product, they produced

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2 that product according to government spec -- they
3 produced the very product they were asked to
4 produce, if they are then having done that, if
5 they can be brought into State Court and forced
6 to face the State defense, that is precisely what
7 Congress had in mind.

8 Now ultimately when the case gets
9 adjudicated on the merits, the kinds of arguments
10 that the plaintiffs are making and the kinds of
11 arguments that Judge Minor mentions now can be
12 resolved in the merits, in terms of resolving the
13 merits.

14 SPEAKER: But the Supreme Court
15 referred to the Oxford English dictionary on the
16 question of acting under as subjection, guidance
17 or control, and of course in that case they said
18 merely complying with the law does not fit within
19 that, but this is merely complying with
20 specifications.

21 I mean subjection, guidance or
22 control seems to be a higher standard than what
23 was accomplished here, was it not?

24 SPEAKER: Well, I think there is a
25 crucial distinction between what was going on in

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2 Watson and what is going on in a situation like
3 this, which the Court emphasized very clearly as
4 some of these discussions earlier this morning
5 suggested in its discussion of the government
6 contractor defense, and its citation in
7 particular of the Winters decision by the Fifth
8 Circuit, and its use of Agent Orange as an
9 example of a situation contrasting directly --

10 SPEAKER: Well, you got to watch out
11 with the Supreme Court, they're a little tricky,
12 you know, they may have said something indicative
13 that they can disown later on.

14 SPEAKER: Well, I won't purport to
15 get into the minds of the Justice prior.

16 SPEAKER: No, that is not a good
17 place to go.

18 SPEAKER: I'm glad you said that,
19 Your Honor, I won't touch that either.

20 But --

21 SPEAKER: That is the difference
22 between having life tenure and not.

23 SPEAKER: Thank you, Your Honor.

24 Nevertheless, the Court, without
25 referring to the line specifically on what they

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2 said about the government contractor defense, in
3 Watson they clearly stated the policies that are
4 severed by section 1442A-1 and they state them in
5 terms that control here directly.

6 They said that what Congress was
7 concerned about when it referred to persons
8 acting under Federal officers were people who
9 were assisting Federal officers in carrying out
10 essential Federal responsibilities, and that
11 applies clearly to a situation like the one here,
12 the United States was involved in -- in fighting
13 the war in Vietnam, it was a determination that
14 was made by Federal officers that obtaining a
15 herbicide that had the characteristics of Agent
16 Orange was essential to do that, and in order to
17 do that they obtained the assistance of private
18 contractors.

19 If those contractors can find
20 themselves again before unfriendly State Courts
21 potentially unfriendly State Courts facing
22 determination of State law issues, they might
23 very well, and again as Mr. Frye alluded to in
24 his argument this morning, there are examples,
25 this is not a hypothetical concern, they might

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very well --

SPEAKER: I take it the statute
arose out of the situation in the war of 1812, is
that --

SPEAKER: That is right.

SPEAKER: Which -- because it was a,
quote, unpopular war.

SPEAKER: Well, they are -- in fact,
there are very clear parallels. At various
points throughout the nation's history when there
were very contentious issues in which there were
conflicts between State governments or --

SPEAKER: I'm just thinking that if
I were to use before an ordinary American the
phrase unpopular war now, two would likely pop
up, and one of them would have been Vietnam, I
mean it's the same -- it's kind of the same sort
of situation that you're concerned about, we
wouldn't -- we can see why the -- why the
government, Congress wouldn't want this case to
be tried in State Court in Berkeley, for example.

SPEAKER: That is absolutely
correct.

SPEAKER: It's the same kind of

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idea.

SPEAKER: That is precisely right.

The policy that underlies the statute is the concern that the Federal government will do things that are unpopular, at least in some parts of the country, and if the government enlists private persons to assist it in accomplishing that, however unpopular this policy may be, this (inaudible) clause and the concept that the Federal government should be able to accomplish democratically elected governmental persons.

SPEAKER: They should be able to accomplish their unpopular ends, is that it?

SPEAKER: Well, they should be able to accomplish ends without concern that they'll be interfered down the road by people who they enlisted to assist them being brought before where these activities may be unpopular.

And as you say there, sir, this -- this -- Congress had that in mind in 1815 when they enacted a predecessor to this statute, and it was expanded during the nullification of (inaudible) in the 1830s, and it was expanded

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2 during the late 1940s during the civil right era,
3 there was concern that people who were engaged in
4 activities of assisting the government should not
5 be faced with potential hostility.

6 And again what the Supreme Court said
7 in the Watson case is clearly directly applicable
8 here, it -- it said that -- that both precedent
9 and statutory policy make clear that acting
10 under, the meaning of the statute means providing
11 assistance to a Federal officer in carrying out
12 the Federal responsibilities, and the Court in
13 fact did refer specifically to government
14 contractor situation and used Agent Orange as a
15 specific example of this, saying that government
16 contractors in that situation are -- provide
17 assistance within the meaning of the -- that word
18 is used by the court when they provide products
19 that are requested by the government and that the
20 assistance they provide, the Court went on to
21 say, goes beyond compliance with the law, that
22 kind of assistance is helping a Federal officer
23 carrying out other basic governmental
24 responsibilities, that is precisely the situation
25 that we have here for the reasons that we've been

1 Proceedings

2 discussing, the concerns that underlay the
3 statute are precisely at issue in this case. And
4 for all of those reasons acting -- acting under
5 the element is satisfied here.

6 The one final element, just very
7 briefly, that is necessary for removal is that
8 the defendant have advanced a (inaudible) Federal
9 defense, and clearly if nothing else, Judge
10 Weinstein's decision on the merits, the Fifth
11 Circuit's decision in the Miller case, and Mr.
12 Frye's argument this morning, the hundreds of
13 pages of briefs before the court today,
14 demonstrate that the defense is more than
15 (inaudible), and for that reason we urge the
16 Court to affirm Judge Weinstein's decision
17 removing these cases up to Federal Court.

18 SPEAKER: Thank you.

19 SPEAKER: Thank you, Your Honor.

20 SPEAKER: Mr. Smoker, you have 22
21 minutes.

22 SPEAKER: Thank you, Your Honor.

23 First, I want to say there is five
24 critical facts that we've talked about, and I
25 just want to put in these were off-the-shelf

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2 products, there was no mention of dioxin in any
3 specification ever, the dioxin was produced at
4 excessively high levels, it didn't need -- need
5 to happen and if you go back, it's not exigency
6 of a war, commercial people were exposed to those
7 levels because they found out in the 1950s that
8 they could have improved their process, people at
9 Boehringer got very ill, Boehringer writes a
10 letter to Dow and to Diamond in 1955 saying our
11 people are sick, we had to revise our process,
12 Dow's people are getting chloracne, (inaudible)
13 writes a letter back to 1930s saying their people
14 are all getting chloracne, the Diamond had a
15 massive problem, Monsanto had an explosion in
16 19 --

17 SPEAKER: Did Dow find a way to keep
18 their employees from getting chloracne and liver
19 damage?

20 SPEAKER: No, they never did. I
21 mean they changed their process somewhat in
22 around '65 or '66, but they never did before
23 that, and as contesting, they were using rabbit
24 ear tests that the government didn't know about
25 either.

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2 SPEAKER: Is there anything in the
3 record to suggest that the problem with employees
4 and manufacturers, people -- not -- not the
5 people who were on the receiving end, but people
6 who were on the sending end continued throughout
7 this period to have a chloracne problem?

8 SPEAKER: Well, yes.

9 SPEAKER: There is?

10 SPEAKER: Yes. In fact the Monsanto
11 employees actually went on strike and then they
12 came back in 19 -- in the '50s, because of the
13 danger, and the Dow -- and Dow had to clear its
14 plant out in 1964 because it was so bad.

15 SPEAKER: Sorry, I didn't hear you.

16 SPEAKER: Dow had to clear it's
17 entire plant in 1964 because it was so
18 contaminated, never told that to the government
19 or anyone.

20 SPEAKER: Now I'm a little confused
21 about the off-the-shelf argument. Now, the
22 government specification, did they call for the
23 same level of manufacture as was used by private
24 industry at the time by the private users of
25 spray defoliant?

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2 SPEAKER: Yes.

3 SPEAKER: There were no difference?

4 SPEAKER: The difference here was
5 that the ambutyl of 50 percent and the two
6 ambutyls were mixed 50-50.7 SPEAKER: And that was not used in
8 the private sector, was it?9 SPEAKER: No, because it would
10 freeze. And the remedies in the private sector
11 had some iso-butyl to stop it from freezing, but
12 that is the one that Dow asked for patent
13 royalties on, so they switched to the ambutyl --14 SPEAKER: So there were two elements
15 that came off the shelf to form one product?

16 SPEAKER: Correct.

17 Now, the fourth is that the
18 manufacturers actually hid their knowledge. And
19 the fifth is no one involved in the government
20 selection, contracting or specification ever knew
21 about any of this.22 Now the defendants have (inaudible)
23 they only had four uncontested, and I'm going to
24 give you some facts, that is all we're dealing
25 with, the four uncontested facts were the

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2 defendants applied Agent Orange pursuant to
3 contract, the United States proved reasonably
4 precise specifications for Agent Orange, the
5 Agent Orange manufactured per the U.S. conformity
6 specifications and the United States knew as much
7 or more than defendants, that is they put in the
8 statement of uncontested facts.

9 SPEAKER: Do the defendants know,
10 according to the evidence, do the defendants
11 know, taking apart -- putting it to the side for
12 one minute, the question of people who were
13 involved in the handling, the manufacturing, the
14 handling of the product, did the defendants know
15 that people who were on the receiving end, that
16 is to say people who were at or near where the
17 defoliant was being applied were suffering
18 adverse consequences at the time?

19 SPEAKER: Well, two types
20 (inaudible) consequences, they have letters
21 reporting at Dow and Hercules, both have letters
22 saying -- and Diamond, they all have letters from
23 people that said we're having a problem.

24 SPEAKER: What kind of people is my
25 question?

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2 SPEAKER: Applicators in the field.
3 50 million pounds of this stuff was used a year,
4 but did it have cancer or the (inaudible) for
5 cancer is going to be 20 or 30 years, so --

6 SPEAKER: I understand that.

7 SPEAKER: So they didn't have -- and
8 nobody would have connected it, because, you
9 know, if you asked everybody after asbestos first
10 comes on the market 15 years later does it cause
11 mesothelioma, everyone will say no, if you ask
12 them 40 years later after the epidemiology is
13 there and they see people with mesothelioma, then
14 they backup and say yeah. So in the early part
15 the reports weren't to cancer and the latency
16 wouldn't have been there. Later, as you get into
17 the late '80s and '90s, and this is a question in
18 the earlier settlement that the latency has to
19 come up to the 1990s for the lympho (inaudible)
20 cancers that is caused by dioxin to be caused.

21 SPEAKER: But my only question, I
22 want to make sure I have it straight, the
23 question is I understand that, of course, but the
24 question is was the concern of the manufacturers
25 the danger that they knew about and therefore

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2 should have warned about did that have to do with
3 the manufacturer and handling of it, or did it
4 have to do with being out in fields to which it
5 had been applied?

6 SPEAKER: They had a concern for the
7 suppliers, there is a letter from Row to
8 Mulholland --

9 SPEAKER: Suppliers?

10 SPEAKER: I mean to the applicators.

11 SPEAKER: Tell me what an applicator
12 is.

13 SPEAKER: Applicator is people who
14 sprayed it on roads, see there is different types
15 of concentration. On agricultural area you might
16 use it in a low concentration, it's on roads for
17 right of ways or for -- on railroad track it was
18 used in a heavy concentration, heavier than
19 Vietnam because you want total clearance, when
20 you don't want to have total clearance in an
21 agricultural sense then, you would dilute it.

22 So the government in the
23 specifications said it goes between 1/16th of a
24 pound per acre and 300 pounds per acre, so there
25 is a great variance in the commercial application

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2 depending on what you want to do. The government
3 used it 3 pounds per pounds per.

4 Now, the applicators had -- there is
5 a letter from Rug, and I'll get to that, when we
6 get to the removal section, I'll get to that
7 letter.

8 SPEAKER: Can we stick with the
9 letter for a minute, tell us what the letter is,
10 where it is and what it -- how it indicates that
11 this information was hidden from the government.

12 SPEAKER: Okay, VK Rug, this is in
13 the -- in the first Stevenson brief, he didn't
14 learn -- he was at the 1963 --

15 SPEAKER: Also that was the piece of
16 evidence, yes?

17 SPEAKER: Yes.

18 SPEAKER: Is it referred to in the
19 brief?

20 SPEAKER: Yes.

21 SPEAKER: How did you find this
22 stuff?

23 SPEAKER: It's in the brief. I
24 found it from other cases that I had --

25 SPEAKER: No, that is fine.

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2 SPEAKER: It's in the brief, it's
3 cited. VK Row was the head of toxicology in
4 Dow's contact with the government. He first told
5 the government that there was dioxin in 1969,
6 he's the one that does all the testings and
7 charged their toxicology lab in doing all their
8 internal tests.

9 He entered into a secret meeting in
10 1965 with all the manufacturers, didn't invite
11 anyone of the government to the meeting, and said
12 we got a problem. We've tested your stuff, and
13 it's highly contaminated, and we have to do
14 something about this.

15 And then, this is quote in his
16 deposition, Why didn't you tell the government?
17 And his quote was, One should avoid regulation
18 whenever it's not needed because it gets extreme.

19 If -- and then he wrote a letter to
20 Ross Mullholland with a privileged, don't
21 disclose to anybody outside of Dow, and Ross
22 Mullholland was the head of Dow Canada, and he
23 said, I would expect restrictive legislation if
24 anybody finds out about this.

25 SPEAKER: Mr. Smoker, my question is

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2 a little more -- and I hope and it's meant to be
3 more focused than that. My question is I can
4 understand that there was -- let's say that there
5 was a problem, the problem turns out, whether
6 they knew it or not at the time to be dioxin, I
7 forget, then Excitor, I think they called it at
8 some point, and that problem has to do -- we know
9 they had problems with chloracne, with liver
10 damage, with respect to people who are -- who are
11 in the manufacturer of it and in the distribution
12 of it and it's possible of course that they found
13 a way to take care of that and therefore thought
14 they didn't have a further problem, the question
15 is is -- can you point to something that says,
16 yes, also they were having a problem and should
17 have been aware of the fact that they had a
18 problem with respect to people working in the
19 fields, near the army basis or who were on the
20 receiving end, rather than the giving end?

21 SPEAKER: They had complaints that
22 were written to them, each of the manufacturers
23 about people getting harmed, that people had the
24 various skin problems, nervous problems.
25 Internally --

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SPEAKER: That -- that the applicators?

SPEAKER: The applicators, yes.

SPEAKER: That is in conflict with the evidence that Mr. Frye, I believe, referred to in general terms saying folks in Vietnam who are handling this were getting it all over themselves, and there was virtually no evidence that there was a problem.

SPEAKER: Well, they -- they cite two chloracne people in Vietnam, now the question is is a 19 year old going to know it's acne or chloracne? Acne looks like chloracne, it says chloracne is a systemic or hormonal disease. The only thing different between acne and chloracne is the chloracne doesn't come up on the nose, but if you have a lot of pimples over you would you know that difference.

The evidence in their toxicity studies internally was that dioxin caused systemic health problems, chloracne, liver damage, peripheral nervous system damage, hormonal effect on cell births and was probably a potent carcinogen, that is what they knew, that

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2 is what their toxicologist --

3 SPEAKER: Right, but the information
4 goes, I think, this is what I'm trying to find
5 out, and I believe Judge Sach is trying to find
6 out the same thing, that information goes to the
7 folks involved in the manufacturer of this, and
8 once the product is done and in the can, so to
9 speak, and then ready --

10 SPEAKER: If you know --

11 SPEAKER: -- there is a suggestion
12 at least that it isn't that toxic.

13 SPEAKER: They never had that
14 suggestion, they said let's keep it from the
15 government.

16 If you know and -- that this is one
17 of the most toxic chemicals you've ever tested,
18 which Rose says, and Kelly who is the head of
19 Monsanto says, we've never tested a chemical that
20 is this toxic.

21 SPEAKER: Referring to dioxin?

22 SPEAKER: Referring to dioxin, you
23 don't keep it a secret by thinking well --

24 SPEAKER: Everybody is talking about
25 dioxin, the studies go way back to talk about

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dioxin, what do we do about that?

SPEAKER: The studies on dioxin --

SPEAKER: The discussions are in the early 1960s and the 1950s.

SPEAKER: There is -- which discussions? There was no testing as to dioxin --

SPEAKER: The ones that Frye referred to.

SPEAKER: I don't know what Mr. Frye referred to, because what he's talking was a 1959 report on chlorophyllin which is a wood preservative, not -- not on 2,4,5-T and it said, but it did say and when it talks about dioxin it was internally to the warfare people. Now that had nothing to do with --

SPEAKER: Well, they're in the government.

SPEAKER: Huh?

SPEAKER: The warfare people are in the government.

SPEAKER: They're in the government but there is 10,000 scientist, that never went to anybody that was involved in purchasing Agent

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2 Orange, getting Agent Orange continuing, they
3 were never part of that -- they were never in
4 that chain, Edgewood is --

5 SPEAKER: And the test is it has to
6 be in the chain?

7 SPEAKER: Yes.

8 SPEAKER: Let's say the President
9 knows about it but nobody else knows about it?

10 SPEAKER: The President didn't know
11 about it.

12 SPEAKER: I know. But let's say
13 hypothetically the President knows about it and
14 nobody else knows about it, and the President is
15 not in the chain for going out and buying
16 canisters of Agent Orange?

17 SPEAKER: Can we implicate the
18 President for all knowledge that is done at any
19 level, local level anywhere in the world?

20 SPEAKER: That is my question, yes.

21 SPEAKER: I don't think we can. I
22 think that the contractor's duty under the Boyle
23 is to explain to the people that they're actually
24 dealing with that this is a problem. Contracting
25 somebody and said here we have found this

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chemical, if you're somebody is doing --

SPEAKER: The contractor defense has to be specific --

SPEAKER: It has to be --

SPEAKER: -- specific to the officer under or the officers under whom you are claiming a defense?

SPEAKER: Yes. It wouldn't make sense if I told the ambassador of France about something who had nothing do with it --

SPEAKER: No, but let's say you told the secretary of the army.

SPEAKER: If I told the secretary of the army, yes, because he would have authority, but they didn't tell the secretary of the army.

SPEAKER: It has to be somebody with authority?

SPEAKER: In all of this there is not a single example from a deposition expert from any defendant that says I told him. Now look at all these document, you'll see volumes, not one deposition excerpt that says I told them, not one document from anybody but Dow ever tells anybody --

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2 SPEAKER: But do you have to tell
3 somebody something that you assume they knew and
4 that there is evidence --

5 SPEAKER: Well first of all, there
6 is documentation that they didn't know, that they
7 were trying to hide it and secondly, they've --
8 you -- and you do have to hide it, you have to
9 find it in government contract defense requires
10 that known -- that is known to the contractor so
11 the contractor that doesn't -- that isn't known
12 by the government, you can't just assume they
13 might know. If you have a problem and it's
14 dangerous and you're doing all this testing, you
15 got to say we got a problem do you know about it?
16 You can't guess that they might have known about
17 it. It --

18 SPEAKER: Do you have a case for
19 that proposition?

20 SPEAKER: I do, and in the three
21 minutes Mr. Krugel will remember that case,
22 because there are several cases for that
23 proposition.

24 The -- now, let me get to the removal
25 question. First of all, you can't say that the

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2 government contractor defense was assumed, or the
3 government contractors are assumed that in the
4 1948 statute, you can't assume that a statute
5 referred to in 1948 assumed a defense that
6 doesn't exist 40 years later, there was no
7 government contractor defense in this statute as
8 written in 1948. Also --

9 SPEAKER: What does that matter? I
10 mean it had to be existing at the time of the
11 statute?

12 SPEAKER: Well, you can't say it was
13 assumed in the writing of the statute, that this
14 would be --

15 SPEAKER: That wasn't the
16 assumption, it was assumed that the government
17 knew, that is --

18 SPEAKER: Well, no, I'm asking a
19 different question, on removal I'm asking going
20 to the removal question, you can't assume that
21 the 1948 removal statute that is written on the
22 1442 of A-1 contemplated --

23 SPEAKER: But if new -- if there are
24 new government defenses that arise, court made or
25 legislatively made, they don't have to go back

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and pass a new statute, do they?

SPEAKER: That is because it's -- that is why I said it's a preemption defense, it's not an immunity defense, in a preemption defense counter cover clearly says it can be handled by State Courts, if -- if you're reading Boyle, Justice Scalia upon multiple occasions says this is a preemption defense, in fact there is a footnote because Justice Brennan was concerned that it might be an immunity defense, and in the footnote he says this is not an immunity defense, we're not weighing in on that, and he describes this as a form of preemption. Now caterpillar clearly says preemption defenses are routinely handled by State Court.

Now, let me -- the notice of removal which was an issue in the MTBE case, dioxin is never mentioned in any notice of removal, it's never -- it's never brought up, not in a single one.

Now Federal officers -- let me get to the -- to the Federal officer removal, we separate that into two parts, one into acting under that officer, which is -- in almost all the

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2 cases, Mason, Willingham, it is the officer,
3 because the primary (inaudible) person is always
4 the Federal officer. In fact in South Carolina v
5 Davis what you're talking about is a marshal
6 assisting -- so the acting other was always
7 people assisting in the enforcement of Federal
8 law, that was (inaudible) it says since 1815.

9 Now you get to the question this is
10 the first time (inaudible) the acting under that
11 officer specifically was taken up in any sense of
12 the corporation and that is where they said they
13 have to have the guidance, tutorship or direction
14 from the officer in an official governmental
15 function, and that is citing to the Graywood
16 versus Peacock case, that it has to be official
17 function, and then you put that together with
18 under color of law, and under the color of law
19 requirement it has two, one is the defense
20 requirement which is always described as the
21 immunity defense and other one is causation, and
22 it says that the act -- this is (inaudible) the
23 causal connection between what the officer has
24 done and the State prosecution.

25 In Ryan (inaudible) starts at three

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2 things that weren't connected, off-the-shelf
3 product, dioxin not specified in the contract,
4 and free to make it with any amount of dioxin and
5 the manufacturers have control over proprietary
6 manufacturing process.

7 And I quickly read on (inaudible)
8 from Isaacson, because I think it's instructive
9 in the removal, in Ryan Judge Weinstein found,
10 correctly we think, we argue, especially in 1991,
11 Agent Orange is a mix of preexisting chemical
12 formula derived from standard recipes.

13 Then in Isaacson he says Agent Orange
14 supplied to the government was not a ready to
15 order preexisting or off-the-shelf chemical
16 mixture.

17 In Ryan Judge Weinstein said they are
18 being sued for formulating a product all of whose
19 components were developed without direct
20 governmental control and all of whose methods of
21 manufacturing are determined by defendants.

22 Then in Isaacson he wrote the
23 government's designed, controlled and supervised
24 dioxin.

25 In Ryan, Judge Weinstein wrote, The

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2 government sought only to buy ready to order
3 herbicides, not to cause, control or prevent the
4 production of the unwanted byproduct dioxin,
5 which is the alleged cause of plaintiffs
6 injuries.

7 In Isaacson, these are 9-450 and 449
8 to 455, in Isaacson, 180 degree turnaround, the
9 government's full knowledge of the dioxin problem
10 inherent in the production of Agent Orange is
11 evidence of the Federal officers maintains
12 control over the (inaudible) on which the
13 litigation is based.

14 Absolute opposite finding of facts,
15 18 years after the litigation, one 20 years
16 after. And we have to look at those facts as the
17 Court said, and each one -- the lying facts in
18 the causation, Judge Weinstein found all the
19 questions. Now I want to just digress for a
20 second in our affidavits, because the affidavits
21 we think in any normal case would defeat summary
22 judgment.

23 We had an affidavit from Doctor
24 Helmsley who wrote the EPA manual on how to
25 produce 2,4,5-T and he said that these were not

1 Proceedings

2 chemically specific precise requirements, and he
3 also said that causation is a manufacturing
4 process, and he explains in detail why they could
5 have as early as the '50s got a less toxic form.

6 Now, Nash is the leading expert in
7 the United States on government contract and
8 procurement law, almost every textbook and
9 casebook was written by him, we gave to every
10 contract to look, and he said, look, these were
11 procurement contracts, these are not design
12 contracts, all they say is this is what we want,
13 there is no specificity to them, and he also said
14 about the rating system that there was no
15 compulsion in the rating system, because the
16 rating systems do not require any company to
17 submit a bid, nor accept a contract.

18 And finally we hit Doctor Weiss who
19 is board certified in four fields in occupational
20 medicine, look at everything that was put out by
21 either side, and she testified that clearly that
22 the product's stewardship of the companies that
23 had been manufacturing this for 20 years and
24 dealt with this for 20 years knew more than
25 any -- than the government could possibly have

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known.

Now we looked at what the government might have known and the question did they hide -- did the defendants hide what they knew.

William (inaudible) director of sales for the government never told -- director of sales for the government from Monsanto never told the government of any Monsanto worker problems or dioxin; Cecil Arthur the product -- director of product quality, I never told them ever;

Diamond's James King, he was their sales manager I never told the government; Robert (inaudible) he was the head of production at Diamond, I never told the government; Milton Teeges and John Egan who headed the -- Hercules synthetic, both testified we never told the government about dioxin, we never told them of any health defects.

Doctor Julius Johnson (inaudible) was trying to say in Congressional testimony he said we knew about it, we knew there was a problem since 1950, we knew how to test for it with rabbit ear tests, we knew how to test for it in 1965 but testing the rabbit ear and we didn't tell the government in 1969, and when Senator

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2 Heart said why, and he said in retrospect it
3 would have been a good idea to tell them sooner.

4 Now Richard Hickman, the manager of
5 government sales, he never told anyone; David
6 Porter, Dow's manager of government relations, he
7 never told anyone; Donald Macallister, the
8 manager of the (inaudible), never told anyone
9 about industrial problems, about dioxin, or about
10 chloracne. The manufacturers hid that knowledge
11 actively and they all knew, they were testing
12 every one of the products because they were
13 afraid of exposure for the people.

14 Now (inaudible) I'll give this in 20
15 seconds, 15 million of pounds of this was made
16 annually. The government out of 3.4 million in
17 gallons in 1965, the government used 400,000 of
18 these products.

19 The government quote says, a variety
20 of herbicide are procured off the shelf, this is
21 1967, millions of gallon of Agent Orange has been
22 procured, the specifications used in procurements
23 have been provided by the manufacturers in terms
24 of potency (inaudible) says there is no potency
25 difference, a pound is a pound is a pound, there

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2 is no potency difference in spraying.

3 And finally I'm going to give it to
4 Mark, Mark Cooker, with Dow's Kenneth Hanson,
5 quote, this is on Agent Purple, which is the most
6 toxic -- Dow's Agent Purple, which is
7 toxic Kenneth (inaudible) says these agents have
8 long been patented with standard commercial items
9 were sold under Dow trade name and had patents on
10 their containers. He says that before he sues
11 Monsanto and Diamond to get money, because they
12 were making the same Agent Purple that Dow was,
13 and that is -- those early agents were 40
14 percent, at least 40 percent of the total
15 contamination of Vietnam.

16 SPEAKER: Thank you.

17 Mr. Speaker.

18 SPEAKER: I just want to talk for a
19 second about the MTBE case and the issue of
20 cutting it real closely. This Court when it
21 looks at the MTBE allegations and notice of
22 removal did not just blindly accept those
23 allegations, this court looked to the substance
24 of what was in the clean air act, what was in the
25 debates and looked to whether in fact the oil

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2 companies were required to include MTBE. It
3 wasn't enough that they were required to
4 oxygenate their gasoline, this Court penetrated
5 into the documentation, saw there was no
6 requirement to use MTBE, or to the extent there
7 was the oil companies wanted it. This case is
8 right on par with that. If you look at the
9 contract there's simply no requirement to make
10 dioxin, certainly not to produce a product with
11 high levels of dioxin.

12 On the issue of the warning the case
13 Mr. Smoker referring to is (inaudible) versus
14 Technologies, it's a Second Circuit case.

15 SPEAKER: Let me take you back to
16 MTBE, for a minute.

17 SPEAKER: Sure.

18 SPEAKER: They are, the oil
19 companies were arguing, and I know the case
20 because I participated on the panel, as you know,
21 there the oil companies were arguing we had to do
22 something, and this is essentially what we opted
23 to do and they tried to hike that in under it,
24 here nobody was trying to produce dioxin.

25 SPEAKER: They're trying to produce

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Agent Orange and --

SPEAKER: They're trying to produce Agent Orange, and the dioxin is in there accidentally. I mean I have a hard time drawing a parallel between something that kind of slips in as a contaminate, MTBE was not a contaminate, it was intentionally injected by the oil companies.

SPEAKER: I would submit even more so, it's a contaminant that takes place solely because -- I mean the government knew about MTBE, obviously they knew MTBE was a possible outcome of this act.

SPEAKER: Right.

SPEAKER: The government in this case had no idea that dioxin was in the finished product as a possible outcome of this production, so how could they have been acting under the government and producing dioxin when the government was completely in the dark as to this?

SPEAKER: Or there is -- there are facts in dispute as to that proposition.

SPEAKER: Well, yes and no. Mr. Frye said even -- before 1965 there was no evidence

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2 the government knew dioxin was in the finished
3 product, by their own admission, we're entitled
4 to a summary judgment up to 1965 based on what he
5 said here today. And while the evidence he said
6 of what happened in 1965 was testimony by two
7 members of the President's Science Advisory
8 Committee, which is, A, contradicted by other
9 evidence, but, B, there is no evidence that the
10 PSAC had any authority over this, it was an
11 advisory body, it did not have decision making
12 power, it was not a contracting power, and had no
13 authority over the army, it got one briefing in
14 Vietnam when herbicides in 1963 that lasted one
15 hour. So there was no evidence that people with
16 authority knew anything about dioxin in the
17 finished product. I would submit that as
18 undisputed on this record.

19 The only other topic I want to talk
20 about, it seems a foreseeability argument has
21 crept into here and I don't think it belongs
22 here. We have evidence the defendants knew that
23 this was capable of causing harm, once they knew
24 it was capable of causing harm, the type of harm
25 it would cause is not necessarily under basic

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2 tort law a need to proceed with the exact harm it
3 would cause, but in any event the law in Court
4 did not hold that the resulting harm was
5 unforeseeable as a matter of law and that issue
6 was not disclosed on summary judgment and
7 foreseeability is not part of the government
8 contractor defense.

9 SPEAKER: Thank you.

10 SPEAKER: Thank you all.

11 We'll reserve decision and let's
12 reconvene please at 1:30 to hear the
13 main (inaudible) the veterans case.

14 SPEAKER: I just have a couple
15 of (inaudible) I want to give you in response to.

16 SPEAKER: Clerk.

17 SPEAKER: Give it to the clerk,
18 please.

19 SPEAKER: Okay.

20 SPEAKER: Thank you. Thank you.

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1 Proceedings

2 AFTERNOON SESSION

3 SPEAKER: It's the United States
4 Court of Appeals, Second Circuit.

5 Hear ye, hear ye, hear ye, all
6 persons having business, court business in the
7 United States Court of Appeal Second Circuit draw
8 near, give attention and ye shall be heard.

9 SPEAKER: Please be seated. Good
10 afternoon.

11 We'll hear argument in Vietnam
12 Association Victims of Agent Orange versus Dow
13 Chemical Company, et al.

14 Mr. Moore.

15 MR. MOORE: May it please the Court,
16 my name is Jonathan Moore, and I'm here appearing
17 today on behalf of Vietnamese Nationals who
18 suffered from illness and injury because of their
19 exposure to dioxin during and after the war in
20 Vietnam.

21 I would like to call the Court's
22 attention to the presence of a delegation of
23 Vietnamese who have traveled from Vietnam to be
24 present in court today, including three
25 plaintiffs in this action as the representative

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2 of the organizational plaintiff, the Vietnam
3 Association For Victims of Agent Orange, that
4 includes Madam Lui Ti Hong who is 60 years old
5 who was exposed to dioxin near Saigon around the
6 Bien Hoa Air Base, that includes Mr. Nuin Van
7 Quii who was a member of the North Vietnamese
8 Army who was exposed during the war, who is from
9 Hai-Fong, who has two children who suffer from
10 severe developmental disabilities, that includes
11 Mr. Nuin Moi who is 24, who is a second
12 generation victim of Agent Orange, he's a
13 plaintiff whose father was a soldier in the South
14 Vietnamese Army, he suffers from spina bifida
15 which as you may recall is an injury that the VA.

16 SPEAKER: I don't have to tell you,
17 I mean that we have no doubt about the severity
18 of their injuries or at this stage that what
19 caused it, and I mean I appreciate it, but we
20 have a very difficult couple of legal issues
21 before us.

22 MR. MOORE: I understand.

23 SPEAKER: And that is what we can
24 decide, and that is what we are trying to decide
25 properly.

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2 MR. MOORE: Since they came from so
3 far away --

4 SPEAKER: That's fine.

5 MR. MOORE: -- I wanted them to be
6 introduced to the court.

7 The defendants and manufactures who
8 supplied Agent Orange --

9 SPEAKER: Can I ask you a
10 preliminary question?

11 MR. MOORE: Yes.

12 SPEAKER: It's very simple, and I
13 should know the answer to it.

14 We heard argument all morning --

15 MR. MOORE: Yes.

16 SPEAKER: -- about the litigation
17 brought under domestic U.S. law, these plaintiffs
18 make the same allegations that is to say, does
19 part of their claim, part of their lawsuit arise
20 or fall on the basis of what we knew about this
21 mornings --

22 SPEAKER: With respect to the State
23 law tort claims, yes, that's correct, Judge.

24 SPEAKER: So we can consider them as
25 a 17th set of appellants for that part of their

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2 case, and you're here just to argue the other
3 part, which is customary international law and
4 alien tort act, is that right?

5 MR. MOORE: That is correct, Judge,
6 and we adopt the arguments of the plaintiffs in
7 those case.

8 SPEAKER: Of course.

9 Thank you.

10 SPEAKER: Thank you, Judge.

11 As I said, the defendants
12 manufactured and supplied Agent Orange and
13 herbicides to the U.S. Government knowing full
14 well; one, that it was not what the government
15 ordered; two, that it contained an excessive
16 amount of a poison; three, that that poison was
17 dioxin, was one of the most toxic substances ever
18 produced and posed great health risks to those
19 exposed to it; four, that the poison could have
20 been kept out of Agent Orange; five, that the
21 poison with dioxin had no military necessity, it
22 did not aid the defoliation process, it was just
23 an unwanted byproduct; six, that the defendants
24 consciously and deliberately, we allege, chose
25 not to take steps to ensure that dioxin was kept

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2 out of Agent Orange, because to do so would have
3 reduced their profits; seven, that the defendants
4 knew Agent Orange would be used on a massive
5 scale in an indiscriminate fashion in Vietnam,
6 and I would remind the Court that this spraying
7 took place over 10 years, that it's estimated
8 that it covered 5-1/2 million acres and that
9 close to 77 million liters of herbicide,
10 including Agent Orange were dropped on Vietnam;
11 and finally, that the defendants knew that the
12 risk of superfluous and unnecessary injury caused
13 by this poison was extremely high.

14 Whatever can be said about the
15 culpability of the U.S. Government, whether they
16 knew as much or more than the defendants, it is
17 clear that on this set of facts, claimants have
18 stated a claim under Sosa, under the alien tort
19 claim for violation of the customary and
20 international norms.

21 Those norms are the prohibition on
22 the use of poison in war, and the prohibition on
23 the use of materials that cause unnecessary
24 suffering and the related norms of military
25 necessity, discrimination, and proportionality.

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2 The defendants concede that these
3 norms are long standing and universal. They say
4 all can agree that international law has long
5 contained a general prohibition on the use of
6 poison during war, and that these norms are
7 universally accepted in Asia. They also say,
8 agree, that as with poison all --

9 SPEAKER: What is it that you assert
10 is the poison? Is it Agent Orange, or is it.

11 SPEAKER: No, Your Honor.

12 SPEAKER: It's the dioxin?

13 SPEAKER: Well, we don't concede
14 that given the circumstances and the massive
15 level of -- to which this dioxin was sprayed that
16 that in and of itself does not violate some
17 customary international norm, however, the Court
18 doesn't have to reach that question in order to
19 allow this case to go forward because clearly the
20 use of dioxin, which everybody has recognized is
21 a poison, violated customary international law.

22 SPEAKER: You, is that -- with --

23 SPEAKER: Please.

24 SPEAKER: Would that be in any part?

25 I mean we're talking about -- and I realize that

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2 dioxin is highly toxic, or at least that is what
3 the record in this case --

4 SPEAKER: Right.

5 SPEAKER: -- leaves undisputed at
6 this point, but regardless of the amount of
7 toxin, I mean let's -- let's say the
8 manufacturers here were trying to do the best
9 they can, and I realize the allegations are
10 otherwise.

11 MR. MOORE: Right, Judge. I
12 think --

13 SPEAKER: This is not Cyclon B in my
14 mind, and I'm sorry, you look askance, so
15 persuade me otherwise.

16 MR. MOORE: I think the Cyclon B
17 case has a significant relevance to this case.
18 But to answer your question because it was asked
19 in the earlier morning session, would we be here
20 if these defendants had maintained the
21 manufacturing process that -- which they could
22 have at the time because they knew how to do
23 that, if they had done that, would we be here
24 today? I can't answer that, I do know that they
25 didn't do that. I don't know whether there is a

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safe level of dioxin.

SPEAKER: There is some indication this morning that neither the government nor the manufacturers were fully aware of the toxicity involved in the product that was eventually put down in Vietnam.

MR. MOORE: Well, Judge, we've alleged that they were aware, for purposes of this motion it has to be taken as true, but I think there is sufficient record evidence that we submitted below that suggests that the defendants had enough knowledge to know that dioxin was -- was a potentially carcinogenic, that it was a poison, that it shouldn't be there, that it served no useful purpose.

SPEAKER: Well, how is it a poison other than as a carcinogen?

MR. MOORE: I'm sorry, Judge?

SPEAKER: How is it a poison other than as a carcinogen?

MR. MOORE: Well, I think the evidence, at least if you look at what the VA does --

SPEAKER: In the amounts that it's

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delivered, that it was delivered?

MR. MOORE: If you look at the -- what the VA says about the association between dioxin and disease, they -- they list a number of -- there are a number of diseases from different kinds of cancer to spina bifida to diabetes which -- to chloracne and liver disease that forwards there is at least an association between exposure and disease, so that clearly is --

SPEAKER: Does the question of whether it's poison have anything to do with the purpose for its use? I mean, after all, Cyclon B was used for the purpose of exterminating people, there is no suggestion that this -- that Agent Orange was being used as an anti-personnel weapon, was there?

MR. MOORE: The question -- that goes really to the question of intent. The fact that the --

SPEAKER: There is no question that it was not used in order to harm belligerence or otherwise, or our own troops?

MR. MOORE: I don't think you have

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to find --

SPEAKER: I didn't ask you that. Is there any reason to think -- you can go on and explain to me that it's a totally relevant question, but is there any reason to think that it was used for the purpose?

MR. MOORE: I don't think for the purpose of appeal we would make that argument. I think certainly that is an argument you can make from historical record, that the use of this -- of this substance in the manner and fashion it was used in this third world country suggests that there was less of a consideration than should have been given to the human element of this thing, but you don't have to go there for the purpose of this -- of this argument, because the ban on poison, these bans, there is an absolute ban --

SPEAKER: I would like to get to something more basic even in carrying through on the last question, this is an alien tort statute?

MR. MOORE: That's correct.

SPEAKER: And it allows a suit in tort. In 1789, when this statute was passed, was

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negligence a tort even?

MR. MOORE: Well, I don't -- this is clearly not a case about negligence, Judge, we have alleged that the -- the -- the defendants knowingly and intelligently kept this poison in the product when they could have kept it out, knowing how it was going to be used.

SPEAKER: Isn't that your basic claim, product liability, negligence, all that sort of thing?

MR. MOORE: It's not -- it is not a negligence claim, Judge, it's not negligence.

SPEAKER: Is it an intentional tort that you're alleging here?

MR. MOORE: It's a -- it's a tort where the -- I would say it rises to the question of reckless behavior because what the defendants have done here --

SPEAKER: That is still not intentional tort, and what I'm saying to you is the -- the Sosa case seems to indicate that we're to look to the paradigm of the 1789 case situation, and in the 1789 of what I can see from some of the dictionaries that were issued around

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2 that time, including legal dictionaries, tort
3 encompassed only intentional law, now you're
4 alleging recklessness, you say, and negligence
5 probably also, I'm just wondering whether you
6 have a tort here within the meaning of the alien
7 tort statute?

8 MR. MOORE: I think we do, Judge, I
9 think the international law norms that we are
10 suing to enforce here are similar in character to
11 those 18th Century paradigms that Sosa talks
12 about.

13 SPEAKER: But they talk about
14 interference with ambassadors, and safe passage,
15 piracy, those are all specific international
16 torts condemned by the entire legal community,
17 they weren't talking about negligence or
18 recklessness at that time.

19 MR. MOORE: I don't think you have
20 to -- I'm hesitant to give a label to it, I do
21 believe that the -- that the conduct of the
22 defendants here was intentional and that they
23 knew of the risk and went for it anyway. To that
24 extent, I think it is a -- it might be qualified
25 as an international tort, but more importantly it

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2 is not just my opinion that that conduct of
3 spraying a defoliant that contains a poison
4 violated international law, it's not just the
5 plaintiffs', it was the U.S. Government's
6 position from 1945 onward through the Vietnam
7 war.

8 SPEAKER: Mr. Moore, let me
9 interrupt this thought and take you to a point
10 while we're on it that is bothering me, are you
11 alleging that the corporations here acted as
12 aiders and abettors in substance, or are you
13 saying that they are primarily liable for the
14 acts?

15 MR. MOORE: Right. Judge, we -- we
16 -- our principal theory is that they're directly
17 liable for their own conduct. To the extent --

18 SPEAKER: And do you, therefore, I
19 mean when I think of what international law talks
20 about in terms of holding parties directly
21 liable, the parties themselves have been engaged
22 in genocide, for example.

23 MR. MOORE: Right.

24 SPEAKER: And that's certainly the
25 principal one, so are you equating the -- the

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2 delivery of this poison in some fashion to -- in
3 the manner that it was and intended by the
4 corporations to genocide?

5 MR. MOORE: Well, Judge --

6 SPEAKER: Or to something of that
7 status, I will say?

8 MR. MOORE: Fine. Let me say two
9 things, one is we don't rely solely on direct
10 liability, we also have alleged aiding and
11 abetting liability to the extent the government
12 knew as much as the defendants knew, that there
13 would be liability both directly and aiding and
14 abetting liability.

15 But the question you asked Judge Hall
16 is an important one because what you're really
17 talking about is comparing this to the -- to
18 the -- the Holocaust cases, the Cyclon B cases,
19 and I don't want to get into whether the conduct
20 of -- of those manufacturers were worse or not as
21 bad as the corporations here, but the effect
22 in -- that is had on the people of Vietnam is
23 sim -- is certainly significant and drastic, and
24 the defendants in the Cyclon B cases said, We
25 didn't know what use was going to be made of

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2 that -- of that product we gave to the Nazis. In
3 fact, in two of the prosecutions, one individual
4 said, well, I did know, and the other individual
5 said, I didn't know, but they were both found
6 guilty.

7 So the question is -- there is --
8 that case has great relevance to the -- to the
9 allegations made by the plaintiffs in this case.
10 We of course would not -- the direct effect of
11 this product compared to Cyclon B was of course
12 significantly different and in no way do I
13 attempt to equate that, but the fact that they --
14 the effect comes later does not diminish from a
15 principal standpoint.

16 SPEAKER: The purpose might. I mean
17 this -- there is this difference between a --
18 even -- let's assume that the -- that the scope
19 of the injury was identical, that it was however
20 many millions, it still was not -- I think you
21 would agree is not -- it wasn't used for that
22 purpose, it was -- it was -- and that can be a
23 very important distinction.

24 MR. MOORE: Well, that is an
25 important distinction, Judge, but the effect is

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the same. In the test for the --

SPEAKER: I'll grant you that.

MR. MOORE: I'm sorry?

SPEAKER: But -- I'll grant you that.

SPEAKER: Let me add one other at least view as to the distinction that I see for the purpose, this -- this stuff was affecting I'll call it our, our country's own personnel as well, who were on the ground, I don't know for a fact whether any of them got sprayed, but I can't help but imagine that they're out there in the jungles.

MR. MOORE: 600,000, it's estimated were exposed to dioxin, 600,000 --

SPEAKER: I realize that.

MR. MOORE: -- U.S. vets.

SPEAKER: But I don't know whether the planes flew over and sprayed 600,000, or whether 100,000 actually got sprayed, but we knew, this country knew as I at least read the record of this case and the one that we heard this morning, that -- and the cases that have dealt with this up to this point, that -- that

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2 our own service personnel were getting exposed
3 directly.

4 MR. MOORE: Right, Judge.

5 SPEAKER: And the companies knew
6 that our own service personnel were getting
7 exposed directly.

8 MR. MOORE: Well --

9 SPEAKER: And I see that as a sharp
10 distinction between this and the Cyclon B case
11 where it's aimed purposely at eliminating human
12 beings.

13 MR. MOORE: I understand but I think
14 that -- and with respect to enforcing the norm of
15 customary international law, the prohibition
16 against poison, I don't think it's a distinction
17 that -- that makes a difference here, the -- the
18 reality is is that the defendants knew that their
19 product contained a poison, they knew that it
20 didn't have to be there, and they went ahead and
21 manufactured and supplied it anyway, they did
22 that knowingly and deliberately.

23 SPEAKER: All right so we're --

24 MR. MOORE: That was a conscious
25 decision.

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2 SPEAKER: Let's focus on poison
3 then, and explain to me the source of
4 international law that says that the prohibition
5 against the use of poisons is or was at the time,
6 and we're talking in the 1960s here --

7 MR. MOORE: Yeah.

8 SPEAKER: -- a clearly established
9 international norm, particularly in light of the
10 fact that our country had not even adopted the
11 convention that might give some legs to your
12 argument until 1972 or '75.

13 MR. MOORE: Well, actually, Judge,
14 there are several points in answer to that
15 question. One is that the defendants themselves
16 have admitted in their briefing that at the time
17 that it -- the prohibition against the use of
18 poison was universally -- universally accepted
19 and ancient, there are going back, and we
20 provided this information in our briefs and in
21 the court below an extensive history of the ban
22 on the use of poison as well as the ban on the
23 use of materials that cause unnecessary
24 suffering.

25 SPEAKER: Let me give -- let's

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2 assume, and I assume it does, I mean I don't know
3 enough stuff, but if you drop a boom that
4 explodes in a lake or in a water source that it
5 is then rendering that water contaminated to the
6 point that, and you may have to go along with me
7 on this hypothetical, but bear with me, to the
8 point that the people who drank it end up
9 poisoned.

10 Now, dropping explosive ordinance
11 into water is not -- even though the effect is
12 poisoning people, perhaps a whole village,
13 perhaps a whole city, is not poisoning those
14 folks in the context at least that I think you're
15 arguing it as a principal of international law.

16 MR. MOORE: Well, here you don't
17 have -- there is no military necessity --

18 SPEAKER: For defoliation?
19 Certainly there was.

20 MR. MOORE: Not to defoliation, for
21 the presence of dioxin in the -- in the -- in the
22 herbicide, so you don't -- there -- it's clearly
23 -- the use of the herbicide has a different
24 purpose than a -- than using a bullet or dropping
25 a bomb, but if the defendants in manufacturing

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2 that -- that bomb were aware that it had a poison
3 that had no purpose for being there, that had no
4 military necessity, I would argue that that might
5 subject them to liability for the use of a
6 poison, either directly or aiding and abetting
7 the -- a government's use of that.

8 But the --

9 SPEAKER: But it isn't your position
10 that dioxin was -- was purposefully added to
11 Agent Orange, it is that not sufficient action
12 was taken to take it out of Agent Orange, is that
13 right?

14 MR. MOORE: That is correct, Judge,
15 we're not alleging that they put it in
16 deliberately, but they certainly were aware --

17 SPEAKER: They recklessly left it
18 there once they knew it?

19 MR. MOORE: I would say even
20 actually if you really want to pin me down on it,
21 I think they intentionally left it there because
22 to take it out would have slowed down the process
23 and you heard earlier this morning, Mr. Frye
24 basically say we were getting pressure to give as
25 much products as we can, so we -- so we didn't

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2 follow the procedure that they could have
3 followed, they sped up the process at a higher
4 temperature, which was -- which guaranteed that
5 there would be the poison in the product.

6 SPEAKER: Sosa teaches us that even
7 though it may appear that there is a cause of
8 action under the alien tort statute, that the
9 courts are to be mindful of the legislative and
10 executive branches and the positions they have
11 taken in regard, especially to matters involving
12 war time, and the United States points out to us
13 that the executive branch authorized the use of
14 Agent Orange and so did the legislative branch by
15 continually appropriating money and approving its
16 use.

17 MR. MOORE: The executive --
18 President Kennedy authorized the use of these
19 herbicides based on a recommendation, an opinion
20 by the Secretary of State Dean Rusk who said, and
21 it's left out in the defendants' brief, the
22 whole, the contents of that memorandum, which
23 says, just ask Judge Advocate General Kramer said
24 in 1945, just as Counsel Buzzard to the Secretary
25 of Defense said in 1971, just as the Army's war

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2 (inaudible) said in 1956, that you could use this
3 product as long as it was not injurious to human
4 beings.

5 That is a significant qualification.

6 SPEAKER: Well, that is a lack of
7 definiteness of the type that Sosa tells us
8 doesn't justify the use of the fed alien tort
9 statute.

10 MR. MOORE: I think it's just the
11 opposite, Judge. I think it was clear, in --
12 clear unequivocal opinion of the United States
13 government, and that is after all the most
14 important source for determining whether --

15 SPEAKER: But isn't that an
16 equivocal standard, use it but be careful?

17 MR. MOORE: No, not use it but be
18 careful, use it only if it is not harmful to
19 human beings. We're not talking -- first of all,
20 we're not talking about a bomb, we're talking
21 about a herbicide.

22 SPEAKER: It doesn't say don't use
23 it.

24 MR. MOORE: It doesn't say don't use
25 it, but it says use it only if it's -- if it's

1 Proceedings

2 not harmful to individuals. May -- Judge
3 Advocate General Kramer was asked a specific
4 question in 1945 because the U.S. government
5 wanted to -- wanted to defoliate areas that the
6 Japanese were in, he was asked a specific
7 question that's before this court, and he
8 answered it in the following way: The question
9 was, can we spray herbicides from a plane to
10 defoliate crops? The very thing that happened in
11 Vietnam for 10 years, can we do that?

12 SPEAKER: But you're not arguing
13 that the Judge Advocate General's opinion is
14 essentially a pronouncement, if you will, that we
15 have to accept of what the state of international
16 law is?

17 MR. MOORE: I think -- I think -- we
18 are arguing that, Judge, I think that is a
19 very --

20 SPEAKER: We're bound by that?

21 MR. MOORE: Pardon?

22 SPEAKER: We are bound by that,
23 you're not arguing that?

24 MR. MOORE: I think if you're
25 looking for the source of the definitiveness and

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specificity of an international law norm, which is what this court has to do.

SPEAKER: That comes from a Judge Advocate General giving essentially an opinion of an Attorney General or something comparable to that?

MR. MOORE: Well, I mean --

SPEAKER: And I'm not putting that down, I'm just saying as looking -- I think our case law, at least, in this circuit tells us to look elsewhere for sources of international law.

MR. MOORE: Well, I think the most important source law of international law is state practice, I think there are also treaties, as the Hague convention of 1907, there is the Lieber code of 1863, it -- back into mid-evil history, that the use of a poison in war was absolutely prohibited. But it's important --

SPEAKER: But if those are anti-personnel poisons, those --

MR. MOORE: The norm doesn't distinguish, Judge, between the --

SPEAKER: But war, just looking at history, war back then distinguished.

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2 MR. MOORE: The war does not
3 distinguish the method of delivery. The fact
4 that in -- in the 1400s the way they delivered
5 poison was through poison tipped arrows or --

6 SPEAKER: Yeah, but that is because
7 I shot the arrow wanting to get you away from the
8 podium.

9 MR. MOORE: I think --

10 SPEAKER: No, offense, Mr. Moore, of
11 course, but --

12 SPEAKER: You have 500 -- excuse me,
13 five minutes and 33 seconds before we do that, so
14 don't worry about it yet.

15 Again, the question is I think -- I
16 don't think any member of this panel would doubt
17 that if they knew that there was dioxin in -- in
18 Agent Orange to a lethal or, you know, harmful
19 and used it for that purpose because they were
20 trying to poison the people of Vietnam, the --
21 you would have an extraordinarily strong case
22 that would clearly be contrary to -- I think, I
23 personally think it would be clearly contrary
24 to it, the question is when you are using it for
25 the purpose of defoliation and instead it has a

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2 byproduct which -- which doesn't appear until 15,
3 20, 25 years later, when presumably, even in this
4 case, the war was long over, it's a different
5 circumstance, is it not?

6 MR. MOORE: I don't think it's a
7 different for -- for the purposes of deciding
8 this case.

9 First of all, the dangers of dioxin
10 were well-known before the use of -- of Agent
11 Orange containing this poison during the war;
12 secondly, the -- if you look at the -- all of the
13 opinions expressed -- there is no -- there is no
14 contrary opinion expressed by any government
15 official during this time, in fact when Buzzard
16 looks back at this in 1971 book-ending the
17 Vietnam war, he says the Kramer opinion has been
18 the policy of the government through three wars,
19 through this whole period of time.

20 SPEAKER: May I interrupt you on
21 something on my own -- on my own time, I read
22 that with great interest because as you may know
23 Fred Buzzard, his great claim to fame is --

24 MR. MOORE: I understand.

25 SPEAKER: -- is that he was the

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2 editor of the Nixon tapes, and was the one who
3 put in expletive deleted wherever anything
4 else --

5 MR. MOORE: He also revealed the 18
6 minute gap, Judge, he did reveal that, so we
7 don't have to contest it.

8 SPEAKER: That is fine.

9 Take another minute, it was my
10 minute.

11 MR. MOORE: That is fine, Judge.

12 The point that they all make, and I
13 think it's a significant point is that if you
14 are -- it's -- are we specifically from --
15 specifically from General Kramer, he says there
16 is no rule of international law that prescribes
17 chemicals in war absolutely apart from their
18 poisonous and toxic effects on human beings. He
19 then says, we'll -- his words which is
20 particularly appropriate for this case, the
21 toxicity of the product, of the poison, is a
22 question of fact.

23 Judge Weinstein below made those --
24 made conclusions of law, made conclusions of fact
25 which were improper for purposes of this 12(b)(6)

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2 motion. He concluded based on his analysis of
3 very (inaudible) what I would consider a suspect
4 analysis in terms of looking at the cases he
5 cited, the EPA standards he looked at, if
6 anything they suggest that the level of -- that
7 he -- that he attributes to the dioxin of 10
8 parts per million, not just one, but 10 parts per
9 million, he says, that's collateral --
10 incidental, that is making it a -- a conclusion
11 that was improper on 12(b)(6).

12 SPEAKER: And yet in 1970 when
13 President Nixon transmitted the 25 Geneva
14 protocol or ratification, the Secretary of State
15 said it is the United States' understanding that
16 it does not prohibit the use in war of chemical
17 herbicides, and in 1975 when President Ford
18 issued his executive order renouncing first use
19 of herbicides in war, he confirmed the consistent
20 U.S. position that the 25 Geneva protocol does
21 not cover chemical herbicides, so you have
22 different higher ranking people in the government
23 than the Judge Advocate General and the counsel
24 to the defense department takes a completely
25 different views.

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2 MR. MOORE: It's not just the --
3 it's not just him, it's -- it's Dean Rusk as
4 well, (inaudible) of the president, it's the
5 conduct of the government.

6 When the government after the release
7 of the bionetic study which was not released
8 voluntarily, it was leaked to the press, which
9 began to make the connection between dioxin and
10 cancers and birth defects, the government when
11 they -- when they -- upon the release of that,
12 shortly thereafter, they suspended the use of --
13 of the product that given our theory that the
14 government didn't know all the -- all the dangers
15 of this product, that is consistent, that is
16 government practice that says this is a potential
17 violation of international law and order against
18 a use of a poison.

19 SPEAKER: We specifically reserve
20 that.

21 SPEAKER: It doesn't have to be
22 that, it can be the government exercising what it
23 should do, and that is doing the right thing.

24 MR. MOORE: It's more -- it's more
25 consistent with I would say the truth than the

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2 fact that the government when they were ratifying
3 the 1925 Geneva Accord offered an excuse to try
4 -- knowing that there was now this international
5 controversy about dioxin saying well, it doesn't
6 cover that.

7 But even more importantly, we don't
8 have to rely on Geneva 25. You have -- you have
9 a long established custom in international law
10 that prohibits the use of poison reflected in the
11 Lieber code, reflected in the Hague conventions,
12 reflected in government opinions that leads us
13 consistently through this period of time.

14 SPEAKER: Agreed, but even you're
15 assuming that, it leaves us with a question, and
16 you have more time, that leaves us with the
17 question of whether poisoning in the sense of
18 Agent Orange which contains dioxin which is
19 concededly lethal but is the same thing as poison
20 in the -- in the dart situation, in the heaving
21 the -- the plague-infested bodies over the wall,
22 and so on and so forth where it's -- it's -- the
23 poison is designed to kill or hurt.

24 MR. MOORE: I don't think you have
25 to have specific intent under the customary and

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2 international law norm to poison, if you are
3 aware -- and if you're knowingly and
4 intelligently aware and conscious of the fact
5 that the product that you're going to use has
6 a -- what the defendants themselves described as
7 the most toxic substance ever created, if you're
8 aware of that, and you have the knowledge of
9 that, how is it different, certainly it's not
10 different for the people of Vietnam who are now
11 suffering from that for 35 years, how is that
12 different than if you intentionally meant to
13 poison people, the effect is the same, and it's
14 not an effect that just happened out of
15 negligence, they made a conscious choice to keep
16 the poison in the product. Having made that
17 choice, they should now accept responsibility for
18 it.

19 Thank you.

20 SPEAKER: Thank you very much.

21 Mr. Wax man?

22 MR. WAXMAN: May it please the
23 Court, my name is Seth Waxman. I represent the
24 Monsanto Company and I'm here presenting argument
25 on behalf of all defendants in the case.

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2 There are a number of fundamental
3 legal principals that absolutely preclude a
4 merits adjudication of the claims of this case,
5 but I think in the first instance I want to start
6 off by making some observations about the context
7 of this litigation, what it is that is being
8 claimed and I want to go directly to I think it
9 was Judge Hall's first -- very first question in
10 the oral argument, which is what exactly is it
11 that is being alleged to be the source of the
12 companies' liability in this case, is it
13 something that they did as a principal, or an
14 aider and abetter.

15 Now the appendix materials are
16 voluminous, and I must say to my distress when I
17 actually started reading them in many instances
18 the print is tiny, but their complaint, which is
19 the very beginning of volume one is the place to
20 look for the nature of the allegations in this
21 complaint.

22 I want to direct the Court's
23 attention to three particular provisions in the
24 complaint. Let's start with paragraph 1 on page
25 37, this is a civil action brought by Vietnamese

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2 nationals for aiding and abetting violations of
3 international law and war crimes.

4 Let's go to paragraph 244, on page
5 883, the defendants conspired with and aided and
6 abetted the governments of the United States of
7 the Republic Vietnam to commit the various
8 violations of international law and most
9 particularly there is only one cause of action
10 under international law that they continue to
11 pursue here, it's the first claim for relief,
12 it's on page 889 and 990, it's called war crimes
13 and it specifically alleges that poisoning and
14 the use of weapons calculated to cause
15 superfluous injury, and I'm quoting from
16 paragraph 262, the acts described here in
17 constitute war crimes in violation of the ATCA,
18 and here is the point about the defendants,
19 paragraph 263, the defendants are liable to the
20 plaintiffs for said conduct in that defendants
21 conspired with and aided and abetted the
22 government of the United States, and the RVN in
23 committing the war crimes against the plaintiffs.

24 The theory of liability in this case
25 is aiding and abetting, and it is a suit by

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2 Vietnamese citizens and combatants that asked a
3 court applying for common law to award them
4 damages for injuries that they suffered at the
5 hands of the United States military in operations
6 that were approved by the President, expressly
7 funded by Congress, and according to the
8 plaintiffs, and you need to find this, for almost
9 a decade, the United States government engaged in
10 war crimes which we asserted aided and abetted by
11 using herbicides against vegetation for military
12 purposes because those herbicides assertedly had
13 foreseeable, foreseeably harmful side effects on
14 human beings.

15 There are a multitude of reasons why
16 those claims failed and let's start first with
17 Sosa.

18 Sosa makes clear three things, first,
19 the ATS extends jurisdiction only to a narrow
20 class of international law prohibitions that are
21 specific, clearly defined and universally
22 accepted; second, even where an actionable norm
23 is invoked a Federal Court can assume common law
24 jurisdiction only where international law extends
25 liability to the type of party being sued; and

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2 finally, even then Sosa explains that because
3 courts asked to apply Federal common law must be
4 quote particularly weary of impinging on the
5 exclusive authority of the President and Congress
6 over foreign affairs, a court must consider what
7 the Supreme Court deemed case specific deference
8 to the political branches.

9 SPEAKER: That latter point isn't a
10 jurisdictional one, however, is it? If you think
11 through how it's going to arise in the course of
12 litigation, first the court has to have
13 jurisdiction in order to be able to determine
14 that latter breach, does it not?

15 MR. WAXMAN: The jurisdictional
16 nature of the questions in this case is quite
17 perplexing, because -- I guess I'm preaching to
18 the choir here.

19 SPEAKER: The perplexed choir, yes.

20 MR. WAXMAN: The perplexed choir,
21 and I'm not sure that I would be able to
22 un-perplex, the way -- but the way I understand
23 this, the court has jurisdiction for a tort only
24 committed in violation of the law of the United
25 States, the Supreme Court has said that is a

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2 jurisdictional statute, it doesn't provide a
3 cause of action.

4 But you only have jurisdiction if the
5 following things are true, number one, the norm
6 has to be specific, clearly defined and
7 universally accepted.

8 SPEAKER: Could we -- could we as a
9 matter of -- of what we are required to decide in
10 carrying about our own jurisdiction, could we
11 stop there? Supposing the answer to that is no,
12 could that be or would that be the end of the
13 inquiry?

14 MR. WAXMAN: Absolutely. That would
15 be the end of the inquiry, because you would have
16 no jurisdiction over the international law claims
17 under Sosa.

18 SPEAKER: And therefore it's
19 jurisdictional, rather than on the merits?

20 MR. WAXMAN: That is correct. It's
21 a threshold --

22 SPEAKER: Are you sure of that? I
23 mean the jurisdiction places the case here to
24 begin with, and Sosa tells us this is the way you
25 evaluate the case, including such matters as

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justiciability which is ordinarily a preliminary jurisdictional question.

MR. WAXMAN: Well, that is what is so perplexing about this is what Sosa said is -- Sosa says claims have to be dismissed because -- and not considered on the merits because there is no -- there is no alleged violation of a specific clearly defined universally accepted norm.

Now there is two levels at which you have to examine the norm, one is is there a general broad norm that is specific and clearly defined, universally accepted with respect to a course of conduct. And second of all, do the facts alleged in this case clearly, specifically and universally fit within that norm, and in the Supreme Court what Sosa said is look, we don't even have to decided whether there is some specifically identified, clearly defined, universally accepted general norm against arbitrary arrests because whatever it is, it doesn't cover the conduct alleged in this case, which was an arbitrary arrest for a period of one day. So there is sort of two levels of the specificity analysis that you have to engage in,

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and if you don't -- that is clearly a threshold issue, that is what Sosa was all about.

Now whether that means technically that you don't have jurisdiction or that there is jurisdiction subject to making this finding, which I think is the answer, it clearly is a threshold determination, and that is all that you have to find.

Now I want to explain to the Court, the -- there has been a lot of stuff thrown around so far about what the poison prescription is and how specific it -- and I want to be sure to address this because I -- it is our contention that even today, forgetting the 1960s, and even in an international tribunal, forget a Federal Court applying common law in the context in which the -- the questions to the court is, what would Congress have intended if it could have thought about this, would it have intended that an Article 3 court adjudicated claim that the United States government engaged in a decade long systematic pursuit of war crimes, even an international tribunal would not recognize as actionable the claims that are articulated in

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this case, and I do want to get to that.

SPEAKER: At which level?

MR. WAXMAN: Excuse me?

SPEAKER: At which level in your Sosa analysis? At the first, more general level?

MR. WAXMAN: Right, the first --

SPEAKER: Or the second, Sosa specific, get rid of the case level?

MR. WAXMAN: I think that if this claim were brought in the International Court of Justice today it would fail at the threshold level, and I'll tell you why, you know, there has been some talk about the Buzzard and Kramer decisions, and I realize this is on my time, but I want to say how gratified I was that somebody on the court remembered the other reason why Fred Buzzard -- because the young colleagues that I've had working with me on this case look at me blankly when I say, Do you know who this guy was, you know, how he -- in any event, I want to get to those, because they don't state what the plaintiffs stated state, and they certainly don't constitute state practice.

If you want to see state practice,

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2 let's look at the -- the opinion of the
3 International Court of Justice on whether or not
4 the use of nuclear weapons, nuclear bombs
5 violated customary international law. They --
6 they wrote this opinion in 1996 at the request of
7 the United Nations general assembly.

8 One of the allegations was there were
9 millions, hundreds -- no, hundreds of thousands
10 of people who were poisoned to death by radiation
11 that everybody knew about. You know, some people
12 were killed by the blasts, some of them were
13 combatants, but there were hundreds of thousands
14 of people who entirely foreseeably were poisoned.

15 The ICJ's decision, and we need to
16 look at paragraphs 55 and paragraphs 57, address
17 this specific allegation that it violated
18 international law against the proscription
19 against poison, and they -- they address both the
20 general proscription that is addressed in Hague
21 article 23 A and the Geneva protocol of 1925, and
22 they said here, paragraph 55, The court will
23 observe that the regulations annexed to the Hague
24 convention do not define what is to be understood
25 by poison or poison weapons and that different

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2 interpretations exist on the issue, nor does the
3 1925 protocol specify the meaning to be given to
4 the term analogous materials or devices. The
5 terms have been understood in the practice of
6 states in their ordinary sense as covering
7 weapons whose prime or even exclusive effect is
8 to poison or asphyxiate, this practice is clear.

9 Paragraph 57, The pattern until now
10 has been for weapons of mass destruction to be
11 declared illegal by specific instruments.

12 Now there are two very key points
13 here, one is that the poison -- the norm against
14 the use of poisons or poison weapons of war is
15 universal, it is general, it required -- it is at
16 such a high level of generality that it doesn't
17 provide actionable proscriptions, except where it
18 has been instantiated with -- instantiated with
19 respect to particular weapons or classes of
20 weapons, and it is implicated only where the
21 substance is used for the purpose of poisoning
22 human beings --

23 SPEAKER: Supposing --

24 MR. WAXMAN: And not for collateral
25 purposes.

1 Proceedings

2 SPEAKER: Supposing dioxin were used
3 as pure as they could get it were used for that
4 purpose --

5 MR. WAXMAN: Well --

6 SPEAKER: -- the purpose of killing
7 people, would that be contrary to customary
8 international law?

9 MR. WAXMAN: It would -- as I guess
10 one of the questions is during -- if they
11 didn't -- if they had sprayed --

12 SPEAKER: If they had poured dioxin
13 into the rivers in order to kill people.

14 MR. WAXMAN: There is no -- well,
15 first of all, one of the things that the Edgewood
16 Arsenal did was it was investigating a whole
17 range of substances for use as poisons, and they
18 rejected dioxin out of hand because the notion --

19 SPEAKER: Don't fight the
20 hypothetical. Let's deal with something --

21 MR. WAXMAN: I couldn't -- I
22 couldn't avoid noting what a bizarre poison it
23 would be that acts secretly, unbeknownst to
24 anybody with the latency period of decades, but
25 assume that it was.

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2 SPEAKER: Assume it wasn't that, it
3 was arson.

4 MR. WAXMAN: Assume it was arson,
5 let's take a better case, let's take a better
6 case. We have 1907, the Hague regulation, which
7 they say confirmed an ancient proscription
8 against the use of poisons. All of the countries
9 that were belligerence in World War I were
10 signatories, they asserted that they maintained
11 it, they glopped what they gleefully called
12 poison gas at each other throughout the war, and
13 the United States manufactured it, but we
14 couldn't get to the theater of war before the
15 armistice was declared. They have no answer for
16 why the acts this state practice existed after
17 the Lieber code and after the Hague regulations,
18 they have no answer for why it was then
19 considered necessary to negotiate and ratify the
20 1925 Geneva protocols against asphyxiating
21 gasses, they have no answer to the question of
22 why in 1993 it was necessary to negotiate
23 chemical weapon conventions. They have no answer
24 for why during the Vietnam war, when there was
25 furious debate about the use, the United States'

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2 use of Agent Orange, and there were resolutions
3 introduced in the general assembly and past that
4 invoked the 1925 convention, which the United
5 States had refused to sign, and even when it
6 signed it as Judge (inaudible) pointed out, did
7 so with the understanding that it did not apply
8 to herbicides, not one person, not one country
9 during the Vietnam war invoked the poison
10 proscription.

11 There were 130 countries that
12 considered the general assembly resolution with
13 respect to herbicides specifically in Vietnam,
14 not one of them even suggested that article 23
15 A's poison proscription was invoked. Half of --

16 SPEAKER: But the appellant's
17 argument here, and they'll make it far more
18 eloquently than I, it's not the herbicide, it's
19 the contaminant to the herbicide.

20 MR. WAXMAN: That is --

21 SPEAKER: It's the dioxin.

22 MR. WAXMAN: Of course, that
23 absolutely right, and there is absolutely
24 nothing -- there is no state practice whatsoever
25 that supports the notion that the poison

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2 proscription is implicated by the deliberate use
3 of something not against people, but against
4 plants that has foreseeable side effects. There
5 is no -- I -- we have to engage in something that
6 I think collectively for all of us as American
7 judges and lawyers is a sort of an unnatural act,
8 because the international law of war is not a
9 common law exercise, it's not an exercise -- it's
10 not the way that I ask you as judges to interpret
11 U.S. statutes, it's a civil code concept. We
12 have a general norm that poisoning is bad, and
13 poison is illegal, it provides actionable
14 proscriptions only when there is specific
15 agreement on certain weapons, because that's
16 the -- we don't ask soldiers to deduct -- to
17 reason deductively from general principals to
18 specific applications, and there is -- there is
19 no state practice whatsoever, none, that has ever
20 applied the poison proscription to herbicides of
21 any sort, no matter what side effects they have,
22 nuclear weapons, no matter what side effects they
23 may have.

24 We -- our troops are being protected
25 right now in Iraq and in Afghanistan by an army

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2 that uses depleted uranium, some of the same
3 people that have brought this case has said this
4 is the new Agent Orange, because the uranium is
5 depleted, but it's not totally depleted. And not
6 only that, we are using projectiles that are
7 hardened with depleted uranium.

8 The consequences of -- the President
9 has made a decision to do that, the Congress is
10 fully aware of it, the notion, and this is
11 getting sort of a side of step one of Sosa, which
12 is the specific and generalized norm, or maybe it
13 isn't, the notion that that would constitute a
14 poison weapon because there are foreseeably
15 people who will incur radiation related disease
16 because of the use of this is fantastic, and what
17 is even more fantastic is the notion that since
18 as Judge Minor pointed out, Sosa's footnote
19 throughout the opinion, and footnote 21 says in
20 determining whether or not to recognize a cause
21 of action the court not only has to look at how
22 specific and universally accepted and clearly
23 defined the norm is and whether the -- whether
24 international law applies liability to the
25 parties being sued, which I'll get to in a

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2 minute, but also the practical considerations of
3 assuming jurisdiction over the case and deciding
4 the case, and in particular in footnote 21, the
5 court points out that the specificity norms and
6 the party norms are not the only considerations
7 the court has to decide. It also must consider
8 case specific deference to the political
9 branches.

10 This is a case in which the United
11 States government has filed not only in this
12 court but the District Court a brief that not
13 just says, gee, this sort of touches on foreign
14 affairs, and this sort of touches on diplomacy,
15 this sort of touches on war making, but says this
16 was at least battlefield decisions, this does
17 affect our ongoing diplomacy.

18 SPEAKER: In fact this particular
19 case, isn't it true that there have been ongoing
20 negotiations between the United States and
21 Vietnam?

22 MR. WAXMAN: Judge Minor, this
23 morning's AP report, and this is a published
24 report, I suppose the court can take judicial
25 notice of it, reports that today the President of

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2 Vietnam is visiting the United States. I
3 don't -- this seems entirely -- the timing seems
4 entirely fortuitous, to discuss trade matters and
5 continuing discussions over Agent Orange.

6 The notion that the United States has
7 not come into this court and said -- I mean they
8 also have a political question point that we also
9 support, that even if this were an implied cause
10 of action under Federal common law under Sosa,
11 that even if this were a statutory cause of
12 action, there are justiciability problems with
13 under the political questions doctrine, but even
14 under Sosa the United States has come in and
15 said, this is a challenge, a predicate of finding
16 liability here is that you find that the United
17 States government in the battlefield decisions
18 that were made by the executive and ratified by
19 the Congress engaged in war crimes, I don't know
20 of any -- any case in which a plaintiff has come
21 in and asked a Federal Court to actually make
22 that determination. Certainly in this -- this
23 court has a pretty reasonably rich ATS
24 jurisdiction, nothing like that, invoking an
25 Article 3 court's jurisdiction -- asking an

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2 Article 3 court to recognize compliantly a cause
3 of action that depends on a predicate
4 determination that the political branches engaged
5 in systematic war crimes, and that applies a
6 damages remedy that the court, the Supreme Court
7 in Garamendi and in other cases has made -- and
8 (inaudible) has made clear our reparations, that
9 is they are requests by foreign nationals,
10 indeed -- enemy combatants for damages arising as
11 a result of what the United States military did
12 during a war.

13 SPEAKER: But we -- we get there,
14 with all due respect, Mr. Waxman, I think to look
15 at that issue not because the government has put
16 in a brief articulating its position that don't
17 touch us, this is -- we're two other branches.

18 SPEAKER: We heard that recently.

19 SPEAKER: We hear that --

20 MR. WAXMAN: That is absolutely
21 correct, Judge Hall, I'm just referring to
22 footnote 21's requirement of case specific
23 deference and just saying that here --

24 SPEAKER: Right.

25 MR. WAXMAN: -- is an instance where

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2 the United States has actually come in, it makes
3 it particularly clear, but the very nature of
4 their claim is the kind of claim that a Federal
5 Court should be cringing at the notion of
6 adjudicating, not just under the political
7 question doctrine, but under Sosa.

8 SPEAKER: And it is -- and you --
9 the strength of that argument, it seems to me, is
10 based on the -- what you pointed out to us in the
11 complaint, that it is an aiding and abetting
12 principal, and they have to have aided an abetted
13 the United States government in carrying out the
14 war crime in quotes.

15 MR. WAXMAN: Yes, that is correct.

16 SPEAKER: If we read it as a direct,
17 if there is any way to read the complaint as a
18 direct claim against your client and related
19 clients, are we still at that point?

20 MR. WAXMAN: Well, certainly not as
21 palpably, but you're still at the following
22 point, there is -- there is no state practice
23 whatsoever substantiating the -- any of the
24 following propositions, that foreseeable harm or
25 collateral side effects have any place whatsoever

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2 in the international law of war regarding
3 weapons, period.

4 The State practice is completely,
5 decidedly and overwhelmingly to the contrary for
6 the reasons that I've addressed and also for the
7 given authorities that we've cited in our brief.

8 SPEAKER: Mr. Waxman, may I just
9 point -- literally point of order, I have on my
10 paper here that Ms. Swindle is going to argue,
11 but it doesn't say how much of the time she's
12 going to take or whether there is time --

13 MR. WAXMAN: Your Honor, we're
14 following the Court's order --

15 SPEAKER: Yes.

16 MR. WAXMAN: -- that the government
17 take 10 minutes of my time.

18 SPEAKER: Good, thank you.

19 MR. WAXMAN: So, all right, I
20 also -- I need to remember before my time goes up
21 to address the State law claims, because I know
22 that was the first question judge (inaudible)
23 asked.

24 SPEAKER: Yes, yes, yes.

25 MR. WAXMAN: And the State law

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2 claims are not entirely resolved -- are not
3 disposed of entirely under the government
4 contractor defense that you articulated this
5 morning. I guess I might as well take my time
6 now to explain this.

7 SPEAKER: Please.

8 MR. WAXMAN: Our position is that
9 you don't -- in this case you don't even get to
10 the substantive issue of the government
11 contractor defense to state tort claims, because
12 the state law claims for some of the same reasons
13 I've just articulated are not justiciable, that
14 is they are preempted under the supremacy clause
15 under the authority of Garamendi and Journey,
16 that is they implicate the core foreign affairs
17 power of the United States, and just as in
18 Garamendi this case implicates both field
19 preemption and conflict preemption, that is --

20 SPEAKER: And is that because of the
21 nature of the plaintiffs?

22 MR. WAXMAN: It is because of the
23 nature of the -- the plaintiff -- well --

24 SPEAKER: The plaintiff says --

25 MR. WAXMAN: Well, it's really the

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2 nature of the relief that is requested and the
3 theory, that is they are asking for reparations,
4 they are asking for something that our
5 governments are talking about now, and that is a
6 foreign affairs function that State Courts don't
7 exercise.

8 SPEAKER: So are you saying that
9 they could have been plaintiffs in cases like the
10 16 we've heard this morning but in fact they are
11 not? That is to say a simple -- a -- a
12 non-resident alien has access to -- to the courts
13 of the United States, I understand.

14 MR. WAXMAN: To be sure, I guess
15 here is -- I understand your question now.

16 Claims for money damages --

17 SPEAKER: Right.

18 MR. WAXMAN: -- arising out of the
19 conduct of the U.S. -- claims for money damages
20 from citizens of a nation at whom -- with whom we
21 were at war arising out of the military actions
22 of the United States in war are reparations, that
23 is whether they are made against the United
24 States government or -- or made against companies
25 that acted with or United States persons, those

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2 -- that was at issue in (inaudible) it was an
3 issue in Garamendi and a court's state law is not
4 in the business -- is preempted from making those
5 kinds of decisions with respect to claims by
6 citizens of enemy nations.

7 SPEAKER: I think we understand
8 that. But I'm not sure, or at least I haven't
9 understood the answer to what I heard Judge Sach
10 asking, which is if the plaintiffs in this
11 case -- if -- if individual members of the
12 association in this case brought claims in the --
13 in this morning's cases, of the nature of those
14 brought in this morning's cases, does your --
15 directly against the corporation, does your
16 argument go away with respect to that?

17 MR. WAXMAN: No. In fact we
18 understand the State law claims in this case to
19 be identical. In other words, if they -- if
20 this -- if you strip the international law claims
21 out of this case, it's a mirror of the ones this
22 morning.

23 SPEAKER: All right.

24 MR. WAXMAN: But because it is being
25 brought by citizens of a nation with whom we are

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2 at war on account of our military activities,
3 they are reparations and the decision whether to
4 pay them or not --

5 SPEAKER: So the answer to my
6 question is because of the nature of plaintiffs
7 the answer is yes.

8 MR. WAXMAN: It is the nature of the
9 plaintiffs and the type of relief that they are
10 requesting, and the fact that --

11 SPEAKER: Specifically?

12 MR. WAXMAN: Damages, reparations.

13 SPEAKER: Damages. I want to make
14 sure that you're talking about that and not
15 injunctions.

16 SPEAKER: Not injunctive relief.

17 MR. WAXMAN: Injunctive relief, I
18 don't think there is anything more I can add to
19 the brief.

20 SPEAKER: That is fine I want to
21 make sure that is what you meant.

22 MR. WAXMAN: Yes, it is clearly the
23 request that they're seeking damages.

24 Now I do want to address, I think in
25 my remaining time, at least, I don't want --

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2 SPEAKER: Just one thing before you
3 get -- aren't reparations brought government to
4 government? They don't involve individual
5 people?

6 MR. WAXMAN: No, in fact there
7 are -- in (inaudible) there were private at issue
8 this is the Iran-Contra claims tribunal, where
9 the United States decided to extinguish all of
10 the claims in -- all of the judicial claims
11 arising out of the disputes with -- between Iran
12 and the United States and create an
13 administrative tribunal, those were private --
14 those included claims by private parties against
15 private Iranian banks, similarly in Garamendi,
16 these were -- these were complaints brought by
17 Holocaust survivors and descendants of Holocaust
18 survivors against private banks and I guess
19 insurance companies in that case.

20 It's entirely clear in the Supreme
21 Court's decision in Garamendi actually expressly
22 treats with this, reparations includes claims by
23 private parties or government parties against
24 U.S. private parties or the U.S. Government that
25 arise out of U.S. military conduct in war.

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2 Now, there is -- the plaintiffs
3 relied heavily is too weak a word for it, on
4 Major Kramer and General Counsel Buzzard's
5 statements.

6 In fact, it's interesting, Mr. Moore
7 acknowledged even here that when you were looking
8 at the contours of international -- the
9 international law of war, you look at state
10 practice first, second, third and fourth, and
11 then of course opinions of bodies like the
12 International Court of Justice and treatise.

13 The only thing -- if you look at
14 their reply brief they have a heading that says
15 state practice, all it talks about is these
16 things, these two things, as if this is state
17 practice.

18 Now let me just deal with them on
19 their terms, because they do not establish what
20 the plaintiffs had claimed.

21 The Kramer memo, which is essentially
22 what the Buzzard memorandum is relying on, the
23 Buzzard letter is relying on, starts off by
24 saying, okay, I've been asked to give an opinion
25 about whether you -- using herbicides against

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2 these remaining islands where there are Japanese
3 belligerence on in order to deprive them of food
4 would violate international law, it appears that
5 the agents are not injurious to animals or human
6 beings, experimentation is continuing, and just
7 to be entirely clear that what he was being asked
8 to give an opinion about was only on the
9 legality, on the assumption that they weren't
10 harmful to humans, the very last -- at the very
11 bottom of page two it says, "Should further
12 experimentation disclose that they are toxic to
13 human beings, I would be pleased to express my
14 opinion on the facts which may be presented for
15 consideration".

16 He was being asked for, he gave an
17 opinion about whether international law, the
18 international law of war proscribed the use of
19 chemicals as a -- for herbicidal purposes on the
20 assumption that they weren't harmful to human
21 beings, and what he said was, first of all, he
22 says, specifically with the relevant portions,
23 the relevant paragraphs on page two go to the
24 1925 convention, which they are no longer even
25 pressing here, and what it says in any event is

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2 that the use of herbicides against -- for
3 defoliation purposes or to deprive the enemy of
4 food does not violate international law, and it
5 goes on to say, "But the use of defoliants to
6 deprive civilians of their food supply by any
7 means does." That is -- that is all the opinion
8 addresses.

9 And the reason why he said, look, if
10 it turns out that these are harmful to you --
11 that, you know, these are toxic to human beings
12 I'll address it is because he points out in his
13 memo the Hague prohibition against poison and
14 poisonous weapon -- poisoned weapons does not
15 apply, but the 1925 Geneva Convention, even
16 though the United States hasn't signed it might
17 amount to customary international law, but it
18 depends on the -- and section 23 E of the Hague
19 conventions depend upon the facts and
20 circumstances, that is a weapon that is
21 calculated to -- as he puts it, calculated to
22 cause unnecessary suffering is something that
23 requires a balancing and requires a case by case
24 determination, in other words, and this I guess
25 does go to a point I should address before I get

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2 to Buzzard, it goes to their alternate source of
3 the international law which is a violation of the
4 prohibition against weapons that cause quote
5 unnecessary devastation or violates --

6 SPEAKER: That is certainly an
7 uncertain standard, isn't it?

8 MR. WAXMAN: They're all -- don't
9 even take my word for it, don't even take -- the
10 International Court of Justice also -- their
11 opinion on nuclear weapons also deals with
12 whether or not the use of nuclear weapons
13 violated those norms and said we can't give an
14 opinion because those norms are so vague and so
15 general they require a case by case adjudication.

16 Their own expert, Mr. Fletcher, on
17 page 1717, I believe, of the -- yeah, 1717 of the
18 joint appendix expressly says that these norms
19 that require adjectives in order to describes
20 like it says unnecessary or disproportionate
21 cannot satisfy Sosa because they aren't specific
22 and they aren't clearly defined, and they do
23 get -- these norms do get -- become actionable
24 for international law purposes when they are
25 instantiated in particular practices that the

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2 world comes to condemn, like the use of do-dumb
3 bullets, or specifically targeting civilians,
4 those are actionable proscriptions that an
5 international court can address, but, you know,
6 when the Nuremberg tribunal considered charges
7 brought against a German general who
8 deliberately, specifically, intentionally
9 devastated an area of Finland the size of the
10 country of Denmark, starving its entire
11 population in the wintertime, it found that it
12 could not decide that that norm had been violated
13 because it involved a balancing that it, even as
14 an international tribunal, could not adjudicate,
15 and so much for a Sosa court attempting to apply
16 those norms.

17 Thank you.

18 SPEAKER: Thank you. Ms. Swindle.

19 SPEAKER: Thank you, Your Honor,
20 Sharon Swindle from the Department of Justice
21 representing the United States as amicus curiae.

22 Because the court's questions have
23 centered significantly on the ATS issues and
24 questions relating to ATS, I would like to start
25 to that and turn if I may afterwards to the

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1 political question doctrine.

2 Picking up on what counsel for the
3 defendants has emphasized, I think the primary
4 norm at least alleged in the plaintiffs'
5 complaint here is one of the violation of the
6 norm of proportionality, and I think it would be
7 difficult to identify a legal norm implied by
8 customary international law that would be less
9 appropriately the basis for a Federal common law
10 claim under Sosa and the analysis appropriate for
11 the alien tort statute.

12 By its very nature, that norm invites
13 a court to weigh unlike things, the risk of
14 attack or ambush, in this case on U.S. soldiers,
15 that was sought to be forestalled through the use
16 of chemical herbicides in the war and the
17 potential risk to enemy soldiers, to civilians in
18 the area of a battlefield, and if the plaintiffs'
19 claims are to be taken at face value, to make
20 that calculus not only with regard to short-term
21 harms or potential effects, but with regard to
22 harms that may be manifest only decades later,
23 may be the subject of great conjecture, that may
24 not even be known at the time of employment of
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the weapons in question.

To the extent that there is such a norm of customary international law, it surely cannot meet the standards for specificity identified by the court in *Sosa*, so for that reason alone the plaintiffs' claim should fail.

I think secondarily, the plaintiffs' attempt to resurrect their claim by recreating or re-characterizing that one for violation of the norm of poison as they identify it, this is problematic for a couple of reasons. I think first and foremost there is no norm of the sort they identify, to the extent that there was an international law norm prohibiting the use of poison during the Vietnam war, it barred the intentional use of lethal or toxic substance to kill people. It was an anti-personnel weapon that was intended to be encompassed within the war, and this is not that. The plaintiffs do not allege that chemical herbicides were used against people, and they were not, they were used undisputedly for the purpose of killing plants. To the extent there were side-effects, to the extent that the plaintiffs claims are based on

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2 the notion that there is a poison norm that
3 imposes some sort of strict product liability,
4 there simply is no foundation in international
5 law for that sort of norm, and I would point out
6 that that norm too would bring in all of the same
7 problems that makes the proportionality norm an
8 inappropriate basis for a Federal common law
9 claim because it again would invite a court or
10 require a court to look at potential, foreseeable
11 side effects and somehow invalidating or making
12 unlawful retroactively the use of a particular
13 weapon during a war.

14 And I think particularly important in
15 looking at the ATS claims here is to look at what
16 indicia of Congressional intent we do have in
17 this area, because the Supreme Court made clear
18 in *Sosa* that in deciding whether to imply a
19 private right of action for our customary
20 international law norm, a court should look to
21 see what if anything we know about what Congress
22 intended in the particular area in question, and
23 here we know quite a lot.

24 For one, we know that if these claims
25 were brought against the United States directly,

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2 they would be barred by sovereign immunity, the
3 Federal tort claims that in setting out the scope
4 of the U.S. waiver of sovereign immunity
5 explicitly carves out from that waiver claims
6 arising out of combatant activities as these are,
7 claims arising out of the exercise of
8 discretionary functions by the United States
9 military, as to these here, and claims arising
10 overseas. So for all of these reasons --

11 SPEAKER: There is a sort of rough
12 parallel between that and the government
13 contractor defense, isn't there?

14 SPEAKER: There is, Your Honor, and
15 really many of the defenses brought to bear here
16 and the issues before the court involved
17 consideration of the same sorts of issues.

18 I think that our political question
19 argument as well, all of these concerns about the
20 scope of the court's appropriate exercise of
21 jurisdiction or the court's exercise of judicial
22 power stem from these separation of powers
23 concerns.

24 SPEAKER: Is it -- do you agree with
25 I take Mr. Waxman's point that if we decide -- we

Proceedings

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2 were to decide this in your favor, of course, on
3 the ATS basis there is no need to do anything
4 else?

5 SPEAKER: Well, Your Honor --

6 SPEAKER: I -- mind you, I'm not
7 asking you whether you would like us to do
8 something else, is there a need for us to do
9 something else?

10 SPEAKER: I understand, Your Honor.

11 We don't entirely agree with his
12 analysis of the issue. In (inaudible) United
13 States once a colorful claim is alleged under the
14 alien tort statute, the court has subject matter
15 jurisdiction, and so to the extent that the Sosa
16 analysis is performed it is not a subject matter
17 jurisdiction question.

18 I think some of this court's earlier
19 precedents has suggested to the contrary, but
20 applying the principals outlined in Bell v Hood
21 the United States simply doesn't agree with that,
22 and we've articulated that position recently in
23 the Ninth Circuit in a support of rehearing in a
24 case pending there.

25 That said, we do not understand Steel

1 Proceedings

2 Co. to bar considerations of defenses that are
3 not core Article 3 defenses. For example, the
4 Supreme Court of public terms decided Tenant v
5 Doe which involved consideration of the Totten
6 doctrine, a defense that essentially barred any
7 claim that required proof of a secret agreement
8 with the CIA to conduct espionage, and that was
9 not an Article 3 defense, but yet the court
10 recognized that it could consider that before
11 deciding the subject matter jurisdiction.

12 So in a similar vein, I think the
13 court could appropriately consider the ATS
14 analysis as -- as the first and deciding issue in
15 the case.

16 And the Third Circuit recently did
17 just that in an unpublished decision rejecting --

18 SPEAKER: And unpublished decision,
19 you said?

20 SPEAKER: It was an unpublished
21 decision in the Third Circuit in which the court
22 recognized that there was a significant political
23 question doctrine analysis to be performed, but
24 skipped over that with its recognition that the
25 claims were not cognizable under the ATS.

1 Proceedings

2 So turning to the political question
3 doctrine, however, and we do think again that
4 many of the same factors are appropriately
5 considered both under the Sosa analysis --

6 SPEAKER: Sorry, may I take it that
7 you think that the alien tort claims act which
8 says that the District Court shall have original
9 jurisdiction of any civil action isn't a
10 jurisdictional -- isn't a subject matter
11 jurisdiction provision?

12 SPEAKER: My apologies, if I was
13 unclear.

14 A District Court has subject matter
15 jurisdiction when there is a colorable claim
16 under international law. And so applying that
17 analysis that applies in Bell v Hood, once there
18 is what appears to be a colorful claim under
19 international law, which does not require a full
20 consideration of whether it's a valid claim under
21 international law, but simply is it brought by an
22 alien, for example, does it (inaudible) --

23 SPEAKER: Any claim brought by an
24 alien is a colorable claim?

25 SPEAKER: No, Your Honor, but we

Proceedings

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2 don't think that the full Sosa analysis is a
3 question for subject matter jurisdiction once
4 there is a colorable claim, you know, a plaintiff
5 who is an alien alleges a violation of
6 international law, we believe that the remaining
7 Sosa analysis is not a jurisdictional analysis
8 but rather a threshold merits analysis.

9 That said, it does encompass many of
10 the same prudential factors that can be
11 considered in a -- in a threshold kind of
12 consideration, much like the threshold defense
13 of -- of Totten considered by the Supreme Court
14 in tenet.

15 SPEAKER: It would be, it seems to
16 me rather a narrower basis on which to base a
17 holding were we to agree with you then than
18 political question, do you agree?

19 SPEAKER: Well, it would not be a
20 constitutional holding, Your Honor, I'm not sure
21 I would agree that it would be narrower, frankly
22 we think that this Court's prior decisions in
23 both DeCosta and Holtzman are quite powerful
24 support for the notion that this claim is not
25 cognizable in this court. The idea that

Proceedings

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2 following those decisions, six months later an
3 alien could have brought a claim seeking to end
4 the mining of the harbors of the North Vietnam
5 simply by bringing those claims as -- as
6 violations of customary international law under
7 the alien tort statute, rather than under some
8 provision of operative U.S. law.

9 It beggars the imagination that this
10 court would have considered such claims to be
11 cognizable after having rejected virtually
12 similar identical claims as barred by the
13 political question doctrine. And I think it's
14 hard to imagine a case that more fully implicates
15 at least the first prong of Baker v Car, the
16 claims here seek really what is a fundamental
17 re-weighing of a decision by the President as
18 Commander in Chief about the military necessity
19 for use of a particular tactic based on his
20 valuation of its strategic military benefits as
21 compared to the potential --

22 SPEAKER: Why do we -- how do we get
23 to that on a 12(b)(6) motion?

24 SPEAKER: Well, to the extent that
25 the political question doctrine is justiciable,

Proceedings

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Your Honor, our terms on the questions of justiciability I think it's appropriate.

SPEAKER: Of course their position isn't that -- isn't that the President of the United States couldn't make a decision to use herbicides, or even Agent Orange for that matter, so long as it didn't have wildly toxic impurities.

SPEAKER: And, Your Honor, obviously we've spoken a little about this, to the extent they relied on principals of international law, they're principals of proportionality, so in their very nature I think they are inviting this court to weigh and re-weigh a strategic military decision. I don't think those claims could be resolved without that, and even their norm -- their argument based on the norm against poison is -- is based on the notion that it is a foreseeable unnecessary side effect which again requires the court to consider and determine what side effects are permissible in light of what the anticipated military --

SPEAKER: You're getting this political question argument out of footnote 21 in

Proceedings

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Sosa?

SPEAKER: No, Your Honor. We don't believe that footnote 21 of Sosa is necessarily co-extensive with or linked to the political question doctrine.

I think footnote 21 asks about case specific deference, I think presuming that that would be a case that was otherwise justiciable, I think those often do come together, as I think this Court recognized in its decision in --

SPEAKER: The Supreme Court is saying assuming you do have colorable claim, and even though it seems to have some merit, you also have to look into the other factors of deference to the legislative and executive branch.

SPEAKER: Well, that is exactly right, Judge Minor. I think Sosa recognizes that it is a fairly dramatic step for a court to exercise Federal --

SPEAKER: Although you don't give total deference to the executive and legislative branch, do we?

SPEAKER: In the same vein that one can look to the views of the executive, one can

Proceedings

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2 look to the views of congress, to the extent
3 they're known in determining whether to exercise
4 common law authority. I think that is a distinct
5 question from whether the claim would be
6 justiciable at all, because of separation of
7 power limitations on the ability of the
8 judiciary.

9 SPEAKER: Thank you.

10 Mr. Moore, please.

11 MR. MOORE: I think the judge --
12 Judge Weinstein clearly understood what claims
13 were being made below.

14 He clearly understood on what
15 international law norms the plaintiffs were
16 relying on. I think that it's clear -- and we
17 have -- we argue below and we argue in this court
18 that this is not a case challenging these
19 battlefield decisions made by the military or
20 even the President for that matter. In fact, our
21 position is that the battlefield decision was to
22 use an herbicide, it was not to use an herbicide
23 that contained an excessive in-avoidable amount
24 of poison.

25 You can't simply ignore the presence

Proceedings

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2 of this poison in the product. It was not
3 anything the government wanted, it didn't have to
4 be there, but it was there anyway by a conscious
5 and deliberate choice by the defendants.

6 Are we to say under those
7 circumstances, under the circumstances of the
8 extent to which the harm has been alleged that
9 that violates no norm of international law? I
10 think that would be a shame position for this
11 court to take. Certainly we believe it violates
12 the norm against poison, but also look at the
13 norm of proportionality, which is an alternative
14 ban for which this court can conclude that there
15 was a violation of the international law. Even
16 the international --

17 SPEAKER: Proportionality is --
18 proportionality by the very term implies an
19 uncertain standard, you got to weigh the
20 proportion.

21 MR. MOORE: That's right, Judge, but
22 this is no -- there is no weighing of the -- of
23 the use of poison with this herbicide. You don't
24 have to even weigh the -- whether the herb --
25 whether the dioxin was a little bit necessary, or

Proceedings

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2 a lot necessary, or used simply too much, it was
3 absolutely unnecessary, it had absolutely no
4 military necessity, it did not aid the position
5 of the military at all.

6 SPEAKER: Well, let me take you back
7 again, and I realize I am probably outside the
8 complaint in this case, which is essentially the
9 documents you'd like to have us bind us to the
10 facts, which the law does, to consider here, the
11 government wants to get a -- an herbicide in
12 place in use ASAP to protect American forces from
13 getting killed.

14 It's -- it's there, they put this
15 together. It's not -- and they are doing it as
16 quickly as possible, and the dioxin is in it.
17 Now, maybe at some point you have an argument
18 that, well, they should have stopped that process
19 and gone onto another one.

20 MR. MOORE: I don't understand how
21 you could say at some point, a poison -- if you
22 put the poison in a product and it's not
23 necessary, what purpose, what possible purpose
24 could there be for it to be there?

25 SPEAKER: If you want the best

Proceedings

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2 product and you get it and it happens to have a
3 little poison in it, which the effects of which
4 were not as well-known at the time.

5 MR. MOORE: Judge, it's -- first of
6 all --

7 SPEAKER: I'm not being an
8 apologist, I'm giving you a hypothetical.

9 MR. MOORE: I understand. It's not
10 a little poison, that is a question of fact, it's
11 not a little poison.

12 We've alleged that this poison caused
13 severe injury, there are now hundreds of
14 thousands of U.S. vets who are compensated every
15 year by the VA to \$1.5 million, it's not a little
16 poison, it's not a trace amount, and these are
17 people who did not have to live under this spray
18 for 10 years, these are people who were
19 incidentally exposed to the poison while they
20 were applying it. The level of exposure of these
21 plaintiffs is much more severe than to suggest
22 that -- that -- that simply saying this was a
23 battlefield decision should give the defendants
24 carte blanche to avoid any liability, to me would
25 be a terrible result.

1 Proceedings

2 We are not challenging the decision
3 per se, you don't have to get to the point of
4 challenging the decision per se to use
5 herbicides, that -- that is a false argument.

6 The issue is whether they used an
7 herbicide with a poison that they knew was in
8 there and knew they had -- did not have to be in
9 there.

10 SPEAKER: Do you mind, I was
11 wandering through the internet last night, which
12 is dangerous, and -- I came up with this
13 quotation, Paracelsus, the father of toxicology
14 once wrote, "Everything is poison, there is
15 poison in everything, only the dose makes a
16 thing, not a poison."

17 MR. MOORE: Well, Judge Weinstein
18 said the same thing below.

19 SPEAKER: He probably could use the
20 internet too.

21 MR. MOORE: He didn't -- I'm sorry,
22 Judge?

23 SPEAKER: I just said he could use
24 the internet too, I'm sorry, it's a serious
25 issue.

Proceedings

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2 MR. MOORE: He didn't -- he didn't
3 -- he didn't then consider whether the dose here
4 was sufficient.

5 SPEAKER: Well, my point really is
6 that -- that Mr. Waxman was talking about all
7 kinds of different things, uranium, I suppose
8 gasoline. Your point, I suppose, and -- and I
9 guess it's true, if you take too much iron pills,
10 that could poison and kill children, but your
11 point -- I -- has -- is linked to the
12 peculiarly -- peculiarly toxic effect of dioxin.

13 MR. MOORE: Well, it's both the --
14 both the nature of the product and extent to
15 which it was used. Don't forget it was used for
16 10 years in over -- you know, the 79 million
17 gallons of I mean million liters of --

18 SPEAKER: Is there anything special
19 about dioxin that makes it qualitatively
20 different from trace amounts of -- of other -- I
21 mean how do we decide what is a poison and what
22 isn't a poison, other than something that has a
23 deleterious effect on -- on a person?

24 MR. MOORE: Well, I think the
25 definition of poison is an obvious one. I think

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2 the extent to which the norm is -- the norms are
3 implicated in a -- in this kind of case, depends
4 on the extent to which it was used, and those are
5 factual questions.

6 Judge Weinstein below said I'm -- I
7 am going to conclude that 10 parts per million is
8 not enough to trigger any kind of -- it wasn't
9 serious enough, it was incidental, it was
10 collateral, that is 10 times beyond the industry
11 standard at the time which was one part per
12 million, 10 times, that is a serious amount. And
13 we know that the dioxin of many these defendants
14 contained the poison -- the herbicide contained
15 dioxin in even much larger amounts, so I don't
16 think you can simply -- you can't conclude at
17 this point in this case whether -- you're really
18 asking about causation, could it have caused the
19 kind of the injuries, that's -- that was
20 specifically referred by the court, and hopefully
21 we'll get to that at some point.

22 SPEAKER: So if the government says
23 or as it did say, we need a defoliant and after
24 playing with all of this stuff, here is what we
25 want in the perfect world the defendants should

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have said, no, you can't use that because it's got a bit of a poison in it, and you should use what?

MR. MOORE: Judge, there aren't perfect worlds, at least not --

SPEAKER: Particularly in the area of war, I suggest.

MR. MOORE: But -- but that is not the facts of this case, they didn't -- there was no effort to stay within an industry standard, there was no effort to comply with any kind of humanitarian concern that the -- about the effect that this -- the poison in this product might have.

SPEAKER: Is it your position that there was a process available that would have virtually eliminated dioxin and they were required to use it?

MR. MOORE: They were very aware of the Boehringer --

SPEAKER: I'm asking you --

MR. MOORE: Yes.

SPEAKER: -- is that your position?

MR. MOORE: Yes, that is our

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2 position, Judge, they were aware of it, they
3 discussed it among themselves, and it was a
4 process, the Boehringer process was a process
5 that would have reduced the presence of the
6 dioxin, and all they had to do was make it a
7 little slower at a lower temperature.

8 As I said, Judge, we're not
9 challenging about the decision, we're not
10 challenging the right of the President
11 necessarily to say I want to use an herbicide.

12 One could argue that the extent to
13 which this -- just an herbicide is used might
14 violate (inaudible) proportionality, but you
15 don't have to get to that point to decide this
16 case because this clearly -- this was about the
17 use of an herbicide with a poison, and Judge
18 Weinstein says -- and the whole opinion in the
19 defendants' brief and the government's argument
20 is all based on the -- the theory that this is an
21 herbicide and not a poison, or an herbicide with
22 a poison, and therefore it gives more currency to
23 the argument about how we're interfering with a
24 decision of an executive, and this is all about
25 preparations, it's not. It's about the conduct

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2 of these defendants, knowingly and intelligently
3 leaving in a poison in a product they knew how it
4 was going to be used, and they knew if they had
5 reason to believe that the effect would be
6 disastrous, and they did it anyway.

7 That's -- that violates -- it's not
8 the ban on poison, poison -- certainly the ban on
9 proportionality.

10 Now I remind the court, the
11 International Court of Justice in the -- in the
12 nuclear weapons case, and they asked to give an
13 advisory opinion although they concluded --
14 although they couldn't decide the poison issue,
15 they did say that they could not envision any --
16 any situation where the use of a nuclear weapon
17 would not violate the proportionality standard of
18 international law because of the wide-spread,
19 indiscriminate use injury that causes from --
20 that results from the use of such a weapon.

21 Mr. Waxman made a lot of points, I
22 wasn't sure he was going for the government or
23 the defendants, because most of his argument was
24 about how the United States government should not
25 be challenged for their actions during the war,

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2 but one of the points he made was I think neither
3 this court nor any other court that decided these
4 ATS cases is that the -- is that under -- that
5 the international law is like a civil code, and
6 that before you can finance (inaudible) one,
7 under the international law, all the rules of
8 construction have to be fully set out, that --
9 that has never been the rule of this court or on
10 Sosa. You recall Judge Edwards in (inaudible)
11 saying if we waited for the international floor
12 to define all of the rules of construction like
13 aiding and abetting and corporate liability, the
14 question of the necessary level of intent, we
15 would never -- the international law norms would
16 be meaningless.

17 Your Honor, this is -- the cause of
18 action here does -- the use of the term war
19 crimes, those are -- those are allegations that
20 are meant to enflame, I think, the court to say
21 we're accusing the United States government of
22 war crimes, they may in fact have may have done
23 so, but you do not have to get to that point to
24 decide this case. A war crime is a technical
25 violation of a customary international law in

Proceedings

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2 war, and it's our -- and it means nothing more
3 than that, even though it has a charge meaning.

4 The fact that these defendants
5 engaged in the kind of conduct they did,
6 violating these norms constitutes a war crime,
7 whether in fact the government did it or not is
8 not -- you don't have to answer that question to
9 decide this case.

10 SPEAKER: Well, if -- if we're
11 proceeding on an accessorial liability theory,
12 don't we have to in substance either find or
13 assume that the government engaged in this,
14 because if they aided and abetted somebody that
15 didn't do that, what have you got?

16 MR. MOORE: Well, I'm never sure on
17 these arguments whether the government is saying
18 they had as much knowledge or not as much
19 knowledge, or whether the defendants are saying
20 the government had as much or not enough.

21 If in fact the government had -- had
22 as much or more knowledge than these defendants
23 did about the dangers of dioxin, then they are in
24 fact guilty of violating these customary and
25 international law norms, and the defendants can

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2 be sued under an aiding and abetting theory of
3 liability for that conduct.

4 If in fact they -- we believe that in
5 fact the government didn't have the level of
6 knowledge that these defendants did, that --

7 SPEAKER: It's kind of the
8 defendants were doing it by pulling the wool over
9 the government's eyes and the government was
10 essentially aiding and abetting them.

11 MR. MOORE: You heard Mr. Frye in
12 the morning session say, up until 1965 they
13 didn't mention anything about dioxin, there was
14 no review of the procurement, of the supplying,
15 the testing of product, did they pull the wool
16 over the government's eyes? I mean, if you want
17 to use that term, it's fine. What is clear is
18 that they had knowledge.

19 SPEAKER: Don't you have to
20 essentially have alleged something along those
21 lines for us to essentially reverse the District
22 Court?

23 MR. MOORE: Well, I -- I -- to
24 reverse the District Court, you have to find that
25 the court made improper findings of fact, which I

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think is clear, and secondly you have to find that -- that the plaintiffs have stated a claim under the ATF for violations of the norms that they talked about, which under the circumstances of this case, I don't think it's a close question, because this is not -- this is not like Sosa.

SPEAKER: Yes, but we have to read this in the context of your complaint, Mr. Moore, that's -- I mean there certainly is some constraint on what we do here, we can't just use our --

MR. MOORE: Judge, to the extent that this court may feel that the complaint does not set out all of the particulars of every claim that we -- we've now asserted both in the District Court or in this court, you know, we would amend that complaint, but I think that the complaint has enough in it on the direct liability question as well as on the aiding and abetting theory for us to go forward, but if the court feels more particularity is necessary, more clarity then we will certainly comply with it.

But as I said, this is -- this is not

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2 Sosa, this is not one incursion across the border
3 to engage in an unlawful arrest. After all, that
4 simply is all that the Supreme Court in Sosa
5 decided.

6 This is a -- this is a course of
7 conduct over a number of years that -- that --
8 that raises the question, and we believe the
9 question should be answered in the affirmative as
10 to whether these defendants had knowledge about
11 the poison -- poisonous nature of this product
12 and -- and -- and allowed it to be manufactured
13 and supplied to the government knowing full well
14 the harms that were incurred, and we are now
15 seeing years later the fruits of that terrible,
16 poisonous product.

17 SPEAKER: Mr. Moore, in light of the
18 comments with which I kind of opened these
19 proceedings, I want to make it clear to you that
20 with respect to the presence of your clients and
21 their colleagues, and we're very much honored and
22 flattered that they would come all this way to
23 hear the argument. Thank you.

24 Very well argued, and we'll take it
25 under advisement and adjourn the court, please.

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SPEAKER: Court stands adjourned.

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CERTIFICATE

STATE OF NEW YORK)

:

COUNTY OF NEW YORK)

I, KAREN PERLMAN, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That the above is a true record.

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of August, 2007.

KAREN PERLMAN

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