UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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IN RE: "AGENT ORANGE"

PRODUCT LIABILITY LITIGATION, MDL 381

United States Courthouse
Brooklyn, New York
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February 28, 2005
11:00 a.m.

TRANSCRIPT OF PROCEEDINGS

Before: HON. JACK B. WEINSTEIN, District Judge

APPEARANCES

Attorneys for Plaintiff:

CONSTANTINE P. KOKKORIS, ESQ.
Attorney for Veterans Assoc
225 Broadway
New York, New York 10007
BY: CONSTANTINE P. KOKKORIS, ESQ.

JUDITH BROWN CHOMSKY, ESQ.
Attorney for Center for Constitutional Rights
P.O. Box 29726
Elkins Park, PA 19027

APPEARANCES CONTINUED
Attorneys for Plaintiffs

MOORE & GOODMAN
Attorneys for Vietnamese Plaintiffs
740 Broadway at Astor Place
New York, N.Y. 10003-9518
BY: JONATHAN C. MOORE, ESQ.

Attorneys for Veteran Plaintiffs
J. MARK ENGLEHART, ESQ.
GERSON SMOEGER, ESQ.
MARK COOPER, ESQ.
JAMES BOANERGES, ESQ.
STAN MORRIS, ESQ.
JOHN NORRIS, ESQ.

Attorneys for Defendants:
RIVKIN RADLER, LLP
Attorneys for Dow Chemical
EAB Plaza
Uniondale, N.Y. 11556-0111
BY: STEVEN BROCK, ESQ.
JAMES V. AIOSA, ESQ.
RICHARD S. FELDMAN, ESQ.

McDERMOTT WILL & EMERY
Attorneys for Riverdale Chemical Co.
50 Rockefeller Plaza
New York, N.Y. 10020-1605
BY: CHRYSSA V. VALLETTA, ESQ.

APPEARANCES CONTINUED
Attorneys for Defendants

KELLY DRYE & WARREN, LLP
Attorneys for Hercules, Inc.
101 Park Avenue New York, N.Y. 10178
BY: WILLIAM A. KROHLEY, ESQ.
WILLAIM C. HECK, ESQ.

DEBEVOISE & PLIMPTON, LLP
Attorneys for Hooker Chemical Entities
919 Third Avenue
New York, N.Y. 10022
BY: ANNE E. COHEN, ESQ.
ANTHEA E. ROBERTS, ESQ.

MYRON KALISH, ESQ.
Attorney for Uniroyal
50 East 79th Street
New York, N.Y. 10021

CADWALADER, WICKERSHAM & TAFT, LLP
Attorneys for Occidental Chemical,
as successor by merger to
Diamond Shamrock Chemical Co.
One World Financial Center New York, N.Y. 10281
BY: MICHAEL M. GORDON, ESQ.

APPEARANCES CONTINUED

Attorneys for Defendants

ANDREW FREY, ESQ.

JAMES BRESS, ESQ.

JOE WEHRER, ESQ.

Attorneys for Monsanto

ROSLYNN R. MAUSKOPH

United States Attorney

BY: ORI LEV, ESQ.

Assistant United States Attorney

One Pierrepont Plaza

Brooklyn, New York 11201

Allan R. Sherman, CSR, RPR

225 Cadman Plaza East

Brooklyn, New York 11201

Tel: (718) 260-2529 Fax: (718) 254-7237

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THE CLERK: Civil cause for motion, In Re Agent Orange Litigation.

MR. KROHLEY: Good morning. Bill Krohley for the defendant Hercules.

I've been asked this morning to speak on behalf of the defendants in connection with the government contractor defense as it relates to the U.S. Vietnam veterans. I promise to be very brief.

The papers filed by the plaintiffs are voluminous. I've been through them. I'm sure your Honor has been through them. They don't contain anything new. The defendants have not offered anything your Honor hasn't seen before or considered before on several occasions going back to 1985 when the Court first granted defendant's motion for summary judgement based on the upon the government contractor defense 19, 20 years ago.

The Court found in its February 9, 2004 decision that defendants met each of the requirements set forth in Boyle. Specifically, the Court found that no reasonable juror could fail to find that the U.S. Government set reasonable and precise specifications, that the defendants met those specifications and three, the government had substantially more knowledge than the defendants whether taken individually or in combination.

The U.S. determined to use Agent Orange in Viet Nam

because from a military point of view its benefits to save lives outweighed the speculative risks involved.

Under Boyle, defendants only had a duty to communicate to the government actual dangers known to them at the time.

In this case, plaintiff's expert, Lara Welsh has put in an affidavit saying that ten years after the war in Viet Nam ended the evidence as to causation was still inconclusive, unquote, as to whether Agent Orange actually caused any injury to U.S. service troops.

If such knowledge was lacking ten years after the war ended, it couldn't have been known by the defendants during the course of the war when Agent Orange was being used. That was, in fact, if you recall, the point made by the Second Circuit in its 1987 decision affirming the dismissal of the Afgan (ph.) cases.

In earlier Agent Orange litigation this Court and other courts concluded that none of the available evidence was sufficient on a more probable than not basis to show that Agent Orange caused injury to anyone as it was used in Viet Nam. And the Court remarked that it's the same conclusion, it seems to be much the same today, things have not changed. There is simply no basis for your Honor to reconsider your decision granting defendants' summary judgement. And with respect to the motions in the other cases, we respectfully

move for judgment in those ca

s as well.

If the Court has an

questions, I'd be happy to

answer them.

THE COURT: Well, I

ake it what you are talking

about is domestic claims.

MR. KROHLEY: That's

correct.

THE COURT: In the \

etnamese cases, I expect that

one of you will argue with res

ect to the application of this

defense in international law.

MR. KROHLEY: That's

correct, your Honor.

THE COURT: Thank yc

MR. BROCK: Steven B

ock for Dow Chemical Company.

I want to address on behalf of

defendants the renewed motions

on remand by the Bower plainti

fs.

Your Honor has alrea

decided this issue by the

Isaacson plaintiffs and as a p

eliminary matter of

housekeeping, I should mention

he Court should be aware that

there are a number of cases th

were removed from the state

court in the MDL 381 docket fo

which we have motions for

summary judgement pending on g

ernment contractor events

which either never made a moti

to remand or made a motion to

remand in state court but did

t renew it before this Court

as the Bower plaintiffs did.

As a matter of housel

eping, I suggest that it may

be a good idea to enter orders

aking clear if that is

your Honor's view since there are no material differences that the rational of the Isaacson opinion holds Federal jurisdiction in the other cases where they have not filed motions to challenge at this point.

THE COURT: I suggested when I issued my original opinion which is now stayed that the defendants submit judgments of dismissal.

Have you not submitted judgments of dismissal in connection with those cases?

MR. BROCK: We have, your Honor, and we also filed motions for summary judgement. Because of the peculiar nature of jurisdiction, plaintiffs might seek to challenge it in the Second Circuit even if they have not challenged it at this point because it was a case removed from Federal Court. It would clarify that the record in the case is the same in all of these cases and that this Court did in fact consider in those cases whether there was federal jurisdiction and didn't find it.

THE COURT: Yes, all right, thank you.

MR. BROCK: Also, defendants in addition to the arguments for 1442 removal had raised the idea of jurisdiction as a matter of federal question which was brought up at the initial stages of the case back in 1980.

As your Honor indicated, in the opinion of the Second Circuit two to one split decision found against federal

jurisdiction back in 1980. We have what we think are substantial arguments that in view of the Second Circuit, which was tentative at the time, would be different now based on intervening Supreme Court cases. We understand that your Honor has -- we understand that your Honor has indicated that it will follow the Second Circuit precedent now, so I will not readdress that and it doesn't mean at this point that we are abandoning that issue. I presume that it's more appropriately raised in the Second Circuit.

As to 1442 removal, we are in very much the same situation as Mr. Krohley indicated as to the government contractor defense. There is very much the same body of evidence. We rely on the evidence submitted on the government contractor defense motions on the government contractor defense motions in support of remand and removal and vice versa. The threshold showing for removal is of course much lower and given the Court's rulings on government contractor defense, there is non-material disputed fact that makes it straight forward that the Court's findings of fact for purposes of removal are sufficient.

I won't go over details. I would say that there are a couple of other matters that I would call to the Court's attention. One is that plaintiffs in focusing on the manufacturing process issues tacitly assumed that the dioxin levels that would result in the manufacturing processes are

the key or overriding factor at the time in evaluating the manufacturing process.

As your Honor has indicated, that would only be the case if it were assumed that dioxin and Agent Orange at the time posed a significant hazard that would merit that sort of attention in designing and manufacturing dioxin.

When we raised and discussed this issue at an earlier hearing, the Court was concerned with the Second Circuit's view that causation evidence even in the 1980s was insufficient, therefore, there could not have been any sort of obligation to disclose or any sort of known hazards with sufficient degree of certainty back in the 1960s.

For purposes of removal, I'd say that your Honor's comparison to the tobacco cases, your Honor expressed concern that in the tobacco litigation there were allegations that the companies knew of hazards which were not publicly known until many years later.

In this case, as your Honor has indicated in many decisions recently, discovery is complete. Plaintiffs have had full opportunity to find any such internal knowledge that the companies might have had and the judgment is going to be entered based on the status of the record as it is right now. So that with all due respect, I don't think that is a valid distinction or reason to be cautious of the Second Circuit's ruling in this case.

It is a valid distinction in general when there has not been sufficient discovery or whether there might still be evidence in a company's possession that was not publicly known but in this case, given completion of discovery, the Second Circuit's rationale I believe is quite pertinent both as to removal and the government --

THE COURT: Getting back to your causality issue, I don't see why the causality issue is necessarily dispositive of the contractor defense issue.

MR. BROCK: I would say it's not a causality issue and I think you are correct, it was a question of what was known.

THE COURT: Everybody knew that dioxin was dangerous or potentially dangerous and that there was dioxin in the material. The fact that there was no proof of causation ultimately doesn't affect, does it, the defense that you are now raising as a contractor?

MR. BROCK: In the remand motion it comes up in this fashion because plaintiffs focus on the important events, that being the details of the manufacturing process and not simply the fact that defendants were acting as part of the federal war effort following the government's instructions to supply herbicide with the appropriate level of inquiry. And our point would be that the manufacturing process details would be irrelevant unless the sorts of differences between

manufacturing process s made some material difference or were thought to make mater al differences at the time.

THE COURT: There was no question that it made a difference, is there? There was dioxin in the material and it was well-known at the time, as I understand your position in your papers, that different methods of producing herbicides would either reduce or increase the amount of dioxin and if it was potentially dangerous, then the manufacturing techniques enter into the equation, don't they?

MR. BROCK: Every substance is dangerous in degree of exposure, at some dose, and there was --

THE COURT: They knew it didn't take very much of a dose. They knew there was at least chloracne problems.

MR. KROHLEY: Your Honor, this is really my area.

THE COURT: I understand it is your area but as I understand, now counsel is raising this problem which I find interesting.

MR. KROHLEY: I'd like to respond to your statement that everybody knew at the time that dioxin was dangerous.

THE COURT: Yes.

MR. KROHLEY: The military on instructions from the president did toxicity testing on Agent Orange on the material that was actually being used in Viet Nam. It was done at Edgewood by scientists. They studied the literature. They did laboratory experiments. They came to the conclusion after

a careful study that the material as it was to be used in Viet Nam would not present a hazard to human beings. This was a conclusion that they came to. They took that conclusion and went to the White House and met with the president's science advisory committee comprised of Nobel prize-winning scientists, the top scientific advisors to the president. They concurred that Agent Orange containing whatever amounts of dioxin it contained was harmless, that it could be used in the way it was going to be used in Viet Nam not harming human beings. That was the knowledge then. That was the consensus then; the risks of dioxin in small amounts used in Agent Orange was purely speculative at the time and it large remains speculative today. But to say as your Honor did that everyone knew it was dangerous.

THE COURT: I thought I said potentially dangerous.

MR. KROHLEY: The potential may have been there but the potential was tested then and there and the potential was found not to be there, that Agent Orange was found to be harmless in the way it was intended to be used in Viet Nam. That was the specific conclusion.

THE COURT: Yes, I understand that, but I think it was suggested by your colleague that the question of increased dioxin because of the manufacturing technique didn't affect this decision.

MR. KROHLEY: Your Honor, these scientists at

Edgewood and PSAC knew that there was dioxin in Agent Orange. The testimony is clear on that. These men were all bright enough to figure out there could be lesser or higher amounts of dioxin present in Agent Orange. It was very simple for them to come to the conclusion that; wait a second, we don't like this, let's go back to the manufacturers, minimize it or take it out. They didn't do any of that. They weren't doing that why? They weren't being negligent. They weren't doing that because the toxicity of the overall composition of the Agent Orange itself was not a problem. The fact that there were trace ingredients in Agent Orange made no difference. It was tested with those trace amounts of dioxin and found to be harmless. And that remains our position today.

In fact, I'll come back to something I raised before your Honor the last time we argued this, that the Second Circuit in it's 1987 decision came to the conclusion that how can you have a duty to warn if the risk was purely speculative at the time.

Your Honor didn't like that argument.

THE COURT: I still don't like it because if everybody recognized that there was a potential danger at the time, then the question becomes whether the United States knew that and knew more about it or at least as much as the manufacturers.

MR. KROHLEY: The United States knew --

THE COURT: So I don't think it helps your case very much to argue now that there was no danger.

MR. KROHLEY: The government didn't come to the conclusion that they used Agent Orange in Viet Nam because they decided it was dangerous. They didn't believe secretly that --

THE COURT: They knew there might be a danger, otherwise they wouldn't have gone through all these tests and taken it up with the president.

MR. KROHLEY: These are precautions.

THE COURT: The government doesn't take precautions because there is no basis for the precaution.

MR. KROHLEY: The testimony is then before the widespread use of Agent Orange in the Viet Nam, the United States administration, Kennedy's administration wanted to be sure that we weren't involved in something that could be characterized as chemical warfare.

THE COURT: That is another problem. It seems to me you are mixing your arguments, at least as I understand it, in getting off what I thought was your main point. And that is that if there was a danger and some people thought there was a danger, that the government knew as much or more than you did about it.

MR. KROHLEY: There is no question that the government --

THE COURT: Is that your position?

MR. KROHLEY: With the exception of what you make about there being a danger. We don't believe there was a danger. We believe the government knew as much if not more than we did about the potential hazard involved.

THE COURT: We are talking about potential danger.

MR. KROHLEY: That is the point.

THE COURT: I understand the point.

MR. KROHLEY: But the actual danger was a matter of speculation at the time.

THE COURT: Well, there is an awful lot of law on toxic chemicals and liability in mass torts that goes off on speculation.

If somebody makes a car with a bad tank, gas tank, it's speculative in a sense as to whether that is going to create a hazard on the road, but that speculation may be enough to create a duty to test further. And that comes up all the time in pharmaceuticals and everything else. So this point, which I now understand, doesn't seem to me to be very weighty.

It seems to me that the position I understood you to take is; there may have been potential dangers, everybody knew what those were or might be, and the government knew as much if not more than we did.

That, as I understood it, was your fundamental

position.

MR. KROHLEY: You got it exactly right.

THE COURT: Good.

Then let's get back --

MR. BROCK: On remand.

THE COURT: To the point that you were making.

MR. BROCK: My point, let me move on because my major point is that there was extensive discussion of the manufacturing process in the context of whether we are entitled to remove this case and I think for a number of reasons that that is off target.

THE COURT: I don't understand why it's off target. If there was a potential danger and the manufacturing process may have resulted in greater or lesser amounts of dioxin, why is it irrelevant to the issues before us that you chose a manufacturing process that produced, possibly, more dioxin?

MR. KROHLEY: Your Honor, if I may, again it is not that the defendants chose to use a particular product, they had arrayed before them three or three or four choices. The defendants had no such option. They were called upon by the U.S. government to produce Agent Orange. They were told to produce as much as they could using the then existing process that they had.

THE COURT: They could have cooked it more slowly, I'm using this in a non-technical sense, at lower temperatures

and reduced the dioxin.

MR. KROHLEY: I think that the temperature is one factor. My client operated at high temperatures and produced very, very little dioxin.

So there are many factors involved.

THE COURT: But the question is whether the government knew what processes you were using, what the dangers attendant on those processes were, and whether they knew as much as you did. That is the question.

MR. KROHLEY: My answer is: Of course, they did.

THE COURT: But, excuse me, that doesn't mean that the plaintiffs aren't entitled to raise the problem that you could have produced less dioxin.

MR. KROHLEY: My point is --

THE COURT: By different techniques.

MR. KROHLEY: That's correct, but it wasn't an issue. It wasn't an issue because the hazard, the actual hazard wasn't there, having tested Agent Orange and Agent Purple and --

THE COURT: Let me get back to that point, and I must say, I have to consider it but at the moment it doesn't strike me as being particularly persuasive.

MR. KROHLEY: If the government wanted less dioxin, they would have said so.

THE COURT: Did they know that there would be more

dioxin if they used the techniques that were being used in order to produce the maximum amount of Agent Orange?

MR. KROHLEY: But the government had full knowledge about the British manufacturing processes by 1967 when the government was asked --

THE COURT: That is the question I put to you. That is what I understand is dispositive.

MR. KROHLEY: Then there are no two ways about it, by 1967 the government knew more about the process that could reduce dioxin.

THE COURT: The answer is that the government knew and they knew as much or more.

MR. KROHLEY: Right.

THE COURT: Well, that is the question.

MR. BROCK: Let me read to your Honor an except from one of the exhibits in the removal motions. It was a meeting of January 16th to January 19, 1968 in connection with the Weldon Springs operation where the government was designing its own Agent Orange manufacturing facility it was attended by three officials.

THE COURT: I know the Weldon Springs material. I've read it all very carefully. But go ahead, you can quote it.

MR. BROCK: Montra Kim recommended that TSR, Thompson Sterns Rogers, these are some of the government

consultants present at the meeting, along with the Edgewood officials, contact the C.H. Boehringer Company of Engelheim, Germany for advice in the control of dioxin. This company has developed a gas chromatograph test procedure for the finding of dioxin process. This was early on. The Dow Chemical Company about half a year earlier than that had written a series of letters to various military officials also referring to the foreign manufacturing process and technology, a method of detecting the chloragogen in the process and offering to make that information available to the government.

In all these circumstances with the government having all this knowledge, they took no action, they did not find it important.

THE COURT: That, as I understand, is your argument.

Thank you.

MR. KROHLEY: Your Honor, just one last word.

It seems to be of some moment that after 25 years of Agent Orange litigation, no plaintiff has produced any evidence that the defendants knew anything more than the U.S. Government did about the dangers of -- alleged dangers, speculative dangers of Agent Orange.

THE COURT: I understand that. That is your position. That is the central position.

Yes.

MR. BRESS: My name is Richard Bress. I represent

Monsanto.

I'd like to thank this Court for granting me leave to appear here pro hoc vice today.

THE COURT: Glad to have you.

MR. BRESS: I'll be arguing today along with several of my colleagues, pointing out the various reasons why the Vietnamese cases should be dismissed as a matter of law.

Personally, I will be addressing why the Vietnamese case should be dismissed as non-justiciable and also will be discussing towards the end of my argument why several of the factors that you consider on justiciability should also cause this Court to hold that there is no cause of action under the ATS for prudential reasons that the Supreme Court laid out in Sosa.

Following my argument, Joe Wehrer will be arguing that even if this case were justiciable, this Court should nonetheless hold that their claims under the ATS fail to state a claim under Sosa for the reasons stated by the Supreme Court in that case going to the nature of the international law claim that could be recognized under the ATS.

Mr. Frey will be discussing why the government contractor defense should apply in a case like this one where the claims are being made under international law and will explain how the doctrine works in this kind of a context, because it is a different context than the usual product

defect context.

And finally Mike Gordon will order to this Court that the plaintiffs' claims are untimely.

Before I dive right into -- before I dive into the rest of my argument, your Honor, I will note that we have two other motions. One is to dismiss VAVAO or VAVA, depending on the abbreviation, why that association should be dismissed from the case for lack of standing. And we also have filed a motion seeking dismissal for plaintiffs from injunctive relief.

I don't propose to address those affirmatively before the Court. I think they have been dealt with sufficiently in the briefs, however, if your Honor has questions, I'd be happy to answer them.

THE COURT: No, I don't have any questions.

MR. BRESS: As a preliminary matter I'd like to make two points to put this case into perspective.

First, it's a lot narrower than it was when it was first filed because plaintiffs have effectively abandoned many of the claims they have made in their complaint. After we explained why the state law claims were preempted for trespassing into foreign affairs of the United States and explained why the Vietnamese law claims couldn't be brought in this Federal Court, plaintiffs made no attempt to respond to those arguments, and argued effectively abandoning those

particular claims. Similarly, plaintiffs made no attempt to resuscitate their claims under the War Crimes Act or under the TVTA or for that matter, arrising under various treaties they cited, none of which were self-executing.

THE COURT: Excuse me, I don't consider any of them abandoned.

MR. BRESS: Your Honor, to the extend that they seek to respond in their time before the lectern today, we'll be happy to address in rebuttal but there is very little to address because they didn't respond to them in the briefs.

THE COURT: I understand.

MR. BRESS: Secondly, your Honor, and this is quite important for today's arguments, plaintiffs's claims as pled seek entirely derivative liability for what they claim to have been bad acts of the United States. In this respect they stand on very different and even weaker footing than the claims that the veterans have made in cases that you have had for the last 20 years.

Whereas the veterans have asserted that the defendants hid information from the United States or had information that the United States didn't have and that that is the basis for liability in the case, the Vietnamese allege quite affirmatively that the United States knew everything that the defendants knew, that the United States knew that there was dioxin in the Agent Orange, that the United States

knew that dioxin was hazardous to man, and indeed, that the United States knew that there were other ways of making it that would have had less dioxin.

Indeed, they say at page 33 of their brief that the fact that the government knew as much as the defendants about the dangers of dioxin contained in the Agent Orange, it is what condemns them with regard that their liability for violating the law of nations.

In other words, it's the Vietnamese position in this case that defendants should be liable precisely because they provided the government what it ordered from them, because according to these plaintiffs, it's the United States' conduct with these materials with the herbicides that violated the laws of war and international law.

Now, plaintiffs are a bit schizophrenic about this. They sometimes in their briefs step back and say no, we are not challenging what the United States did at all, we are not accusing the United States of war crimes. This case is all about the defendants and what they produced.

THE COURT: I assumed that the contention is that the United States knew it was violating international law and that independently these defendants knew.

That, as I understand, is the claim, not necessarily that they knew it was a violation of international law, but they knew that they were doing acts which somebody else could

find fell within the ambit of international law violation.

MR. BRESS: Your Honor, I think that is true not only as to the knowledge of law and what their claims are here today, but also with regard to the facts. Their factual allegations made quite clear in this case that they are saying the United States knew everything that the defendants knew.

THE COURT: I think that is so, for the sake of this argument.

MR. BRESS: And that is not inadvertent, your Honor.

THE COURT: What follows from that? I don't understand.

MR. BRESS: The justiciability argument, your Honor, are all the stronger because their claim is that the United States knowingly used Agent Orange in violation of international law.

THE COURT: I find that difficult to follow. It's clear, is it not, that the president himself or herself must follow the law and that international law is a part of federal law?

That being so, the fact that the president and all his assistants know about it does not prevent these defendants from being held liable for their own violation, does it?

MR. BRESS: Your Honor, I believe it does and I disagree with the premise of the statement.

My colleague, Mr. Frey, will be addressing in the

context of the government contractor defense exactly what the president's or the United States' obligations are with regard to customary international law and norms and I would defer to Mr. Frey.

THE COURT: If it was a violation, that is the issue, if it was a violation and your clients knew all the facts, that would make it a violation when they persisted?

MR. BRESS: The case would nonetheless be non-justiciable and I would explain why.

THE COURT: I think that's where you want to go because this argument, it seems to me, doesn't help your basic argument.

MR. BRESS: I was merely previewing I think what you will hear from the plaintiffs and explaining why it's inaccurate because it's important to what I say which follows.

THE COURT: I look forward to that.

MR. BRESS: Thank you, your Honor.

In 1987 the Second Circuit justified its application of the government contractor defense in part based on its observations regarding the separation of powers.

What the Second Circuit said was: Subjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond not only its constitutional authority but also its institutional competence.

THE COURT: But what was involved in those cases and still is in the domestic claims of the plaintiffs was essentially state law.

What is involved here is federal and international law, not state law.

MR. BRESS: Which doesn't make the intrusion any less, your Honor.

THE COURT: That is an interesting question. If it is a violation of federal law for the president to order something done, then his action in doing it is illegal and does not justify the acts of anybody carrying out his orders, isn't that so?

MR. BRESS: Your Honor, if we are talking about a federal statute, if there were United States statute --

THE COURT: What is the difference between a federal statute and a rule of international law that is incorporated in the federal laws, either common-law or as a treaty under the Constitution that the courts of this country must follow?

MR. BRESS: If it's incorporated in a treaty, in a binding treaty, the treaty has the same stature as a matter of domestic law as a statute. Essentially a treaty, as your Honor has written previously in the Vehary case, a treaty can be superseded by a statute in a later treaty but customary international law, your Honor, to the extent U.S. courts have spoken of it as law of the land, they have spoken

of it in a -- on an almost pre-Erie general common-law sense.

THE COURT: Are we clear that Erie has no application in this case?

MR. BRESS: Under Sosa, it does.

THE COURT: Under Sosa, it does or does not?

MR. BRESS: In Sosa the Supreme Court recognized that notwithstanding Erie, there is still a federal common-law cause of action for violation of customary international law or the law of nations defining customary international law in a very, very narrow way.

THE COURT: Erie has nothing to do with this case, and that is the difference between this case of the Vietnamese and the veterans. The Vietnamese case, I'm talking about the international law aspects, not the domestic law aspects.

Why is federal common-law --

MR. BRESS: Because it's a gap filler. All that customary international law is in our system is a gap filler, your Honor. Customary international law comes in when there is a cause of action and it fills the substance when there is no controlling executive or legislative act.

That's what the Supreme Court said in Paquette Habana when the Supreme Court was discussing what the place of customary international law is in our system. It said it applies in the absence of a controlling executive or legislative acts. In this case we have a controlling

executive act. In this case,
ndeed with Congress continuing

to appropriate funds for the p
rchase of Agent Orange and

specifically rejecting Legisla
ion that was proposed to outlaw

the use of Agent Orange. For de
oliation and crop destruction,

it's also speaking. And when
he executive and the

legislative has spoken in tak
g controlling action, customary

and international law is displ
ced, and that's what we have

here.

THE COURT: And you
re relying on what case to say

that?

MR. BRESS: That is
aquette Habana, and there was

also a case in the D.C. Circui
. U.S. Committee of Americans

Concerned With Nicaragua, the
itle is something of that sort,

a D.C. Circuit opinion where t
e Court faced straight out what

happens when you have controll
ng executive and legislative

acts.

THE COURT: We don't
have a legislative act, you

have a non-act here. The Legi
ature never before, as I

recall, before 1975 ruled expl
citly that herbicide spraying

was okay.

MR. BRESS: What the
egislature did was continue to

appropriate monies for Viet Na
without restricting its use

even amid the controversy when
a bill was proposed.

THE COURT: That is a
lot weaker and a lot more

ambiguous.

MR. BRESS: Certainly, the appropriations, that aspect of it was considered in Decosta and Holtzman by the Second Circuit.

THE COURT: Yes, I know the Holtzman case. It was decided here by my distinguished next door neighbor Orin Judd.

MR. BRESS: In that case, the Second Circuit did view the appropriations to be sufficient evidence of legislative support, but in any event I don't know that we know that because we do have a controlling executive act.

THE COURT: What?

MR. BRESS: The decision of the president to use.

THE COURT: Where was it published as an executive order?

MR. BRESS: It wasn't an executive order, your Honor, but there is no requirement that there be an executive order at this point. Just like in Holtzman and just like in Decosta, in those cases, that's exactly what the losing side argued. They said what Congress is doing here has to be in the statutes, has to be in something that affirmatively says this. And what the Court said in those cases is we are not going to impose that on the legislature --

THE COURT: But in the Holtzman case, there was no international law that was claimed to have been violated. So the question was in the absence of anything at all where the president ordered something done and Congress went along with

the president's act, whether that was illegal.

MR. BRESS: In this case, we have no statement that the international, that Congress intended international law to apply to the president's military authority.

THE COURT: That is the question: Does international law operate to inhibit to some degree what was done with herbicides prior to 1971?

MR. BRESS: Your Honor, as a matter of our basic sovereignty, our nation retains the ability to disregard customary international law as an actor in the international forum.

THE COURT: That statement has to be reflected on.

MR. BRESS: The Constitution certainly doesn't say otherwise. The Constitution says how law is to be made in the United States and it doesn't say besides the Constitution, besides the statutes.

THE COURT: The very first Congress recognized that there was non-written international law that inhibited action by this country.

MR. BRESS: It inhibited action by private actors in certain circumstances.

THE COURT: And you think that if the president called in one of these privateers and said go ahead and do it, that that would have made it okay for the privateer to violate international law?

MR. BRESS: I think that the president doing so would have been lawful, and I think that the privateer could not be sued in that circumstance without violating the separation of powers.

THE COURT: That is a view that Queen Elizabeth had when she authorized Drake to get up a private group of vessels and soldiers to invade Ireland and to destroy the Spanish fleets, but I don't know whether that is a proposition that still remains powerful in this country.

MR. BRESS: Perhaps the better way to look at whether this Court has the power to look at it is to look at whether anything remotely like this has been adjudicated by any court in the United States.

THE COURT: What about the steel cases in Korea where the president seized the steel mills and the Supreme Court said give them back?

MR. BRESS: Your Honor, what the Court decided in that case, and I think that it's a very important case, the Youngstown steel case, what the Court decided in that case was the president, acting within our country, that his military authority as commander and chief didn't extend so far as to allow him to take over domestic steel production which was far removed from the actual battlefield.

What we have in this case is something far more core to the commander and chief's authority. The Supreme Court

most recently in Homdy, the plurality in Homdy said there is a sphere of core strategic military judgement that the courts may not venture into.

Justice Kennedy said the same thing in Brezule and the Second Circuit in Holtzman and in Decosta said the same thing.

THE COURT: Holtzman seems to me to be different from this case and what it respectfully suggests, but you may be right.

MR. BRESS: In Holtzman, what the Court said --

THE COURT: I thought that in Nueremburg this country decided that the fact that all power was centralized in Hitler did not permit people operating under his orders to violate international law.

MR. BRESS: What was decided in -- your Honor, I think that you are right and I am right because what the Court said in Nueremburg, what the international court said in Nueremburg was as a matter of international law, we, this tribunal, presiding over a conquered nation, have the authority to look into these issues --

THE COURT: It wasn't presiding over a conquered nation, it was presiding over individual defendants.

MR. BRESS: It wasn't a suit brought in Germany against the German defendants. Your Honor, what we have here is a suit being brought in the courts of the United States --

THE COURT: But the ATS says, as I understand it, that we authorize the federal courts to act in effect as an international court to protect foreigners against these violations.

So we're acting here, are we not, as an international court?

MR. BRESS: But far beyond -- no, what the ATS doesn't say is that all separation of powers concepts are out the window.

And when the Supreme Court has looked at statutes that even facially would appear to apply to the military, your Honor, in -- for example in the --

THE COURT: I'll give you an example. I had one where I was reversed by the Second Circuit where I said that the commander of one of the local force had no authority to remove a band member because he expressed hostility to the Vietnamese war. And that is a good example that the Second Circuit reversed promptly.

MR. BRESS: It was actually Eagan, your Honor. But at any rate, Eagan was a case involving whether the Equal Protection Clause of the Fourteenth Amendment -- whether a race-based claim could made, this is Shapell, whether a race-based claim could made under Bivens given the Equal Protection Clause of the Fourteenth Amendment.

What the Court did in that case, which I think is

pretty close to this case because Bivens is also a Federal Common Law cause of action like we are talking about here, and what the Court said in Shapell is that there are special considerations that attend the Federal Court's recognition of federal common-law causes of action, and in some cases that is going to be inappropriate. And so in Shapel what they said was the special needs for military discipline carves out of this federal law common law cause of action the ability, even of an African-American, to challenge under the Fourteenth Amendment.

THE COURT: But those cases and the one I cited to you were not based on international law. The question is does this Court or any Court have the right to change international law in the same way?

It's quite different.

MR. BRESS: Your Honor, in the Merit Systems Protection Board statute in Eagan, there you have a U.S. statute which certainly is at least on par with customary international law, it had no exceptions to it and yet the Supreme Court in interpreting it said we are not going to interpret a statute of the United States to reach into core military decisions unless Congress has said so quit expressly.

THE COURT: It's interpreting a statute. The question is what is the meaning of the international law if it has any application here?

MR. BRESS: What we have here is an international law brought in as a matter of federal common-law. It's not applying in and of itself.

THE COURT: Some of what they rely on is treaties and statutes.

MR. BRESS: But in terms of the customary international law, what they are saying is this comes into this Court as a matter of federal common-law. You have a federal common-law cause of action that the court itself is supposed to create to enforce it.

THE COURT: It comes in if it comes in as incorporated from binding international law, as I understand the theory.

MR. BRESS: The theory -- I may have to disagree with your Honor on this because I think the theory in Sosa is not that binding international law in and of itself sort of jumped the ramparts and became actionable in our courts but rather as a matter of the history of this country, certain very core customary international law, very few of them, were actionable as a matter of federal common law. And the Court specifically instructed the lower courts that in the future, when the lower courts were thinking about; should I recognize a common-law cause of action before these other customary international law norms, not only were the courts to heed the notion that these norms had to be defined with sufficient

specificity and that they had to be universally accepted in other countries but the Court went further and said beyond all that, you have to step back and consider has the legislature given guidance that should cause us, the Court, to believe that it would want a cause of action like this to exist and they said you should step back and say would it interfere with the United States foreign affairs if I recognize a customary common-law cause of action like this.

And in this case you have the United States here before this court with a statement of interest saying: Yes, if you do it here, it will interfere with United States foreign affairs.

In this case not only do you not have legislative guidance telling you it would be a good idea to create this cause of action, to the extent that we know anything about what Congress was thinking at the time, Congress was appropriating monies, Congress was refusing to enact laws that would restrict the use of Agent Orange. And more broadly when you step back, what has Congress done with regard to liability arising out of war time activities? We know with the FTCA, you have not only the discretionary function exception, but indeed, a broader combatant activity exception that applies in the war time field.

So stepping back more broadly, we have no legislative guidance that says this is the sort of thing that

Congress would want to see created.

THE COURT: But there is a difference between what I'll call internal common-law or statutory law and international law, because if you are dealing with internal law, a modification by the courts applies to the entire country.

There is a uniform interpretation, but when you are dealing with international law, if this Court or any of the American courts began to interpret international law in a more restrictive way carving out from it, to that extent you lose much of the authority and utility of international law which has to apply, if it's to be effective, to the all countries equally.

MR. BRESS: Your Honor, again, I will respectfully note that the Supreme Court came the distance in Sosa from a dramatically different angle. They didn't look in Sosa at the case of there is this wonderful thing out there called international law and we have to worry about restricting its application.

THE COURT: They said it wasn't a violation of international law.

MR. BRESS: But they went further than that. They did provide you guidance for future cases, not just decide the case at hand. And the guidance they provided you was the opposite. What the guidance was was all we know that applies

as federal common-law under the ATS are these three species of claims that were recognized by Blackstone and defined with specificity of statutes and universally allowed, and think long and hard before you add to that list.

THE COURT: I'm going to do that.

MR. BRESS: No, your Honor, I'm sorry, I was paraphrasing the Supreme Court. I didn't mean to instruct you.

THE COURT: No, I'm going do it.

MR. BRESS: What this said in fact was we're leaving the door open just a little bit so it's that it's a different application of customary international law in the United States.

THE COURT: That is quite true. We stepped into this problem very gingerly because it constitutes a violation of long held beliefs that our sovereignty is supreme.

MR. BRESS: And I believe that the Supreme Court because of that is obviously --

THE COURT: The Supreme Court is very reluctant to rely on any international law. Even Justice Kennedy's opinion which cites some of the European law on homosexual activity is very reluctant.

MR. BRESS: In terms of looking towards the more traditional factors that the Court looks at in deciding whether a case is non-justiciable, those factors were often

cited in many cases and I've read them and they jump out in this case in a manner that is far more stark than they do in many of the cases that have even held causes of action to be non-justiciable. In this case, unlike many of those cases, you have claims that the president himself ordered the wrong materials or used them in a wrong way and they are asking this Court to adjudicate that question.

THE COURT: If it was a violation of international law, if he was bound by international law, he couldn't authorize an activity that that violated international law. I think that syllogism is clear, just as Hitler could not authorize what he did.

MR. BRESS: He couldn't authorize it under international law before an international law tribunal, that is true, but that doesn't mean that our --

THE COURT: I don't see how the tribunal affects it. If it's the law, it's the law.

MR. BRESS: A tribunal is not bound by the Constitution's limits on power.

THE COURT: Who?

MR. BRESS: The Constitutional of the United States limits on judicial power do not apply to an international tribunal. Our domestic notions of separation of powers do not apply to an international tribunal. It acts of its own authority and what we are talking about here is something very

different, which is whether you can come into a U.S. court and ask a judge to adjudicate for example whether the president should have used a different dilution factor in Agent Orange, whether it should have -- the president should have sprayed it a little less broadly.

THE COURT: That is another problem. I understand that that question is different.

MR. BRESS: But I think that comes into justiciability too.

THE COURT: And the-degree.

MR. BRESS: And the degree that this Court was being asked to go into very core areas of executives discretion with the commander and chief's powers is extraordinary.

The plaintiffs would have this Court decide whether with American lives being lost on one side of the balance and potential harm to civilians or enemy combatants on the other side, whether the president weighed that balance correctly.

THE COURT: Let's change the situation slightly. Suppose instead of manufacturing Agent Orange, you were manufacturing mustard gas and the president said it's okay to spray mustard gas in this war, would that change your view?

MR. BRESS: It would change, your Honor, how I would assess some of the factors on justiciability but it wouldn't change my bottom line.

THE COURT: That is the president could authorize

the use of mustard gas and you as a manufacturer of mustard gas, knowing that it was being used, that it was being used in war, could defend?

MR. BRESS: It reason it wouldn't change my bottom line is as follows. After historically, and throughout the existence of this nation and international law, reparations claims --

THE COURT: No, the reparations issue which you raise very skillfully doesn't to me seem to have anything to do with this case.

MR. BRESS: Will you let me to try to convince your Honor otherwise?

THE COURT: Of course.

I will tell you so you understand my view of it. There was no reparations in Viet Nam. There was no conquered nation. There was nobody paying reparations.

In the case of Germany, there was a very long history of reparations involved in many cases, some of which are pending in this court and one of which was before me.

So I don't see how reparations has anything to do with the Vietnamese case.

MR. BRESS: Your Honor, the definition that I think you have implicitly set out for reparations, which are payments by a conquered nation to the victor is really overly narrow. International law does not recognize that narrow a

conception. If you look back at Diekelman, what Diekelman holds is that when citizens of one nation have claims based on the conduct of another nation, those claims are to be raised through that citizen's vote in government, that they are a matter for international negotiation, not litigation. And in Daramendi, I know it arose out of Nazi Germany, but in Daramendi this Court emphasized that it just doesn't matter whether the claims are between private persons, that it's reparations nonetheless as a concept, as a matter of substance. When what you've got are claims by citizens of one side who believe they were injured against members of the other side, whether it's the government or the government's manufacturers, based on war injuries they say they have sustained, and that it's a matter for international negotiation and not litigation, the decision to pay those amounts is a foreign position decision, it's based on what will this do to our relationship with this country, what will it do to relationships with other countries and how will it bind us in the future militarily or on foreign policy, and the idea that as a matter of federal common-law, this Court or any Court of the United States should inviting millions of individuals from a former enemy nation to bypass that process and instead come to court an litigate their claims against the American companies who were doing precisely what they were being asked to do would take it out of the realm of policy and

diplomacy, which is where it is and where the Supreme Court said it should be. You would be aggregating all of those powers to yourself, including what does this do to our diplomacy.

With all due respect, I don't think that is a power that you want to aggregate to yourself. I don't think that it's a power that the Courts are competent of capable of handling.

THE COURT: You make a powerful argument, but I'm always driven back to the question: If the president authorizes what is a violation, authorizes an individual, calls in X (I think that Jefferson did that in some cases) behind the scenes and authorizes him to do something and that is illegal, and that person is caught doing it, the person could defend on the ground that the president told him to do it.

MR. BRESS: There is only one case that I know of and that involves the scenario you are talking about and there was a U.S. statute in that case, it's the little case, plaintiffs have raised it in their briefs, an 1804 case, and there was a federal statute involved and the U.S. captain was sued in that case for his conduct. But again, you have a statute from Congress at that point telling the courts; this is something that you are allowed to adjudicate. And there was nothing vague in what they were being asked to adjudicate.

It was a statute that said you can't take ships going towards France or you can't take them coming from or vice versa. It was very specific. The courts weren't being asked to travel outside their realm of decision-making.

In this case, putting to the side the poison gas case that you spoke of, you'd be being asked to make those very proportionality examinations that are meant for commanders in the field.

THE COURT: Proportionality is a consideration, and that enters into the question that you posed a moment ago of whether more should have been applied or less or how they should have applied them?

MR. BRESS: And taking into account where the troops are, where you think they are going to go.

THE COURT: All of that has to be taken into account. That is true.

MR. BRESS: And at the heart of the decision that you make at the end of all that, weighing American lives in the balance is not just something the judiciary has ever done. And the case that you averted to, the hypothetical that you averted to, I would still be constrained that nonetheless in that case in the suit by former enemy combatants wanting to come to the United States to collect their due --

THE COURT: Certainly, the argument would be strong in the case of Nazi Germany, but it would be less true, I

think, in the case of Viet Nam because you have never raised the question of compensation.

It's virgin territory.

MR. BRESS: The question of compensation was raised but it wasn't compensation for Agent Orange. When the United States and Viet Nam signed an agreement in 1985, they did settle certain financial claims that were between them that arose as a result of the hostility and actions that the parties took. So there was money that changed hands. In fact, I think Viet Nam gave the United States.

So it's not as though the parties in that case, the two nations didn't come together and discuss whether money should change hands. They did.

Now, there was no agreement and never has been an agreement by the United States to make reparations to Viet Nam.

THE COURT: Or Viet Nam to make reparations to this country.

MR. BRESS: To this country. And as the United States explains in its statement of interest, the United States has instead moved slowly, taken a measured approach to those issues. What it's done is authorized scientists from federal agencies to meet with their counterparts in Viet Nam and to explore what the toxicity may have been, what kind of remediation could be done, those types of issues.

The United States has not taken the next step and said if we find toxicity, we are going to provide you funds. For this Court to jump ahead of the executive branch and take that into its own control would violate the separation of powers, your Honor, and it's something this Court should consider long and hard before taking that step.

THE COURT: Thank you very much.

MR. BRESS: Thank you.

MR. WEHRER: Good afternoon, your Honor. My name is Joe Wehrer and like Mr. Bress, I'd like to thank you for allowing me to appear this afternoon pro hac vice.

THE COURT: It's a pleasure to have you.

MR. BRESS: As you know, all of plaintiffs' allegations of international law violations rest on allegations concerning the harmfulness of Agent Orange that this Court has rejected, but even if you accept those allegations for present purposes, those allegations still fail to state claims provided by tenets of international law.

THE COURT: I have not rejected these cases.

MR. BRESS: I'm just saying the factual allegations concerning the alleged harmfulness that are necessary to the claims have not been accepted by this Court and are the same allegations.

THE COURT: I haven't determined them in this case and the Supreme Court has in effect by a four to four decision

suggested that these plaintiff's are entitled to or may be entitled to contest.

MR. WEHRER: I'm accepting them for present purposes, your Honor, because even accepting that they can not state claims for violations -- even accepting these allegations as accurate, true, they fail to state violations of international law that would be actionable under the alien tort statute.

Now as Mr. Bress indicated, it's our belief that although the plaintiffs have invoked a number of statutes and treaties for their bases for suing us, for suing the defendants here for such violations, we think those claims fall entirely on their ability to satisfy the standards that the Supreme Court said forth in Sosa for recognition of federal common-law cause of action under the ATS.

And I would just like to pick up briefly where Mr. Bress left off. The question under Sosa is not have we established a norm, is there an international norm out there and then once you have made that judgment, called such norms actionable. The Court was quite clear that it was recognizing a very limited federal common law making power in courts, an exception to the general rule that the courts lack such powers and it characterized that power very carefully. In particular, it said that it was authorizing courts to recognize a modest number of international --

THE COURT: They only want one. In this case it's a modest number of one they want.

MR. BRESS: Actually, I think it may be two. But my point is not all norms of international law are actionable under the ATS. It's a narrow set the Supreme Court said could be heard and the critical, in addition to the prudential factors that Mr. Bress discussed, the critical threshold requirements are that the norm be defined with specificity and have the same degree of universal acceptance as the three eighteenth century paradigms that the court discussed repeatedly throughout its opinion, namely, the three Blackstone defenses, piracy, infringement the rights and violations of safe conduct.

As we have shown in our papers, Blackstone defined these defenses with the specificity of statutes. He cited a number of English statutes. In defining those three offenses in his treatise, he explained that those statutes were simply the clarity of the customary law of the day. He also indicated that the norms were universally accepted by the civilized world.

So what you derive from that benchmarker that the Supreme Court is pointing you to are three requirements. You must have a norm that is defined with the specificity of a statute; it must be an absolute prohibition. These were not prohibitions on undue infringements on the rights of passers

or unnecessary piracy, they were flat prohibitions. And third, they have to be universally recognized. For purposes of this case, that means the plaintiffs must establish one of two predicates, that during the Viet Nam war there was either a specific absolute or universally recognized prohibition on the military use of herbicides that might be alleged to cause secondary harm, incidental harm to humans. Failing that, they have to establish a specific absolute and definite prohibition on the manner in which the United States employed herbicides during that war.

I'd like to start with the first of these proscriptions, the alleged prohibition that they claim on herbicides, and somewhat to our surprise, they purport to locate this norm in the 1907 Hague regulations, Article 23 A, which prohibits the use of poison or poison weapons. And the reason I say that is surprising, as you know from our opening brief, we assumed that they would be premising this claim on the 1925 Geneva Gas Protocol because during the Viet Nam war, that's where highly motivated --

THE COURT: I don't see that 1907 helps them at all. We can forget about it.

MR. WEHRER: That may substantially shorten my argument quite a bit, your Honor.

I think it's sufficient to say under the --

THE COURT: You can rebut if they can convince me

that I'm wrong. These weren't poison bullets.

MR. WEHRER: I'll turn my attention to the 1925 Gas Protocol.

Your Honor, as you know, this prohibited the use of asphyxiating or poisonous gas --

THE COURT: I find it difficult to see that 1925 helps them either.

MR. WEHRER: I may be done in a hurry.

THE COURT: That is going to be their burden to show, and it's very hard for me to understand how the 1925 Geneva accord, and we were not a party to it, of course, until after the Vietnamese war ended in 1975, as I understand it, but assuming it applies, they were not dealing here with the kind of gas that we are talking about.

MR. WEHRER: That's right, your Honor, and what they have tried to demonstrate is that nevertheless that was a customary international rule derived it that swept broadly enough to encompass herbicides.

THE COURT: They will have to show that. I think that your argument is clear and hard to rebut but they may be able to.

MR. WEHRER: Then I'd jump straight over to what I understand to be their backup argument as to the action in law prohibiting unnecessary or wanton destruction. And there they seem to contend, as best as I can determine it, that the

United States use was so indiscriminate of herbicides in the Viet Nam war that that was a war crime.

THE COURT: That gets us over into proportionality and I suggest you reserve that because I don't see that as a critical factor here.

Proportionality is such a strong burden to overcome that I'm skeptical of it.

Your brief seems to me to be persuasive, subject to hearing from the plaintiffs.

MR. WEHRER: If there is no actionable norms, and those are the only two that they have identified, then their case fails. If the questions of corporate liability and aiding and abetting liability only arise if there is --

THE COURT: That is the critical factor.

MR. WEHRER: Would you like me to address corporate liability or aiding and abetting liability?

THE COURT: You can address corporate liability because on corporate liability, if we were to get to it, I don't find your arguments persuasive. It's true that in Nueremburg and in the Zyklon B British decisions, there were involved liability, but that was because there was no action against Frick and Krupp and all the others as firms. But in modern life, so much is done by corporations that to exclude corporations from individual liability seems to me to take the teeth out of international law.

If an individual can violate international law and should be held accountable, it's hard for me to see under modern circumstances where corporations control much of what we do and where outsourcing depends upon corporations not individuals, that issue is dispositive here.

MR. WEHRER: Your Honor, I'd like the opportunity to convince you otherwise.

THE COURT: Go ahead. I'm interested in it because I approach it very sceptically.

MR. WEHRER: I understand the policy considerations that you have just described and they certainly animate a certain amount of United States domestic law but Sosa tells us that we have to look to international law to determine the scope of liability including who can be sued.

THE COURT: I don't know what international law says on that. The only case I know of was the Burmese case in which plaintiffs sued the corporations or one corporation and that was settled. So we don't have a decision.

MR. WEHRER: Your Honor, that case I don't believe was applying -- it didn't reach any decision under the Sosa standards, the Sosa standards are new. They render totally irrelevant all the case law that the plaintiffs cited in their brief and experts' affidavits for the simple reason that those cases were not applying, most of them weren't applying international law at all. And they weren't applying the

international law related to the given norm. And that is quite important.

Sosa says the question is whether international law extends the sort of liability for a given norm to a particular actor.

So the question here is the norms here or all the norms that we are talking about, not just all conceivable norms but violations of the law of wars, if those norms extend to corporate entities and --

THE COURT: I don't really see why not. If the government needs anything, it's not -- there are I suppose a few cases where it may hire a genius, but otherwise, it goes to corporations.

MR. WEHRER: Your Honor, again, you are looking at this through the understandable prism of our domestic experience but I'd like to talk about --

THE COURT: I don't think that it's only a domestic experience. We're dealing with corporations on an international scale that control most of these supply arrangements.

MR. WEHRER: That is true, your Honor, but the international experience, the international legal regime that is out there has not yet decided to impose liabilities on corporations.

THE COURT: True.

MR. WEHRER: That's what Sosa says is dispositive. You must look to the international legal regime.

THE COURT: They haven't had a case. They have had only one case and it has been settled. All the other cases involve individuals.

So this is a case of first impression.

MR. WEHRER: That is precisely right. It's a case of first impression and the way to resolve it is to look at how international law has addressed corporate liability.

THE COURT: The reason it has not was that those cases that have come up in the main have been criminal cases; Nueremburg, international court, these are all criminal cases. We are now dealing with a civil case.

MR. WEHRER: But the norms that they are alleging violations of are criminal norms.

THE COURT: I know but they are being sought to be applied in a civil setting.

MR. WEHRER: But if the scope of liability is determined by the norm, then we look to the norm to see who can violate it and if it's a criminal norm, international law like most domestic law that has not yet decided to impose liability on corporations for any war crimes.

THE COURT: That is an interesting problem.

Even if that was so, I'm not sure that when we enforce international law, we shouldn't use to some extent

American concepts.

It's clear in criminal law, we prosecute corporations. And civil law, there is no question about it. The corporation is responsible. And if you exclude corporate and other organizations, you make it almost impossible to enforce on any sensible level international laws.

MR. WEHRER: I think that Sosa tells you that you must look to international law for those policy judgments. And international law -- international law has not raced ahead. United States ATS litigation is racing ahead of international law extending liability to corporations while international law itself doesn't get there and that is especially true with respect to these norms. There may be certain treaties that have been entered into that impose obligations on corporations vis-a-vis environmental harms or visa vis the treatment of workers, but what we have here are alleged violations of the laws of war and five tribunals have been convened to prosecute crimes under those norms. They have not ever had jurisdiction over corporations and the question is not because they haven't thought about it, there was a proposal made to put jurisdiction over corporations in the 1998 --

THE COURT: Yes, I know that.

MR. WEHRER: And it was excluded.

THE COURT: I understand the point. It's a point of

first impression. I think an interesting one and you have a good strong argument.

MR. WEHRER: Thank you, your Honor.

I hope on reflection that you will see that Sosa requires that this be decided on an international treaty basis.

Finally, assuming that again you don't need to reach the question of whether there is aiding and abetting liability because we have no primary violation as you have indicated for either of the two norms that they seek to enforce, but even on that question, we submit that there is no basis given the Sosa standards and the timeframe we are dealing with for imposing aiding and abetting liability.

THE COURT: I don't see this as an aiding and abetting case. I see it as contention that the defendants independently with foreknowledge violated an international law.

MR. WEHRER: If that is the theory of their case, then it's even weaker than our papers suggest, because there is no basis in international law for concluding that a prohibition on weapons, on the use of weapons is violated by a supplier of the weapons as a direct matter.

The only theory --

THE COURT: If the supplier knows how they are going to be used illegally?

MR. WEHRER: That doesn't have to be under aiding and abetting.

THE COURT: I don't see that. No, not aiding and abetting. They know that it is going to be used illegally and they supply it.

MR. WEHRER: Let me take the norms one at a time.

THE COURT: If I know that you are going to use a gun to shoot somebody and I give you the gun, I don't think under the federal statutes it's necessarily aiding and abetting, although it does come within I think it's Section 2 of the Code. You are a principal.

MR. WEHRER: If I could just address them more separately and also address them under international law because again, that is the relevant framework for analyzing these questions.

With respect to the per se prohibition, which you seem to agree with us there isn't one so you don't need to reach that question, but if there were one, if it were illegal to have used herbicides during the Viet Nam war and allegedly cause secondary harm to civilians and others, during the 1970s the only established precedent for holding suppliers liable for any involvement in war crimes was on an aiding betting theory. That's what the theory was in the Zyklon B case, that the evidence showed that they had supplied the poison knowing it would be used to murder mass numbers of contra nationals

and there was also evidence to show that they had assisting by helping set up to test the gassing systems. In that case on those facts the tribunal said you are guilty as an accomplish. Then you get to the Rasch case. There you had a banker. The tribunal says we don't buy for a minute that a sophisticated banker didn't know that he was supplying funds in order to fund slave labor that clearly violated the Hague regulations concerning the treatment of nationals. And there they said this may be morally repugnant, but it's not a crime.

And that is the only guidance that we are aware of for deciding the question. There have been aiding and betting treaties that have come since the '90s but they are not applicable to the law as it existed in the 1960s and '70s.

You look at those two precedents for the Nuremburg cases, aiding and abetting liability imposed in a very narrow circumstance, far, far removed from what you got here of knowingly supplying the means to commit mass murder. Beyond that, there is no clearly established definite specific recognition of the norm to say that someone who supplies materials to others who commit violations of law in war can be held liable.

Now, in addition to that argument, when you get to the norm of proportionality, we think as a matter of pure logic, it's simply impossible to be an aider and bettor as a civilian supplier because the norm requires that you have to

balance a whole host of factors that; A, suppliers don't know about; B, they don't have the expertise to make any independent assessment about.

In 1999, the Cosovo prosecutor took the position that when investigating the bombing at Cosovo, that the law of proportionality, we don't know what it means. If an expert military analyst can't make a judgment about whether there was prime facia evidence of a violation of the law of proportionality, military supplies who don't have that expertise, who don't have any of the facts relative to the assessment can't possibly be aiding and abetting.

THE COURT: That is a strong argument. That is one of the reasons why, as you know, the criminal enforcement internationally has stayed away from charges based upon violation of proportionality.

MR. WEHRER: That is correct. And we think that same logic applies --

THE COURT: But if it were, for example, to go back to the hypothetical, a gas outlawed by 1925, you wouldn't have a proportionality problem.

MR. WEHRER: No, I would rest on my principles deprived from the Neuremburg tribunals.

THE COURT: I understand.

MR. WEHRER: I think Mr. Bress has accurately covered the arguments that even if you were to conclude that

they cleared all these hurdles, there are compelling prudential factors that demonstrate that there -- that you still should not recognize a cause of action. And I think that we will be hearing from the government on that as well.

THE COURT: It's 25 to 1. Do you want to go on a little longer?

I think our reporter probably needs a break.

Shall we break for lunch?

Be back at 25 to 2.

(Luncheon recess.)

AFTERNOON SESSION

THE COURT: As soon as the next defense counsel is ready or prepared to go ahead.

MR. FREY: I'm ready.

THE COURT: I want to announce before you begin that one of my law clerks, Marsha Wellknown Yee, studied at Columbia Law School and she did some work for the Human Rights Clinic to fulfill the Law School's pro bono requirement but there were no Agent Orange matters before the clinic at that time.

MR. FREY: I don't think the defendants have any problem at this point.

THE COURT: Thank you.

MR. FREY: Good afternoon, your Honor. My name is Andrew Frey. I represent Dow and I'm here speaking on behalf of all the defendants.

The issue I have been asked to address is the question of the availability of the government contractor defense assuming that you have reached and found a violation of international law. So the issue is posed first assuming we have lost on the justiciability and Sosa arguments and at the same time that we have satisfied the government contractor defense requirements if it's applicable.

Before I get to the body of my argument, I want to make a couple of arguments relaying to the justiciability

argument you heard this morning. The question that you asked was whether if there is a violation of international law the Court should not be empowered to decide that question particularly even if it's a categorical violation. That puts the cart before the horse because the justiciability question is whether you should decide in the first instance the international law question.

So in other words, the justiciability argument is that the decision of the president as to how to fight a war is a decision that cannot be second guessed in the courts and the courts should not inquire into whether those actions violated international law.

That's particularly true in a case like this where the answer is far from clear. The second point is that you have said during the course of Mr. Bress' argument that it was important for the Court to cut back on international law because it had ramifications beyond the borders of this country. But that too is consistent with our point which is that you should not be deciding the international law question in the first instance.

And if you agreed with that argument of justiciability, there would be no decision on your part on the substance of the international law claim and no cutting back on international law.

With regard to the issue of corporate liability, I

wanted to call your Honor's attention to, you probably read it, the Anderson reply declaration which deals with that issue in great length. I fully understand why corporate liability has much to recommend as a principle. Footnote 20 of Sosa, however, puts a different cast on the question and limits what the inquiry is.

Now let me turn to my issue. Let me say at the outset that it has a sort of Alice In Wonderland feel to it because here we have a situation in which the president considered the question of international law in which it seems to me there was certainly no clear prohibition at the time of the 1960s to the use of herbicides in which there was no knowledge of a real problem of toxic harms beyond the chloracna problem which was a problem of the manufacturing process irrelevant to the government. Putting all of that to one side and taking the issue as a point of academic interest, our position is that the defendants enjoy government contractor immunity not withstanding an arguendo violation of international law by the government.

And let me say as someone who has spent 14 years representing the government in its criminal cases in the Supreme Court I think we are talking about accessorial liability here, a point that came up earlier. I think that if you imagine the situation in which the government decided after procuring the Agent Orange to never use it, you will

have no liability at all even though that the manufacturer's offense is not completed requires the completion of the offense by the government so I believe that the liability is accessorial, doesn't mean there can't be liability, just affects the character of it and that's important because international law has something to say or not to say about aiding and abetting liability.

Now, there are two possible types of claims that are being made against the defendants. The first I would put in the category of product defect or failure to warn claim is the traditional kind of tort claims that there was something wrong with the product that the manufacturer supplied to the government, it was unreasonable, dangerous to those who used it or were exposed to it.

The second is a claim that the defendants were involved in and assisted the government in committing a violation of international law. Those two claims correspond to two different exercises of discretion by the government. The product liability claim corresponds to the exercise of discretion in which the government decided what the product was that it wanted, told the manufacturers what to provide, specified it and specified the warnings and so on.

The second exercise of discretion is the discretion exercised by the president in deciding to use herbicides in the war and then by military commanders in Vietnam in their

decision to use it in specific instances.

So if you look first at the product defect/failure to warn claim and the exercise of discretion by the government in designing Agent Orange, there is absolutely no reason why the question of a violation of international law should be relevant to that issue. That's a product liability issue. The Boyle test is designed to set the parameters.

If you put aside the question that the defendants are helping a violation of international law, then there is no reason not to apply the Boyle test.

THE COURT: Yes, there is. As I suggested, or maybe arguably, in the domestic situation you are dealing with the supremacy of federal law over state law. So no state law declaring this activity a violation of the tort law domestically can withstand a federal defense. That's essentially Boyle.

MR. FREY: Suppose --

THE COURT: Where you are dealing, however, with an international law, you are not dealing with the supremacy clause, you are dealing arguably with a rule of law which is embodied in the federal law. And the federal law is not at war with itself which is a different issue.

MR. FREY: Well, to tease that apart into a couple of things, let's suppose we had a domestic case in which the cause of action rested in federal law not state law and the

question would be whether a Boyle-type defense is available as a matter of federal common law to a federal common law cause of action. In that context at least I can think of no reason why the courts being free to formulate an appropriate defense, the policies bearing on contractor immunity being exactly the same there should be any difference in the Boyle test.

THE COURT: Because federal law there is generated by federal courts or federal statute. In this case, the claim is that the cause of action is generated, as I understand it, by international standards and imported. So we have a different kind of problem assuming there is a violation.

MR. FREY: I don't think we have a different problem in that situation because I believe and I think Mr. Guerre or Mr. Bress said this and I think they are clearly right, that the cause of action under Sosa is a federal common law cause of action.

What the Court was talking about was the federal common law that incorporated certain principles of international law as part of federal law.

THE COURT: It imported a substantive law. The substantive law was defined by international law, that's the claim. If it's defined by international law, you have a different problem from federal courts changing law that they have defined by federal common law to the extent it exists or that state courts have defined by state statute or common law.

That is the different.

MR. FREY: I think you make a mistake in suggesting that the federal courts would be changing international law. The recognition of the government contractor defense in a domestic action because of various considerations that commend themselves to the Court doesn't change the international law principle, it just says that --

THE COURT: It does, respectfully, because it provides a defense which otherwise may or may not exist. Now, it may be that you should argue or it can be argued that international law is subject to this defense, all international law, but that's quite different from saying that international law per se is subject to this defense created to protect against domestic claims.

MR. FREY: Well, if what your Honor is saying is that -- first of all, I don't want to suggest that there wouldn't be an international law defense. In fact, there is no international law liability we submit for various reasons apart from the question of whether the use of herbicides by a state is unlawful. We have various other reasons.

THE COURT: We do have the Nuremberg material which says that when the head of state declares you can use these poisons to kill people, it is not a defense to --

MR. FREY: But Nuremberg is not a case where the claim was the product was defective, it's not a case where the

claim was there was something wrong with the product. It is a case -- I am getting to this in the second set of cases where the claim was that the use of the product violated international law and the manufacturers participating in it by aiding and abetting or as principals, whichever way, in that violation of international law.

THE COURT: There are two prongs, as I understand it, although they haven't made it clear to me, to the plaintiff's view on the international claim: 1, that the mere spraying of herbicide is a violation, that's one claim. 2, that the spraying of the substance with a known poison is a violation. Those are two legs, as I understand it, to their claim. And they are quite independent.

If herbicides had no dioxin, you had one problem.

MR. FREY: That would not be the slightest foundation in international law for that claim.

THE COURT: If the claim is you can't spray a known poison, that's another claim. They are related in this case because the herbicide contains dioxin but they are independent.

MR. FREY: That does not make it a poison in our view.

THE COURT: That's the only problem. That hasn't been established.

MR. FREY: The point I was trying to make, to tease

apart the claim there was something wrong with the product which it seems to me if there is something wrong with the product, that's due to the government's design decisions; there is no ignorance on the part of the government.

THE COURT: If the government had ordered mustard gas, it would have been a perfectly good mustard gas and there would have been liability according to the plaintiffs.

MR. FREY: Right. So we reach the second question which is in the category of claims that says you violated international law as opposed to you made a defective product, there's nothing wrong with the product, it did what it was supposed to do but it's use in this circumstance was a violation of the international law, with that claim, we would say that the inherent immunity of the contractors is greater not less than that in the product liability context for several reasons.

THE COURT: Zyclon-B was designed to do what it did -- kill people and insects. There was no defect in the product.

MR. FREY: I agree.

THE COURT: It was a violation of international law to supply it.

MR. FREY: I will get to that. My point here is -- let me elaborate the argument and I have well in mind the Zyclon-B situation, I hope to be able to deal with it to your

satisfaction or to some judges' satisfaction eventually.

First of all the first and second prongs of Boyle don't have -- we don't have to satisfy those in the international law context, they are sort of irrelevant whether they have designed the product, could be an off-the-shelf like Zyclon-B and you could still have --

THE COURT: You have to bear in mind the plaintiffs have two classes of claim, one is domestic there as I understand it your defense is exactly the same as it is to the veterans, that's based on the defect. The other class is based on international law. As I say if you tease it out, there are two legs to it.

MR. FREY: I'm now focusing on the international law claim. And our position is that the act of supplying non-defective weapons or materials to the government is immune from liability even if the government is intending to use them in a manner that violates international law.

Now, there may be an exception to the immunity for the kinds of heinous or atrocious offenses such as genocide atrocities or torture but it's essentially to confine any exception to the small category of universal conduct which cannot encompass every case.

THE COURT: You mean if the government ordered poison-tipped rifle rounds and you supplied poison-tipped rifle rounds knowing how it would be used, it wouldn't be a

violation of 1907?

MR. FREY: The government might be committing a violation of 1907. The question is whether the contractor should be held liable for that violation. And I guess my position is that it's only the category of crimes that are called jus cogens which are the ones that are universally recognized like malum in se and malum prohibitum in criminal law. The kinds of international law wrongs universally abhorrent to civilized people.

THE COURT: Abhorrent since 1907 to use poison-tipped rifle rounds as I understand it.

MR. FREY: No, it's been unlawful under international law under the Hague Treaty since 1907.

THE COURT: You have never been wounded by such a rifle round otherwise you would have counted it as abhorrent.

MR. FREY: There is a distinction drawn in international law and there is a distinction drawn under Sosa between violations of international law and violations of those norms of international law that have the elevated status of jus cogens.

Let me turn for a minute -- so if a federal common law defense is being formulated by the courts --

THE COURT: You say jus cogens is higher than the treaty?

MR. FREY: The treaty can be one of two things, can

be domestic law if it's ratified as law in the United States in which case it has the status of a statute or it can be evidence of customary international law.

THE COURT: That seems to be entirely unrealistic; what we now call international law is created by treaties and other documents. The theory of the Supreme Court in Sosa is like the theory of American courts with the common law. Common law has very little to do with what the law is, it's all statutory now. And the international law situation we face is enormously complex pertaining to statutes, treaties and a great many other written things in addition to the unwritten law.

MR. FREY: I believe from everything I have read that treaties are like contracts binding on their parties but for non parties they are evidence of what customary international law is but the source of the international law principle still resides in customary international law.

So customary international law makes a distinction between jus cogens, wrongs and other kinds of wrongs in terms of universality of condemnation and instant recognition by civilized societies.

THE COURT: I find that distinction very hard to make because Sosa dealt with three examples, one of them was essentially questions of etiquette among diplomats. I don't see that that is such a big deal.

MR. FREY: When you are looking at the circumstances in which aiding and abetting liability should be created, I think that the principles -- I think international law makes a distinction as you recognized yourself something like the Geneva Convention of 1925, the United States didn't subscribe to it much of the world may have thought of that as stating a proper proposition of international law, it's not a proposition of international law that's binding on the United States. Until 1975 or whenever it was we ratified the Geneva Convention, and with reservations.

In any event, I think the distinction is a rational one to bear when we get to the policies that explain why the federal courts, if they get this far, would wish to or feel it appropriate to recognize a contractor defense in these circumstances.

Now, the plaintiff's position is that the contractor has a duty to refuse to aid and abet illegal government conduct. If you consider that position it means that contractors should refuse to fill government orders if they have any doubt about the legality] of the use the government intends to put the material to. Or if the orders are rated orders such as some of them were in this case, they should go to court and get it enjoined. In other words, the idea is to create an adversarial relationship between the government and the contractors in any area where there is doubt about the

legality of what the president has decided to do.

The government contractor defense is designed in part to eliminate that situation.

THE COURT: Well, your argument is very forceful but it doesn't deal with one of the basic premises and that is that when you are ordered to do something illegal, you shouldn't do it. If your sergeant or lieutenant orders you to shoot down somebody and you know it's wrong, you shouldn't do it. If he orders you to do something that's illegal, gas somebody, you shouldn't do it. That's the nature of the dilemma we are faced with. Where a corporation is ordered to do something, if it's going to use personal responsibility --

MR. FREY: I think.

THE COURT: -- it has to be prepared to refuse to follow orders. It's the nature of the problem.

MR. FREY: I think you oversimplify the problem because of the situation as you know from First Amendment law there is a doctrine of chilling effect and the doctrine of chilling effect says that rules that impose liability for conduct that is unprotected have to be very specific, not overbroad, not vague because of the fear that if they aren't desirable conduct it would be chilled. Well, the same thing is true here. You can look at this case as an example the government ordered the production of herbicides. Now, what is the manufacturer to do? Does the manufacturer have an

independent duty to research and second guess the government's determination that this is a lawful thing to do?

THE COURT: Whether it did or not in this case, we assumed that it knew.

MR. FREY: Well, knew -- I'm going to get to knowledge.

THE COURT: Knew how they were going to be used or how in fact they were used.

MR. FREY: I don't mean to ask you a question but whether they knew it was illegal or not?

THE COURT: Yes.

MR. FREY: It matters.

THE COURT: Of course.

MR. FREY: But often the question of illegality will be unclear and people years later will say yes, look at the Hague Convention, look at Geneva, the 1969 U.N. Resolution, this was illegal. But from the perspective of the contractor in the 1960s, they can't be confident of that, they face potentially gigantic bankrupting liability if they make a mistake.

THE COURT: Look, in the German gassing situation, what the individual defendant said was you were supplying for de-lousing purposes, you thought it was being used for. These objects can be used in a variety of ways.

MR. FREY: As Mr. Guerre pointed out earlier I think

you recognized if it violates international law to use slave labor, the defendant accused of helping in the use of slave labor was acquitted, I think the international tribunals are drawing a distinction between specially heinous offenses and others. And I would like to quote to your Honor from the Eichmann opinion which is a parallel situation I'm sure you are familiar with. What's required is, quote: Flagrant and manifest breach of the law, clearly criminal character of the order of the acts and unlawfulness piercing the eye and revolting the heart be the eye not blind nor the heart stony and corrupt. That is the measure of manifest unlawfulness. Unlawfulness is not enough. It's the unlawfulness that pierces the heart, revolts the heart. That's distinct and that distinction has been drawn in international law and there is a very good reason in domestic law where it is part of your Honor's responsibility to have regard for not interfering in the government's legitimate ability to make war or not interfering with the legitimate relationships between the government and contractors. I'm afraid that will at the simple level you are stating have the level for that interference through the chilling effect, it will embroil the contractors in reviewing and second guessing decisions of the political branches in matters of war and foreign relations.

THE COURT: We are dealing with the problems now in the Supreme Court and in many of the federal courts with

respect to torture cases because the courts are involved in second guessing what's going on.

MR. FREY: I think the torture jus cogens I'm not the international law expert others are but I think that is true so I think that -- the point is that not every violation of international law -- suppose we supply sonar that's going to be used by American Coast Guard vessels to illegally oust foreign fisherman from international waters, a clear violation of international law, I don't think that is the kind of wrong for which the government is responsible and has dealt with on a state to state basis and the kind of wrong that the plaintiffs are alleging here is also one barring the Zyclon-B kind of case. And I accept arguendo there is corporate liability and aiding and abetting liability is potentially present.

THE COURT: You make a very persuasive point, that is that this is another factor in deciding what is a violation, how you should define the substantive law.

MR. FREY: Right, but -- I think you don't have to decide whether ultimately it turns out to be a violation if it's not a clear violation of those fundamental principles that are captured by the concept of jus cogens then that is the end of the inquiry.

THE COURT: Substantive laws which are not in that category are not within the enforceability of the statute.

MR. FREY: You mean the alien tort statute. We would certainly say we have argued these are the kind of claims that don't come within the alien tort statute and don't make out an international law claim. I'm slightly more resistant with that even if they are a violation of international law, unless they are of the kind that qualifies under the Eichmann definition which qualifies Nuremberg and Zyclon-B which to me is sort of a proof of the pudding in our favor because the courts carefully justified it not simply on the basis it's illegal to massacre millions of people but on the basis anyone who was aware of what this was doing would have known it was a gross and horrifying illegality.

Let me just say a few words about the plaintiff's rationale. I think from what was gone over before, you may not accept this either. Their proposition is simply put that the president has no discretion to violate international law and that therefore the discretionary function exception doesn't apply and therefore the contractors are not clothed with immunity derived from the government.

Now, first the government is still immune from liability under the combatant activities exception. That too can be a source and in my view the policies we have just been speaking about justify clothing the contractors in the combatant activities exception. In this context with the combatant immunity the government has otherwise -- you back

door that immunity, you impose the costs on the government that that immunity is designed to defeat. This doesn't mean people who are injured by combatant activities have no resource, it means their resource is through diplomatic negotiations, private bills or conceivably in international tribunals.

The argument that if this is a proposition of international law the president has no discretion to disobey it, first of all, let's remember that in this case, the president, Kennedy, before he decided to do this actually got opinions that it did not violate international law. And so it's a little odd to say that against the background of making what appears to have been a good faith inquiry in international law concluding it doesn't, to come along and impose huge liability, liability on the basis he was wrong it really was is problematic.

In any event, as your Honor also said in the November opinion, it's fair however to know once again the use of Agent Orange and other herbicides to clear foliage during the Vietnam War prevented many more and allied casualties that includes Vietnamese in the Army than could possibly be attributed to exposure to such herbicides.

So the president makes the decision and suppose somebody comes along and says this probably violates international law and he says you have a responsibility for

the lives of all these people, I'm charged with the decision as commander in chief for how to run the war, I will take the responsibility which is partly political, he is answerable to Congress and answerable to the people, and I will do it now, our position is that he has discretion and in that action is not outside his discretion.

THE COURT: Does that apply to the gases used in World War I after we ratified the 1925 Geneva in 1975?

MR. FREY: Your Honor, you know, that's a difficult question. I think the answer probably is that he does have that discretion; I think that would be our position.

THE COURT: If he said order it and you supplied it and some soldier who had gone to Columbia Law School said "I'm not going to use it," would he be subject to court martial?

MR. FREY: I think there would be a difference between a defense to court marshal and an imposition of liability so the contexts are a little different.

THE COURT: And if he was caught using it and an international tribunal grabbed him and prosecuted him, he couldn't do it?

MR. FREY: Maybe an international tribunal could do it. They don't have the separation of powers. They don't have the problem.

THE COURT: That's one of the reasons that we have not joined the International Criminal Court, as you know, that

is one of the reasons, that exactly. But the question is not before us on what an international court should do. The question before us is what an American court should do which is authorized by statute in effect to act as an international court for this purpose.

MR. FREY: We ratified -- it's a little -- today after we ratified the Geneva Convention, it would violate domestic American law and I think that is different and worse, that is, I think the power of the Court to intervene and provide a remedy is different where the violation is one of international law -- of domestic law, federal statute or constitutional or regulation. Your Birnbaum opinion is an example of that situation.

I'm not saying that the president has the discretion to violate domestic law. I am saying that he has the discretion to violate international law and while that may seem to you counterintuitive, that merges clearly from the Paquette Habana case where in three different places the Court asks if there is executive action controlling an executive or legislative act that authorized the conduct, whether in the absence of any treaty or other public act of their own government in relation to the matter then they examined the instructions given to the secretary by the secretary of the Navy to Admiral Sampson and those instructions said he should comply with international law. So the Court says there is no

executive action that authorizes a violation of international law and therefore the Court is free to examine what customary international law is.

I might add that Paquette Habana arose in the context of a forfeiture action, a prize action. And there is a more traditional basis for judicial involvement. Here one of the questions is whether this is a fit domain for judicial involvement. And we are saying that that domain ought to be very narrowly confined and that if you don't do that, there will be effects on the relationship between the government and its contractors and the government's ability to conduct foreign affairs and war.

Now, let me just say a couple of words about one other point, then I will have covered everything I have to cover on this point, and that is the requirements of knowledge and intent. Assuming for the moment that there might be liability here, the question is what do the contractors need -- what knowledge do they need to have.

Now, my view is that there are several kinds of knowledge. They need to know that the product is going to be used and how it's going to be used by the government; what degree of specific knowledge they need to have is another issue. In addition they need to know that this is clearly unlawful action by the government. It's not enough that it turns out later on in 2005 that what President Kennedy

authorized in 1961 was a violation of international law. It has to be something where you can say the contractor must have known it, there is no excuse for their not knowing it.

Now, in this case, I'm sure that's the right test. I'm sure you will agree with us there is absolutely no basis for finding it satisfied.

Finally the question of intent, I think intent ought to be an element. I think if there is a tort here it's a tort that has some requirement akin to willfulness which is knowledge of illegality and intent to do the prohibited act, the specific intent to poison people. And our position is that there was not the intent, nobody wanted to poison anybody, they just wanted to poison the plants for legitimate military reasons. So even if you get to that point, our final submission, you cannot find -- there is no basis for finding that the defendants had either the knowledge or intent that's necessary.

If you have any questions, that does it.

THE COURT: Thank you very much.

MR. GORDON: Good afternoon, your Honor. My name is Michael Gordon. I will be addressing the defendants' motion for partial summary judgment dismissing the claims of the Vietnamese plaintiffs based on the applicable statutes of limitations. I am going to try to do this very quickly, your Honor. If you have any questions, please interrupt and ask

them.

I believe this has been fully briefed. I will summarize essentially the defendants' position.

Vietnamese claims filed on January 30, 2004. The parties are in agreement that the ten-year statute of limitations in the Torture Victim Protection Act governs the Alien Tort Claims Act and TVPA claims. The parties are also in agreement that accrual is governed by the diligence discovery rule. Here because of the extensive widespread media coverage of Vietnam concerning Agent Orange and all of its alleged health effects, the accrual began as soon as any of the plaintiffs' manifested injury.

THE COURT: Is that statute tolled by infancy?

MR. GORDON: No, we look to the Federal Tort Claims Act where there is no minority tolling. We are looking at federal tolling rules here not state.

THE COURT: Is it tolled by equitable considerations such as the plaintiff was prevented from bringing the action?

MR. GORDON: No. There are two aspects of the tolling arguments raised by plaintiffs, first is general equitable tolling. There is no basis for equitable tolling in the circumstances presented here. It requires either fraudulent concealment by the defendants or extraordinary circumstances and the cases that the plaintiffs themselves cite though what types of extraordinary circumstances will

suffice. The three cases they cite involve torture, murder by repressive governments in El Salvador, the Philippines and Chile where the Court found there was fear of retribution or death if the claim had been brought. And in the case of the Chilean government, I believe the decedent's body had been hidden so that the plaintiffs could not determine the cause of death.

Those circumstances have nothing doing with the situation presented here. The plaintiffs in their affidavits complain they were essentially too busy working or didn't know they could sue in the United States the manufacturers or they don't have a lot of money. Those simply are inadequate to establish a basis for equitable tolling.

In addition, the plaintiffs have invoked foreign asset control regulations and contended that prevented them from hiring a lawyer or to prosecute their claims until those regulations were lifted in February of 1994 which was coincidentally a week and a half after ten years from when they would have been barred.

First, the regulations never on their face do not purport to bar the plaintiffs from hiring an attorney.

THE COURT: Yes; I read your analysis.

MR. GORDON: Even if they did they could have applied for a license.

Second, they contend if they could have hired a

lawyer, they couldn't as a practical matter have obtained a lawyer because they couldn't have paid him. However, there was certainly a procedure under the regulations to seek permission from the Treasury to pay the attorneys and the attorneys could have been paid out of any judgment and the rest of the judgment.

THE COURT: I read the regulations and the cases.

MR. GORDON: And that is basically the argument. Now, I have one other motion that I need to address.

THE COURT: Does that ten-year statute apply to all international law?

MR. GORDON: It's to all claims, the international -- our claims as I understand it, and Mr. Frey or Mr. Bress could supplement, but my understanding is the international claims are basically federal claims as they are being asserted so the federal statute of limitations would apply.

THE COURT: Is that based upon the ten-year statute?

MR. GORDON: Yes.

THE COURT: Independent ten-year statute.

MR. GORDON: Ten-year statute of limitations adopted from the TVPA.

THE COURT: When was that, 1995?

MR. GORDON: January 30, 1994 as to any claim that manifested prior to January 30, 1994. That claim was barred by the ten-year statute of limitations.

That completes my presentation on the statute of limitations issue.

I have one other motion which is on behalf of defendants Valero Energy Corporation, Occidental Petroleum, Maxis Energy Corporation and Tierra Solutions, Inc. which I refer to as miss joined defendants. As set forth in their motion for summary judgment, none of those defendants ever manufactured or sold Agent Orange.

THE COURT: I will decide that on the papers.

MR. GORDON: Fine. Thank you, your Honor. Finally, I believe the defendants would like to reserve any remaining time they have for rebuttal.

THE COURT: You can reserve a half hour.

MR. GORDON: Thank you.

THE COURT: Is that the end of the plaintiff's arguments?

MR. GORDON: Defendants.

THE COURT: Pardon me.

MR. GORDON: Yes.

THE COURT: I will hear from the government.

MR. LEV: Good afternoon, your Honor. May it please the Court. I'm Ori Lev and here representing the United States. I will be speaking solely to the Vietnamese plaintiff's case and solely to the international law claims they have raised in that case.

The nature of the plaintiff's claims in this case are truly extraordinary. Former enemies of the United States including former enemy soldiers are asking a United States Court applying United States federal common law to challenge the manner in which the president decided to conduct the war in Vietnam.

They seek to do so notwithstanding the express presidential decision to use the weapons at issue in the manner in which they were used notwithstanding that the decision to use chemical herbicides including the decision as to the legality of such use involves the weighing of competing policy considerations that are particularly inappropriate for a Court to adjudicate.

They seek to do so notwithstanding the consistent and persistent United States position that no rule of international law prohibited the use of chemical herbicides in Vietnam.

They seek to do so notwithstanding the fact that the United States and Vietnam have never agreed upon compensation for such claims even though such claims are traditionally resolved on a nation to nation basis.

And they seek to do so notwithstanding the fact this Court has repeatedly ruled our nations own soldiers are barred from pursuing similar claims.

And they do all this based on an alleged norm of

international law that was widely debated at the time affirmatively objected to by the United States.

With the Court's indulgence, I will address the four legal arguments that have been set out in our statement of interest in what I think is a slightly illogical order but in response to the arguments of this morning. I will begin with what I think seems to be the argument that the Court is most amenable to and that is that there was no norm of international law that prohibited the use of chemical herbicides in the 1960s and early 1970s.

And your Honor this morning stated that in your view, and we heartily agree, neither the 1907 Hague regulations and the norm that was embodied therein nor the 1925 Geneva protocol and it's ban on poisonous gases was understood to apply to the use of even toxic chemical herbicides. I won't belabor that point unless your Honor has questions. I would like to make a couple of additional points with respect to the Supreme Court's holding in Sosa because the question before the Court is not simply whether international law prohibited the use of chemical herbicide, the question before the Court is whether there was a rule of international law that was universally defined to prohibit the use of chemical herbicide.

I submit the mere fact that President Kennedy acting upon the advice of his appointed and confirmed cabinet

officers determined that such use did not violate international law and the fact that the United States consistently asserted in the international arena that no norm of international law violated the use of chemical herbicides conclusively demonstrates that there was no norm that was sufficiently widespread, sufficiently universally accepted or sufficiently specifically defined to be actionable under the ATS.

THE COURT: I find that an interesting argument. Supposing other nations in the world took a different position.

MR. LEV: Your Honor, that's a fair question.

THE COURT: Does this country have the power in effect to veto, the way it has veto power on the security council?

MR. LEV: Your Honor, I think for purposes of the ATS the answer is that if the United States, the world's leading democracy and military power, rejects a norm of international law as it's being created, then by definition that norm is not as widely accepted as the three historical paradigms as the Supreme Court discussed in Sosa.

THE COURT: One dissent is enough?

MR. LEV: Sorry?

THE COURT: One dissent is enough because it's a powerful nation? That's a little circular, isn't it? It

doesn't bind us as international law because we decide what is international law.

MR. LEV: Your Honor, there are two different arguments in response to that comment. One is that under the ATS, again, the question is not simply is there applicable rule of international law, the Supreme Court clearly stated there might be such a rule but unless it's as universally accepted and specifically defined as the three paradigms they discussed, there is no cause of action to enforce that norm under the ATS in Federal Court. So our sole dissent might not affect whether or not there is such a norm but it does affect whether such a norm is actionable under the ATS.

The second response to your Honor's question is that even as a manner of international law, a nation that persistently objects to the development of a customary norm is not itself bound by that norm that is the persistent objector rule and it recognizes of course that international law is based upon sovereign nations willingly giving up some aspect of their sovereignty as members of the international community.

THE COURT: Even an outlaw nation like the Nazis were running in Germany? If everybody agrees that something is genocide except nation X, you mean they are not violating international law when they commit genocide?

MR. LEV: Your Honor, I misspoke because I failed to

cabin the persistent objection rule with the following exception, that is, I believe it's not applicable to jus cogens rules of international law, i.e., peremptory norms of international law from which there is no derogation such as the abominable act of the Nazis. Certainly if the United States objected to the development of an international legal norm regarding whether we have three miles or 12 miles or 15 miles of fishing rights off our coasts, if we objected to that norm during its development, it would not be binding upon us.

Again, I just return to the fact -- to the point in the question under Sosa, not merely existence of a norm but whether it existed and was universally accepted and specifically defined.

I think your Honor's statements this morning that neither the 1907 Hague regulation nor the 1925 Geneva protocol embodied any norm with respect to the use of chemical herbicides conclusively demonstrates that no cause of action can be had under the ATS.

And I will make one additional point with respect to the ATS and that is that Sosa also instructs this Court to consider the practical consequences of recognizing a federal common law cause of action for an international law violation. And in this case, the practical consequences strongly counsel against recognizing any such cause of action.

First, recognizing a claim by former Vietnamese

soldiers and Vietnamese civilians for the manner in which the president prosecuted the war in Vietnam would as stated in our statement of interest interfere with the United States ongoing bilateral relationship with Vietnam. We have entered into two agreements with Vietnam relating to the war and post war period. One was a property agreement which related to properties expropriated from Vietnam and Vietnamese assets frozen in the United States. The second was a memorandum of understanding that provided for ongoing cooperation in scientific studies regarding the impact of dioxin.

That second agreement represents the full extent that the executive in its conduct of the nation's foreign relations the full extent to which the executive was willing to go in engaging Vietnam with respect to the use of Agent Orange. It would be inappropriate for this Court pursuant to its common law powers to allow the plaintiffs in this case to effectively throw an end run around the executive's foreign powers -- foreign relations power in that respect.

The next point, your Honor, I would like to discuss briefly is the role that customary international law plays in domestic law. It's a point that is relevant to our arguments regarding justiciability of these claims and is a point that is relevant to our argument regarding the fact that the president's decision to use chemical herbicides constituting a controlling executive act that displaces international law as

a matter of domestic law.

Let me just digress for a moment, speaking here not about treaty law, not about a law supporting a treaty to which the United States is a party but merely about customary international law. Customary international law is considered part of our domestic law as a default matter as federal common law under our positive law system of government. Of course the Congress if it were acting within its constitutional authority could enact statutes inconsistent with a rule of customary international law.

For example, I'm not sure if the rule of customary international law is three miles or 12 miles of fishing rights outside the seashores, let's say Congress enacted a statute that said United States hereby claims jurisdiction on 20 miles, as a matter of domestic law, that statute would trump any international legal norm that was inconsistent with it. As a matter of international law, the international community might not recognize the validity of that act but as a matter of domestic law that would be the law of the land, that would be the law that this Court, a federal domestic court, would apply.

The same is true with respect to certain executive acts because the president is the nation's sole organ in matters of foreign affairs, because it is the president who will act on behalf of the United States as a sovereign nation

in the international arena. His actions so long as they are within his constitutional authority so long as they do not violate any proscription in positive federal law, i.e., an act of Congress or a treaty that's been ratified by the Senate, his actions constitute law for domestic purposes and again likely the act of Congress would displace any rule of customary international law that might otherwise have been incorporated into federal law.

This Court sits not as an international court even when your Honor is asked to apply rules of decision that are derived from international law. You are sitting as a Federal Court applying federal law either statutory or in this case federal common law. The mere fact that that federal common law often incorporates international legal norms does not mean that contrary federal law cannot exist. It can certainly exist in the matter of a congressional statute and it can exist by means of presidential conduct. And the president's act in deciding to use chemical herbicides in prosecuting the Vietnam War constitutes just such a controlling executive act that would displace any inconsistent international legal norm as a rule of decision in this case.

(Continued on the next page.)

MR. LEV: (Continuing.) Any rule to the contrary, your Honor, would bind the president's ability and the United States ability to be an actor in the development of customary international law, because if this Court were to hold that the president has no discretion to act in a manner inconsistent with customary international law, it would mean that although other nations of the world might take actions inconsistent with that legal norm and thus cause that norm to in effect be amended, we, the united States, would be barred from doing so as a domestic matter until that norm can effectively change.

THE COURT: That gets us into that circularity. Essentially, if everybody agrees, the president says we don't agree, that is the end of the matter for the United States and the international lawyers.

MR. LEV: I'm not following, your Honor.

THE COURT: If everybody agrees that international law is X and the president says no, it's no longer X, then you are arguing that that international law has no application to the United States.

MR. WEHRER: I'm arguing that as a matter of domestic law, the president's actions are legal so long as they are within his constitutional authority.

As a matter of international law, they may be deemed violative of international law.

THE COURT: If the international law is embodied in

the American law, you are back in the same problem.

MR. LEV: Unless you recognize that international law is embodied in America law, only to the extent that there is no contrary domestic exercise of law either by Congress passing a statute --

THE COURT: Congress passing a statute is one thing. The president making an executive order is another thing. If what you are asserting now is that by mere action of order, privately conducted, the president has the right to veto the application of international law, now, that is going pretty far.

MR. WEHRER: That is what the Paquette Habana stands for. It speaks of a controlling executive act and the act there in question related to the seizure of a ship off the coast of Cuba. And what the Court looked to was did the president direct the captain who seized the ship to do so notwithstanding any rule of international law to the contrary?

Now, in that case, the Court found that the president had not done so, but the clear implication of that case is the president had the discretion to do so and had he done so, the act would not be dealed illegal as a matter of domestic law.

THE COURT: That goes pretty far to say that in substantial areas of the law, the president isn't bound by the law when he is dealing with war or international relations.

We know that isn't the case in the steel cases in the Korean War.

MR. WEHRER: He is bound by the following things, he is bound by the Constitution and by federal law. So long as he is acting within constitutional authority, and that's what Youngstown Steel addressed, but if he is taking an action, forgetting international law, if he is taking an action that is within his constitutional authority, he has the discretion to do so unless there is a federal statute that renders the conduct illegal.

THE COURT: I understand your position, but it does seem to me to go pretty far because he is obligated to enforce the laws and the law is thus and thus unless, as you say, he says it no longer exists.

I understand the position.

MR. WEHRER: I would just point out, your Honor, that the law, to the extent that we are talking about international law incorporated into federal law is common-law, we are not talking about displacing positive statutory law.

I also make the point that in this case, and that is what is before you, you have not just a presidential decision, you have a presidential decision that was indisputably undertaken after the president sought the advice of the Secretary of State as to the legality of the conduct and others in which the secretary, fully aware of the

international controversy surrounding the use of chemical herbicides persisted in the decision that such use was legal as a matter of international law, and you have a case where the Congress continued to appropriate funds for those actions.

I can think of no more quintessential executive act than the one that is at issue here.

THE COURT: I can think of one, and that is just by executive order.

MR. WEHRER: I fail to see why issuing a written executive order has any greater weight as a matter of a controlling executive act for this purpose than a presidential decision that is made, that is publicly made, that the world is aware of, that is made based upon consideration of the international legal matters at hand with the support of the Congress.

I sense the Court doesn't quite agree with our views of the role of international law.

THE COURT: I don't disagree with you. I am just troubled by the logic, where you are driven. You are driven to the authority of the president to declare unilaterally and in defiance of every other nations' view of what the international law is, having the power to violate the norm of international law and, we then have a position where it's no longer international law in this country. That is a pretty extreme position.

MR. LEV: In this country is a key phrase. I would point out the president is always subject to the checks of Congress in terms of appropriations in this case and ultimately subject to the democratic process. And those are significant and substantial checks. His power derives not from the international community but from the people of the United States.

THE COURT: Not from the Court?

MR. WEHRER: Not in this instance.

THE COURT: I see.

MR. LEV: But his power derives from the people of the United States and the Constitution of the United States.

THE COURT: So does the Court's power, so does the legislators' power.

MR. WEHRER: I understand, vis-a-vis the rest of the world so long as he is acting in conformity with that authority, his actions are legal as a matter of domestic law.

We submit this again is a quintessential non-justiciable case. What plaintiffs are asking is for your Honor to essentially declare that the president committed a war crime. They are asking you to sit in judgment of the president's decisions made. It was undoubtedly his constitutional authority as the commander and chief.

THE COURT: Why does that shock you? Suppose the president did deliberately say start using gases outlawed by

1925 in 1975. Why does it shock you that the president is then committing a war crime?

MR. WEHRER: It shocks me because Baker versus Carr instructs that a case in which an issue has been Constitutionally committed to a coordinate branch of government is non-justiciable. And the power to decide what weapons to use, how to use them, has been committed to the president as commander and chief.

THE COURT: That seems to go very far.

We all recognize that the president wouldn't do anything like that. I suppose most of us do. But no matter what it says, wipe out this group, bomb this group out of existence, torture, use gases outlawed by the '25 convention.

MR. WEHRER: Again, your Honor, those are not the claims before this Court.

THE COURT: But that is a different problem. That doesn't go as far as you are going.

MR. LEV: You only need to go so far as to determine that where the president, acting on the advice of his advisor, after consideration has determined that a certain act is not a violation of international law, and in having so decided has decided to exercise his constitutional authority as commander and chief based on that decision, then in those circumstances it would be inappropriate for an Article 3 court to second guess those determinations.

THE COURT: I find that very hard to accept, that a direct, and I'm not saying this occurs or will occur, your proposition is that a direct violation of a major human rights right by the president under his direction is not subject to check by the courts of the United States. That seems to me to be an outrageous position.

MR. LEV: Your Honor, again, you do not need to reach what you consider is an outrageous position to determine that these claims are non-justiciable.

THE COURT: Now you are getting back to what I understand the defendants' position is.

There are two types of international claims; one, the outrageous claim; and the second, the non-outrageous claim or so I'll characterize them, and you are saying this is a non-outrageous claim and therefore, at least initially the president has the power to define what is international law. But what you have said is that applies to any type of claim and that I find difficult to accept.

MR. LEV: And I think that is a harder principle to accept and I don't think the Court needs to be comfortable with that position to find that this case is non-justiciable.

I point out that the other factors identified in Baker versus Carr similarly support the determination of non-justiciability.

Specifically, the last three factors identified by

the Court can only be viewed as presidential considerations that are animated by separation of powers principles.

The Court says if the case is going to risk embarrassment from multifarious pronouncements by the different branches of government, it's not justiciable. If there is a need for the United States to speak with one voice, the questions are non-justiciable. If there is a questioning need to adhere to a political decision already made, the claims are non-justiciable.

All of those factors fit this case to a tee. They all address the concept that in international law, the United States is a single sovereign. It's not three different sovereigns. It's a single sovereign. Having acted on the international arena, the president himself having so acted, for this Court 40 years later to decide in hindsight that the president's decision taken after due consideration of the legal issues; well, he got it wrong, that would be embarrassing, that would be undermining the United States position --

THE COURT: I understand the position. I think that is a good argument, but it's the more extreme argument that I find troubling.

MR. LEV: I submit under the last three factors in Baker versus Carr, the factors that the plaintiffs presented here are non-justiciable by a Federal Court.

Finally, I would like to briefly address the question of the availability of the government contractor defense in the international law claims in this case.

As the Court knows, the defense was created as a matter of federal common-law based on practicable considerations. The very same considerations that led the Supreme Court to recognize the defense in Boyle apply here. I can't see the government directly -- shouldn't have an end run around suing these contractors.

Second, Sosa tells the Court that in considering whether or not to recognize federal common-law cause of action under the ATS, the Court should consider practical consequences. That leads you right back to Boyle and the practical considerations that underlie the government contractor defense.

Finally, nothing in international law precludes applicability of a civil government contractor defense to cases such as this. With the Neuremburg cases, that in a criminal context, there is no superior order defense when the order issued is manifestly illegal. It shocks the conscience. That principle says nothing about applicability of a government contractor defense in a civil case such as this where the claims at issue come nowhere close to manifesting the illegal conduct that was at issue at Nuremberg, the Zyklon B case and the Eichmann case.

THE COURT: Thank you.

MR. LEV: Thank you, your Honor.

With the Court's indulgence and in light of the weather, I'll be leaving before the arguments are complete this afternoon.

THE COURT: I wish you good speed.

MR. LEV: Thank you.

THE COURT: Now I have heard from the defendants, I believe, we will take a few minutes before the plaintiff will be heard.

10 minutes.

(Recess.)

MR. SMOEGLER: Christian Smoegler appearing on behalf of the Isaacson and Stevenson plaintiffs.

I should begin, your Honor?

THE COURT: Please.

MR. SMOEGLER: Initially, we are talking about a summary judgement.

This Court has made clear itself that all inferences drawn from the underlying facts should be drawn in favor of the party opposing the summary judgement. We believe that regardless of how this Court may weigh those inferences, we have absolutely set forth a justiciable case on every single fact that is put there and with substantial counter-evidence as to why we believe it's a question of fact for the trier of fact.

THE COURT: You are speaking for the veterans?

MR. SMOEGLER: We are speaking for the veterans. There will be four of us speaking. I'll address the summary judgement issue. Mr. Cooper will address the contract themselves. Mr. Englehart will address the remand issue and then Mr. Boanerges will talk for the Anderson plaintiffs.

Now, in terms of Boyle itself, there is four, actually four predicates. The first is a conflict with underlying state law, before you even get to the Boyle factors. We would submit there is no conflict of state law. The same products were sold on the domestic marketplace. The

products sold on the domestic marketplace all had the same dioxin in it in the same concentrations and domestic users of those products had the same rights and had the same rights to bring lawsuits the entire time.

I believe that this came before your Court where there was an application of whether there was a preemption under Pheffer and this Court found that under certain circumstances there were not but the justiciability of the underlying claim is no different under state law or federal. So we are asking the contractors to get an immunity.

THE COURT: I don't think there is any justiciability problem.

MR. SMOEGLER: Then we get to design defects and we are saying it's a performance specification with a manufacturing defect, that they had complete and full discretion over the dioxin in their product. And I'm going to go back to that later.

THE COURT: When I say justiciability, I'm talking about the veterans' claim.

MR. SMOEGLER: I am saying that state law versus federal law, that there is no conflict in state or federal law because the state law has the same product dealt with under state law under the same theories against the same defendants and there has been lawsuits all over the United States for domestic applicators.

THE COURT: Yes, I understand that.

MR. SMOEGLER: And finally, and I'll do it in reverse order, the final point, the supplier warns the United States about the dangers in the use of equipment that were known to the supplier but not the U.S. There is a predicate in that. The predicate is that in order for that to take effect, the supplier has to know that the United States has the information, otherwise, it has a duty to inform the people that they are working with of the information. It's axiomatic in this case.

THE COURT: I don't see that at all. If the government knows it, why should they have to tell them?

MR. SMOEGLER: The question is what government is, and I will get to that. The government, if you're contracting with a contracting officer who you know knows nothing but you have told somebody in Asia about the problem and he works for the embassy of the government, you can easily say the government knows everything but you have a duty to tell the person who you are contracting with to say I want to buy this product, that you have a problem. They did not. There is no evidence that anybody that actually dealt with these corporations, anyone was ever told by any of the corporations about any of the dangers. No one.

They picked from other places in the government but not the people that they dealt with. And they seek to benefit

from the knowledge of others.

Now, only to digress just a second because I am going to come back to the silence part.

For five years now I have not talked about the medicine and in every decision this Court has predicated upon the fact that the medicine shows that the evidence, epidemiology, toxicology does not show the relationship of injuries. And when we say that and they pointed out to the use of Dr. Walsh affidavits, in terms of cancer epidemiology, that was true in the '70s and '80s because the only major studies that were done, there were two studies by --

THE COURT: Excuse me, the question of causality is not before me.

MR. SMOEGLER: I understand that and that's why I say I'm digressing. For five years I haven't mentioned causality but I want to say for the record that causality has changed and the ILN, the WHO and HSTR all recognize dioxin is a class A-1 human carcinogen.

In 1984 it was a probable human carcinogen, recognized as a class B two. It has changed. The epidemiology, the studies done of the workers when this court tried the case in 1984, there were two Monsanto studies. They were the only industry studies done. These two studies were later proven to be fraudulently conducted.

THE COURT: Excuse me, I would prefer that you get

to the main point here.

MR. SMOEGLER: I will get to the main point but I will say that those workers were done and there was an increase in all cancers. The main point of what was known at the time by the defendants in the 1950s and 1960s is that chloracna was not just a contact dermatitis, it was a systemic poison that affected all of the organs and particularly the liver.

We have subsequently found out that is because dioxin actually mimics a hormone and sets forth, it's called the aerohydrocarbon receptor and it sets forth a cascade of reactions because the body mistakes it for something else. We didn't know that scientifically until 1989 but the defendants all knew that they were dealing with a systemic poison.

Now, the defendants talk about four agencies of the government that had some knowledge. One was Edgewood Arsenal, the second was the Weldon Springs Project, the third was the PSAC, the President's Science Advisory Counsel and the fourth was the Public Health Service. None of these services communicated, they don't show that they communicated with the contracting officers, not a single one did or in writing the specification. Secondly, they misstate what these organizations knew.

In terms of Edgewood Arsenal, there is one doctor, a Dr. Hoffmann who tried to test dioxin to see if it was good

for chemical warfare. That had nothing to do with 245T. That was the chemical on its own, and the paper that he talks about is a pentachlorophenol which is a wood preservative and also has dioxin as a by-product though it's a different type of dioxin. The reason it's a different type of dioxin is that the chlorine positioning is different on the two benzine molecules. So it's not the same but it still would be called a dioxin. He then attaches a Kimmig & Schulz paper that stated that nobody -- almost all the people asked about it had never read it. He doesn't attach it. He mentioned it and they say since he mentioned a paper in an article, ergo people would have read it.

When the depositions were taken, people did not read it. Now, in terms of Edgewood, in 1963 the Edgewood meeting, the words dioxin or chloracna do not appear anywhere in the minutes of that meeting.

Let's look at the Edgewood people themselves. Edgewood itself was a conglomeration of various parts. It was not one place. It included Rocky Mountain Arsenal and other arsenals including Weldon Springs. Now Dellmore who was the general in charge of Edgewood testified that he first learned of dioxin in 1980 or 1981, pages 124 and 125. He never heard of chloracna, never heard of any of the industrial accidents. James Henry Wills, chief of pharmacology testified that he first learned that dioxin was in 245T was in 1970, he did not

know of any industrial accidents. Frank L. Bauer, director of the medical division, testified the same. Francis W. Morthland, deputy life science division of the Army Research Office testified that he did not hear of dioxin before the 1970s. Brunildo Herrero, who is the chief of pathology, did not know, first heard of dioxin in the 1970s, never heard of any industrial accidents. John S. Leary, chief staff officer for pharmacology did not know chloracna could be caused by 245T. William H. Summerson, chief scientist, U.S. Army Chemical Core never heard of dioxin until right before his deposition in the 1980s. John F. Callaghan, section chief for, the chief of mechanics, skin prevention, first learned of dioxin in 1971.

To take a single person and say one person might have known something when I just went through all the chiefs, they knew nothing, they do not know this information.

Now let me get to Weldon Springs.

Mr. Krohley admitted that nobody at Weldon Springs knew about the manufacturing process until 1968. The only people in the government that ever knew how dioxin was produced in the course of the manufacturing process were the three people that were assigned by Edgewood to Weldon Springs. There is not a single paper substance, single document that shows that anybody else knew dioxin was created in the manufacturing process.

The people at Weldon Springs don't communicate at all to the contracting officers, the people at Weldon Springs are off at their own project in Colorado where Stern Rogers is. They are assigned out of St. Louis which is where Weldon Springs is, they are not in Washington, not part of the contracts, and they learn of -- they are trying to manufacture their in their own facility.

The defendants hired a lobbyist to get the government to shut down that facility. I'm just dealing with that now because that is part of the compulsion argument. When they formed that facility and these three people know about it, they do not communicate that to the people involved in Agent Orange contracting. And in fact, Merle Ringenburg who was the commodity manager for the project, their boss, testified that he never heard of dioxin until after the Weldon Springs project was abandoned. That is at page 63 and 121.

Now I'll go to PSAC.

The defendants have made, said things about the PSAC. 245T and 24D were never critical to anything that PSAC did. The reality, if this Court recalls at the time when PSAC considered this, Rachel Carson had written her book on DDT. To the extent that herbicides and pesticides were an issue, it was because of the worldwide issue of the poisoning of DDT, and in that course, a number of chemicals were thrown together. Hundreds of chemicals were used and two of them

happened to be 245T and 24D but they were the never the issue of PSAC.

Later, the BWCW primarily spent its time on atmospheric nuclear testing, a main issue in the '60s and biological warfare. The issue of 24D and 245T were not issues that were important or germane and most of the PSAC scientists who testified have no recollection of it ever coming before them.

Now, in particular, since this Court had talked about Dr. Calvin who was on the board of Dow Chemical and a Nobel prize winner, I'll read Dr. Calvin's own testimony.

"Question: Do you recall was there any discussion in connection with meeting with the President's Science Advisory Committee about the chemical 245T?

"Answer: Not to my knowledge.

"Question: Was there any discussion of a contaminant?

"Answer: Not to my knowledge.

"Question: Do you recall, Dr. Calvin, any discussions with regard to health implications of herbicides?

"Answer: Where?

"Question: Do you recall any discussions in connection with that related in any way to the meetings of the President's Science Advisory Committee and the subpanel

thereof?

The answer is: No.

That is Dow's board member sitting on PSAC.

Finally, we get to the Public Health Service. They did have two dermatologists that were involved in two of the industrial accidents. Those two industrial accidents were the one at Diamond Shamrock and the one at Monsanto.

When Dow had its major industrial accident, it never informed the Public Health Service or anybody in the federal government, so there was nobody at the Public Health Service involved in the Dow accident. The same is true of the incident at Thomson. They were not informed. So the Public Health Service investigated two of the incidents. They sent dermatologists to only look at the skin condition chloracna, nothing systemic. Dr. Birmingham testified that he never did any work in connection with Agent Orange. He didn't communicate with any of the officers. Dr. Key testified that he actually first learned that Agent Orange was used in Viet Nam by reading about it in the newspapers a few years after the war ended.

So to impute the Public Health Service knowledge, even though they had knowledge that -- in fact, they didn't know about the manufacturing process but they knew that there was chloracna where they were working, but there is no evidence that they were involved with the decision-makers.

What defendants want to do is say we can randomly take different people and impute the knowledge to the government as a whole. The reality that we think this Court needs to look at is what did the people who actually speced this, decided on this, and the defendants, know. The person that made this decision, undisputed, was Dr. Charles Minarik along with Dr. J.W. Brown. Dr. Brown decided before this action proceeded and was never deposed, however, Dr. Minarik was deposed and on pages 152, 153 and 216 he testified that neither he nor his assistant ever knew anything about dioxin and chloracna. The same is true of his assistant, Mr. Darrow, and his other assistant Mr. Irish. They were the ones that made the decision. They were the head -- in Edgewood, there were various departments. The decision was made by the people in the Krupps division that said these are who we want to use, they did not know about either of these. So then we have to go, okay, the decision is made, let's look, the next step is we have to have specifications for a contract. The person that specifies the contract for the Army is Sinclitico. He deals with a man named Russell at Monsanto who knows substantially more and Russell provides him with most of the information for the specification. Russell even testified, writes a letter saying I wrote the specification.

Sinclitico testified that in drafting these government specifications, he had no idea 245T contained a

contaminant called dioxin; page 168.

So he doesn't know. Should they have sold Sinclitico if they wanted the benefit of this? Who should they have told? They should have told Minarik and Sinclitico. After Sinclitico ceases, the contracts goes from the Army to the Air Force. And the Air Force after that, they wrote the specifications. There the specification head is a guy named Vandeventer in volume 173 and 174 testified that he learned about Dow's method -- that he learned -- the first time he learns that Agent Orange contains dioxin and there is a method for testing about it, this is the person writing the specifications, the first time he learns about that is in 1970 at a meeting in March of 1970 with Dow. One month, that meeting takes place one month before it's pulled off the market and Dow tells them we didn't tell you this but for the last five years we've been testing our product for dioxin and by the way, dioxin is contained in this 245T.

So the three people, the head decision-maker and his assistants and the two people that write the specs don't know dioxin is in 245T.

The question is: Aren't they the ones that we would have to look to who would need the comparative information?

We get to what the defendants knew. In the defendants' documents, and we pointed on a number of occasions, they described the dioxin as "one of the most toxic

materials known." That is a quote from Dell.

Monsanto; the most toxic chemical that they have ever experienced. We cite in to E56, B38 of our exhibits along with B7, B30, B38, B40, E56, E30 E29, absolute statements about the horrific danger of this chemical.

There is not a single statement by a government employee using that level of -- saying that to that degree, there is no government employee who ever says this is the most toxicity or even toxicity.

In fact, the chemical companies in 1963 when they talk to the government, they didn't tell the government that they are not aware of workers. We know the Public Health Service knows that but when they talk to the people at Edgewood and Edgewood is asked to give Dow's report and represented from Dow at the Edgewood meeting is V.K. Rowe. The meeting is concluded. "To the best of your knowledge, none of the workmen at any of these factories has shown any ill-effects as a result of working with these chemicals." Absolutely untrue. Monsanto has documents that said it was a universally recognized problem in the factories. We know about the Monsanto incident in 1949. We know about the incidents that at Diamondhead and we know the workers and we know what was going on, but that knowledge was not communicated to Edgewood nor to the people writing the specs or choosing them. So as a result, those people say: There is

no damage to workers. There is no damage to -- we don't know of any harm. 300,000,000 gallons of this material has been used. 50 gallons a year is made at the time the government starts purchasing it. V.K. Rowe testified, let me say who V.K. Rowe is. He was the head of all of the science and toxicology labs for Dow Chemical. He testified that he had no recollection of notifying any government agent about dioxin before 1969. Here is the person in the world that knew more about this chemical than anyone else and that is his testimony. So they don't communicate.

Now, the other thing is that the manufacturers, beginning in '65 are all testing their product for Dow. Monsanto, we were given an exhibit that shows all the testing runs of their 245T. We have showed Dow's testing, where Dow calls everybody to their meeting saying we have tested your product. The government stipulate isn't informed of this testing until 1970. The testing was kept hidden from both the government and from the people that came. So even the people that came who were contractors, they didn't know the product was being tested for a product called dioxin. The only thing they are testing for is whether there is product purity; are we getting what we are buying.

Even going back to Boehringer, when Boehringer in the early '50s had a problem, they closed their facility. Within five days every Boehringer rabbit died. They knew

that. That Boehringer had liver problems, they communicated this information to Dow and to Diamond Shamrock, we showed the correspondence, and I will get to the Boehringer technique of dealing with this problem in a second.

I would ask the Court, we have submitted an affidavit from Dr. Janet Weiss, a specialist in occupational medicine and toxicology who is board certified in three different disciplines; pathology, dental toxicology, toxicology and occupational medicine.

We charged Dr. Weiss with reading everything that the defendants submitted for summary judgement and everything in the opposition documents that we have. And it's the conclusion of Dr. Weiss that defendants clearly knew more than the government. After all, they are dealing with their workers and their workers illnesses on a day-to-day basis. As she describes, most had medical departments, toxicology departments, and they knew the worker's health situation. The government to the extent there is a Public Health Service makes a fleeting trip to look at certain products, but even they are relying on the reports of the companies that know the risks. To the extent that there are people in the field that say they have problems, those go to the company like they did in any other major company in the United States.

So let me go to the other problems. One of the problems talked about is warning and it says: And the warning

they would have used had a similar product commercially been used by them was admitted by government direction.

Now this Court has pointed out that particularly on some later -- there was no warnings. The reality is the defendants did not warn of dioxin on any product they sold to anybody in the world. So the fact that there was a limitation on warnings does not effect this issue because they universally didn't warn about their health problems to the workers, they universally didn't warn about the question of systemic illnesses and they universally didn't warn that their product had dioxin in it.

I want to go finally to the other problems, the components of Agent Orange. This Court in Ryan wrote the components of Agent Orange, Agent Purple, Agent Green, Agent Pink were developed without direct government control. All the methods of manufacture were determined by defendants. The government sought only to buy ready to order defoliants and the government did not cause control or prevent production of the by-product dioxin. We agree with that.

In fact, General Olenchut, Ft. Detrick's commanding officer, when asked: Agent Purple, the 50/50 mixture, was this the result of research and development work done at Ft. Detrick, Agent Purple?

"Answer: I don't know. My impression was that it was a commercial mix well applied in the United States coast

to coast.

The reality is that the people at Ft. Detrick who had to choose the herbicide were defunded in 1958. They didn't have staff. There was one person working on the desk. They come in 1961 with a directive; we need herbicides, we need them now. Tell us what will work. And by intention, they realize that they could not develop a herbicide. So they send a mission to Viet Nam with five people in it and they said: What will work? But we have to have something that industry is making already because we need to get this into production. And for that reason they use something that is produced that is a generally produced off-the-shelf material. They first use Agent Pink and Agent Green which are 100 percent mixtures. They then decide to go to a 50/50 mixture, Agent Purple. The hundred percent mixtures are 245T. The reason you go to a 50/50 is that 245T only kills certain things and they want to have told destruction, so they mix them both. And what happened, and it's not in the record, is that Dow says: Look, use this mixture which is a 30/20 percent Isobutyl Ester with a 50 percent 24D. Why do you use that? Because it doesn't freeze. But it's patented by Dow. Dow then goes and when Monsanto and Diamond start making that, selling it to the government, Dow sues them for a patent violation, they are infringing. Certainly off the shelf, it's their patent. At that point they go to Agent

Orange because Dow didn't have a patent on it and it's 50 percent isobutyl and they decide it doesn't matter in ambient temperatures in Viet Nam that it's going to freeze because it's not going to happen, it's too high so they don't need the Agent Purple and that's why you go to that. Each is sold commercially and they are sold in different mixtures, various mixtures. It's incorrect to say this weren't sold undiluted. At times they were with dilutions sent to the end user because they shipped them that way. They would ship them to commercial formulators and large end using houses and then the end user would then mix. I personally represented somebody who was exposed to the process of mixing it on his truck to whatever the specifications were.

Finally, you got to the manufacturing process. The Court in Hercules -- there were two cases and I'll -- this Court is cited to the Winters case and the other cases.

It's difficult to fault the decision-making in those cases given the record that was before those two courts. The attorney representing for the plaintiffs in those cases put no record before the Court in those. So those courts relied exclusively on the papers presented by the defendants to effect that by that type of representation and in that court Judge Cobb when he wrote his decision wrote it with the record that he had and he didn't have any of the counter-record that we have put in, but that was different in the two circular

proceedings that I would ask this Court to look at, and we have cited them, which is the circular proceeding involving Diamond Shamrock called the MAXOUS and CERCLA, it's an acronym. Those two litigations proceed hotly contested with the U.S. Government because MAXOUS in one case and Hercules in the other case sought to bring the Department of Defense into those cases as an additional defendants pursuant to their commandeering requests so that the Department of Defense could share in the cleanup costs related to the contamination.

One was tried, the Hercules case. There were summary judgement motions brought by both sides and in those, the district courts in both, affirmed by their circuits, ruled against the defendants and ruled absolutely that Hercules had complete -- Hercules had complete discretion over the manufacturing process they wished to use and their plants were never commandeered and, therefore, the Department of Defense could not be brought in to either of those cases; summary judgement against both the defendants.

The question then that we go to is: This case to us is about a manufacturing defect, not a design defect. There was no approval in any document of the manufacturing technique. Everyone admits that the manufacturing technique and actually dioxin itself is not mentioned in any specification, no matter how long they are.

In fact, except for a few people in Weldon Springs

beginning in 1968, nobody in the government knew how to manufacture. When Weldon Springs was started, the government had subcontracts with Thompson Chemical and Sterns Rogers, which is why it's Thompson Sterns Rogers, to come up with a way to manufacture it because the government had nobody in its own employ who knew how to manufacture these chemicals. So the rest of the government doesn't know what the defendants know as early as the 1950s. The defendants in the 1950s are told about the Boehringer process.

There is substantial correspondence with Dow Chemical and Diamond going through this process. And the process says look, we have had a really bad accident. We have substantially hurt our workers. We have discerned that there is a level at which this is created and that level is getting towards 160 degrees, so we have stopped production between 150 and 155 with an alarm that sets off at 157 so that we can't go above that and under those conditions we find no detectable level of dioxin.

The defendants, this was in the 1950s, to say that they were stuck with orders in 1961 they didn't use, not just for the military, but they had orders for a commercial product, to sell a safer product, and they were told the problem with the process is that when you put it in the Boehringer process, it took 13 hours to cook. In contrast, the Diamond process and the Monsanto process took four hours

to cook. In fact, up until '64 and '65, Dow used a process that was at 215 degrees and took 40 minutes to cook. And when Boehringer saw that, they went through the roof because Dow sent it to them, they said it was an incredibly toxic material and that was sent to Viet Nam until Dow had a blowup at its plant and changed its process.

So we get to the affidavits that we submitted, and the defendants submitted no counter-affidavits. We went to Dr. Harry Ensley. The EPA in 1980 wrote a manual as the how dioxin is made in manufacturing process. The part of that manual that describes how dioxin is produced, it's actually a book, it's called EPA dioxins, Harry Ensley wrote that, and he testified that the state of the art was to use the Boehringer process and they didn't and they breached the state of the art.

He also looks through and he says that to a reasonable degree of scientific certainty. Also to a reasonable degree of scientific certainty, he testifies that he looked at the specifications, that the specifications talk about the overall purity the government was going to get, but there is a very large area of impurities in trichloroanasol and dioxin that left a wide margin of error as to how much, and at all times, just like there are asbestos cases and I think there is a hydrochloride fluid case that talks about a toxic fluid, if the specifications are open and don't specify

exactly what was there, what was required, then it was up to the manufacture. There was nothing that prevented any of those manufacturers for producing the safest material possible for the government. At least warn them that what we are producing is not safe. They ignored that. In fact, in the 1965 meeting which Judge Pratt wrote about, when they spoke to the other manufacturers, they say we can't tell the government about this. That's when they all start testing their own materials but they don't inform the government, they don't inform anybody that they are contacting with.

So finally, in the last prong, and I would ask this Court to look at Dr. Ensley's affidavit, all appropriately testified to, the last prong is whether these were reasonably precise specifications. So for that question, and we found what we thought was appropriate to address each question, we have an affidavit, and I'm going to submit -- we submitted last night a supplemental affidavit, which I can, if I can approach.

THE COURT: Give it to my clerk, please.

Thank you.

Have you given this to your opponents?

MR. SMOEGLER: Yes, before we met this morning and it was filed electronically last night.

For that purpose, doctor -- Mr. Ralph Nash, as he said in his prior affidavit, he is the leading legal expert on

procurement law in the United States. Virtually every case book on procurement law and government contracts was written by Mr. Nash. We had him look at every one of the contracts. In his first affidavit, he delineates everything that he looked at. His conclusion is, first of all, we are mistaken in the way the defendants want to talk about rated orders. Rated orders do not in any way require the contracting party to fulfill the rated order. What they do is they give the contracting party a priority over -- to get materials from other parties. So the contracting party wants the rating because that gives them a preference. Where this system was really developed was in the 1940s during World War 2 and there are four major metal that were in short supply for the war, steel, aluminum, nickel and copper.

So they said we want you to make this, we need to have a way of saying that you get this in priority to someone else. So they set up a rating system saying you accepted this bid for the tank, we will give you a rating that you can use with your suppliers. And there were two types of ratings, the DO and DX ratings. The DO was the basic rating and the higher level rating was DX. So if somebody had a DX rating, that trumped any DO rating on their contract. It did not require them to bid on the contract, it did not require them to accept the contract. It only gave them a tool to get supplies from people they are dealing with. That is why Diamond -- that's

why Diamond Shamrock had the ability to get contractors and carpenters and use their rating saying you have to come to us but as Professor Nash states in his supplemental affidavit, I think I gave you -- I think I better switch because I gave you a marked copy.

THE COURT: Well, I read the markings but I'll forget them.

I'll read the clean copy.

MR. SMOEGLER: As he stated, I can categorically state that the placing of priority ratings on a contract is not an indication --

THE COURT: The markings incidentally were only the yellow overscoring.

MR. SMOEGLER: That a rating on a contract is not an indication that the contractor was forced to enter into the contract. And the other marking is where he looks at these, and he looked at every contract, and said: It is therefore my opinion that the element of the specifications that led to the conclusion of dioxin and various agents was a performance specification and may not be described as a reasonably precise specification or design specification. And the last thing that I was going to say about that is there were differences in specifications. There were performance specifications that say look, we want this, here's what we want, make it. We don't care how you make it. We don't care what you do to make

it. We want 97 percent this. Then there is design specifications that said we want you to go through these processes when you manufacture. We want this. We're in control of this. We might assume that if you don't do it this way, you won't be able to give us what we want so here is the design that you have to follow to get us what we want.

These were performance specifications. The government never cared, didn't know how they manufactured it. The Hercules and Vertex cases state that they were totally separate from the manufacturer. There is testimony from all the defendants saying they weren't involved in the manufacturing process. They were just asked to manufacture this stuff for this level. And finally, if there is nothing on this and for the looseness of the specifications, we submitted a document that was not in MDL 381, there is another contractor, Hoffman Taft. They competed to get into this market. They were told that they could get material from Hooker. And they went into it, and we submitted a document because it was such a profitable market, they wanted to get in but then they were having trouble meeting certain specifications in terms of purity. They called up, they were told don't worry about it, we've been moving the specifications around for everyone, just send us what you've got and we'll see what they are. So did they know? None of the people that dealt with this on a one-to-one basis knew

what was in it. None of the people in 245T that were involved with the defendants in specifying this material, and none of them knew about chloracna, and on that basis, we believe there was substantial evidence on every one of these prongs that the case should be submitted to the trier of fact to make that decision, that at least there is sufficient information and including all the affidavits that we submitted, that that exists.

Now I'll leave it to Mark Cooper to talk about the contracts themselves.

THE COURT: Thank you very much.

MR. COOPER: Your Honor, I'm just going to speak about the contracts in a little more detail.

On the issue of summary judgement on the contractor defense, this is not rocket science. You look at the contract. The contract is there in black and white. You decide whether in black and white did that contract require the defendants to manufacture a defective product?

The language the defendants rely on, their prime argument is the military specification which is 51148. As a practical matter, that specification is only referenced in about half of the contracts, by my count 26 out of 57 contracts. But let's deal with that. What it says, typically it says something like N butyl 245T conforming to mil H 51148 dated 19 July 1963. And by the way, as a matter of contract

law, these are some of the most integrated contracts any Court is ever going to see. They are massive contracts. They are filled with pages and pages of boilerplate and fine print. The government wanted to regulate something, if the government wanted to control something, it had the ability to insert those provisions in these contracts.

The evidence of what the contract required is what is in the document black and white, not what somebody testified about the contract 20 years later.

So let's go to mil spec, mil H 51148, dated 19 July 1963.

This is a mil spec that Mr. Sinclitico wrote after, pretty much after all the Agent Pink, Purple and Green contracts were done. All those contracts before that pretty much said we want a mixture of 245T and something else, we're not any more specific than that. And we maintain that is no more reasonable -- that is no more a precise specification than we wanted Coca-Cola, we want Pepsi Cola. And if there is something wrong with the Coca-Cola and somebody got sick, obviously Coca-Cola could get off the hook because the government asked for Coca-Cola.

In this case the language of the contracts is very clear and simple. It appears in Section 3.1.1 and its says the composition of the herbicide shall be normal butyl 245 trichlorophenoxy acetate. That's what it says. It doesn't

say it shall be N butyl 245T with a tolerance for impurities. It doesn't say it should be N butyl 245T with a tolerance for dioxin. And it certainly doesn't say you must include some dioxin with this product, which is what it has to say for the government contractor defense to kick in.

And that is the strongest argument they have, that particular document. That is the linchpin of the Miller case and the linchpin of the Winters case, was this military specification.

Now, Hercules, says wait a minute, in 1966 the mil spec was revised. And this is very interesting. It said -- instead of saying the herbicide shall be normal butyl 245T, it was changed to say the herbicides shall be composed of no less than 95 percent normal butyl 245T.

That tells you two things. It tells you the first spec must have been 100 percent because now they are saying 95 percent, before they just said 245T. The second thing about the revised spec which became know as mil-H-51148A is you would be hard-pressed to find it incorporated in any single contract. It is a spec without a contract that applies to it. At least in my recollection and the documents I was able to review before today, I wasn't able to find a single contract that incorporated that spec. Where a tolerance for impurities was first incorporated into a contract was the April 1968 revision of the Air Force purchase description.

There were two Air Force purchase descriptions. The first is dated 23 February 1968. And that one says, again, the ingredient material shall meet the following requirement: Specification mil H 51148. That is the 1963 version, not the '66 version. The '66 version has an A at the end.

However, in April of 1968, the purchase description is amended to read as follows: Tolerance. Tolerance range for the amount of each composition ingredient contained in the final mix will be 1.5 plus or minus 1.5 percent. Range for N butyl 245T is 48.5 to 51.5. Range for N butyl 24D is 48.5 to 51.5. So that creates a tolerance. The interesting thing about that tolerance is it still doesn't allow any dioxin because if you are short on the 245T, what they want is 24D. That don't say if you are short on 245T, we want more dioxin. Even this more lenient spec says nothing about dioxin, says nothing about tolerating impurities, certainly doesn't mandate these companies to produce dioxin as an impurity 245T. Hercules itself admits in these papers that the acid purity requirement which has some play, two percent, from 78 to 80 percent, has to nothing to do with the product purity requirement.

And lastly, even if you accept, if you were to find that this April 1968 revision somehow allowed dioxin or somehow mandated dioxin, that April 1968 spec only appeared in four out of 57 contracts, obviously less than 10 percent.

mandate of dioxin and there was no mandate in the contracts to require the defendants to produce a defective product.

THE COURT: Thank you.

MR. ENGLEHART: Good afternoon, your Honor. My name is Mark Englehart. I am here on behalf of the Bauer and Walker plaintiffs. This obviously is my first appearance before the court. I appreciate the opportunity to appear before the Court today. As Mr. Smoeger said, I am here to address the remand argument.

The remand argument obviously deals with this Court's jurisdiction to even proceed to the merits issues as to these plaintiffs because as to these plaintiffs, their motion to remand for lack of subject matter jurisdiction has not been addressed.

We take as our starting point this Court's decision in Ryan that removal was not appropriate. The defendants here have sought removal under the federal officer removal statute and under Federal Common-Law. And I'll be focusing primarily on the federal officer removal statute. I'm not going to address all the points we raised in the brief.

We obviously don't waive anything that we have addressed in the brief.

causal nexus and the colorable federal defense requirements for federal officer removal.

This Court in Ryan made four predicate factual findings that this Court found mandated that the defendants had not shown a colorable federal defense.

I'll address very briefly the Defense Production Act, DPA. I think the simplest argument I can make here is that the DPA does not even come into play in these circumstances because the government never invoked the DPA. The government never compelled any of these defendants to produce any of the agents under any of those contracts. It did not compel any of these defendants to enter into any of these contracts. And that is set out in some detail in Professor Nash's supplemental affidavit, the supplemental affidavit Mr. Smoeger referred to.

With respect to the other asserted federal defense, the government contractor defense, in this particular context, the causal connection and the -- basically, my two arguments dovetail and there is factual overlap between the two arguments.

Mr. Smoeger has gone through the Boyle predicates, the Boyle elements. I'll be focusing on the reasonable precise specifications. That is the other one that does dovetail. The reasonable precise specification and the causal connection dovetails the factual matter.

Boyle, as this Court knows, is only a limited displacement of the state law duties that all these defendants have. Boyle requires an actual conflict between duties under the government contractor, and in the absence of a specific conflict between government contract duties and the state law duties, the government contractor defense does not apply. And that is the situation here.

The Court correctly found in Ryan that defendants do not have a colorable government contractor defense. The contracts that Mr. Cooper has just mentioned and as Mr. Smoeger mentioned before him are silent in a number of respects with respect to the particular injury causing mechanism. And this Court does need to focus on, as you know, the particular injury causing mechanism which here is not 245 -- it's not 24D, it's not 245T, it's not a mixture of those two ingredients as the Miller and Winters courts, I believe, mistakenly relied on. In fact, it is the presence of the dioxin contaminant in the 245T and therefore in each of the agents.

Looked at in that light, the contracts are silent as to any requirement dioxin be in any of the agents, that any level of dioxin, maximum level of dioxin be set forth in any of the agents.

They are also silent as to any particular manner in which any of the defendants produced the 245T, whether to

minimize, maximize, do anything with respect to the dioxin contaminant content in their products.

The significance of the silence is twofold; one, with respect to reasonable precision of the specifications, silence as to an injury causing mechanism means that you don't have a reasonably precise specification for purposes of the government contractor defense. The other significance is that because it is possible to comply both with the contract specifications and with the state law duty, there is no conflict under Boyle. There is nothing that triggers the application of defense and there is no causal nexus between compliance with the contract on one hand and compliance with the state law duties on the other.

If the specifications under the contract, as they do here, leave the manner of production, the manner of manufacturing, within the discretion of the defendants, which they did, there is nothing specified as to the reaction time, as to the process temperature, as to any of the features that the defendants have acknowledged can affect, reduce or increase the level of dioxin contaminant in their 245T. There is absolutely nothing regarding any of those specifications. There is nothing regarding that in any of the contract specifications, in any of the 57 contracts that Mr. Cooper has just alluded to.

Where the government contracts do leave that manner

of production, manner of manufacturing to the discretion of the manufacturers, then these defendants cannot be said to have -- to have been compelled to produce their product in such a way as to cause the harm.

Absent that type of significant conflict, absent that type of compelled conflict, absent that type of situation where compliance with the government specifications necessarily means that you violate your state law duty, the government contractor defense does not apply.

THE COURT: That is all determined after the removal.

MR. ENGLEHART: Sorry?

THE COURT: All of those factors are determined after the removal, not before.

MR. ENGLEHART: I would suggest those are part of the defendants' threshold showing. The defendants at least have to make a threshold showing that there is a conflict between state law duties and their duties under the government contracts and I believe that when looked at in the proper light when the inquiry is narrowed as I think the cases say it's supposed to be, the inquiry is narrowed to the specific mechanism of injury, the specific harm producing event, which again is the presence of the dioxin contaminant in the 245T and the agents, looked at in that light, defendants cannot even make that threshold showing to make it a colorable

federal defense.

THE COURT: I see.

MR. ENGLEHART: And I acknowledge that that is obviously not the same. The cases are very clear. Boyle is -- Boyle is not clear. The removal cases are clear that success on the matters is not required in order to show a colorable federal law defense.

What I am saying is that part of that threshold showing is advancing the proper fit between the government contract, the particular specification under the government contract and the injury producing mechanism as set out in plaintiffs' claims.

THE COURT: I understand your position, but it's taken well over a year of discovery and extensive depositions to raise the issues properly, and to remand at this stage doesn't seem to me to make much sense.

MR. ENGLEHART: I understand that that may be the Court's position. Jurisdictionally, I'm not sure that is appropriate.

THE COURT: Jurisdiction doesn't yield to common sense always.

MR. ENGLEHART: And the only point I would make there is that particularly in the steel company case in the Supreme Court, the ordinary order is for the jurisdiction to be decided before the --

THE COURT: It is not an invariable rule. He knows that.

MR. ENGLEHART: But the situations where the Court has deviated from that is in the personal jurisdiction standpoint situation where the personal jurisdiction issue was decided a lot more easily than the subject matter jurisdiction issue.

Here we are talking about different variants for the same --

THE COURT: I understand your position but it does seem to me you have to know a great deal before you are in the position to make the determination; and once you have gone through the whole process of getting the information, deciding the threshold issues, it doesn't make much sense to remand it.

Anyway, that is the position I am going to take.

MR. ENGLEHART: The only thing I would say in response to that is that, I think, follows from defendants inappropriately framing the issue.

I think properly framed, the issue is, as the plaintiffs have framed it, which is if the specific duties under the contract to the specific injury causing harm, if the two cannot co-exist, only then do you have a colorable federal contractor defense.

I would also note in that regard that the government contractor defense is frequently adjudicated in state courts.

It's frequently adjudicated in lawsuits in state forums.

THE COURT: I have no doubt that the states are competent to answer all these questions.

MR. ENGLEHART: And to the extent that that is a justification for an official immunity claim being advanced in Federal Court --

THE COURT: That is not the basis for the official immunity claim.

Occasionally, very occasionally states make mistakes and that is the reason for the immunity and the removal, so that officials and others acting as if they were officials can get suitable protection and go directly up the line to the Court of Appeals and the Supreme Court.

But I understand your position and you've made it very well.

MR. ENGLEHART: For that reason, your Honor, contrary to what the defendants argued previously, the threshold for removal is actually stricter for, I would say considerably stricter for a government contractor defense than it is for an official immunity claim and this is a situation where removal should be looked at strictly. And I would say a majority of the courts have followed this Court's reasoning in Ryan.

THE COURT: Maybe I have misled them. If I have, I apologize. I have made other mistakes.

MR. ENGLEHART: You may have created a majority view by doing that, judge.

THE COURT: Thank you, very much.

MR. ENGLEHART: And I'm not planning to leave now but if I may have leave also to catch my plane.

THE COURT: Yes, safe trip.

MR. BOANERGES: My name is James Boanerges. I'm here on behalf of Colonel Anderson and now about 13 or 14 other American veterans who seek redress for their injuries sustained as a result of the defendants' conduct, not in complying with the government's specifications and design but by selling the government an adulterated and contaminated product. To the extent the government -- that the contractors cannot hide behind the idea that oh, the government made me do it.

Rather, it's a situation where they knew what they were doing and they kept on doing it for four years between 1965 and 1969 when they finally came clean with the idea that well, the reason the 245T and the Agent Orange is causing these birth defects is because it was contaminated and we knew it was contaminated but we didn't know it was contaminated the whole time and we failed to tell the government. And judge, they say we brought nothing knew. I submit that the testimony of Dr. Julius Johnson to Senator Hart is new. I don't believe that was ever in the MDL 381 record before now.

When Senator Hart pressed Dr. Johnson, Dr. Johnson admitted every single thing. We found out about it in 1964 when our people started getting sick. We told the other manufacturers about it because we didn't dare risk this happening to our customers, and especially customs operators who might tip off the government and cause this restrictive legislation that would put us out of business, so we are going to keep on keeping on.

And they had a choice. They had so many choices. They could have done what Hercules did. They could have taken it out of their product. And that's what Hercules did. And that is in the summary judgement evidence which we brought you.

And what did it do? It caused them to get in trouble with the government in the Vertac case because they buried it back there in Jacksonville and contaminated that property and ended up having to pay for that, but at least they didn't sell it in an adulterated and contaminated state.

THE COURT: Hercules never got rid of 100 percent of the dioxin, as I recall. You may be right, but as they were able to determine with a greater degree of specificity dioxin, they were able to find more dioxin. Are you claiming they had a 100 percent cure under the more extreme form?

MR. BOANERGES: In the most extreme of all extremes.

THE COURT: I see your colleagues are shaking their

heads.

MR. BOANERGES: They may disagree, because he told me there was one test that came out dirty. And I know that they sold 330,000 gallons of 242T -- of Agent Orange with the 242T in it before they ever tested but what I can assure this Court is that when the whole thing exploded in 1969, when Dow told the government oh, this has got dioxin it in and dioxin is the contaminant and the government immediately stopped using it, they said we are not spraying it on the Vietnamese anymore, we are not putting it in the population anymore, we are not going to use it in our country anymore, we are going to suspend the use of it, we are going to freeze what we have. We had about 800,000 barrels of it in Gulfport, Mississippi. And we had about a million two hundred thousand barrels of it sitting in Viet Nam and we said we want this stuff tested, we are not using it anymore. And when and those tests were actually submitted to this Court in the affidavit of Dr. Crowley from Hercules in the defendants' movant summary judgement data, and what they had is they had the actual tests of all of the Agent Orange at dock at Gulfport and had all of the tests, and all of the Hercules tested clean. And by then, we're testing in '72.

THE COURT: You may be right but my view is based on what I know about this. This stuff was never 100 percent clean. It was not ever 100 percent clean.

The problem that is suggested by what you are saying is that as time went on, they were able to test with a greater degree of precision so that when they started, it was only, whatever it was, one per million units that they were able to find dioxin and gradually it went up so they were able to determine it to a very precise degree. But I don't think plaintiffs' claim is that it was ever pure.

MR. BOANERGES: Judge, I think it important to say that in your opinion, in February of last year you indicated that in 1970, it became -- this test became available to determine the level of dioxin content in the Agent Orange through the vapor phrase chromatography test.

THE COURT: That was a more precise test.

MR. BOANERGES: That was a more precise test, but they have been doing it since 1965 and they have been keeping records ever since 1965.

THE COURT: But the 1970 tests showed dioxin to some degree.

MR. BOANERGES: Judge, it's in the summary judgement and I am not going to argue.

THE COURT: I suggest that your colleagues take a different position.

MR. BOANERGES: The next thing is that in establishing a specification for dioxin, they had to decide individually with benefit of the knowledge through their

analysis of how much dioxin they had, and it's important to stress that they -- none of them were innocent of information in this regard because Dow wrote them all a letter and said come and let me show you what your stuff has in it and here is the way you analyze it and find out what you have in it.

As a result of that knowledge and the knowledge of how toxic this material is, I think it was 17 millionths of a gram would instantly kill a rabbit, and there is other letters and correspondence in the plaintiffs' summary judgement evidence that they knew that one part per million could create a severe response, yet that was the level they chose. That is the level Dow decided on.

And when Senator Hart said: Well, did you have any consultation with anybody in making that decision? He said no, we made that ourselves. We took that upon ourselves.

And I suggest to the Court if they set the specification, then it's their problem. They can't blame the government now and say the government made me do it.

Had they shared with the government the same knowledge that they shared with the other chemical manufacturers, had they told the government here's the way you test it, we want to suggest that one part per million is what to use, and included it in the specification, and the government approved the specification, wouldn't even had to write under Boyle, all they had to do is approve it. They can

hide behind the government contractor defense all they want. They can say the government made me do it, it was specified, that's what we set it at, we are not liable, but they accepted that liability on themselves by setting that specification.

Monsanto in documents that they filed last week or the week before last, they said it -- they didn't set it -- they constantly tested, they constantly monitored. It generally ranged between two and 20 parts per million dioxin in the Monsanto product. And as high, it jumped up in April of 1965 to 55 parts per million.

So at the end of the story, when the tests were done, they found that the average level of contamination for all of the Agent Orange that was stockpiled was right at two parts per million in the Agent Orange.

Since the dioxin is only in the 24T and 24T is only half of it, that meant it was four on the average in the Agent Orange that was surplussed at that time or in stock at that time.

This Court in a manufacturing case said last February that just because it's a manufacturing defect case doesn't mean that necessarily the government contractor defense is out. If the product was acceptable to the government and met the government's expectations, and I suggest that it absolutely did not meet their expectations because that's why they burned it.

THE COURT: That's not why they burned it. They burned it because the president and the executive said stop using it in January, I think it was about January 8th of 1970 and they had all this surplus they had to get rid of, and the only way they could get rid of it was burning it.

MR. BOANERGES: Judge, can I go through a little bit of this evidence with your Honor? Is it okay?

THE COURT: You have -- the plaintiffs have one and a half hours and you started at three. You have eight more minutes and you can use your time any way you would like.

MR. BOANERGES: I think that it's important to go through some of this.

The Agent Orange was chosen because it was thought to be safe. They needed it right then. It was commercially available. It had a long documented history of no problems. Nobody had ever been hurt by it. No animals had ever been hurt by it. No chemical workers had ever been hurt by it based on what the chemical companies were telling the government.

None of that was so. Yet the government in good-faith contracted for them to sell this product. 2 years later they found out it was contaminated. They kept on selling it contaminated. The government didn't know it for four years. During that four years, they sold 8.6 in spray, 8.6 million gallons of it.

The idea that the Weldon Springs information would somehow matter came way too late for my client who was there in '66 and '67.

So Weldon Springs information wasn't even available until 1968. So it's important to know what they knew and when they found out about it. And all those are fact questions.

I suggest that the contractor defense motion for summary judgement should be overruled. The first specification, that was theirs, compliance, that they didn't comply with the requirement that it be free of defect in design and material workmanship because it was contaminated.

And lastly, the idea that the government knew all they did, what they knew, they never told us what they knew. They think we are supposed to know what they knew, but to compare it, they would have had to have summary judgement evidence on that.

So they have failed to meet their requirements under the summary judgement law, and I ask you to overrule, deny the motion for summary judgement based on the government contractor defense.

Thank you.

THE COURT: You only have five minutes.

MR. SMOEGER: Gerson Smoeger.

I just want to say two things with respect to Hercules contracts.

The image of Hercules and what they stated over and over again was that the 1965 testing when Dow tested that sample, they found substantial contamination in the Diamond Shamrock material, they found substantial contamination in Monsanto. And in that test, they didn't find it. However, in May of that year, they retested Hercules and Hercules sent some more material to be tested and that testing contaminated --

THE COURT: There is no doubt all was contaminated to one degree or another. It varied with the run, even within the same run there was variation in contamination and there was variation over time and there was variation among the companies.

That is clear. There is no question about it.

MR. SMOEGER: I'm glad that it's clear with the Court, and it's clear to me. It hasn't been clear to Hercules in their pleadings.

THE COURT: I don't think the defendants' contention ever was that this was ever absolutely free of dioxin.

MR. SMOEGER: There is two things. One is can you get to the level that it was not detected by any means. That was the Boehringer process. We get it to that level. Could you get it to even above the Dow self-imposed one part per million?

When Dow tested the Hercules product, it went up to

three parts per million, so there was contamination of that at a high level.

THE COURT: I thought your position was that it didn't depend on the degree of dioxin in the product.

If the product was less than one per million, if that was what your test is or per billion, as ultimately they were able to tell, would there be no liability?

MR. SMOEGER: The liability at any -- there would be liability if two things they have to do. They have to fully inform the people they are working with that it's there, and they have an obligation to get it to the lowest possible safe level. So they have two obligations as a reasonably prudent manufacturer.

THE COURT: That is a concept I hadn't heard from plaintiffs before.

MR. SMOEGER: They would still have to have -- under a product liability, they have a duty to produce and sell to the public the safest material that they can produce and they have the duty to inform.

THE COURT: Even if it's dangerous?

MR. SMOEGER: Even if -- that would impact the government. If there is danger to it, then they have to inform the government.

THE COURT: No matter how little there is.

MR. SMOEGER: No matter how little there is, they

have to inform the government.

THE COURT: That is the position.

MR. SMOEGER: You asked me two questions. You asked me a liability question which is under product liability as against the government contractor question.

THE COURT: Even under general liability, they would be liable if they sold a dangerous product, even if they made it as safely as possible.

MR. SMOEGER: They would be strictly liable under a dangerous product concept.

THE COURT: So what does the 1 percent have to do with it?

MR. SMOEGER: It only has to do with whether you can sell a dangerous product to the government even though you know it's dangerous, and that implicates the government contractor question. I would say as far as strict liability, absolutely you are liable.

THE COURT: You are saying you can sell a more dangerous product to the government than to the public at large?

That is a strange concession for a plaintiff.

MR. SMOEGER: The premise of the government contractor defense is setting forth under what conditions can you sell a known dangerous product to the government that is conflicting with state law.

That is the underlying premise. So even the helicopter in Boyle was a known dangerous product if the door opened the wrong way. The question is when can you sell it? If you want to sell the helicopter with the door opening the wrong way, you can't do it commercially. The government says we want that because we want people to jump out quickly.

THE COURT: But your position is that they didn't want dioxin, it's not like a door opening in the helicopter case where they wanted it to open that way. Your position, I thought, was that this was a dangerous product that they shouldn't have sold without explaining to the government the danger.

MR. SMOEGER: That is absolutely right.

THE COURT: And whether it's one percent or four, there is no difference.

MR. SMOEGER: It's absolutely my position.

THE COURT: Because otherwise you are going to get into a problem that the different corporations that were supplying this were producing it at varying percentages of dioxin. And there is no possible way that you can tell whether your client was sprayed by the dioxin from one defendant or the other. There are no data that I know of available so you have to, it seems to me, base your theory on dioxin is dangerous and it doesn't make any difference whether it was one or four. And I thought that was your position but

I am surprised.

MR. SMOEGER: It is my scientific position that there is no threshold limit value for dioxin and at any level, it's dangerous.

THE COURT: That, I understand.

MR. SMOEGER: That is different from the government contractor position of informing that dioxin is there, which they did not do.

THE COURT: It's 4:30. We have heard from the veteran plaintiffs. Thank you very much.

We'll take a 10 minute break and then we'll hear from the Vietnamese plaintiffs.

(Recess.)

THE COURT: I'll be pleased to hear you.

MR. MOORE: Good afternoon, your Honor.

Jonathan Moore on behalf of the Vietnamese plaintiffs.

THE COURT: Nice to see you.

MR. MOORE: Nice to see you, judge. It's been a long day. Hopefully, we'll stick to our time limits. There will be three additional plaintiffs counsel speaking. I guess the plaintiffs are in teams of four.

I did want to introduce to the Court Dr. Fon T. Fefe who is a plaintiff in the case who is here in court today for the argument.

THE COURT: Where is Dr. Fefe?

Nice to see you. Thank you for coming to Brooklyn.

I'm sorry that the weather is so poor. I apologize but you'll find it a pleasant city. I hope you can spend some time here.

MR. MOORE: Judge, I want to begin with in this presentation by talking about some contentions, some critical facts which we believe are not in dispute in this case which form the basis for our argument.

The first critical fact is that I think it's undisputed that dioxin is a poison. Agent Orange contained dioxin. Dioxin is a potent poison that causes serious harm to humans, the plaintiffs suffer from diseases that are caused or

are associated with dioxin poison.

As this Court previously stated in a previous opinion as to the poisonous nature of dioxin and its ability to cause harm to animals, including homosapiens, there is no doubt. Despite suggestions to the contrary by the defendants, the definition of poison is really quite simple, quite clear and quite definite. You can find it in almost any dictionary. The American Heritage Dictionary defines it as a substance that causes injury, illness or death, especially by chemical means.

The second critical fact which I think this Court must be aware of which is taken as true for purposes of the motions to dismiss is that the chemical companies, the defendants here knew that their products contained dioxin as well as other toxic chemicals.

This also, we believe, is a fact that is beyond dispute. Despite this knowledge, the defendants did not take adequate or reasonable measures to reduce the dioxin content of their products or to otherwise prevent or mitigate the toxicity in humans.

The third critical fact that I think this Court must consider is that the presence of dioxin, at least to the extent that it was present in the Agent Orange and the other chemicals, was unnecessary and was present only because the defendants failed to follow the proper procedures in the

manufacture of their products. And I think the Court is aware of the factual predicate for that. There was the experience with the Boehringer firm in Germany which clearly set out the standard which could be followed to reduce at least to the extent measurable at the time the amount of dioxin that would occur in these products.

The defendants were aware of that, they were aware of those procedures and they failed to follow those procedures. Instead of taking the 12 to 13 hours that it would take to produce a relatively safe, perhaps not entirely safe, but relatively safe product, they sped up the process by heating up the process and reduced the time it took to make the product as far down as to 40 or 45 minutes from 12 to 13 hours.

The fourth critical fact that the Court must keep in mind on these motions is that -- it is our contention, that in and our allegations that the presence of dioxin posed a great health risk to human beings, animals and the environment.

Once again, I'm sure the Court is familiar with the evidence with respect to this. There was the number of materials written before and during the time in question by the chemical companies where they alluded to the extreme toxicity of dioxin.

Hooker received a letter from Boehringer in 1957 that described dioxin as a really sinister character. A

Diamond memo from '67 called dioxin, "An extremely toxic material."

A Monsanto memo referred to information gathered from Dow. It says, and I quote, "According to them," Dow that is, "it is the most toxic compound they have ever experienced."

And another Monsanto memo in '65 suggests, and I quote: "Very conceivably dioxin can be a potent carcinogen."

Finally a Dow memo '65 says, "The effect of dioxin is systemic."

These are just a few of the examples that I think indicate the knowledge of the defendants as to the toxicity of dioxin and the potential of harm to human beings.

The fifth critical fact that this Court must keep in mind is that the defendants knew that their product was being employed by the U.S. Government in a chemical warfare operation in Viet Nam. The defendants' chemical companies knew this very early on. There were materials submitted in support of our motion which are the records from the defoliation conferences held in 1963 to '65. At those conferences, the participants including representatives from the defendants talked explicitly about the fact that the chemicals being developed would be used as part of the weaponry of war.

THE COURT: There is no doubt about it.

Nobody disagrees with what you are saying. They knew how it was going to be used.

MR. MOORE: That is fine, judge. I'll move on. Based on this set of core factual assumptions, the plaintiff asks this Court to rule that the plaintiffs have stated a claim against these chemical companies for violating long-standing principles of the Law of Nations which forbid the use of poisons as weapons of war.

THE COURT: One of your cocounsel is going to argue the domestic issue or are you going to rely upon the veterans analysis for that purpose?

MR. MOORE: Mr. Kokkoris will refer to those but we would also rely on the argument by the veterans, judge.

THE COURT: Because as I see it, you are in the same position, almost, not quit.

MR. MOORE: It is the use of this weapon, these chemicals as a weapon of war that makes this action cognizable under the Alien Tort Claims Statute. Try as they might to wrap themselves in the flag, the defendants cannot and should not be permitted to escape liability for their knowing violations of international law.

It matters not in our judgment that the joint tort feasor in this case may be the unsued United States and that the joint tort feasor may be immune from suit.

As in any tort case, these defendants who acted

jointly and in concert with the government --

THE COURT: That is clear. You don't have to argue that.

MR. MOORE: That is fine, judge.

THE COURT: The question is whether it is a violation of international law.

That is the core question.

MR. MOORE: I agree with you that that is one of the critical questions. I will deal with that briefly. Mr. Kokkoris, my colleague, will deal with that in more detail but I will deal with it in more detail in my argument on justiciability.

I appreciate that we have all been sitting here for a long time.

THE COURT: I can sit here forever. It is just fascinating. I couldn't think of anyplace I'd rather be.

MR. MOORE: And if I do repeat some of the comments that have been made previously, I apologize.

THE COURT: Not necessary. It's nice to hear them again.

MR. MOORE: In Sosa, the Supreme Court ruled on the scope of the ATS. In Sosa, the Supreme Court rejected the argument that the alien tort statute was purely jurisdictional and held that it was designed to afford the Court's jurisdiction over certain well defined, clearly defined

principles under international law.

It invoked a graphic metaphor to make a point that said: Congress did not intend the ATS to sit on the shelf until some future time when it might enact future legislation, further legislation.

It is against the backdrop of the holding in Sosa and the historical context of the issues raised by the present motion that we address these claims.

In Sosa, the Supreme Court set forth one overriding principle for the courts to consider in determining whether a conduct should be found encompassed by the ATS.

The Court said as a prerequisite that any new claim under the ATS must rest on the norm of international character, accepted by the civilized world and defined with the specificity comparable to the precepts of the 18th century paradigm we recognize. Tested by these precepts, it is clear in our judgment that the plaintiffs have stated a claim for violation of norms of international law.

As I said, as the Court is aware, plaintiffs have asserted more than one violation of international norms and Mr. Kokkoris will go into those in more detail. I do want to say one word about the ban, what we believe to be the universally accepted ban on the use of poison.

It's our position that the ban on the use of poison in war has a historical definition.

THE COURT: Are you depending on treaty or general international theory?

MR. MOORE: I am relying on both.

THE COURT: What treaty prevents the use of herbicide?

MR. MOORE: That is a good question, judge, and I think that is a question that is often asked, and it's not actually an accurate question. Because we are not talking about whether the herbicide, the use of herbicides violates accepted standards of international norm. We are talking about whether the use of a poison violates accepted standards of international law.

THE COURT: Are you conceding that herbicides, if they were completely clear of dioxin, could have been sprayed?

MR. MOORE: I'm not conceding it to the extent that the manner in which it was used or the extent to which it was used or the widespread use of it might trigger some other violation of international law, but I want to focus this argument for the time being on poison, because I think that it's clear if you look at the historical development of the concept of poison, that it has achieved a level of recognition similar to how -- to the 18th century paradigm that the Supreme Court in Sosa said we should look to as a guide as to determining whether there is a violation of international law in the future under the Alien Tort Statute.

There is, of course, the Hague Conventions of 1899 and 1907. Article 23 provides, and I quote: "It is especially forbidden to employ poison or poison weapons. Poison or poison weapons. The U.S. both signed and ratified this convention."

THE COURT: I understand that only is -- apparently was interpreted generally to apply to poison tip missiles.

MR. MOORE: Judge, I don't think that would be consistent with the plain language of 23A which says --

THE COURT: It obviously did not prohibit all use of poison. Mustard gas is a poison. Mustard gas was used in World War I by both sides.

The United States was prepared to use it but didn't because of the armistice and it took the 1925 convention to deal with that problem.

So the use of poison was not all inclusive.

MR. MOORE: I think the world probably understood in 1907 before the first world war that the use of poisons were banned. It was then employed during World War I.

THE COURT: I don't see that at all. Every large military organization in the world, the largest ones used it in World War 1, including the United States.

So how could it be conceded and understood that any use of poison in conjunction with a weapon was illegal under 1907?

MR. MOORE: First of all, the Hague Conventions preceded the war.

THE COURT: That's right. The U.S. was a party to 1907. So was Germany, England, France, all the allies.

MR. MOORE: Historically, I think if you look at what happened -- let me say two things.

First of all, the customary international law ban against poisons doesn't only have its roots in the Hague Conventions. If you look back to the Lieber code in 1863 which was used as a basis for the rules of warfare by the U.S. Army, it also says in very specific terms, "The use of poison in any manner, be it to poison wells or food or arms is wholly excluded from modern warfare."

THE COURT: Food and poisoning wells, yes, that is -- Lieber, as you know, also advised the United States Army in the Civil War and that was the basis for Order 100, was it?

MR. MOORE: That is right, judge.

THE COURT: So Lieber's relationship to it is clear but it doesn't affect a complete ban on all use of poisons as far as international law is concerned as far as I can see.

MR. MOORE: I certainly think it might have been interpreted not to include a prohibition against all use of poisons, unfortunately, perhaps but I agree with you that historically countries, particularly in World War I abandoned to a certain extent following that proscription.

THE COURT: I don't think they ever believed that those poison gases were covered. Poisons have been used historically.

Wells have been poisoned and dead horses thrown in them, the British threw blankets with disease over to Indians. They have been used every since warfare began probably. They were used in the jungle, as you know, poison from frogs put on the missiles and blowers and so on. But I am just not going to accept that 1907 includes every type of poison.

MR. MOORE: I certainly think if you trace it historically, it didn't. I think they tried to carve out an exception, which is the experience of World War I and why there was the Geneva meetings in 1925.

THE COURT: They had to deal with it because otherwise, they might have another disaster in the forthcoming Second World War.

MR. MOORE: So that focused on the use of toxic gases and non-toxic gases. We have a classic example here.

THE COURT: You are not contending that the spray is a gas?

MR. MOORE: Absolutely not. We are contending quite the opposite, that it's not a gas, that it's a poison. It poisons the water supply, the wells, the land in Viet Nam, in the same fashion that poison historically was banned leading up to World War 1.

THE COURT: It is not the herbicides per se, it's the dioxin in the herbicides that you object to?

MR. MOORE: That is absolutely correct, your Honor, and that same thing is, I think, if you really, and I know you will, of course, examine the government and the defendants' position in this case when they talk about what we say is wrong here. They say we're only talking about the prohibition against the use of herbicide as part of war.

That speaks too broadly. That doesn't do justice to the claim being brought in this case which in part is narrowly focused on the issue of the use of poison. And you see that same distinction implemented after World War I in the U.S. Army in the military manuals that they issued. The manual issued in 1956 says, specifically it says, referring to Rule 23A of the Hague Treaty, it says that "It's especially forbidden to employ poison or poison weapons," the same language from the Hague Convention, an earlier war department manual.

1940 was even more dramatic. That war department manual called The Rules of Land Warfare in Section 2 Article 25 says that: "Military necessity does not include the use of poison in any way nor the wanton destruction of the village."

This once again is an absolute ban.

Historically, I think you have to see the Geneva Convention ban focusing primarily on the use of toxic and

noxious gases as a response to the war but not limiting the Hague Convention in the prior customary international law prohibition on poison and that is -- unfortunately, the United States chose not to sign that or ratify that convention.

THE COURT: Until 1975.

MR. MOORE: Right. And the defendants made much of their cynical failure to adopt that prohibition until 1975.

However, the failure to adopt the ban focused primarily on toxic and noxious gases does not mean that the government or those acting in concert with them during this period could use poisons with impunity. And the fact that after 1925 in the military manuals, the manuals of warfare given to all the soldiers in the Army, the fact that they both continued to contain this absolutely ban on the use of poison or poison weapons I think speaks volumes as to the international -- customary international law on the banning of weapons.

So we disagree with your earlier comment today expressing scepticism about the reliance on the Hague Convention as a source of the customary international law prohibition on poisons in this case.

As I said, judge, I don't want -- Mr. Kokkoris will talk more about the international law issues. I want to speak a little bit about justiciability.

I know that you have heard a lot about it. I have

listened carefully to your comments but I do think that it's important that we make some comments about that.

The mere fact that this case implicates war and foreign affairs it seems in my judgement does not make it a political question. The defendants and the government state over and over again that this case involves foreign affairs, diplomatic relations.

Courts can and are constitutionally obligated to insure that the president and Congress can act within the bounds of the law. Courts are constitutionally obligated to adjudicate cases and controversies before them. Merely because the case is difficult, arises in a politically charged context does not mean that it's not proper for decision.

As the Supreme Court's observed in Baker V Carr, the political question doctrine is one of political questions, not political cases.

The Supreme Court as you know has frequently adjudicated highly sensitive questions of law and foreign policy, even ongoing wars, unlike in this case where we are talking about events that occurred 30 to 40 years ago. The Court referred to some of those cases earlier, the Youngstown Sheet Two versus Sawyer case, the Caesar case, and all of those cases, the New York Times case, the Homdy case just last term by the Supreme Court, the Court ruled against the government during a time of war despite the same kind of

assertions we heard in this court today by the government that to do so with threaten national security and would somehow infringe on the discretion of the executive to engage in war.

Contrary to the defendants' assertion that the first factor in Baker requires that the court not deal with this case. That first factor was that there is a textually demonstrable constitutional commitment of the issue to a coordinate political department does not dispose of the case.

As the Second Circuit has recognized, while the Constitution grants responsibility of foreign affairs to political branches, this is not dispositive.

There is then a lot of talk in this case about what the president did or did not do back in 1961, what he decided, whether he decided to engage in authorizing this program in Viet Nam, these operations in Viet Nam.

First of all, there is no statute, there is no executive order. It's simply a decision made in the oval office, apparently, to approve, once again, a herbicide program. There is no evidence on record that in approving such a program, President Kennedy had any knowledge of the extent to which poisons would be spread across the land of Viet Nam. And I dare say had he known about that, been informed of that, I'm not sure that he would have approved that program.

And in seeking the opinion of his advisors at the

time about whether it was okay under international law, their response was an herbicide program, and it's not harmful to people, would be okay.

That is not the kind of broad discretion that prevents this case from going forward the way the defendants and the government have argued.

THE COURT: Certainly, the president in time of war does not have to request a study that is the equivalent of an environmental review.

MR. MOORE: I agree with that, judge, but I think in 1961, first of all, we were not barely engaged in Viet Nam at that point. We were just beginning our involvement. There was no war that went on. We were advisors at the time. I would think that under the historical context of those times, there would have been or should have been full disclosure to the president about what this product was. And these companies knew and apparently the government as well because that is the position that the defendants and the government are taking. They knew as well that there was this poison in these products that was potentially a carcinogen, potentially harmful to individuals if they came in contact or were exposed to it.

I know that there is talk about how this is really the plaintiffs are seeking reparations here, however, this is a private lawsuit seeking private remedies.

THE COURT: You don't have to go into the reparations problem. I don't see this as a reparations suit.

MR. MOORE: I believe the other factors that appear in Baker versus Carr weigh in favor of justiciability. I think that the Court is familiar with those factors and we argued them extensively in our brief so I won't go into them in great detail unless the Court wants me to.

THE COURT: No, I think that I can assume for the purpose of the argument justiciability.

MR. MOORE: I want to speak about the issue of standing and the issue of injunctive relief.

THE COURT: Don't argue injunctive relief because I'm not going to give it to you. Under any circumstances, I would not give injunctive relief in a case which would require the Court in effect, if it grants an junction, to supervise the cleanup of hundreds of thousands of acres in a foreign country without any information about the scope of it. It's like the Second Circuit case -- Bohpal in India.

MR. LEV: You are speaking of the Bono case and I think in that case the Court said we would be concerned about getting involved. They didn't simply say --

THE COURT: That was just a little area around one manufacturing plant. What this would require is in effect the Court to take over a large part of Viet Nam. It's not going to happen. I'm not going to grant any injunction. That

doesn't mean that you lack standing to seek it. That is a different problem.

MR. MOORE: That is always before the Court.

THE COURT: You don't lack standing to seek it. But I don't want to hear any argument on whether you are entitled to it because there is no way that I would give it. No court would possibly intervene in Viet Nam to that extent.

MR. MOORE: Well, judge, I hear what you are saying, I respectfully disagree on that point. I think particularly your Honor would be imminently capable of fashioning some relief in conjunction with the sovereign authorities of Viet Nam, particularly working through the organizational plaintiff.

THE COURT: You are exaggerating my competence to solve a problem that is insolvable. The cleanup of Viet Nam is not going to be ordered by this Court or any Court in the United States.

MR. MOORE: I think to some extent that is rewarding the defendants for the magnitude of the harm that they caused in this case. And I think that that -- that I have a problem with that, but I understand the position that the Court is taking and I won't belabor the point.

Let me just conclude my remarks, your Honor, by saying in deciding this case, the Vietnamese plaintiffs who stand before this Court ask only for simple justice. They

stand before this Court as did the U.S. veterans many years ago and simply ask this Court for the right to demonstrate to the world, to the Court, that they were wronged and that they have suffered terribly and that they should be compensated for those injuries.

Addressing those consequences of the defendants' conduct is what this lawsuit is about. Many years removed and hundreds of thousands of miles away from that distant land, many Americans may have forgotten what took place in Viet Nam. However, those who experienced it, lived through this chemical warfare campaign have not forgot, and generations of people who are born today in Viet Nam, the heirs and the children of the people who were exposed continue to carry the harm in their bodies caused by Agent Orange.

THE COURT: Those are the allegations. There is no proof of it. I haven't reached that issue.

MR. MOORE: I understand, your Honor.

THE COURT: There is no proof in the record one way or the other with respect to whether the children were affected by any of the parents's exposure, none whatsoever.

I don't say that that can't be proved. I'm saying only that there is no proof of it.

MR. MOORE: We are confident that could be proved. It certainly wasn't a part of the discovery in the MDL 381 case at this point.

And in the intervening years, it has improved the science as well as our ability to document the extent to which these injuries have occurred.

I end simply by saying in the name of the Vietnamese, in the name in the plaintiffs who have brought this case, we urge this Court to have the courage to make history and make good the core principle of our constitutional democracy spoken most eloquently by Chief Justice Marshall in Margaret versus Madison years ago: "Where a right is violated, there should be a remedy."

Thank you, your Honor.

THE COURT: Thank you.

MR. KOKKORIS: Good afternoon, your Honor. My name is Constantine Kokkoris.

THE COURT: My mind is completely open. Anything I have suggested to the contrary was just to find out what the position was.

MR. MOORE: I'd like to jump in where you left off with my colleague, Mr. Moore on World War 1.

Clearly, we are not alleging events that happened in World War 1. Depending on what view you take, the prohibition on poison is ancient and originally does not have to do with mustard gas or it has to do with poisoning the food and water supply. That's primarily what we are alleging here and that is ancient and goes back to poisoning wells and animals and in

your comments about the fact that there was widespread use of mustard gas and chlorine gas and other types of weapons during World War 1, I think you are picking up on an argument made by the defendants which is slightly wrong.

The Hague -- there was no progression from Hague Article 23 to the Geneva protocol of 1925. The prototype or the precursor of the 1925 Geneva protocol was the Hague gas declaration which was enacted simultaneously at the Hague conference which shows that the purposes of these two instruments were different.

Hague Article 23 was meant to prohibit a type of warfare, a means of waging war, a way of using certain substances like animals which are not themselves prohibited per se in war.

It is the Hague gas declaration which is a per se prohibition on a certain type of weapon. We have recounted some of the history in our brief about what the claims were by the German side that the Hague gas declaration stated that it applied to shells whose sole purpose was to disseminate deleterious an asphyxiating gases. And there was a claim initially while, we weren't using shells, we were using cylinders so therefore, it doesn't cover us and eventually the 1925 Geneva protocol was an attempt to seal that possibility shut, to account for all types of chemical weapons.

THE COURT: They used shells too.

MR. MOORE: Later, they did, correct, your Honor. Initially, it was the Germans who initiated the use of the chlorine gas and officially, the others retaliated. And retaliation led to more retaliation. Retaliation is a valid means of reprisal since it's not necessarily in every case where there is use on both sides is there violation on both sides but it's aggreed that the use in World War 1 was widespread such as to prevent a customary non-performing.

But the use of Article 23 in the way that I have just described is not something that the plaintiffs have invented, it's not an innovation of ours.

In fact, there is no need for us to speculate at all about the United States position because customarily international law depends on state practice and opinio juris, which is the belief that one acts or refrains from acting because it is required by law.

In 1971 Senator Fulbright asked General Counsel Buzzhart from the defense department what they relied upon whether any review of international law was performed before operation ranch hand was performed. And in his answer you'll find reference to Hague Article 23 and he makes specific reference to Section A which deals with poison, to Section E which deals with unnecessary suffering and section G which deals with wanton devastation without justification. And he

mentions the List, United States versus List case from Neuremburg with regard to wanton devastation.

And the defendants have raised --

THE COURT: Excuse me, but that response to the senator's question was: It was not illegal under either 1907 or under 1925 or any other international binding norm.

That was the response of the executive through the general and everybody who testified before the Senate committee at those hearings. Senate Fulbright in a forward indicated at length why he indicated herbicide use should stop, but that was never the position of Congress or the executive.

Their position was that it was not a violation as late as 1970 when the hearings you are referring to were conducted and up to '75. Fulbright didn't represent the position of Congress.

MR. KOKKORIS: Right, your Honor, but it's instructive that in General Counsel Buzzhart's letter he never gives an opinion whether it was legal. What it says is so long as it's not harmful to man. That was his language. In '75, I would agree --

THE COURT: By '71, everybody knew all about dioxin, all about these claims. It was still the position of the executive and of the majority of Congress which refused to act that this was not illegal.

And Senator Fulbright and a number of other senators disagreed and Fulbright was very eloquent but that doesn't help your case.

MR. MOORE: Well, your Honor, I'm not sure that the opinion as you said of the executive that it's not a legal should be binding on this Court.

THE COURT: It isn't.

MR. MOORE: In terms of -- what Buzzhart does is he refers back to Cramer. He satisfies we considered this, we considered a herbicide campaign in the Pacific islands which was never pursued and Major General Cramer did a review which has never been overruled. When it came time to do it in Viet Nam, he consulted on this.

Our position with respect to the knowledge, I believe --

THE COURT: They declined to use it not because it was illegal under international law but for reasons of military expediency.

MR. MOORE: In what sense, judge?

THE COURT: In the sense that it didn't appear to be worth the effort. And it wasn't until the British Malaya campaign that it was demonstrated that it had utility for these purposes.

MR. MOORE: Judge, I believe also when it was suggested to Admiral Leahey that these herbicides should be

used --

THE COURT: When?

MR. MOORE: 1945, and this is from the Buckingham book, the official Air Force historian, Buckingham.

THE COURT: That is one admiral. It was not the position of the government ever.

MR. KOKKORIS: Judge, it's our position -- we take the same position as do the Isaacson and Stevenson plaintiffs that knowledge of the government, we make reference to it in that manner, there were government scientists who were aware of the toxicity. It's not our position that any of the military commands or at any level had knowledge of the toxicity, certainly not the soldiers who were spraying.

So to the extent -- at some point, you are correct, your Honor, there was a realization of scope of the harm that was being caused and the program was stopped.

I believe it was in April 1970, triggered by the Bionetics report which found harm beyond the chloracna and porphyria and it was stopped.

In 1975 Senator Nelson, who was the chairman, I believe, of the Senate subcommittee dealing with chemical weapons in speaking to the House on the occasion of ratification said: If we had known how toxic 245T was, we would have included it within the scope of the protocol ban, but whether he phrases it that way, he is acknowledging that

this is a toxic agent that is banned by the international law. We are primarily resting on international law so it's not as neat as referring to the exact language of a treaty.

Although the U.S. did ratify the Hague Convention in 1907, and there is a question in the literature as to whether Viet Nam was not a party at the time, but I believe that France was and since they were technically a colony -- that is not relevant, we're not claiming that the Hague Convention creates -- is self-executing and creates a private right of action, but the defendants speak of legislative acts which tend to vitiate the effect of international law domestically or with respect to domestic remedies, although -- we don't feel there is a need to reach that issue.

To the extent there were truly executive acts meaning executive acts with a force of law, we said the opposite. President Roosevelt issued an executive order just before the beginning of World War 2 in which he said the use of all toxic and noxious, noxious with the clear meaning of harmful to health, are against the norms of civilization and we will never, hopefully never have to use them and we won't use them first.

THE COURT: We won't use them first.

We had a large supply of those elements at the beginning of World War 2 and the Germans were aware of it and they were not used in World War 2 because of our ability to

retaliate overwhelmingly on that score.

That has nothing to do with what we are talking about, I believe.

MR. KOKKORIS: Judge, if you -- granted there was wide express use of chemical weapons in World War 1. In World War 2, the Nuremberg prosecutions, in fact there were two, one was the Nuremberg Tribunal the other was the Tokyo Tribunal, there were at least two indictments that cited Article 23A for poisoning and one involved -- one was one of the Zyklon B cases. It was not the British case. It was the American tribunals case which is the I.G. Farley case and the Crouch case in which the defendants were acquitted, but they were tried and they certainly were subject to very severe penalties if convicted. But that involved clearly much more heinous conduct that involved mass murder of people, prisoners held in concentration camps.

But it's instructive, they were prosecuted not only for that but for violation of Article 23A use of poison.

THE COURT: I think that those convicted in the Zyklon B case were convicted under the London agreement, which limited and specified what the crimes were not, under 1907.

You may be right but I don't think you are.

MR. MOORE: The London agreement, certain of the offenses, more especially with respect to crimes against peace were customary international law which essentially --

THE COURT: I don't recall the London agreement mentioning 1907.

MR. MOORE: It does, your Honor. It's not the London agreement but it's the prosecutions that came out of the --

THE COURT: The London agreement was the agreement that counted. I don't believe it did refer to it but you may be right.

MR. MOORE: Your Honor what the London agreement did is establish control of counsel law number 10. The major war criminals were tried by international military tribunal and then pursuant to control counsel number 10, sort of the lesser war criminals were tried by military tribunals of the four powers. Those prosecutions, that was the Flick case, the Krupp case, the I.G. Farley case. Those were the American tribunals.

THE COURT: Those were prosecutions of individuals, not those corporations.

MR. MOORE: Correct, your Honor, they were criminal prosecutions of individuals for corporate acts, for acts they took as owners and managers of corporations. But the point that I wanted to get to was particularly the American tribunal's decisions were very -- they were extensive. They gave their reasoning and the indictments in those case were almost exclusively from the Hague Convention.

THE COURT: They were?

MR. MOORE: Yes.

THE COURT: I'll look at it again.

MR. MOORE: Particular three, the I.G. Farley case, there are a lot of charges. One of them, a small part of the case, had to do with supply of poison gas like the Tesch case or the other Zyklon B case. They were indicted on Article 23A prohibition poison and it's instructive that in addition to murder that reference was made to Article 23 because the Court saw that as an additional important factor. Presumably they could have slaughtered concentration camp inmates by a machine gun or other means and it presumably wouldn't matter that they were poisoned. But the fact that the Court indicted them additionally under Article 23 is instructive.

In addition, the Japanese employed biological warfare in World War 2 and there was an indictment although eventually, apparently there was immunity given that the Americans captured the Japanese, and I'm explaining why there was no decision.

THE COURT: Those turned out to be wholly political crimes. They were horrible crimes but MacArthur and the government preferred to make peace.

MR. KOKKORIS: But what is significant at least about the indictment, they were indicted for the use of biological warfare.

THE COURT: Were there convictions?

MR. MOORE: There were no convictions -- I take it back. The Russians tried --

THE COURT: The Russians did a lot of things that we didn't do.

MR. MOORE: But they weren't indicted. The indictment was Article 23A. What they did was drop bacteria cultures from aircraft and it was a form of biological warfare and they did cite Article 23A. And what it means is that Article 23A, contrary to what the defendants say, has relevance.

The language is from the wrong statute today. And in addition, Buzzhart and Cramer both mention extensively in their memoranda, in their letters, it's not a dead letter, Article 23, and it has been applied towards the use because initially, chemical weapons were invented around the time of World War 1 or were first used during World War 1. Before that, there were other means of poisoning. There were animals, blankets with smallpox. And that was always considered to be a very serious violation. I don't think we have to convince you of that. I think, your Honor, you may have difficulty seeing the use of herbicides as poison but it's got to do -- and you see a reference, and we're not dealing with causation and a lot of the toxicology studies, you see reference to aspirin, that some of these agents are

more toxic that aspirin and some are less. A tablet or two of aspirin is good for a headache but to take an entire bottle of aspirin, that is poison.

One of the counsel said it's a question of degree, anything can be poisonous if there is too much of it. That goes to the heart of the Zyklon B case. It's not that they supply the stuff because there could have been legitimate uses of -- Zyklon B was prussit acid, that is an acid, it had legitimate uses and in fact in the American case, the I.G. Farley case, they found it was very possible that the defendants believed it was being used legitimately. And that made the difference, that these vast quantities, they were shipping vast quantities of these pesticides to the concentration camps. It was impossible that it was being used to delice people and they heard about it. That goes to the heart of the violation. We are not just talking about trace amounts in herbicides that were used to clear fences or communications lines of weeds. We're talking about over 20,000,000 gallons, over 80 million liters sprayed over a 10 year period repeatedly and repeatedly. And at some point these trace amounts of dioxin and arsenic, there was arsenic in Agent Orange, they sprayed food with arsenic, at some point those trace amounts when they are sprayed repeatedly, they are not trace amounts and they build up.

There is concentration. They say well, there is

some risk to animals, foul or fish. That is true, it's not toxic to humans, but when the fish and foul are contaminated and are repeatedly sprayed, and there are even processes that they knew about where a body can accumulate them, they become poisons and that's your food supply, that is your food chain. That goes to the heart of what we are alleging. That's why we are alleging a violation of Article 23A.

And it's a customary prohibition. It's not Article 23A. It goes back to poisoning wells. Lieber said it and all the language in the Hague Convention distinguishes between poison weapons and poison. And there is a basis for that. It goes back to Grotius, Grotius, he explained the difference --

The distinction --

THE COURT: I think I get the drift of your argument.

MR. KOKKORIS: The language -- the customary prohibition goes back before the Hague. There was the Lieber code which then became attributed to the Oxford manual, then the Brussels declaration. Brussels like the place.

The different formulations make it clear that any use of poison in any manner is prohibited. And our position is that the repeated spraying over 10 years and millions of gallons of trace amounts which poisoned the plants, the soil, the fish, the foul, that in any manner, that is a manner of poisoning. And that's what was done and they were aware of

it. There was a recent submission. It's in the MRI report. It was contemplated. Although this is a 12(b)(6) motion.

THE COURT: No, it's not a 12(b)(6), it's a motion to dismiss, summary judgement.

MR. KOKKORIS: Your Honor, on the international law claims, it's a 12(b)(6).

THE COURT: Is that right, that the defendant's motion?

Okay.

MR. MOORE: And we are relying on the allegations in the amended complaint and as it turns out, our worst fears have been realized. We have the studies to show that the food chain has been contaminated.

Article 23, the field manual, the source of instructions for U.S. soldiers in the field makes it clear that Article 23 is going to be considered in conjunction with the use of chemical herbicides to kill plants. That is probably taken from the Cramer manual. That is a black and white instruction to U.S. soldiers how to conduct themselves. It's clear. Defendants try to interpret it and they talk it out of existence and they speak of obverse, but the prohibition is clear and the fact that the U.S. Army field manual mentioned the Hague prohibition on poison and then says we are not yet a party to the Geneva protocol so that doesn't apply but we have the Hague prohibition on poison and because

of that, you can not use herbicides that are harmful to man, and you can not use herbicides that are not harmful to man to destroy the food supplies of individuals.

THE COURT: Your side has about half an hour. Do you want to let your colleagues --

MR. MOORE: Judge, it seems to me that this is where we should spend some time.

THE COURT: You can use your time whatever way you want.

MR. MOORE: Just to pick up on your Honor's point, you are correct, you have the argument correctly. There is the issue of the spraying of non-toxic herbicides which the U.S. forces believed they were doing and then there is the spraying of toxic herbicides which is what we are complaining about.

Our position is that the spraying of non-toxic herbicides can also violate the laws of war, although we wouldn't take up the Court's time with a claim based upon non-toxic herbicides.

Although the use of non-toxic herbicides can also violate the laws of war as I just mentioned, the destruction of civilian food supplies, the destruction of mangroves that are essential to life. But clearly we wouldn't have a claim under Sosa for non-toxic herbicides. We are alleging that in fact the use of the herbicides also violated the Geneva

protocol and we are relying on the legislative history in essence of the protocol which made it clear that there was the intent to ban biological weapons and that the anti-plant agents were considered to be biological weapons, but most importantly, there was the notion at that time in 1925 that there was no such thing as a chemical or agent that was harmful to plants but not harmful to humans.

That is in essence where we have gotten into trouble in attempting to make that distinction.

We have also made claims for what might be called a humanitarian law and that is also other provisions codified in Hague Article 23. There is the provision prohibiting unnecessary suffering, superfluous injury and destruction without military necessity.

Unnecessary suffering and superfluous injury applies not only to unnecessary suffering of combatants but disproportioned suffering of civilians. And we are also claiming violations of the law codified in Geneva 1949 convention protecting civilians, that civilians were disproportionately affected. You can't control the effects of over 20,000,000 gallons of toxic herbicides that were sprayed over twenty years. Some leach into the water, some remain in the soil, some are carried into the animals that eat them. And it is and indiscriminate weapon and that's what makes it illegal.

Again, in this regard one could conceivably have a claim for wanton devastation and destruction based upon non-toxic herbicides that destroy the forests, but that is not the nature of our claim, it's that the herbicides were laced with toxic chemicals that are persistent and have remained in the soil, remained in the water and remained in the food chain for 30 years. And the government and defendants have made a point to say these are not egregious allegations but it referred to the memorandum of understanding, the joint research project in 2002 that was meant to study the weather. 30 years after the spraying was over the possibility existed that people continued to be contaminated, that they were getting cancer and birth defects and miscarriages because of this campaign that happened 30 years ago.

THE COURT: That is an allegation. Again, there is no proof of it.

MR. KOKKORIS: Judge, the United States Government thinks enough of this possibility to commit its time, money and resources and science.

THE COURT: They are exploring the probabilities, but that doesn't mean that that is the truth.

MR. MOORE: The mere possibilities of such an effect after 30 years gives one pause.

THE COURT: That is true.

MR. MOORE: Judge, it seems that with respect to

corporate liability, I'm not sure we have such a hard road to hoe.

THE COURT: I'm assuming corporate liability if there is liability.

MR. MOORE: With respect to the -- again, I'm not sure that I mentioned it but I'll possibly repeat myself. The defendants are claiming, based upon, as I understand it, treatises or war articles that the requisite intent wasn't there on the part of the defendants.

First of all, the fact that Cramer did his memorandum and assumed that the use of the herbicides was only against plants yet still discussed the possibility of violating the rules of war if it was toxic to humans makes it clear that the requisite intent, there does not need to be an intent to poison people per se, that the knowledge that -- the knowledge of a herbicidal campaign, anti-plant campaign might be enough under the rules that he was discussing, primarily the rules with regard to poisons.

The fact that -- the defendants, as we said in our brief, the defendants' culpability is far greater than that of the soldiers who sprayed the herbicides. The defendants culpability is far greater than the soldiers who sprayed the herbicides. The standard that we rely on is wantonness which is established from at least World War 1 as a sufficient standard for a violation of the laws of war.

Wanton, which is probably a degree more culpable than reckless or reckless disregard, it's creating a terrible risk and not caring about it. It's similar to a drag racer racing on a residential street, sees a crowd crossing and plows into them. Was it his intent to kill people? Of course, not. His intent was to win the race, but his wanton disregard of the risk he was creating wouldn't be a defense in a murder prosecution, that he intended to win the race and not kill anybody.

That is the standard that we allege the defendants had. The defendants knew more than anybody about the toxicity of the chemicals they were making, about the presence of dioxin. About the ability to lessen the amounts of dioxin either through the manufacturing process or through filtering it out. They were never requested to make chemicals to make herbicides containing dioxin or arsenic or hexachlorobenzene but they did it because they were trying to crank out as much of it as they could to increase their profitability and I believe that was their motive.

Judge, I'll finish up by saying that there was a very eloquent passage quoted by the government in its brief. It was mentioned by other defense counsel from the Eichmann decision -- we didn't quote it, I wish we quoted it -- discussing what the standard of liability for this type of act, and I'll read from it.

"The distinguishing mark of a manifestly unlawful order should fly like a black flag above the order given as a warning saying: Prohibited."

Judge, we see the black flag in this case, except in this case the black flag is the warning label that should have been on those barrels of Agent Orange that the U.S. soldiers should have seen, should have realized what they were spraying, the warning saying do not contaminate feed or foodstuffs, do not contaminate water, harmful to swallow, later on danger, poison with a skull and crossbones.

That is the black flag in we see. The defendants saw that flag at the time they were making these herbicides. The U.S. soldiers didn't see the flag because those warning labels weren't on there.

We hope the Court can see that flag today.

Thank you.

THE COURT: Now, I raised the question about whether this was a 12(b) motion or a summary judgement motion.

The Viet Nam plaintiffs are relying upon the same materials, as I understand it, as the veteran plaintiffs with respect to domestic problems and the question of the defense in the domestic area, so that I am going to treat the motions before me as motions for summary judgement on the domestic issues but as 12(b) issues on the international law.

It seems to me that we ought to move the case and

your colleagues in the veterans group have done an extraordinarily thorough job. There is no sense in your picking up on that.

MR. MOORE: You mean the state law claims?

THE COURT: Domestic law, state and all other law except international law that you are now talking about.

MR. MOORE: That is correct. We do rely on the Isaacson and Abramson plaintiff submissions.

THE COURT: So that is agreed.

MR. MORRIS: Good afternoon, your Honor, I'm Stan Morris from Burmingham, Alabama.

Nice to be up here.

THE COURT: Glad to have you up here. Sorry the weather is so poor.

MR. MORRIS: Your Honor, I don't think there is a lot that hasn't been said today about our claims, especially the ones that we bring pursuant to international law.

Suffice it to say, your Honor, that it's our position the government has no discretion to violate the laws of nations, therefore, there is no immunity of the government to do that and derivatively, there is no immunity for the contractors.

THE COURT: The government is immune from suit, however.

MR. MORRIS: Pardon?

THE COURT: The government is immune from suit.

MR. MORRIS: Yes, sir, under the Alien Tort Claims Act, when they yield their immunity, such as Bull discusses, the immunity is pursuant to discretionary functions. And we feel that there are no discretionary functions involved when it comes to violating the laws of nations.

THE COURT: You mean the government could be held liable in suit?

MR. MORRIS: As was discussed earlier this morning, your Honor, we don't feel that the president of the United States --

THE COURT: I understand, but you haven't answered my question.

Please answer it.

Is the government of the United States amenable to suit in this court on the ground that it violated international law?

MR. MORRIS: Your Honor, we are going to take the position that the government is not amenable to suit.

THE COURT: I thought you would take that position.

MR. MORRIS: And, judge, we have one more of our colleagues that is going to address the statute of limitations issue but I do want to address the so-called domestic claims vis-a-vis Bull and to recap Bull, as I stated a moment ago Bull gives immunity to contractors based upon the immunity of

the government in performance of discretionary functions. And one of the discretionary functions --

THE COURT: No, you are wrong about that.

The government has absolute immunity based upon the history of the immunity of the King of England from suit. Absolutely immunity.

The only time you can sue the government is if the government waives and only to the extent of the waiver and it has not waived, as I understand it, with respect to this type of suit.

So the government may have violated the law but you can not sue them in our court.

MR. MORRIS: I understood that under the Alien Tort Claims Act, one of the exceptions under the Alien Tort Claims Act of not being able to bring a suit was the performance of discretionary functions. One of these discretionary functions was the procurement of materials for war and therefore, the contractors that the government has asked to manufacture these munitions and other articles of war were immune from suit because that is a normal function of government and a discretionary function. But as your Honor touched on in the first 15 minutes, and I'm not sure anybody else has visited this, you stated that there were different manufacturing techniques that could be employed to lower or lessen the dioxin that could be found in Agent Orange.

If we take the premise, and your Honor has held this so many times in his opinions and as late as the one from approximately a year ago concerning manufacturing defects, that the government, being aware that the dioxin was in Agent Orange through its cloak of defense contractors immunity over Agent Orange producers, even though it and they knew of the dioxin in Agent Orange, and I think what you were was saying was that it was an important thing to the government to have Agent Orange and that the government needed the Agent Orange for its use in Viet Nam, but to that extent, your Honor, we simply see no compelling government interest being forwarded in having dioxin in Agent Orange beyond that which was commercially reasonable or what the state of the art at the time said that it could be produced at.

THE COURT: The dioxin was in what was being used commercially in this country, this was in your submission and the submission of the other plaintiffs, off-the-shelf material, all of which had this percentage of dioxin.

The difference was, of course, that the material used commercially in this country was very substantially diluted and with warnings. And that's why possibly this Agent Orange as sprayed was more dangerous. But all of this stuff was made the same way. That is your contention on your domestic law part.

MR. MORRIS: In this instance, we know that the

defendants had the ability to lessen the dioxin in the Agent Orange, knowing that it was being sprayed on foodstuffs in Viet Nam and sprayed in a manner not like it's sprayed in the United States on fence lines and conifer forests.

It was being sprayed on and around where the people in Viet Nam lived and grew their food, raised their animals and survived on a day-to-day basis. That is the difference that draws the distinction which is that there was no governmental function in having more dioxin in it than was minimally required to meet the contract.

To the extent that the Agent Orange could have been made with a minimal amount of dioxin, we feel as far as the domestic claims go, that is the extent of the immunity provided under Bull. That is the minimum level that would satisfy the government's purpose in having a defoliant that would aid and benefit our troops, because it served no purpose whatsoever. Once that amount is exceeded, your Honor, we believe that Bull does not provide or shield the contractors with immunity.

THE COURT: Thank you very much.

MR. NORRIS: Your Honor, I'm John Norris, also from Burmingham, Alabama.

THE COURT: Nice to meet you.

MR. NORRIS: Nice to meet you, and thank you very much for admitting us pro hoc vice to practice in this case.

THE COURT: It's an honor to have you.

MR. NORRIS: I'm going to try not to regurgitate the briefs on the statute of limitations, what I'm here today to address on behalf of the Vietnamese plaintiffs. Instead, I want to draw the Court's attention to some particular areas. In outline, there are four issues, I think, raised under the statute of limitations.

The accrual, and then we make three arguments with regard to tolling. The accrual issue simply, which I think is the legal standard, is agreed upon between the defendants and plaintiffs has to do with when the plaintiffs either knew or should have known of their disease as well as its cause.

The three tolling issues have to do with, number 1, whether the Trading With The Enemy's Act and the Treasury Department's regulations under that in and of itself toll the statute of limitations until 1994.

THE COURT: I won't find that.

MR. MORRIS: Whether or not --

THE COURT: I will not find that it does.

MR. MORRIS: Whether or not that combined with other factual elements --

THE COURT: There are other factual elements. The difficulty of bringing suit from a Communist nation, the very recent development of mutual relations and the like, all of that would require a good deal of factual development, and

since on the international aspects, it's a 12(b) motion, I'm not going to decide against them on those grounds, on statute of limitations grounds.

That has not been developed factually.

MR. GORDON: Michael Gordon.

The motion regarding the statute of limitations is a 12(b)(6) motion.

THE COURT: It is also?

MR. GORDON: Yes.

THE COURT: Then I withdraw my comment. I'll hear you.

MR. NORRIS: Your Honor, on that point, I want to focus attention, I think the briefs have adequately covered it, and finally, the tolling issue, let me make sure I'm making my record, is whether or not the statute of limitations was tolled during the minority of any of the minor plaintiffs during that time period.

And I do want to briefly address that issue in just a minute, but what I want to focus the Court's attention on is the fact this is a Rule 56 motion and it's in the following posture.

The statute of limitations is an affirmative defense and the law is clear that with regard to the accrual date of the statute of limitations, that the burden of proof is on the defendants.

I have a Second Circuit case, Banner versus Union Carbide at 361 F.3d 696 at page 710, that is a 2004 Second Circuit case, that says in applying New York law, that the normal burden of the defendant includes showing when the cause of action accrued.

Looking at federal statutes of limitations, the Third Circuit has held in Hughes versus U.S. at 263 F.3d 272, a 2001 case, at page 278, that failure to comply with the statute is an affirmative defense which the defendant has the burden of proof of establishing, citing Rule 8(c) of the Federal Rules of Civil Procedure, also citing Schmidt versus U.S., which is a 1991 Eighth Circuit case and a quote from the Third Circuit case in Huges: In this procedural posture, it's the defendant's burden to establish the date when the plaintiff knew or reasonably should have known of the cause of his injuries.

So that being the procedural posture where we are in terms of the burden of proof on Rule 56, then we have the look at the evidence that Mr. Gordon submitted in support of the motion for summary judgement.

That evidence consists of the following. Mr. Gordon's associate along with some employee of his law firm that spoke Vietnamese went to the Library of Congress. They then looked at two publications; one called The People's Daily from a period of 1954 through 1995. Apparently, they looked

at every issue of The People's Daily. And they looked at the Saigon Liberation, another newspaper, from various time periods between 1975 and 2001.

If you look at the information they submitted with regard to The People's Daily, there were 17 articles that they cited over a 17 year period between 1969 and 1984 relating to Agent Orange and dioxin.

THE COURT: What evidence are you relying upon to show the date of first knowledge?

MR. NORRIS: The declarations that we have submitted in opposition to summary judgement of certain of the individually named plaintiffs, all of whom testified that they did not have knowledge themselves personally until varying dates but all within a 10 year statute of limitations.

So we have submitted that evidence, but before you even get to our evidence, your Honor, what I'm about to say will demonstrate to the Court that they have not even come close, even if we had not submitted anything in opposition, as a matter of law, these plaintiffs should have known purely based on publicity, which is 100 percent of what they are relying on.

What you have is 17 articles out of The People's Daily. What do we know about The People's Daily? All that is in the record is that it's a publication that was supportive of the Communist Party and that the circulation of it as --

the only statement we know about that is that it was distributed to all government officers.

With regard to the Saigon Liberation Newspaper, there is nothing whatsoever in the record as to its distribution. In addition to these two newspaper sources, there are some third-party accounts from the U.S. Government of the radio broadcasts which we can not determine from the record where those broadcasts came from, how far they blanketing the country, what percentage of the Vietnamese people during the timeframe had radios.

There is no evidence in the record that any of the plaintiffs ever received The People's Daily or the Saigon liberation.

With regard to the Saigon Liberation paper, apparently the associate working for Mr. Gordon and the Vietnamese translator reviewed that newspaper from 1975 until 2001.

What is interesting about that review is that apparently, they only found one 1993 article relating to the subject matter for that entire period.

The cases they have cited, your Honor, which their principal case they are relying on is the Winters versus Diamond Shamrock case out of the Fifth Circuit are cases where courts have made presumptions about what plaintiffs should have known based on widespread publicity in the United States

where we know that if you went back to a time period when your Honor was presiding over the trials and the hearings that were going on during that time period in this -- in the veterans Agent Orange case, if you went through the morgue at the New York Times at that time point, you with come up with a stack of articles about this. The television accounts were widespread in the Unite States and widely known. It was almost a matter, I would say, of judicial notice as to how wide the publicity was.

I don't think this Court has information before it to make such presumptions with regard to the Vietnamese plaintiffs in this case, particularly when in this case the Vietnamese plaintiffs have testified that they did not in fact know about it.

THE COURT: It's a good point. You have made it very well.

Very convincing.

MR. NORRIS: Thank you.

THE COURT: Is there anybody else that wants to speak?

Are we going to have an amicus talk?

MR. NORRIS: Your Honor, can I return?

THE COURT: You have one minute right from where you are.

MR. NORRIS: With regard to the tolling under the

children's tolling, the latest reply brief from the defendants takes the position that there is no federal statute in the world that declares any particular position of the federal government in favor of tolling for minors.

I would draw the Court's attention to the statutory provision contained in CERCLA, the Comprehensive Environmental Response Compensation and Liability Act, and particularly 42 U.S.C. Section 1958, which as your Honor probably knows, in a case of a CERCLA spill, the policy of Congress as enunciated in that statute has been to trump state laws, commencement date for their statute of limitations.

In addition to that, in subsection (b)(4)(B), it says: In the case of a minor, the term federally required commencement date means the later of the date referred to above, or in the case of a minor, the date on which the minor reaches the age of majority as determined by state law.

And I think that is a pretty good pronouncement.

THE COURT: What is the majority in Viet Nam?

That is the state law?

MR. NORRIS: 18.

THE COURT: 18, same as the United States.

Okay.

MR. NORRIS: Thank you, your Honor.

THE COURT: Why don't we take a few minutes break because I don't want the amicus to talk to a tired audience.

Well, how much time will you take?

MS. CHOMSKY: 20 minutes, your Honor.

THE COURT: How much time will the rebuttal take?

MR. WEHRER: We may need half an hour.

THE COURT: At 7:30, the Court is closed.

(Recess.)

THE COURT: Ladies and gentlemen, if you would come to attention.

I'll be glad to hear the expert.

MS. CHOMSKY: Your Honor, my name is Judith Chomsky. Jennifer Green from the Center for Constitutional Rights is here to move my admission pro hoc vice.

THE COURT: It's our great pleasure to have you address us and instruct us.

MS. CHOMSKY: I am speaking --

THE COURT: The Center is from where?

MS. CHOMSKY: In Manhattan.

I'm speaking today on behalf of the amici, the University of Virginia Human Rights Clinic, the Center for Constitutional Rights and Earth Rights International.

I'd like to begin by addressing what I believe to be distortions by the defendants and the government in their interpretation of Sosa.

They argue that the courts should look to international law for every aspect of an ATS claim. I don't believe that is the case. I believe that it's clear from the analysis in Sosa that the court, that the Supreme Court intended the courts to look to federal common-law to fill in the interstices created by the -- the criminal norms which are the basis for the norms that are actionable under the ATS.

I think they err by stating that Sosa sets a uniform

code in standards. I think it's clear that is incorrect, that the standards set for a norm actionable under the ATS is that it be specific universal and obligatory.

They assert that all of the prior decisions under the ATS are overruled by Sosa. I think that is also incorrect. Sosa states -- confirmed the validity of the Court's analysis in Felidarca, in Cattish, in Marcos and in Edward's opinion in Telgorin.

They also try to create some prudential hurdles beyond showing that the norm is specific, universal and obligatory. But in fact the prudential considerations led the Court to set the high bar for actionable norms.

It's not that you have to show it's specific, universal and obligatory and then meet another set of hurdles but that the prudential hurdles led to that standard. And they claim, contrary to Sosa, that the federal government is the proper interpreter of customary law. And to the contrary, Sosa is clear that it is the function of the judiciary to interpret customary law.

In their argument that every aspect of the case is supposed to be looked at through international law, the defendants are making an argument that was rejected in Sosa. The Sosa Court makes reference to the dispute between Judge Edwards and Judge Borke in Telgorin in which Judge Borke suggested that in order to find an internationally based cause

of action, you had to find an internationally based cause of civil action before you could pursue a claim under the ATS.

Judge Edwards said: In consequence, to require international accord on the right to sue when in fact the law of nations relegates decisions on questions to the states themselves would be to effectively nullify the Law of Nations portion of Section 1350. There is a fundamental principle of statutory construction that a statute should not be construed so as to render part of it inoperative or superfluous.

And Judge Borke's interpretation and the interpretation offered by the defendants and the government would have the same effect, that the Court would have to look to international law to see if there is aiding and abetting, to see whether corporations could be sued.

The question of suing corporations is a good example because it's one where in order to -- there are no criminal actions in international law against corporations, but that doesn't mean that we don't look to our understanding of the liability of corporations in civil common-law.

THE COURT: So in effect, we have to translate what is criminal into civil in the context of American jurisprudence?

MS. CHOMSKY: That's correct, your Honor. And in that sense, it's a bedrock of American jurisprudence that corporations may be civilly liable, just as it is part of U.S.

common-law that there is aiding and abetting liability.

The defendants and the government have claimed that there is no aiding and abetting --

THE COURT: Is your theory completely aiding and abetting or do you go further in saying that there is a direct violation by the corporations?

MS. CHOMSKY: We believe that -- well, it's my understanding of the plaintiffs' claim, I can't speak for the plaintiffs themselves, that there is a direct violation of the norms.

THE COURT: All right.

MS. CHOMSKY: It was a position taken in the briefs of the defendants that there was no aiding and abetting under international law in the period of 1960 and 1970, and that is simply inaccurate.

In a 1795 opinion issued by Attorney General Bradford, he specifically states that individuals would be liable under the ATS for committing, aiding or abetting violations of the law of war.

And that same year there was a case Talbert V Jansson in which a French citizen was found to be liable for acts of piracy, essentially, by aiding a U.S. citizen named Balford in his action on the high seas, and he did that by providing him with the instruments to commit the crime.

THE COURT: Where is the citation to the Attorney

General's statement?

MS. CHOMSKY: It's in our brief, and I believe there is a citation to it in Cattish at 70 F. 3rd at 239.

THE COURT: Thank you.

MS. CHOMSKY: But both of the opinion and Talbert are cited in our brief.

The Nuremberg Tribunal also had an aiding and abetting liability standard and, of course, the cases have already been discussed, your Honor, and I won't go over them again, except to point out that in one of the many cases in the ATS that have already been issued, there is a citation to a prosecutor versus Foronzia, which is a case which analyzes the jurisprudence of the post-World War 2 tribunals and talks extensively about aiding and abetting liability.

THE COURT: Citation?

MS. CHOMSKY: It's cited in Mahenovich at 198 F.Supp 2nd at 1356, but I'm sorry, I don't have the citation and it's cited in our brief.

In any event, as I said before, there is no requirement under Sosa that every aspect of the claim be an aspect found in international law. As a tort stature, the ATS should be understood in the context of tort principles.

I note that you appear to have a settled opinion about the issue of corporate liability but I would just like to say that there have been a number of Second Circuit cases

in which the defendant was a corporation sued under ATS and although the courts didn't address specifically the issue of whether a corporation could be sued, it assumed that. That was the case in Wewa, it was the case in Beggio, in Hota and Akinda as well as in Pfizer.

THE COURT: Those are all in your brief?

MS. CHOMSKY: Yes, they are. There has been, I believe, a distortion of the footnote -- I think it's footnote 20 of Sosa.

The Court said: A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, that is, if the defendant is a private actor such as a corporation or an individual.

That is the Court was looking to state versus private actors, not to whether a natural person or a corporation could be sued.

There are also a number of cases cited in our brief, Talisman, Wewa, Chevron versus Bawilto, Bodner in which the courts have dealt directly with the issue of corporate liability.

I'd like to turn for a minute to the issue of the interpretation of the government, of the executive branch of the government on the content of customary norms. The dissent in Paquette Habana expressed a rule of deference to the

executive such as being now argued by government, but that was the dissent.

The majority rejected this principle and said: We look to precedents and authorities to determine that by the general consent of civilized nations and independent of any express treaty or public act, it is an established rule of international law.

And then in Sosa, talking about the ATS as a grant to the courts to interpret customary law, the first Congress, Sosa says, which reflected the understanding of the framing generation and included some of the framers assumed that federal courts could properly identify some international norms as enforceable in the exercise of 1350 jurisdiction.

There have been a number of recent cases decided the same month as Sosa in which the Supreme Court has clearly rejected the notion that the Court must defer to the interpretation of the content of an international norm given by the government.

If it were true that there should be such deference, the Court in Sosa would have said the government says it was okay, it's okay, we're done.

THE COURT: Yes, I agree, the extent of deference argued by the government would make it almost impossible to sue in any case.

MS. CHOMSKY: There has also been much discussion by

the defendants of whether there is a controlling act of the executive which removed from the ambit of international law the use of poison in this case.

Without going into whether poison was used, since that was so adequately dealt with by counsel, by plaintiffs' counsel, I would just like to say that in Paquette Habana, there was an act by the executive branch, that is, there was a seizure by the Navy. Nevertheless, the Court says that the government is also bound by customary law in the absence of presidential action which says that we're not going to abide by that.

We have nothing like that in this case and we certainly have no such action -- the fact that they okayed spraying with an herbicide which they may not have known was a poison didn't equate with the grave and important task of saying the United States will no longer abide by the poison convention.

THE COURT: It's your position it has to be a formal statement?

MS. CHOMSKY: Yes, certainly to give rise to such a serious act, especially in terms of our relations with other "civilized nations."

I'd just like -- on the issue of justiciability, I'd just like to bring the Court's attention to one case. The defendants don't like my old cases but they are still good law

and they were quoted by the Sosa court that was looking to the history of the U.S. jurisprudence on the issue of customary law.

In a case called Little versus Barreme, Chief Justice Marshall spoke for a unanimous Court in holding that a continue in the U.S. Navy was liable for damages to a ship owner for the illegal seizure of his vessel during war time. The Court held, this is Justice Marshall speaking: "The president's instructions cannot legalize an act which without those instructions would have been a plain trespass."

I believe that is still the law today.

I'd like to talk briefly about two of the international law norms that are at issue.

Very little has been said about the claim for crimes against humanity, but it is a well established part of U.S. jurisprudence, it's been recognized in a number of cases, in particular by the Cattish case which is a decision of this Circuit. The Nuremburg Tribunals were based on the concept of crimes against humanity and it had a specific content. The Nuremberg Tribunals established that they included atrocities and offenses, it goes on to list several, and other inhumane acts committed against any civilian population.

So I believe with regard to crimes against humanity, it's clear that there is a distinction between what is permissible with regard to your conduct against enemy soldiers

and what you can do to a civilian population.

I submit that what was done here in terms of the harm that it caused to this civilian population comes within the recognized definition of crimes against humanity.

It's also important to note that crimes against humanity does not require state action. Therefore, whether or not the government is immune, whether or not there is some government contractor defense, it cannot be an defense to crimes against humanity.

THE COURT: That is a direct action theory.

MS. CHOMSKY: Yes.

THE COURT: Direct liability.

MS. CHOMSKY: It's also important to note Nuremberg principles also expressly incorporate liability for accessories to international crimes. Article 7 states: The complicity in the commission of a crime against peace, a war crime or a crime against humanity, is a crime under international law. It is a direct crime under international law.

The plaintiffs have also stated a claim for war crimes. The prohibition against war crimes has long been recognized as a human rights norm. It was affirmed in Sosa. It was a decision in Cattish. It was not the norms violated in Cattish. And it's extensively discussed in Presbyterian Church of Sudan versus Palestine.

War crimes, that is violations of the Geneva Convention, include any of the following acts if committed against persons or property protected by the Convention and those persons are civilians protected by the Convention.

THE COURT: What convention are you quoting from?

MS. CHOMSKY: I'm quoting from the commentary for the Geneva Conventions of 12 August 1940. It's the ICRC Convention and the commentator is Pictet.

And it says: Any of the following acts, if committed against persons or property protected, and it goes on to say: Inhuman treatment willfully causing great suffering or serious injury to body, health and extensive destruction, and other things, of property not justified by military necessity and carried out unlawfully.

The Geneva Conventions are directly enforceable in the U.S. Courts. There are several cases that are cited in our brief at footnote 18. We recognize that there are courts that have found that not to be the case but the language of the Convention explicitly refers to the protections offered as rights. The protections provide that protected persons may in no circumstance renounce in part or entirety the rights secured to them by the Convention and Convention states cannot restrict the rights which the Conventions confer.

THE COURT: What convention is that?

MS. CHOMSKY: This is the fourth Geneva Convention.

This particular part comes from the fourth Geneva Convention.

THE COURT: What date?

MS. CHOMSKY: 1952.

And it says: The drafters in a commentary on the Convention say -- the drafters explicitly contemplated proceedings in domestic courts. And here is the quote. It should be possible in states which are parties to the Convention for the rules of the Convention to be invoked before an appropriate national court by the protected person who has suffered the violation.

THE COURT: When did we ratify?

MS. CHOMSKY: I think this commentary was written in 1952.

THE COURT: When did we ratify the Convention?

MS. CHOMSKY: I'm sorry, but I don't know that -- 1949.

THE COURT: We ratified?

I'll check and see when it was ratified.

MS. CHOMSKY: I'd also like to mention briefly the issue of specificity.

This is the last point that I want to make, your Honor, and that has to do with the paradigm case. We need to have, according to Sosa, human rights norms or international law norms that are comparable in specificity to the paradigm norms.

In 1820, not so long after the ATS was passed, there was a case, the United States verse Smith, and this case is cited in Sosa. And this case was cited as an illustration of the specificity with which the law of nations defined piracy in this case, and in Smith the Court noted the diversity of definitions of piracy but held that despite that diversity, all writers concur in holding that, in that case, robbery or the forcible degradations on the seas is piracy.

And I submit to your Honor that the international law norms against the use of poison, the Geneva Conventions and crimes against humanity have the specificity that is comparable to the specificity that existed for piracy at the time of the passage of the ATS.

THE COURT: Assuming that is true, do the specifications include the kind of herbicide spraying that we have here?

With respect to the poisons, you have in the order of one in a million. Would that be characterized within that specificity?

You have an intention to take out plant life for the protection of soldiers and also, beyond that to reduce the amount of food available for the enemy.

Is that within the specificity?

MS. CHOMSKY: I think, assuming the knowledge that the defendants had about the effect of the use of the

herbicides.

THE COURT: No, there is not that in the record. These are collateral damages that we are talking about. What is in the record with respect to that issue is that in a number of industrial accidents, there were injuries of a certain kind, chloracna and others. That industrial type of injury is not what we have here, which is spraying from a few hundred feet, deterioration of dioxin in the sunlight, it may have lasted within the soil when the soil was covered up, there may have been other aspects to it, but the degree of knowledge of what happens to employees in a factory with respect to these matters is entirely different from foreknowledge that it will create this kind of problem for a population at large.

That is a problem with all toxic torts, as you know.

MS. CHOMSKY: I would say that I don't know much about toxic torts, your Honor, but I do understand that to be the problem.

But I think if you move for a minute to --

THE COURT: To characterize that kind of situation within the specificity of a human rights violation akin to genocide seems to me to be a very far reach in view of Sosa.

MS. CHOMSKY: I don't believe --

THE COURT: Conceding everything that you say is true, you have made a very good argument and I respect your

expertise in cases, but that is not the answer to the problem we have with respect to the specificity and the foreboding that should have arisen from the use of this substance the way it was used.

MS. CHOMSKY: I have only heard the evidence presented here about what knowledge the defendants had about the effect of the Agent Orange on the population.

THE COURT: I can tell you there was practically no information available until substantially later, and even that was ambiguous with respect to what the effect of these sprayings would do beyond taking out the leaves and cover.

MS. CHOMSKY: Your Honor, putting aside for one moment whether they knew specifically --

THE COURT: These were not 50-gallon drums of poison. You understand that. These are collateral damages after a war use of herbicides for an entirely different purpose.

MS. CHOMSKY: If I may, your Honor, putting aside whether they understood that it was poisonous in a systemic way, it was certainly clear that it would affect the civilian population in terms of getting into the water, getting into the food and depriving them of food. It's not just the soldiers.

THE COURT: Not getting into the water or the food but depriving them of food indirectly, that is true. But that

has historically been part of military practice. It was U.S. Grant who said that it was his policy to destroy cropsd to destroy food in surrounding areas in order to avoid a continuation of the war.

MS. CHOMSKY: Respectfully, your Honor, it was indeed the policy of the Roman Army to salt the earth.

THE COURT: No, just Carthage.

MS. CHOMSKY: Nevertheless, there are standards that are set by international law norms that refer to what you can do to a civilian population.

THE COURT: Yes, I understand that, and you make a powerful argument. The question is: Was this particular use during the Viet Nam war within the norms as they then existed?

They might be now but we're talking about in the '60s.

MS. CHOMSKY: But the norm for crimes against humanity existed.

THE COURT: Is this a crime against humanity?

MS. CHOMSKY: Respectfully, your Honor, at the motion to dismiss level, there is not a fully developed record enough to make a conclusion about whether this was a crime against humanity.

THE COURT: I see your point and I am very grateful for having you here.

Thank you very much.

Any rebuttal?

MR. WEHRER: Thank you, your Honor, for your patience.

I know that it's an extraordinarily long day for you.

The presentation that was just concluded and Mr. Kokkoris and one of his colleagues who have preceded him have all approached the question how to interpret these various treaties as if they were interpreting U.S. statutes. They look at the plain language. In one instance they look at what they view as legislative history and then they say this looks like a crime against humanity because civilians have been harmed or this is a toxic substance so it must be a poison. But that is simply not the manner in which the meanings of those norms are derived.

The key evidence of what these terms mean is not to look at Webster's dictionary, it's to look to state practice, how states have accepted the norm and what conduct they have understood to be governed by the norm is the evidence that we look to to determine what norm actually means.

And so if you look at the poison norm, the Article 23A that they talk about here, it's very clear that what that proscribes is use of poisons for the intentional purpose of incapacitating or killing enemies. It's not incidental by-products that might occur from, as you just described,

collateral damage.

And probably the most concise statement on this point is in the International Court of Justices' 1996 opinion on the legality of nuclear weapons, and it was looking at Article 23A and the 1925 Gas Protocol the question was: Are nuclear weapons a form of proscribed poison?

Now, however horrible the effects of Agent Orange are alleged to have been here, there is just no question that one of the most extreme instances of secondary poisoning you can imagine is the use of nuclear weapons. The international Court of Justice said these proscriptions do not apply. Why? The quote from paragraph 55 is that: Both of these proscriptions are aimed at weapons whose prime or even exclusive effect is to poison or asphyxiate.

It's the intentional affect, what you hope to achieve with the toxic substance that renders an act of poisoning. It's not an incidental by-product you are guilty of poisoning.

The U.S. submission in connection with that very proceeding before the ICJ, this is the U.S. State Department Legal Advisors' opinion. It says: Hague Regulation 23A is a prohibition that was "established with particular reference to projectiles that carry poison to the body of the victim. It was not intended to apply and has not been applied to weapons that are designed to injure or cause destruction by other

means even though they may also create toxic by-products.

And that is not just in the U.S. view alone, the British foreign officer opined that: 23A was intended to apply to weapons whose primary intended effect was to be "poisonous and not to those where poison was a secondary or incidental effect."

So the key to understanding what it means to engage in poisoning under the laws of war is: Did you intentionally use a weapon or substance for the purpose of killing or harming people through its toxic properties. Collateral damage resulting from weapons used for other purposes is simply not an act of poisoning.

Your Honor this is also the same distinction as reflected in the 1993 Chemical Weapons Convention which is two decades or more after the cessation of the herbicidal program in Viet Nam.

States still could not agree to prohibit herbicides as a chemical weapon. The herbicides were eliminated from the definition of toxic chemicals and a well respected commentary on this convention states as follows: Herbicides will not be regarded as chemical weapons if used with an intent to destroy plants. That would apply even if secondary effect of such use were the killing or harming of people, for example, by toxic side effects.

Now, the same view is reflected, and I'm not going

to quote all of them, but I will quote just a couple of the preeminent writers in this field who have --

THE COURT: This is in your brief?

MR. WEHRER: These quotes are in the brief, yes, your Honor.

So I would direct your attention to the Kalshoeen and Zegfeld quote. I don't know what page it's on but they say that the prohibition of poison is mainly of historical interest. Why? Because it refers to those historical examples that plaintiff recite in their lengthy list about poisoning food, poisoning wells.

Mr. Kokkoris referred to the Nuremberg cases as examples of prosecutions of 23A.

From the materials that I've been able to review on the Zyklon B case, there is no mention of Article 23.

THE COURT: Not in the Zyklon.

MR. WEHRER: That's correct. It's a prosecution under Article 46.

Farley and Flake are both cases in which corporate officers were charged with employing slave labor.

Flake cites 23, not 23A but 23. There is absolutely no allegation of poisoning in that case. The reason that their citation to 23 in Flake, and I suggest the same reason that it's cited in Farley is because the final sentence in Article 23 says that it's impermissible to use

contra-nationals as part of your work force to aid your effort against their own country.

So I don't think that the Nuremberg cases stand for the proposition that any use of poison violates Article 23. But even if it did, Zyklon B is not a case in which people were charged with using delousing agents that had unintended secondary lethal effects.

And I submit that there would never have be a prosecution with that fact pattern that was demonstrated in that circumstance.

So there is very clear evidence from state practice, from the commentary from the International Court of Justice that poison proscription has a narrow meaning and it requires a specific intent of using a substance to kill people in battle. And there is no allegation in this complaint that that is what the United States military did. So for that reason, there can't be a claim stated under that provision.

We have just heard reference made to the war crimes and crimes against humanity. Both of these provisions refer to actions specifically and intentionally directed at civilians.

And it's been our position throughout that it's not permissible to target civilians, putting aside perhaps the complicated questions that arise in strategic bombing situations, but targeting civilians, we have never suggested

is permissible. The allegations in this complaint however are not that there were, that the herbicides were targeted against civilians.

The allegations are that there was dual use crop destruction, that there were -- that essentially there was incidental collateral damage to civilian crops and that that constitutes a crime against the laws of war.

But if you look at the Rome statute which in Article 7 defines crimes against humanity, it requires a number of acts that are quite heinous in themselves but those acts have to be committed as part of a widespread or systematic attack directed against any civilian population.

And similarly, war crimes include intentionally directing attacks against a civilian population as such or as against individual civilians not taking direct part in hostilities.

So perhaps if you were coming to this with a complete blank slate, you might take a look at these definitions and the complaint and think they somehow parallel the crimes, but in reality as they are restricted by international law, these are very specific offenses and all three that were described require intentional conduct that has not been alleged and we submit could not have been alleged.

Mr. Kokkoris did say that he was relying on the unnecessary suffering and disproportional indiscriminate

weapon use and wanton destruction norms. Unnecessary suffering is actually a prohibition on causing unnecessary suffering when you wound or kill somebody, it's not about proportionality. But in all events, your Honor, there has not been a word spoken this afternoon demonstrating that this norm can possibly satisfy Sosa's very strict standards.

And finally, your Honor, I would like to comment on the 1949 Convention and the article that is self-executing. We have cited cases, the Levi case in the Sixth Circuit and the Iwanawa case in the District Court of New Jersey, both of which hold that these treaty provisions are not self-executing.

The cases that the amici cited in their brief to suggest otherwise are not cases in which causes of action were recognized, but are instead habeas cases in which the treaty was brought up as a rule of decision. And the commentary that was just alluded to a while ago refers to certain -- first of all, if you read the commentary, you will see that the drafters are talking about the ability of protected persons to have their rights enforced by their own governments against belligerents or by some third-party or intermediary like the Red Cross.

And there is a specific instance in which they talk about the possibility that a protected person's government would reach an agreement with the belligerent that would

renounce that person's rights. And there the drafter suggests there ought to be a mechanism to bring a claim against that country that renounces its own citizen's rights through any procedure that is available, so it's presupposing that there would be some mechanism, not that it creates one.

And in any event, it's talking about a very different circumstance, it wouldn't be here that the enemy citizen is bringing claims against the Vietnamese government, not against military contractors of the United States.

Thank you for your patience, your Honor.

MR. FREY: Your Honor, my name is Andrew Frey.

Just preliminarily, one of the things the plaintiffs have done throughout their argument is conflate dioxin and Agent Orange. And I know that your Honor understands that those are two different things, Agent Orange contains a very small amount of dioxin but the fact that dioxin was considered to be toxic does not prove that Agent Orange was considered to be toxic or was a basis to believe that it was.

Under the very broad definition of poison that Mr. Morris just used, I think even with regard to Vioxx a person could bring an action under international law.

Let me turn to a question that we have talked about before and it came up again, which is the question of whether the president can act to violate international law. And I wanted to call your Honor's attention to the opinion of Judge

Mikvah in The Committee of U.S. Citizens Living in Nicaragua case in the D.C. Circuit, which is 859 F.2 929.

Now that case is different in the sense that it involved an act of Congress funding contras not just a presidential action.

But the mode of analysis, Mikvah says: When our government's two political branches acting together contravene international legal norm, does this Court have authority to render it a violation? The answer is no. If the type of international obligation the Congress and the president violate is either a treaty or rule of customary international rule of law. If on the other hand, Congress and the president violate a peremptory norm, the domestic legal consequences are unclear.

The Court went on to quote the Headmoney case about a treaty saying: A treaty depends for its enforcement on its provisions, on the interest and honor of the governments which are parties to it. If these fail, it's infractions become the subject of international negotiations and reclamations but with all this, the judicial courts have nothing to do and can give no redress.

And Judge Mikvah goes on to quote your former colleague Professor Henkin who said that: This conclusion reflects the United States adoption of a partly dualist rather than strictly monist view of international and domestic law.

So there are two different systems and international law can be modified.

Now, your Honor asked whether it would take an executive order to do that. I don't think the executive order has any particular legal status and I would just make the observation that why would the president issue an executive order if he studied the matter and concluded there is no violation of international law?

I think the courts look to the president's acts, and the Eleventh Circuit in the Garcia case said even the Attorney General's action can be sufficient to override international law to constitute an executive act.

Finally, let me just -- two other points.

Amicus suggested that aiding and abetting liability is some kind of default principle in federal civil law. That is not correct, as the Central Bank case shows. Ordinarily there has to be specific congressional action establishing aiding and betting liability in civil cases. Of course in criminal cases, there is Section 2.

Finally on Paquette Habana, I looked at Justice Fuller's dissent. He I think said he disagrees whether the protection of fishing vessels requires customary international law.

What is important is that the Court looked to the orders from the Secretary of the Navy which said that they

were going to act consistently with international and so it was clear there was no intent in that case to renounce or override international law.

But had there been, the clear impression from the opinion is that that would have been done and it would have been done with claims by owners of the vessels thank you.

THE COURT: Thank you very much.

MR. BRESS: I'm last and I intend to be short.

Richard Bress.

Three points, your Honor.

Number 1; amicus suggested in her presentation that the prudential factors in Sosa are not additional factors that this Court needs to consider but are rather simply justifications for Sosa having adopted the strict universality and definiteness standard.

And again, the Supreme Court's opinion in that case belies that reading. There are two prudential factors specifically that are additive as described in the case.

First, legislative guidance. That is on page 2762 of the opinion. What the Court says is that the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shackle for much of the prior two centuries.

So certainly the Court is saying that you should look to legislative guidance before recognizing any cause of action under the ATS.

Second, on page 2766, footnote 21, the Court says: That the requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, although it disposes of the case in Sosa.

And one of the factors the Court says that courts should look to, it says: Another possible limitation that we need not apply here is a policy of case specific deference to the political branches.

And it was referring to letters and representations from the executive branch of that sort. That is the first point.

And the second point is that amicus brought up the Little case. Of course, we haven't been trying to hide from Little, the 1804 decision by the Chief Justice Marshall. I brought it up in my earlier argument, but just to clarify how Little is different from this case for purposes of justiciability, Little involved a suit in prize jurisdiction, admiralty jurisdiction, by a neutral for a captain having taken the ship of the neutral in violation of a federal statute. It bears no resemblance to a case like this where the plaintiffs are asking this Court to recognize a new cause

of action under customary international law for 4,000,000 residents of our former enemy to come into court alleging that on orders of the president of the United States, our military committed war crimes.

The third point, your Honor, has to do with the domestic cause of action that plaintiffs claim to have in addition to their international cause of action.

I submit, your Honor, that to the extent that they are relying on an alleged New York State cause of action, New York State has never come close to suggesting that it offers a cause of action for injuries suffered by the enemy or civilians on the battlefield as a result of U.S. military conduct. And if it did, it would be preempted by federal law.

There is no doubt that states have little to no interest in regulating what goes on in U.S. battlefields and that is a matter entirely of federal concern.

Thank you very much, your Honor.

THE COURT: Thank you.

That is the end of the arguments?

(No response.)

I want to thank you all for being so patient, and you've been extremely helpful. We'll try to get immediate copy sometime tomorrow. Some of you may want to suggest corrections with the spellings and so on before the transcript becomes official and you are free to do that in view of the

difficulties.

So you'll get a draft.

Is there anything else anybody wants to present?

(No verbal response.)

Safe home and thank you.

(Matter concluded.)