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Report/Article Title Typescript: Outline of Facts to be Researched

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Description Notes Outline is in reference to litigation/claims brought by defendants against the United States.

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DEFENSE

KEY: DF = Discretionary Function
CO = Combatant Activities
FO = Foreign Country
FE = Feres
RC = Reasonable Care (No Negligence)

ATTY

KEY: AM = Arvin Maskin
GW = Gretchen Witt
JS = Judith Sack
RL = Robert Longstreth
PC = Pat Cavanaugh

CONSULTANT

KEY: AY = Alvin Young
RK = Robert Kaines
WB = William Buckingham
HH = Harbridge House

CLAIMS BROUGHT BY DEFENDANTS AGAINST
THE UNITED STATES (Actionable Through
the Claims of Genetic Damage):

1. US negligently selected the herbicides
2. US negligently failed to provide proper instructions to users of the herbicides
3. US negligently failed to warn the plaintiffs
4. US negligently misused the product
5. US negligently exposed the plaintiffs

OUTLINE OF FACTS TO BE RESEARCHED

I. What was the military problem? (AM/GW)

A. What was the need? (DF) (AM/GW)

- (1) When and why did the military start experimenting with defoliants?
- (2) When did defoliating in Vietnam become an issue and why did it become an issue?

B. What were the goals of defoliation? (DF) (AM/GW)

(1) Generally

(2) In Vietnam

- (a) Prevention of ambush by enemy troops
- (b) Destruction of enemy food supplies
- (c) Discovery of enemy troop movements and trails

- II. How did the military solve the problem? (DF; RC)
- A. What was the decision-making process? (DF; RC)
- (1) Decision to use herbicides in Vietnam (AM/GW)
 - (a) Who made the decision?
 - (b) When was the decision made?
 - (c) How was the decision made?
 - (2) Decision of what herbicides to use (RL) (HH)
 - (a) Who made the decision?
 - (b) When was the decision made?
 - (c) How was the decision made? (see B, infra)
 - (3) Decision of how to use the herbicides selected (JS; RL)
 - (a) Who made the decision?
 - (b) When was the decision made?
 - (c) How was the decision made? (see III.E.2, infra)
- B. How were the herbicides selected? (RL) (HH)
- (1) What were the properties desired? (JS; RL)
 - (2) Who drafted the specifications? (RL) (HH)
 - (3) Were the specifications then negotiated? (RL) (HH)
 - (4) Who finalized the specifications? (RL) (HH)
 - (5) Were the specifications ever modified at defendants' request? (RL) (HH)
 - (6) What were the markings on the drums and why were they marked in this manner? Why no warning? (RL)
- C. Were the herbicides ever tested? (RC; DF) (RL)
- (1) Field testing for efficacy?
 - (2) Testing for toxicity? Did we rely on defendants?

D. How were the herbicides obtained?

- (1) Contracts - how were they let? (RL) (HH)
 - (a) Were any adjustments made in the contracts (apropos product)?
 - (b) What was the effect of the Defense Production Act?
- (2) Did the product meet the Government's specifications? (RL) (HH)
 - (a) What was the meaning of 2% impurities?
 - (b) Did the presence of dioxin mean that the specifications weren't met?

III. How was the solution effectuated? (all defenses)

A. Transportation of the herbicides (RC)

- (1) Domestic
- (2) To Vietnam (RC; FO; FE)
- (3) What precautions were taken?

B. Storage of herbicides in Vietnam (RC; FO; FE; DF)

- (1) Were there leaking problems?
- (2) Were there any other problems in handling?
- (3) What were the safety precautions?

C. Loading of herbicides onto C-123s (RC) (JS)

- (1) What precautions were taken in the handling of the herbicides? (RC)
- (2) Were there any health problems?

D. Selection of spray sites (DF; FO; FE; CO)

- (1) What were the criteria used? (DF)
- (2) Who decided what sites to spray? (DF)
- (3) How long after selection of a site was it sprayed?

E. Conduct of the Spray Missions (all defenses)

- (1) How was Ranch Hand informed as to what and when it should spray? (JS)
- (2) What were the rules for the conduct of spray missions? (DF; RC) (JS)
 - (a) What was the rate of spray?
 - (b) What was the concentration of active ingredients?
 - (c) How often was an area sprayed?
 - (d) How low was the plane to fly; what speed; what weather conditions; what time of day; etc?
 - (e) What were the methods of spray?
 - (f) What efforts were made to coordinate with ground troops?
- (3) What precautions were taken apropos the herbicides? (RC; FE; FO; CO) (JS)
 - (a) Ground troops
 - (b) Ranch Hand pilots and crews
 - (c) Ground crews
- (4) What was the situation like during the spray missions? (RC; FE; CO) (GW/AM)
 - (a) Was there a fighter escort? Why?
 - (b) Were the C-123s under fire and were planes lost?
 - (c) Were loads ever dumped (even if troops may have been in flight path)? Why?
 - (d) If troops were in flight path or traversed defoliated ground, why were they there? Tie to representative plaintiffs.

IV. Did the proposed solution work?

A. Was the solution reasonable under the circumstances? (DF; RC) (see I, supra) (AM/GW)

(1) What were the circumstances? War.

(2) Compare the costs and the benefits (risks and goals).

(a) Risks -

(i) What were defendants' representations as to health risks?

(ii) What was the relevant persons' knowledge as to health risks? (chain of command for herbicide choice, contracting and usage).

(iii) What were the ecological risks?

(b) Goals - (see I, supra)

(i) Saving lives of servicemen

(ii) Harming the enemy by exposing their troop movements and ambushes

B. What was the effectiveness of the herbicides? (DF; RC) (PC)

(1) Did the product meet its goals (accomplish what it was designed to do)?

(2) What were the results of military reviews of the program's effectiveness and worth?

(3) What were the results of outside reviews of the program's effectiveness and worth?

(4) Did they decide to continue using the program?

C. Why did the program end? (PC)

(1) What factors went into the decision?

(a) Geneva Protocol?

(b) Bionetics?

(c) Other?

(2) Who made the decision?

(3) When was the decision made?

D. Destruction of Orange?

V. Causation

A. Exposure of the representative plaintiffs? Limited.

1. Water

2. Contaminated Food

3. Amount that got to the ground.

2. Countering plaintiffs' use of Times Beach, etc.
(AM) (AY)

CONSULTANTS: We envision the consultants assisting the trial attorneys by pointing the way to the evidence supporting the stories that we need to tell.

1. Consultants identify documents and sources (actual and potential). If consultants can easily obtain the documents, they should do so.

2. If documents must be searched for, consultants will point the DOD team (to be obtained) toward the documents. The DOD team will retrieve and initially screen the documents.

3. The DOD team will then return the documents to Mr. Kaines (tentative assignment) who will screen the documents. If Mr. Kaines believes the document will serve the purpose for which it was sought, he will pass it on to the appropriate attorney.

4. That attorney will review the document. If s/he agrees that the document should be used, it will be put into the trial document system.

5. The same will apply as to potential witnesses. Trial consultants will identify the potential witnesses and then one of the consultants will interview the witness using questions developed by the trial attorneys.