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COURT REJECTS AGENT ORANGE CLAIMS BROUGHT UNDER INTERNATIONAL LAW *(Vietnam Assoc. for Victims of Agent Orange v. Dow Chemical Co.)*

The U.S. Court of Appeals for the Second Circuit this week issued a decision dismissing a class action lawsuit brought on behalf of Vietnamese nationals, including former North Vietnamese and Viet Cong fighters, against a group of American chemical companies for their role in producing Agent Orange during the Vietnam War. The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief urging that the claims be dismissed.

The lawsuit arose out of the U.S. military's use of Agent Orange and other herbicides in Vietnam beginning in 1961. These operations, approved personally by President Kennedy in their first years, were intended to clear vegetation from transit routes of U.S. troops to curb anti-U.S. ambushes and to destroy crops grown by Viet Cong forces. The State Department determined at the time that the operations were consistent with international law.

The plaintiffs, the Vietnam Association for Victims of Agent Orange/Dioxin ("VAVAO") and various Vietnamese nationals, filed suit on September 13, 2004, alleging that the spraying program was illegal under various multilateral treaties regarding the laws of armed conflict and under customary international law. The plaintiffs asserted that their claims were actionable under the Alien Tort Statute (ATS), a 1789 statute originally adopted to combat piracy. The plaintiffs also brought various federal and state law claims. They contended that the defendant chemical companies' role in the program rendered them liable for deaths and injuries allegedly caused by the herbicides. The lawsuit demanded monetary damages, clean-up of the contaminated areas of Vietnam, and disgorgement of profits.

In dismissing the claims, the court of appeals held that international law has never been understood to prohibit use of herbicides in waging war. While a 1925 treaty prohibits use of "poisoned weapons," the court held that that treaty was only intended to prevent the poisoning of enemy soldiers, not to prohibit use of herbicides to kill vegetation. The court noted that when it ratified the treaty, the U.S. Senate stated



explicitly that it was doing so with the understanding that the treaty did not apply to use of herbicides.

The appeals court decision upheld the March 2005 dismissal of the lawsuit by a federal district judge in Brooklyn. Although the district judge ruled that the Agent Orange spraying did not violate any norms of international law, he rejected a separate defense raised by the government contractors: the well recognized “government contractor defense” exempted them from ATS liability under the international law claims (i.e., they were exempt because everything they did was pursuant to direct contractual orders of the federal government). Much of WLF’s brief was devoted to arguing that the district court had erred in this respect and that the defendants were, in fact, entitled to raise the government contractor defense. In light of its decision to dismiss the international law claims on their merits, the Second Circuit declined to reach WLF’s arguments regarding the applicability of the government contractor defense.

WLF is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. Since its founding in 1977, WLF has engaged in litigation and advocacy to defend and promote free enterprise and a limited and accountable government. WLF previously participated as an *amicus* in Agent Orange litigation in *Dow Chemical Co. v. Stephenson*, 539 U.S. 111 (2003).

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF’s brief is posted on its web site, www.wlf.org.