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WLF OPPOSES AGENT ORANGE TORT CLAIMS BROUGHT UNDER INTERNATIONAL LAW

(Vietnam Assoc. for Victims of Agent Orange, et al. v. Dow Chemical Co., et al.)

The Washington Legal Foundation (WLF) filed a brief today in the U.S. Court of Appeals for the Second Circuit urging the court to reject 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 lawsuit arises 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 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 demands monetary damages, clean-up of the contaminated areas of Vietnam, and disgorgement of profits.

In a March 10, 2005, ruling, the Hon. Jack B. Weinstein of the U.S. District Court for the Eastern District of New York granted the defendants' motion to dismiss. The court ruled that the contractors were exempt from liability for all claims under United States law, including state law claims, based on the government contractor defense. The court also sided with the defendants in determining that the spraying did not violate any norms of international law that existed at the time. In the course of reaching those holdings, however, the court indicated that international law overrides the government contractor defense – rejecting the view of the Justice Department that the defense is valid against international law claims.

In its brief, WLF focused on the applicability of the government contractor defense to international law claims, arguing that the defense does apply. WLF argued that the district court improperly analyzed federal law on the government contractor defense. WLF further noted that allowing tort suits against defense contractors based on alleged violations of the laws of war by U.S. forces – violations as defined by commentators decades after the fact – would be inequitable and would have serious deleterious effects on military procurement.

WLF is a non-profit public interest law and policy center founded in 1977 and based in Washington, D.C., with supporters nationwide. Since its founding, 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 Chem. Co. v. Stephenson*, 539 U.S. 111 (2003). WLF's Legal Studies Division frequently publishes papers on civil justice policy issues, including in the area of government contracting. *See, e.g.*, Ronald H. Clark, *Asserting Counterclaims And Third Party Claims In False Claims Act Litigation* (2005); Victor E. Schwartz, *State High Court Ruling Departs From Tort Principles In Consumer Protection Cases* (2005); Mark D. Plevin and Leslie A. Epley, *Court Issues Key Ruling on Estimating Liability In Asbestos Bankruptcies* (2005).

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For further information, contact WLF Senior Vice President for Legal Affairs David Price, (202) 588-0302. A copy of WLF's brief is posted on WLF's web site, www.wlf.org.