05-1953-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, *et al*.,
Plaintiffs-Appellants,

v.

DOW CHEMICAL CO., *et al*.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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February 13, 2006

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit 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 has 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). A WLF COUNSEL'S ADVISORY addressed the government contractor defense issue that is the subject of this brief. *See* David Price, *Agent Orange Ruling Holds Hidden Hazards For Defense Contractors* (2005).

WLF is submitting this brief because it is concerned 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.

ARGUMENT

While *amicus* fully supports the arguments of the defendants-appellees in this case, this brief focuses on the conclusion in Part IX of the district court's opinion – that is, the district court's determination that the government contractor defense does not apply to international law claims. 373 F. Supp. 2d 7, 85-99 (E.D.N.Y. 2005). For the reasons set out below, this determination was in error. Under the type of analysis employed by the U.S. Supreme Court in *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988), claims brought under international law should be subject to the government contractor defense to the same extent as any other claim.

The district court's discussion of this issue is *obiter dicta*, in that the court ultimately found the defendants had not taken part in any violation of international law. Should this Court reach the merits of plaintiffs' international law claims before considering the applicability of affirmative defenses to those claims, the Court should affirm the district court's sound reasoning as to the legality of the United States herbicide program in Vietnam. 373 F. Supp. 2d at 105-38. If, however, this Court does reach the government contractor defense in the context of the international law claims, we respectfully urge the Court to reject the district court's approach and to hold the government contractor defense both applicable and dispositive.

I. The Government Contractor Defense Is Applicable To International Law Claims

In the district court's discussion of the applicability of the government contractor defense to international law claims, the court does not refer to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*., the statute on which the government contractor defense is grounded. It does not discuss *Boyle*, the leading U.S. Supreme Court case on the government contractor defense, giving it only a bare citation for the assertion that the defense "does not apply to violations of human rights and norms of international law." 373 F. Supp. 2d at 91. The district court's lack of analysis of the pertinent federal law led it astray on this issue.[1]

The Supreme Court in *Boyle*, in addressing the liability of military contractors under state law causes of action, treated the issue as one of federal common law to be resolved largely on the basis of pragmatic considerations. The

[1] The *amici* supporting plaintiffs are incorrect in asserting that this Court rejected the application of the government contractor defense to federal *Bivens* claims for constitutional violations in *Malesko v. Correctional Servs. Corp*., 229 F.3d 374, 377 (2d Cir. 2000), *rev'd*, 534 U.S. 61 (2001). *See* Brief *Amici Curiae* of the Center for Constitutional Rights, *et al*., at 51. This Court in *Malesko* assessed the defendants' government contractor defense and found it unavailing because there was no claim that "the government played any role in formulating or approving" the policies that led to the plaintiffs' injury. 229 F.3d at 382. In *dicta*, this Court questioned, but expressly refrained from deciding, whether the defense applies to *Bivens* actions, noting that such actions "are not state law claims but arise under the U.S. Constitution." 229 F.3d at 382 n.4. The claims at issue in the present case, of course, are not constitutional claims.

Court noted that "it is plain that the Federal Government's interest in the procurement of equipment is implicated by suits such as the present one – even though the dispute is one between private parties. . . . The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price." 487 U.S. at 506-7. Accordingly, the Court held that military contractors are immune from liability imposed pursuant to state law when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512.

The Court in *Boyle* grounded its decision in the policies underlying a provision of the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2680(a). 487 U.S. at 511. Section 2680(a) provides for an exception to the FTCA's waiver of sovereign immunity in cases of

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

The rationales that the Court cited for recognizing a federal common law immunity for military contractors apply in the context of international law claims no less than in the context of state law claims. Foremost among these was a realistic recognition that lawsuits against military contractors who had simply carried out government requirements would, if allowed to go forward, amount to a collateral challenge to the military's decision-making:

> We think that the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this provision. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that *permitting "second-guessing" of these judgments . . . through state tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption*.

487 U.S. at 511 (emphasis added).

The Court also took note of the reality that allowing civil suits against military contractors would undermine the financial insulation Congress sought for the public fisc when it enacted the FTCA:

> The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.

487 U.S. at 511-12.

The text of the statutory provision on which the Court relied, which broadly bars "any claim" rather than "any claim under state law," strongly suggests that Congress's purposes would be served by applying the government contractor exception to international law claims. In addition, the policy rationales noted by the Court when addressing state law claims against military contractors – the FTCA's policy against judges and juries second-guessing military procurement choices and its policy of insulating the public fisc from the potential effects of such civil litigation – are equally present in the context of international law claims. Moreover, factors unique to international law claims render the policy case for the government contractor defense even more compelling in that context.

First, international law claims against military contractors will likely implicate the foreign relations powers of Congress and the Executive. As the Court in *Boyle* itself noted, the fact that an issue "concern[s] the exterior relation of this whole nation with other nations and governments" renders it "intimately blended and intertwined with responsibilities of the national government." Such circumstances have long been treated as "a significant factor" counseling courts to defer to federal decision-making. 487 U.S. at 508 n. 4 (citations omitted).

Second, in a case such as the present one, the international law claims amount to a collateral challenge not only to military procurement choices, but to the very methods and means of warfare selected by the President and his

subordinate commanders. Such litigation strikes at not only the FTCA's discretionary function exception in § 2680(a), but also the FTCA's exceptions for any claim "arising out of the combatant activities of the military or naval forces . . . during time of war" (§ 2680(j)) and for any claim "arising in a foreign country" (§ 2680(k)).

Thus, when determining the federal common law rule for treatment of international law claims against military contracts, appeals courts should adopt the approach of the Supreme Court in *Boyle* and effectuate Congress's policy choices in the FTCA by applying the government contractor defense.

II. The Post-World War II Military Tribunals Relied Upon By the District Court Are Inapt Here

The district court states, "No one, of course, suggests that use of herbicides in Vietnam is remotely comparable to the genocidal use of Zyklon B." 373 F. Supp. 2d at 91. Yet the notion that the use of Agent Orange in Vietnam was "comparable" to the Nazis' use of Zyklon B – "comparable" in a legal sense – is at the core of the district court's reasoning. The district court's analysis of the government contractor defense in the context of international law claims is based fully on post-World War II military trials of accused German war criminals. *See* 373 F. Supp. 2d at 91-94 (Zyklon B cases); *id*. at 94-96 (Nuremburg Military

Tribunals); *cf. id*. at 96-99 (addressing "necessity" defense in light of Nuremburg precedents).

Absent from the district court's analysis is any demarcation between violations of human rights norms on the scale of the Nazi regime and allegations of other, lesser violations of international law. In the present case, the district court correctly held that the herbicide program did not violate international law *at all*. 373 F. Supp. 2d at 138. Even if there were some basis for holding the herbicide program to have been illegal, however, a further leap – and a very significant one – is required to maintain that the program should be treated the same as genocide for the purpose of determining the defendants' affirmative defenses. At a minimum, implicit in the post-World War II military proceedings, and explicit in the Jerusalem trial of Adolf Eichmann, is a requirement of manifest unlawfulness. As the Jerusalem District Court explained in the Eichmann case,

> The distinguishing mark of a 'manifestly unlawful order' should fly like a black flag above the order given, as a warning saying "Prohibited!" Not formal unlawfulness, hidden or half-hidden, nor unlawfulness discernible only by the eyes of legal experts, is important here, but a flagrant and manifest breach of the law, definite and necessary unlawfulness appearing on the face of the order itself, the clearly criminal character of the order or of the acts ordered to be done, 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" required to release a soldier from the duty of obedience upon him and make him criminally responsible for his acts.

Attorney General of Israel v. Eichmann, 45 Pesakim Mehoziim 3 (Jerusalem Dist. Ct. 1965) (quoted in Statement of Interest of the United States at 59).

Here, any element of manifest unlawfulness is lacking. The district court's careful analysis of the merits of the claim of illegality belies any suggestion that the herbicide program was manifestly unlawful in the 1960's.

Even today, some forty years after the fact, there has been no judicial determination that the defoliation program in Vietnam was unlawful. Nor has any Executive Branch agency made such a determination during the course of seven successive Presidential administrations. On the contrary, the Executive Branch has taken just the opposite view; a text published by the International Committee of the Red Cross recognizes as much. "As is well-known, the United States have always refused to accept that the Protocol [the Geneva Protocol of 1925] should be construed in such a manner as to bring tear gas (and herbicides) within its terms." F. Kalshoven, *Constraints on the Waging of War* 31 (1987).

It is worth noting in this regard that the drafters of the Geneva Protocols of 1977 included, in Article 55 of Protocol I, a restriction on "methods or means of warfare" that may cause great environmental damage. The drafters of the provision were motivated by "the large-scale deforestations carried out by the Americans in the course of the war in Vietnam." Kalshoven, *supra*, at 81. The United States has never ratified this treaty. What is significant is that the herbicide operations in the 1960's can hardly be considered to have been "manifestly unlawful" at the time if

the drafters of Article 55 found it necessary to draft a prohibition to make their illegality clear *in 1977*.[2]

III. The Policy Considerations Underlying the Government Contractor Defense Strongly Support the Application of the Defense to the International Law Claims In This Case

The plaintiffs' grievance, if any, is not with the defendant chemical companies; it is with the United States Presidents who conducted the war in Vietnam and the Members of Congress who appropriated funds for it. The defendants here did not simply fulfill detailed purchase orders submitted by the government; the Executive Branch came to regard the herbicide program as so important that it compelled the defendants to supply the desired chemicals. Moreover, the hazards of Agent Orange were well known at the time to the government. While outright governmental compulsion is not at all necessary to make out a government contractor defense, the effective conscription of the defendants' operations, combined with the government's equivalent or superior

[2] Moreover, even Article 55 covers only those operations intended or expected to cause "widespread, long-term and severe damage" to the environment. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), of 8 June 1977, Article 55(1) (available for download at http://www.unhchr.ch/html/menu3/b/93.htm). Whether the herbicide operations in Vietnam caused "long-term" damage is debatable, at best.

knowledge of the risks involved, render this a quintessential case for the government contractor defense with respect to plaintiffs' international law claims.

In obtaining Agent Orange and its constituent ingredients from the defendants, the Department of Defense eventually exercised its powers of coercion under the Defense Production Act of 1950, 50 U.S.C. Appx §§ 2061 *et seq*. In an earlier proceeding, the court below has described the extent of the compulsion applied in the Vietnam herbicide program:

> Effectively the United States commandeered the [Diamond Shamrock Corp.] Newark Plant pursuant to the Defense Production Act for use in the national defense effort. The government mandated that the Newark Plant produce 2,4,5-T exclusively for use in the production of Agent Orange, prohibited the sale of 2,4,5-T to private customers, closely monitored production activity, required Diamond to account for production and inventory levels, controlled access to the crucial starting ingredient, TCB, permitted TCB deliveries only for use in making Agent Orange, ordered Diamond to accelerate deliveries of Agent Orange, and acted to increase the Newark Plant's production capacity by helping to obtain, and assigning a priority rating to, material and equipment needed for the Plant expansion. It closely supervised production and tested the Agent Orange delivered to ensure that it complied with specifications.

Isaacson v. Dow Chemical Co., 304 F. Supp. 2d 404, 426 (E.D.N.Y. 2004) (Weinstein, J.). *See also Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996); Brief For Defendants-Appellees on the Government Contractor Defense, *Stephenson v. Dow Chemical Co.* 51-55 (2d Cir. No. 05-1760-cv).

The district court in *Isaacson* noted that the above facts "parallel those submitted on behalf of other defendants, and the affidavit and documents submitted on behalf of all defendants." 304 F. Supp. 2d at 424.

The record amply discloses, furthermore, that the government was well aware of the then-available knowledge of the health risks associated with Agent Orange. Health hazards of the chemicals in question were investigated during the 1950's and early 1960's by the U.S. Public Health Service; the Army Chemical Corps Chemical Warfare Laboratories located at Edgewood Arsenal, Maryland; and the Environmental Health Laboratory of the U.S. Air Force. *Isaacson*, 304 F. Supp. 2d at 426-29. The government received assessments of the hazards from other institutions, as well. "Knowledge possessed by the government – albeit somewhat speculative as to the actual hazard, if any, posed by Agent Orange as it was used in Vietnam – was far greater than that possessed by defendants. There was never a period when defendants possessed as much knowledge as the government of the dioxin content of Agent Orange and of its dangers as it was used in Vietnam." *Id*. at 429.

If plaintiffs' international law claims were permitted to proceed despite these facts, the effect would be not only to force defense contractors to second-guess the lawfulness of the military's operational decisions, but to do so while wondering how academic commentators and judges may view those decisions ten, twenty, or even forty years later. This deterrent effect could well create significant difficulties for the military's processes of weapons development and acquisition. Through the FTCA, Congress has indicated that the military's decisions about battlefield

operations should not be subject to collateral attack in civil proceedings; through the Defense Production Act, Congress has underscored the necessity of the cooperation of defense contractors in carrying out the Defense Department's procurement decisions. Where, as here, the defendants have fulfilled the Defense Department's detailed procurement requirements during wartime in furtherance of a military policy approved at the highest levels of the government, a federal common law rule allowing monetary liability on the basis of that cooperation would be imprudent in the extreme.

CONCLUSION

Amicus respectfully urges the Court to affirm the judgment below.

Respectfully submitted,

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February 13, 2006

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 2,922 words, excluding the parts of the brief exempted by the Rule.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 with Times New Roman in 14 point.

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David Price

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of February, 2006, I caused the original and ten copies of the foregoing brief to be deposited in the U.S. Mail, first-class postage pre-paid, addressed to the Clerk of the Court, and I caused two copies to be deposited in the U.S. Mail, first-class postage pre-paid, addressed to each of the following:

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