

05-1953-CV

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Vietnam Association for Victims of Agent Orange, Phan Thi Phi Phi, Nguyen Van Quy, individually and as parent and natural guardian of Nguyen Quang Trung, Thuy Nguyen Thi Nga, his children, Duong Quynh Hoa, individually and as administratrix of the Estate of her deceased child, Huynh Trung Son,
(caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLEES

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(caption continued)

on behalf of themselves and others similarly situated, Nguyen Thang Loi, Tong Thi Tu, Nguyen Long Van, Nguyen Thi Thoi, Nguyen Minh Chau, Nguyen Thi Nham, Le Thi Vinh, Nguyen Thi Hoa, individually and as parent and natural guardian of Vo Thanh Tuan Anh, her child, Vo Thanh Hai, Nguyen Thi Thu, individually and as parent and natural guardian of Nguyen Son Linh and Nguyen Son Tra, her children, Dang Thi Hong Nhut, Nguyen Dinh Thanh, Nguyen Muoi, Ho Thi Le, individually and as administratrix of the estate of her deceased husband Ho Xuan Bat, Ho Kan Hai, individually and as parent and natural guardian of Nguyen Van Hoang, her child, and Vu Thi Loan,
Plaintiffs-Appellants,

v.

Dow Chemical Company, Monsanto Company, Monsanto Chemical Co., Hercules Inc., Occidental Chemical Corporation, Thompson Hayward Chemical Co., Harcros Chemicals, Inc., Uniroyal Chemical Co. Inc, Uniroyal, Inc., Uniroyal Chemical Holding Company, Uniroyal Chemical Acquisition Corporation, C.D.U. Holding Inc., Diamond Shamrock Agricultural Chemicals, Inc., Diamond Shamrock Chemical Company, also known as Diamond Shamrock Refining & Marketing Co., also known as Occidental Electro Chemical Corp., also known as Maxus Energy Corp., also known as Occidental Chemical Corp., also known as Diamond Shamro, Diamond Shamrock Chemical, also known as Diamond Shamrock Refining & Marketing Co., also known as Occidental Electro Chemical Corp., also known as Maxus Energy Corp., also known as Occidental Chemical Corp., also known as Diamond Shamro, Diamond Shamrock Refining and Marketing Company, Occidental Electrochemicals Corporation, Hooker Chemical Corporation, Hooker Chemical Far East Corporation, Hooker Chemicals & Plastics Corp., Chemical Land Holdings, Inc., T-H Agriculture & Nutrition Co., Thompson Chemical Corporation, also known as Thompson Chemical Corp., Riverdale Chemical Company,
Defendants-Appellees,

Pharmacia Corp., formerly known as Monsanto Co., Ultramar Diamond Shamrock Corporation, Maxus Energy Corp., Diamond Alkali Company, Ansul Incorporated, American Home Products Corporation, formerly known as American Home Products, Wyeth, Inc., Hoffman-Taff Chemicals, Inc., Elementis Chemicals, Inc., United States Rubber Company, Inc., Syntex Agribusiness, Inc., ABC Chemical Companies 1-50, Syntex Laboratories, Inc., Valero Energy Corporation, doing business as Valero Marketing and Supply Company,
Defendants.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-1953-CV

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

v.

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

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INTRODUCTION AND STATEMENT OF INTEREST

Plaintiffs in this action are former Viet Cong and North Vietnamese soldiers and Vietnamese citizens. They seek recovery for injuries allegedly sustained as a result of military operations during the Vietnam War, in which the United States used Agent Orange and similar herbicides for strategic defoliation and enemy crop destruction. The herbicide operations were undertaken by direct order of the President and, in later years, the U.S. Ambassador to Vietnam. They were based

on the Executive's determination that such military tactics were necessary to our forces' defense and were fully consistent with international law.

Plaintiffs cannot sue the United States for alleged harms arising from military tactics on a foreign battlefield. Nor can they properly maintain this action against the military contractors who provided the herbicides for use in Vietnam.

As the district court correctly ruled, the military's use of herbicides in the Vietnam War for defoliation and enemy crop destruction did not violate any binding obligation of international law. The court was mistaken, however, in holding that the questions raised by the plaintiffs' claims are subject to judicial review at all. Although plaintiffs seek recovery from private defendants, their suit directly challenges the judgment of the Commander in Chief regarding battlefield tactics in a foreign war. A court trying the case would be required to probe the motives, reasoning, and judgment behind the military decision to use herbicides. It is difficult to posit issues more plainly within the scope of the political question doctrine.

The plaintiffs' claims are non-justiciable for a second and independent reason: the plaintiffs lack a private right of action under the Alien Tort Statute, 28 U.S.C. § 1350. The international-law norms on which the plaintiffs rely — in particular, prohibitions on means of warfare that cause superfluous injury or

unnecessary suffering in relation to the anticipated military benefit — are too indefinite to support an implied cause of action under the ATS. Nor is there an established international-law norm of civil aiding-and-abetting liability. The significant harms that would result from permitting private claimants to challenge the Commander in Chief’s approval of herbicide operations in Vietnam, including judicial intrusion on an area of core Executive power, also weigh heavily against the recognition of such a cause of action as a matter of federal common law.

Wartime military judgments cannot be the basis of post hoc actions against the United States and also cannot be invoked against the private contractors on which the government relies. A contrary rule would gravely impair the conduct of military operations and jeopardize this country’s security. For these reasons, the United States participates in this case as *amicus curiae*.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the political question doctrine bars a court from reviewing the Executive’s military judgment that the use of herbicides for defoliation and enemy crop destruction was a necessary and lawful means of war in Vietnam.

2. Whether the Alien Tort Statute authorizes an implied private right of action to challenge the manufacture and sale of herbicides to the United States military for wartime defoliation and enemy crop destruction.

3. Whether the plaintiffs' claims against the herbicide manufactures state a violation of customary international law.

4. Whether the government-contractor defense applies to customary international-law claims brought under the Alien Tort Statute.

BACKGROUND

1. Plaintiffs are former Viet Cong and North Vietnamese soldiers who fought against the United States military in the Vietnam War, and other Vietnamese civilians. They purport to represent 4 million similarly situated persons. They seek recovery for injuries alleged to arise from the United States military's use of Agent Orange and similar chemical herbicides to defoliate military bases, transportation corridors, and other crucial territory, and to destroy enemy crops. In earlier decisions, this Court affirmed the dismissal of claims against the United States brought by U.S. servicemen and their families and by other civilians for injuries allegedly resulting from exposure to Agent Orange in Vietnam. *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 194 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 210 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). These cases recount some of the relevant history, which we also set out briefly here.

The United States military began using herbicides in Vietnam in 1961. *See* A. 47; *see generally* William A. Buckingham, Jr., *Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia 1961-1971* 20-23 (U.S. Air Force, Office of Air Force History, 1982) (“Operation Ranch Hand”). The Department of Defense sought approval to clear vegetation from crucial transportation arteries, in order to forestall ambushes and to allow freer troop movement. *See* Operation Ranch Hand, at 20-21. President Kennedy personally authorized a plan of “selective and carefully controlled” defoliation operations and approved defoliation targets. *See id.* at 21; *see also id.* at 31, 43-44, 58-59. The President subsequently approved defoliation operations around military bases and airfields, in order to inhibit surprise attacks by enemy soldiers and, “in conjunction with military field operations, to spray defoliants in areas wherein attainment of a military objective would be significantly eased.” *Id.* at 66-67.

In 1962, President Kennedy authorized the use of Agent Orange to destroy crops grown by Viet Cong forces. *See* Operation Ranch Hand, at 76-78. In order to improve military flexibility and responsiveness, the President delegated the authority to approve defoliation and crop destruction operations (within strict guidelines established by the President) to the U.S. Ambassador to Vietnam. *See* Operation Ranch Hand, at 85-86. A subsequent evaluation of herbicide operations

in Vietnam rated the military value of defoliation and crop destruction as high. *Id.* at 88-89.

As the military situation in Vietnam deteriorated, expanded use of Agent Orange was recommended by the Joint Chiefs of Staff, and approved by the U.S. Ambassador. *See Operation Ranch Hand*, at 103-104. Herbicides were used to destroy crops and vegetation in areas secured by the Viet Cong, *see id.* at 109-111, 113, and researchers found substantial evidence that herbicide use had adversely affected enemy readiness and had increased the security of U.S. and South-Vietnamese installations and lines of communication. *See id.* at 119-120. A 1968 review of the herbicide program found that the military benefits of herbicide use outweighed its harms, *see id.* at 145-164, and that herbicides permitted the U.S. military to employ its technological superiority to save a “large number of American and Allied lives.” *Id.* at 146.

Herbicide use by the U.S. military in the Vietnam War was phased out between 1967 and 1971. *See Operation Ranch Hand*, at 129-130, 160-161, 171-172. By late 1970, crop destruction operations in Vietnam had been discontinued, although the President ordered continued use of herbicides for defoliation around U.S. military bases. *See id.* at 181-183. Following the 1971 withdrawal of U.S.

forces from Vietnam, Vietnamese forces conducted spraying operations with the remaining stores of herbicides.

2. Defendants in this case are chemical companies that manufactured and supplied Agent Orange and other herbicides under fixed-price contracts with the United States military. The plaintiffs allege that the companies were aware that the herbicides would be used for defoliation and crop destruction in Vietnam. The plaintiffs also allege that the companies were aware that one byproduct of the herbicides, dioxin, could be harmful to plants, some animals, and potentially humans when sprayed in high concentrations. In earlier litigation against the United States arising from the use of Agent Orange, this Court concluded that both the government and the private companies that manufactured Agent Orange possessed information that dioxin posed some danger to humans — with “the information possessed by the government at pertinent times * * * as great as, or greater than, that possessed by the chemical companies.” *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 187, 193 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The Court held, however, that the known risks at the time that Agent Orange was used in Vietnam were limited to chloracne and certain forms of liver damage, and did not extend to the numerous injuries now claimed by individuals exposed to Agent Orange. *Id.* This Court also noted that the use of Agent Orange

by the U.S. military “to deny enemy forces the benefits of jungle concealment along transportation and power lines and near friendly base areas,” had saved “many, perhaps thousands of, lives.” *Id.*

3. In approving military use of herbicides in the Vietnam War, the United States concluded that herbicide defoliation and destruction of enemy crops did not violate international law; our government has never departed from that view.

In 1961, when President Kennedy was faced with the decision whether to approve herbicide defoliation operations, he was informed by Secretary of State Dean Rusk that “[t]he use of defoliant does not violate any rule of international law concerning chemical warfare and is an accepted tactic of war.” *See* Nov. 24, 1961, Memorandum from Secretary of State to President, J.A. 1339. As Rusk noted, the British had recently used herbicides in armed conflict in Malaya for the purpose of enemy crop destruction. J.A. 1339.

During the relevant period of military use of herbicides in Vietnam, the United States had not yet ratified the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. Furthermore, it was and remains the position of the United States that neither the Protocol nor any other norm of international law prohibited

the use of chemical herbicides in Vietnam for defoliation and enemy crop destruction. When the President submitted the Protocol to the Senate for approval in 1970, he explicitly noted the “understanding” of the United States that the Protocol “does not prohibit the use in war of * * * chemical herbicides.” Message from President of United States Transmitting 1925 Geneva Protocol, 91st Cong., 2d Sess. (Aug. 19, 1970), J.A. 1399. Both before and after the United States’ ratification of the Protocol in 1975, representatives of the Executive Branch explicitly affirmed that the use of chemical herbicides was not unlawful under the Protocol and that herbicide use in Vietnam had been an appropriate and life-saving means of war.¹

¹ See, e.g., Hearings before Subcommittee on National Security Policy and Scientific Developments of House Committee on Foreign Affairs, 93d Cong., 2d Sess., at 150 (May 9, 1974) (statement of Amos Jordan, Acting Assistant Secretary for International Security Affairs, Department of Defense) (noting report by Secretary of State in 1970 that “It is the United States’ understanding of the Protocol that it does not prohibit the use in war of * * * chemical herbicides,” and stating that “[t]his position has not changed.”), J.A. 1348; Hearings, at 150, 154 (statement of Amos Jordan, noting that herbicide use was an “appropriate” means of war that “ha[s] saved American and Allied lives in combat and could do so again in future conflict situations”), J.A. 1348, 1352; Hearings before Subcommittee on National Security Policy and Scientific Developments of House Committee on Foreign Affairs, 91st Cong., 1st Sess., at 224 (Dec. 19, 1969) (statement of Rear Adm. William Lemos, Director of Policy Plans and National Security Council Affairs, Office, Assist. Secretary of Defense for International Security Affairs) (describing United States’s consistent position that use of herbicides does not violate 1925 Geneva Protocol), J.A. 1372; 1969 Yearbook of
(continued...)

Following the United States' ratification of the 1925 Geneva Protocol, the President renounced "as a matter of national policy" the "first use of herbicides in war," but reaffirmed the position of the United States that such use did not violate any binding obligation of international law. *See* Presidential Statement on Geneva Protocol of 1925 and the Biological Weapons Convention, Jan. 22, 1975, J.A. 1403. In the years since, the United States has never modified its stance on the legality of herbicide operations in the Vietnam War.

4. In 1995, the United States and Vietnam entered into an agreement to settle war claims arising from expropriation and other measures directed against property. Socialist Republic of Vietnam-United States: Agreement Concerning the Settlement of Certain Property Claims, Jan. 28, 1995, J.A. 1406-1408. This agreement did not address claims for personal injury or environmental harm.

In 2002, the United States and Vietnam held a joint conference on the health and environmental effects of Agent Orange and dioxin, and subsequently agreed to conduct joint research on the effects on humans of prolonged exposure to dioxin and the environmental consequences of dioxin residue. *See* Memorandum of

¹(...continued)

United Nations, Vol. 23, at 28 (statement of United States that "[c]hemical herbicides, * * * which were unknown in 1925," are not included within Geneva Protocol's ban), J.A. 1394.

Understanding between Vietnam and the United States, Mar. 10, 2002, J.A. 1430-1433. No agreement has ever been reached on claims by Vietnam or its nationals arising out of the United States military's wartime use of herbicides.

5. The plaintiffs brought this class action on behalf of Vietnamese Agent Orange victims and their families against chemical companies that manufactured and sold herbicides to the United States military for use during the Vietnam War. The plaintiffs have brought tort claims as well as international-law claims;² they seek monetary damages, disgorgement of all profits from sale of the herbicides, and injunctive relief requiring the defendants to provide environmental remediation of all contaminated areas in Vietnam.

The district court dismissed the plaintiffs' claims in a sweeping opinion that began with a claim of authority to sit as a "quasi international tribunal[]" to enforce international-human-rights law, which the district court suggested could "supplement[] national law, superseding and supplying the deficiencies" of our domestic laws and Constitution. 373 F. Supp. 2d 7, 17 (E.D.N.Y. 2005)

² In their complaint, the plaintiffs brought international-law claims against the defendants for war crimes, genocide, crimes against humanity, and torture. They have abandoned most of those claims on appeal, where they now argue only that the defendants (and, allegedly, the U.S. military) violated international-law norms against "poison and wartime tactics causing unnecessary devastation not related to military necessity." Pl. Br. 75 n.21.

(quotation marks and citation omitted). Consistent with this expansive characterization of its role, the district court rejected threshold arguments presented by the government and the defendants challenging the court's authority to adjudicate on the merits the plaintiffs' claims under international law.

The district court ultimately agreed, however, that the plaintiffs' claims failed on their merits. The district court held that the plaintiffs' domestic tort claims were barred by the government-contractor defense. 373 F. Supp. 2d at 16-17. Although the district court refused to apply this defense to the plaintiffs' international-law claims, *id.* at 91, the court held that international law did not prohibit the wartime use of herbicides for defoliation or enemy crop destruction. *Id.* at 105-145. As the court recognized, “[n]either a treaty to which the United States was a party, nor a statute, nor a binding declaration of the United States, nor a rule of international or human rights law applied to limit spraying of herbicides by the United States in Vietnam during the period up to April of 1975.” *Id.* at 105.

In holding that the plaintiffs failed to establish a violation of international law, the district court specifically addressed the plaintiffs' claim that the herbicide spraying violated customary international norms of “military necessity or proportionality,” under which “loss of life and damage to property must not be out of proportion to the military advantage to be gained.” 373 F. Supp. 2d at 136

(quoting U.S. Dep't of the Army, Field Manual No. 27-10, The Law of Land Warfare ¶ 41 (1956)). Although the district court recognized that the proportionality norm was imprecise and difficult to apply in practice, the court nonetheless held that it could support a federal common-law claim under the Alien Tort Statute. 373 F. Supp. 2d at 136-138. In this litigation, however, the court held that the plaintiffs' claim that "the United States may have properly used herbicides in some situations for legitimate military purposes, but that it used too much of them in too many places," did not establish a valid claim. *Id.* at 138.

ARGUMENT

I. THE POLITICAL QUESTION DOCTRINE BARS A COURT FROM SECOND-GUESSING THE EXECUTIVE'S MILITARY JUDGMENT THAT HERBICIDE USE WAS A NECESSARY AND LAWFUL MEANS OF WAR IN VIETNAM.

Although the plaintiffs seek recovery from military contractors rather than from the United States directly, their lawsuit is a direct challenge to the decision of the United States military, with the explicit sanction of the Commander in Chief, to employ Agent Orange and other herbicides in the course of fighting a foreign war. The plaintiffs seek a judicial declaration that defoliation and enemy crop destruction were not necessary components of our battlefield strategy, based on the plaintiffs' assertion that the tactical benefits gained and lives saved from

herbicide use were outweighed by the long-term health consequences for enemy soldiers and others and the environmental effects of exposure. *See* Pl. Br. 14, 38-39; J.A. 89-90, 101. In essence, the plaintiffs ask this Court to award wartime reparations to enemy soldiers and others exposed to herbicides in the battlefield, relief that Vietnam failed to obtain in post-war diplomatic negotiations with our country.

The district court correctly held that the plaintiffs' international-law claims fail on the merits because the U.S. military's use of herbicides in the Vietnam War was fully consistent with international law. The court erred in even addressing the issue, however, because those claims raise questions that are wholly unsuited for judicial determination — as this Court has already recognized — and would embroil the district court in judgments that are inherently political in nature. In *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court identified six factors that might render a case nonjusticiable:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already

made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. Although the presence of even *one* of those factors can render a claim non-justiciable, *see, e.g., id.* at 217; *Whiteman v. Dorotheum GmbH & Co*, 431 F.3d 57, 72 (2d Cir. 2005), *all* of the factors are implicated by the plaintiffs' international-law claims.

A. The legal and policy questions raised by the plaintiffs' international-law claims — in particular, whether the United States' use of Agent Orange and other herbicides in the Vietnam War was justified by military necessity — are constitutionally committed to the political branches.

As a general matter, “[t]he conduct of the foreign relations of our Government is committed by the Constitution” to the political branches, and “the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.” *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005) (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918)).

Article II vests the President with exclusive power as Commander in Chief. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (acknowledging “broad powers of military commanders engaged in day-to-day fighting in a theater of war”); *DaCosta v. Laird*, 471 F.2d 1146, 1154 (2d Cir.

1973) (recognizing “Constitution’s specific textual commitment of decision-making responsibility in the area of military operations in a theatre of war to the President”). Any residual authority over military tactics rests in Congress, which is authorized “[t]o make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const., art. I, § 8; *see In re “Agent Orange,”* 818 F.2d at 198 (outlining Congress’ congressional authority in relation to President’s authorization of use of Agent Orange in Vietnam). “Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004).

The plaintiffs’ challenge to the military’s use of Agent Orange directly implicates this sphere of exclusive political-branch authority. Indeed, this Court has already recognized that the challenged decision to use Agent Orange as a weapon of war in Vietnam was made by President Kennedy acting as “Commander in Chief of the Armed Forces with decision-making responsibility in the area of military operations.” *In re “Agent Orange,”* 818 F.2d at 198 (quotation marks and citation omitted). In an analogous challenge to U.S. military action in Southeast Asia, this Court recognized that tactical decisions in a foreign war “are precisely the questions of fact involving military and diplomatic expertise

not vested in the judiciary.” *Holtzman v. Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974). The decision to use Agent Orange and other herbicides in fighting the Vietnam War is similarly nonjusticiable.

The district court mistakenly reasoned that the first *Baker v. Carr* factor was not implicated because federal courts are empowered to resolve international-law claims. 373 F. Supp.2d at 69-70 (citing U.S. Const., art. III, § 2). Under that rationale, however, *no* case would fall outside judicial cognizance, since the “judicial power” under Article III also extends to all cases arising under the Constitution or federal law. Here, despite the absence of any statute establishing a substantive standard for the military’s use of herbicides or creating a private cause of action for persons injured by herbicide use, the district court claimed authority to evaluate the Executive’s military judgments and to craft a remedy for alleged harms. While the review of a tort-law or international-law claim may be a judicial function, the choice of battlefield tactics is not.³ The decision that the military

³ Of course, the President may choose to limit his own discretion as Commander in Chief by entering into international agreements that restrict permissible methods and means of war. Even where the President has done so, however, there is a presumption that these agreements do not create judicially enforceable individual rights. *See, e.g., Hamdan v. Rumsfeld*, 415 F.3d 33, 38-39 (D.C. Cir. 2005), *cert. granted*, No. 05-184 (U.S. Nov. 7, 2005); *see also Johnson v. Eisentrager*, 339 U.S. 763, 789 & n.14 (1950); *Head Money Cases*, 112 U.S. 580, 598 (1884).

advantage gained by using herbicides to fight the Vietnam War outweighed anticipated harms is constitutionally committed to our Commander in Chief, not the courts.⁴

B. The plaintiffs' international-law claims also implicate the second and third factors of *Baker v. Carr* because they would require judgments as to the quantum of threat posed by the Viet Cong, the value of protecting U.S. and allied soldiers from harm, the best tactics to use in the face of enemy resistance, and the appropriate balance between risk to our soldiers and the safety and well-being of enemy soldiers and other people in enemy territory. These are quintessential policy determinations that are wholly outside judicial expertise.

Federal judges are “deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action.” *DaCosta*, 471 F.2d at 1155. There is

⁴ In finding the issues raised in this case to be justiciable, the district court relied on *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), and *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991). In those cases, however, the underlying question was whether non-state-actors' violent conduct violated international law or was tortious. *See Kadic*, 70 F.3d at 249 (torture claims against self-declared president of unrecognized Bosnian-Serb entity); *Klinghoffer*, 937 F.2d at 49 (tort claims against Palestinian Liberation Organization, where United States had not granted diplomatic recognition to Palestine). In *Kadic*, the United States specifically disclaimed application of the political question doctrine. 70 F.3d at 250. Neither decision implicated issues at the core of the political branches' constitutional authority.

no reasonable standard by which a court could second-guess the Executive's decision that particular tactical decisions were commensurate with military objectives.

Furthermore, a district court adjudicating the plaintiffs' claims would have to evaluate the use of herbicides not by reference to a single incident, but with regard to a decade-long campaign. The President authorized the use of herbicides in Vietnam "to protect United States military and civilian personnel from a grave risk of personal injury or death." *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 204, 206 (2d Cir. 1987) (quotation marks omitted) (noting that, "[t]he greater the scope of a military decision and the more far-reaching its effect, the more it assumes the aspects of a political determination"); *Schneider*, 412 F.3d at 197 (decisions regarding the need for covert military action are "not the stuff of adjudication, but of policymaking"). Our judicial system is simply not equipped to handle challenges brought by millions of Vietnamese dissatisfied with the Executive's wartime judgment as to the proper balancing of competing military goals. *See In re "Agent Orange,"* 818 F.2d at 206-207.

Indeed, it is difficult to imagine how a federal court could actually try the plaintiffs' claims. A court would be required to probe the motives, reasoning, and judgment behind the President's orders approving the use of Agent Orange and

selecting targets for defoliation. High-level military officials would have to testify regarding the number of soldiers dying because of heavy ground cover, the strength of enemy forces, and a host of other military exigencies. The court would have to evaluate these decisions, in order to determine whether the use of herbicides was justified by the danger posed to our forces. The political question doctrine forbids such an intrusion on the President's exercise of core constitutional powers as Commander in Chief. *See, e.g., El Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1363-1367 (Fed. Cir. 2004) (refusing to permit challenge to President's decision to bomb Sudanese manufacturing plant believed to be producing nerve gas for al Qaeda), *cert. denied*, 125 S. Ct. 2963 (2005).

The district court suggested that no concerns regarding judicially manageable standards or judicial competence were implicated because the court could refer to customary international law to evaluate the military's conduct. 373 F. Supp. 2d at 70-71. Whether couched in terms of customary international law, tort law, or some other source of law, however, "courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life." *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998); *see also Schneider*, 412 F.3d at 197 ("recasting foreign policy and national security questions in tort terms")

does not provide judicially manageable standards for review). Faced with a similar challenge to U.S. military operations in Vietnam, which were alleged to constitute a unilateral escalation of hostilities rather than a foreseeable continuation of a congressionally authorized war, this Court held that it was “powerless” to second-guess “the President’s view that the mining of North Vietnam’s harbors was necessary to preserve the lives of American soldiers in South Vietnam and to bring the war to a close.” *DaCosta*, 471 F.2d at 1155. Here, too, the plaintiffs’ claims would require a court to undertake policy judgments that it has neither manageable standards nor expertise to make.

C. A judicial holding that the United States military’s herbicide use in Vietnam violated international law would be flatly at odds with the Commander in Chief’s determination that herbicide defoliation and enemy crop destruction were necessary and lawful means by which to wage the war. Subjecting the Executive’s battlefield decisions to judicial scrutiny could impose extraordinary damage on our national security and the safety of our armed forces, as well as our foreign relations. And a ruling in the plaintiffs’ favor would conflict with the view of the Executive Branch during the Vietnam War that the use of herbicides for defoliation and enemy crop destruction did not violate any binding obligation of

international law. The plaintiffs' claims thus implicate the fourth, fifth, and sixth factors of *Baker v. Carr*. See, e.g., *Schneider*, 412 F.3d at 198.

The district court held that a judicial determination that the President had violated international law would not indicate a lack of respect for or conflict with an Executive decision, because it would be akin to judicial invalidation of an Act of Congress. That reasoning ignores the nature of the underlying dispute, and the specific conduct that the Court is being asked to evaluate. We are aware of no other case in which a federal court has evaluated the military judgment of the Commander in Chief's regarding whether to employ a particular means or method of warfare in a foreign war. The court has been asked to do so, furthermore, with regard to conduct that the Commander in Chief explicitly found to be permitted under international law. Such an inquiry would be fraught with practical dangers and the possibility for great embarrassment in our foreign affairs. For these reasons as well, the plaintiffs' claims should have been dismissed as nonjusticiable.

II. THE ALIEN TORT STATUTE DOES NOT AUTHORIZE A PRIVATE RIGHT OF ACTION BASED ON THE PROVISION OF AID AND ASSISTANCE TO THE U.S. MILITARY'S HERBICIDE OPERATIONS IN VIETNAM.

Even if the political question doctrine did not bar adjudication of the plaintiffs' international-law claims, those claims would nonetheless be nonjusticiable because the plaintiffs lack a private cause of action under domestic law. The plaintiffs assert that the defendants are liable because they provided aid and assistance to the U.S. military's use of Agent Orange — conduct that is alleged to have violated prohibitions imposed by customary international law on the use of poisons or other wartime tactics causing unnecessary devastation not related to military necessity. *See* Pl. Br. 75 & n.21. But no treaty or other international agreement to which the United States is a party creates a private right of action for this alleged wrongdoing. The plaintiffs' claims are cognizable, therefore, only if the district court was authorized by the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to recognize this alleged violation of the laws of nations as a federal common-law claim. *See Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

The Supreme Court held in *Sosa* that a court's limited authority under the ATS to recognize private causes of action for violation of international law must

be exercised with “great caution” and “war[iness].” *Id.* at 728, 730. Not only is the creation of causes of action “better left to legislative judgment” in most instances, but private enforcement of international-law norms pursuant to the ATS could have serious implications for the political branches’ conduct of foreign affairs. *Id.* at 727-728. A necessary (but not sufficient) condition to recognition under the ATS is that the claim be based on a legal “norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms,” *i.e.*, “violations of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 725, 732. “[T]he determination whether a norm is sufficiently definite to support a cause of action” must also involve a “judgment about the practical consequences of making that cause available to litigants in the federal courts.” *Id.* at 732-733.

The plaintiffs’ claims fail to meet these standards. The U.S. military’s use of herbicides in Vietnam for defoliation and enemy crop destruction did not violate any concrete and clearly defined norm of international law. Nor is there a generally accepted principle of international law that imposes civil liability for aiding and abetting. Recognizing these norms as the basis for a private cause of action could have significant adverse consequences for the Executive’s conduct of foreign affairs and national security — weighing heavily against an inference that

Congress intended to permit private litigants to enforce those norms. Indeed, it defies imagination that Congress would have intended to authorize a private action to challenge the President's authorization of herbicide use in Vietnam based on his explicit determination that such conduct was lawful.

A. The Plaintiffs' Claims Rely On Ill-Defined And Innovative Legal Norms That Do Not Support An Implied Cause Of Action Under The ATS.

1. The plaintiffs argue that the U.S. military's use of herbicides was unlawful because the harm to persons and property caused by herbicide use was disproportionate to the anticipated military advantage. *See, e.g.*, Pl. Br. 50-53; *cf.* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Art. 23(e), (g) (Oct. 18, 1907) (prohibiting use of "arms, projectiles, or material calculated to cause unnecessary suffering," as well as destruction or seizure of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war").

The international-law norms that the plaintiffs invoke lack the specificity required for an implied cause of action under *Sosa*. In order to adjudicate the plaintiffs' claims, a court would be required to balance the U.S. military's interests in protecting our forces from ambush or other attack, and in weakening enemy forces, with the anticipated harms that might be caused by exposure to herbicides.

Even apart from the significant uncertainty about the effects of Agent Orange and other herbicides, this balancing would be inherently subjective since it would involve unlike quantities and values — *e.g.*, the long-term health of civilians or enemy soldiers exposed to herbicides, with the death of U.S. forces and the accomplishment of military objectives. This open-ended assessment is a far cry from the clearly-defined and carefully cabined set of norms discussed approvingly in *Sosa*. See 542 U.S. at 720, 731-732.

The plaintiffs also claim that the U.S. military's use of herbicides in Vietnam violated international prohibitions on the use of poisons. Any categorical ban on the use of poisons under international law is limited to weapons used for the primary and intended effect of causing injury or death. See Def. Br. 40-44 (citing sources).⁵ The district court properly rejected this norm as a basis for an

⁵ Prior legal opinions by U.S. officials on this issue are fully consistent with this understanding that international-law prohibitions on poisons apply to weapons used for the purpose of causing harm or death to the persons against whom the weapons are employed. See Letter from J. Fred Buzhardt, General Counsel, Department of Defense, to Hon. J.W. Fulbright, Apr. 5, 1971 (noting that poisons are banned as weapons “*calculated* to cause unnecessary suffering”), J.A. 1487; Memorandum from Myron C. Cramer, Judge Advocate General, for the Secretary of War, SPJGW 1945/164, March 1945 (noting distinction between herbicides used for defoliation and enemy crop destruction and “the employment of poisonous and deleterious gases *against enemy human beings*”), J.A. 1490. Chemicals used for other purposes, such as defoliation or enemy crop destruction, might still violate international law if there is no valid military objective for which
(continued...)

implied private cause of action, based on the undisputed fact that the United States military used Agent Orange and other herbicides for the purpose of defoliation and enemy crop destruction, *not* to cause harm to enemy soldiers or others exposed to the chemicals. *See also In re “Agent Orange,”* 818 F.2d at 193 (noting United States’ limited knowledge during the Vietnam War regarding potential harms posed by exposure to Agent Orange). Accordingly, the international-law norm against the use of poisons cannot be the basis for an implied private cause of action to pursue the plaintiffs’ claims.

2. Not only do the plaintiffs’ claims depend on a highly generalized norm of proportionality, but they also require this Court to accept a novel theory of civil aiding-and-abetting liability. *See, e.g.,* J.A. 55 (alleging that private defendants are liable because they produced and supplied herbicides to military “knowing they would be used in herbicidal/chemical warfare, in violation of international law”).

⁵(...continued)

they are used or if they impose unnecessary or superfluous injury in relation to the military advantage anticipated. As we have explained, however, these international-law norms of military necessity and proportionality, at least as applied to the U.S. military’s use of herbicides in Vietnam, lack the specificity and clear definition needed for an implied private cause of action under *Sosa*.

An aiding-and-abetting claim is not within the plain terms of the ATS, which applies to a “civil action by an alien for a tort only, committed in violation of the law of nations.” 28 U.S.C. § 1350. Such a claim is brought not against a party who has “committed” a tort in violation of international law, but against a third party who allegedly provided aid and assistance to the tortfeasor.

Nor does the plaintiffs’ aiding-and-abetting claim satisfy *Sosa*’s requirement of being based on an international-law norm of universal or near-universal acceptance. Virtually the only international source even to mention non-criminal aiding-and-abetting liability⁶ is a draft article by the International Law Commission. *See* United Nations General Assembly Resolution 56/83 & Annex, art. 16, adopted Jan. 28, 2002. That draft article has no relevance here, because it extends liability only to States that aid and abet the wrongful act of another State.

Notably, *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), establishes that a court may not imply a civil cause of action for aiding and abetting based solely on the existence of criminal aiding-and-abetting liability. *Id.*

⁶ The charters of certain modern international criminal tribunals have incorporated criminal aiding-and-abetting liability. *See* Nuremberg International Military Control Council Order No. 10; Statute of the International Criminal Tribunal for the Former Yugoslavia (1993, updated 2004), art. 7(1); Statute of the International Criminal Tribunal for Rwanda (1994), art. 6(1); Rome Statute of the International Criminal Court (1998).

at 181-182. The holding of that case is equally applicable to claims brought under the ATS on a theory of aiding and abetting a violation of customary international law. No established principle of customary international law supports the plaintiffs' attempted "vast expansion" of civil liability to aiders and abettors. *Central Bank*, 511 U.S. at 183. Nor is there any indication that Congress intended, in providing federal courts "implicit sanction to entertain the handful of international law *cum* common law claims," *Sosa*, 542 U.S. at 712, to include aiding-and-abetting liability.

Finally, it is significant that, in order to adjudicate a civil aiding-and-abetting claim based on an asserted violation of international law, a federal court would be required to confront a host of issues not resolved or even addressed by international law: the allocation of liability among multiple potential tortfeasors; the standards of causation applicable to an aider and abettor; the remedies available for harms caused; and whether it is appropriate to create a private cause of action against an alleged aider and abettor in circumstances where the primary tortfeasor is immune from suit. This broad exercise of lawmaking is a far cry from the cautious and limited steps permitted under the ATS by *Sosa*.

B. The Significant Harms That Would Result From Permitting Private Challenges To Military Judgments And The Provision Of Aid And Assistance To The Military Weigh Decisively Against Judicial Recognition Of An Implied Cause Of Action.

1. The practical consequences of permitting litigants to bring private claims to adjudicate the need for and harm imposed by military operations would be colossal. Virtually any military action taken by the United States could be challenged in federal court at the behest of an injured party or even an enemy soldier. Federal courts would be invited to relive military campaigns and to evaluate whether combat decisions, often made in the heat of battle, were justified with the benefit of hindsight. *Cf. Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (“It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts * * *.”). Federal courts, rather than post-war diplomatic negotiations, would become the forum of choice for claims to war reparations.

Judicial recognition of an implied private cause of action to challenge military action as unnecessarily harmful would also constitute a significant affront to the political branches. The military action that the plaintiffs challenge was undertaken at the order of the President, based on his explicit determination that

herbicide use was lawful. Notably, Congress acquiesced fully in that decision, enacting multiple appropriations bills to fund ongoing herbicide operations in Vietnam. *See, e.g.*, S. Rep. No. 91-1016, at 85-87 (1970). Congress surely would not have intended to permit a private right of action to challenge the President’s decision, with congressional authorization, that our foreign policy and national security interests were best-served by the use of herbicides as a weapon of war. *See Sosa*, 542 U.S. at 724, 733.

As the Supreme Court recognized in *Sosa*, courts considering whether to recognize claims under ATS should be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” 542 U.S. at 727. Given the significant practical harms to the political branches’ conduct of foreign affairs and the conduct of military action abroad, and the improbability that Congress would have intended to authorize private challenges to political-branch actions in this context, a court should decline to recognize the implied private cause of action that the plaintiffs invoke.

Wholly apart from the ATS-specific limitations recognized in *Sosa*, furthermore, general principles of statutory construction weigh against interpreting the ATS to authorize a federal common-law cause of action arising out of the U.S. military’s use of herbicides in the Vietnam War. Before countenancing an

interpretation of federal law that intrudes so substantially on the conduct of military and national security affairs by the Executive, a court should require clear evidence of Congress' intent to provide for such review. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529-530 (1988); *cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989) (court should be reluctant to interpret a federal statute in a manner that raises constitutional concerns, with reluctance "especially great" where concerns relate to "the relative powers of coordinate branches of government").

In this regard, the amorphous nature of the international-law norms that the plaintiffs invoke is particularly troubling, since a court seeking to adjudicate the plaintiffs' allegation that the U.S. military caused unnecessary harm by its use of Agent Orange would have no concrete standards by which to review the Executive's military judgments regarding the need for military action, the proper balance between the security of our forces and potential harm to enemy forces and others, and similar policy determinations. Absent clear evidence of Congress' intent to create such an unprecedented and extraordinary cause of action, a court

should not interpret the ATS to impinge so substantially on the President's core authority as Commander in Chief.⁷

2. Recognizing an implied cause of action against military contractors for aiding and abetting the alleged war crimes of the United States military could hinder our nation's ability to conduct war and, ultimately, endanger the lives of U.S. and allied military personnel. Uncertainty about potential liability would deter businesses from producing military goods — particularly weapons of war — with a corresponding increase in military procurement costs and a decrease in combat-readiness. Permitting a claim for aiding-and-abetting liability would be particularly anomalous here, where the defendants would have had no basis for determining whether the use of herbicides for defoliation and enemy crop destruction was justified by military exigency.

Aiding and abetting liability could have serious adverse consequences in other contexts as well. As the United States recently explained as *amicus curiae* in

⁷ Given the defendants' failure to challenge it on appeal, this Court need not review the correctness of the district court's holding that the President's approval of herbicide operations in Vietnam, based on his explicit determination as to their lawfulness, did not constitute a controlling executive act that displaced customary international law as the rule of decision for U.S. Courts. The United States notes our opposition, however, to the district court's holding that only a formally adopted Executive act can have that effect, even in the context of military operations.

Khulumani v. Barclay National Bank Ltd., Nos. 05-2141-cv, 05-2326-cv (2d Cir. argued Jan. 23, 2006), in which the plaintiffs sued companies for doing business with the apartheid-era government in South Africa, permitting private claims for aiding and abetting could impede the United States’ ability to pursue a foreign policy of constructive engagement as a means of advancing human rights. Furthermore, by enabling plaintiffs to challenge the conduct of a foreign government by asserting claims against private defendants alleged to have aided and abetting their abuses — although a suit directly against the foreign government would typically be barred by the Foreign Sovereign Immunities Act, *see* 28 U.S.C. § 1605(a)(5) — an aiding-and-abetting rule could cause serious diplomatic friction. These harms are exacerbated in the civil context, which lacks the significant checks imposed by prosecutorial judgment in the context of criminal aiding-and-abetting liability. These consequences, too, weigh strongly against recognition of an implied cause of action for aiding and abetting an alleged violation of the proportionality norm by the U.S. military.

III. THE PLAINTIFFS HAVE NOT STATED A VALID CLAIM UNDER INTERNATIONAL LAW.

As we have discussed, the district court erred in exercising jurisdiction over the plaintiffs’ challenge to the United States military’s use of Agent Orange and

other herbicides during the Vietnam War, and in holding that the plaintiffs have an implied private right of action under the ATS. The court was plainly correct, however, in holding that the plaintiffs failed to state a valid claim under international law. The United States' military's use of herbicides in the Vietnam War for defoliation and enemy crop destruction was fully consistent with our nation's obligations under international law.

The plaintiffs invoke international-law norms against the wartime use of poisons, but, as we have discussed (*infra* at 26-27 & n.5), the use of herbicides for the purposes of defoliating military bases, transportation corridors, and other crucial territory, and destroying enemy crops, did not contravene the ban on the use of poisons. *See also Statement of Interest of the United States, Vietnam Association for Victims of Agent Orange v. Dow Chem. Co.*, MDL 381, No. 04-CV-400 (JBW), at 4-11 (E.D.N.Y. filed Jan. 12, 2005). The plaintiffs also allege that the United States military's use of herbicides in the Vietnam War imposed unnecessary harms on those persons exposed to herbicides and to the environment, but this Court has already recognized that, to the best of the United States military's knowledge during the Vietnam War, any risks posed by Agent Orange were both limited and rare. *See In re "Agent Orange,"* 818 F.2d at 193. The plaintiffs claim that this assessment was erroneous when viewed in hindsight, but

there is no principle of international law that would render battlefield conduct retroactively unlawful based on later-acquired knowledge about the long-term effects of such conduct. Even in hindsight, furthermore, the use of herbicides was clearly justified. *See In re “Agent Orange,”* 818 F.2d at 193 (noting that herbicide use saved “many, perhaps thousands of, lives”).

As we described in our Statement of Interest, the United States’ use of herbicides in Vietnam carefully hewed to the Executive’s longstanding interpretation of international law. *See U.S. Statement of Interest* 4-13. The Executive’s interpretation of our nation’s responsibilities under international law is entitled to significant deference. *See, e.g., Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982). Given the generality of the relevant international norms that the plaintiffs cite, the high military value of the challenged herbicide operations, and the limited risks thought to be posed by Agent Orange usage, the Executive’s interpretation was plainly not unreasonable.

Indeed, the very fact that the United States has openly employed herbicides for defoliation and enemy crop destruction weighs against any finding that such conduct was prohibited as a matter of customary international law. *See United States v. Yousef*, 327 F.3d 56, 92 n.25 (2d Cir. 2003) (“[I]t is highly unlikely that a purported principle of customary international law in direct conflict with the

recognized practices and customs of the United States * * * could be deemed to qualify as a *bona fide* customary international law principle.”). In any event, the United States’ vociferous protests both before and during the Vietnam War against the development of an international-law norm prohibiting wartime use of herbicides, *see, e.g., U.S. Statement of Interest* 4-9, prevented our government from being bound by any such norm. *See Sideman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

IV. THE MILITARY-CONTRACTOR DEFENSE APPLIES TO CLAIMS BROUGHT UNDER THE ALIEN TORT STATUTE.

Finally, even if the plaintiffs had brought a valid claim under customary international law, it would likely be barred by the government-contractor defense. That defense “shields a contractor from liability for injuries caused by products ordered by the government for a distinctly military use, so long as it informs the government of known hazards or the information possessed by the government regarding those hazards is equal to that possessed by the contractor.” *In re “Agent Orange,”* 818 F.2d at 190; *see Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The doctrine is intended to advance the separation of powers, by preventing judges faced with claims against the military suppliers from injecting themselves into political and military decisions beyond their constitutional

authority and institutional competence. *See In re “Agent Orange,”* 818 F.2d at 191. The defense also protects the military procurement process, by guarding military suppliers against ruinous liability or the forced adoption of additional safety or testing measures. *See id.*

The district court held that “all domestic state and federal substantive law claims” against the defendants were barred by the military-contractor defense. *See* 373 F. Supp. 2d at 16, 39. The district court refused to apply that defense to the plaintiffs’ claims under the ATS, however, on the basis that the defense “is peculiar to United States law.” *Id.* at 91. It makes little sense to bar claims brought by U.S. military personnel, the anticipated users of military equipment, but nevertheless to permit suits by enemy forces or foreign nationals against whom the equipment is used. If the government-contractor defense was properly applied in this action to the state-law and non-ATS federal-law claims — an issue on which the United States takes no position — then it should have also been applied to the plaintiffs’ claims under the ATS.

The district court’s refusal to apply the government-contractor defense was based on a fallacious distinction between domestic and customary-international-law claims. A claim brought under the ATS *is* a federal-law claim, albeit one that looks to principles of customary international law in defining as a matter of federal

common-law the substantive liability rules. *See Sosa*, 542 U.S. at 712 (explaining that ATS “enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law”). It is particularly appropriate, in recognizing as a matter of federal common law a claim under the ATS, to apply federal defenses to liability such as the government-contractor defense. Nothing in the ATS or its history suggests a reason to exempt that class of claims from generally applicable federal-law defenses.

Furthermore, the rationales underlying the government-contractor defense apply with equal force to claims brought under the ATS. The challenged decision by the Commander in Chief to approve herbicide use in Vietnam was based on his judgment as to the proper “trade-off between greater safety and greater combat effectiveness,” *Boyle*, 487 U.S. at 511 — *i.e.*, precisely the type of decision shielded from judicial second-guessing. Furthermore, there is an acute need to protect the government contracting process in this context, in which a huge damages award would wreak havoc on the United States military’s ability to secure needed war materials at a reasonable cost. *See In re “Agent Orange,”* 818 F.2d at 191 (noting that “procurement process” would be “severely impaired” and national security harmed if military contractors were exposed to liability for injuries arising from military use of their products).

The district court looked to past war-crimes trials in support of the conclusion that the government-contractor defense does not apply to violations of international law. 373 F. Supp. 2d at 91-99. In a criminal proceeding, however, the basic rationale for the government-contractor defense is inapplicable, since a wrongdoer lacks the ability to shift onto the government the burden of criminal sanctions. Nor is there a clear statement of congressional intent to shield military decisions from criminal liability. In the civil context, not only do policy grounds support application of the defense, but there is also evidence that Congress did not intend to permit an award of money damages. *See* 28 U.S.C. § 2680(a) (excluding from United States' waiver of sovereign immunity for certain torts committed by its employees any claim based on exercise of "discretionary function"); *id.* § 2680(j) (excluding any "claim arising out of the combatant activities of the military * * * during time of war"); *id.* § 2680(k) (excluding any "claim arising in a foreign country"). It would contravene congressional intent to allow claimants to sidestep these limitations through the simple expediency of suing government contractors rather than the government itself.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of this action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), as modified by this Court's order of February 14, 2006, granting the United States leave to file an oversize brief, because this brief contains 8,910 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

I further certify that the electronic copy of this brief filed with the Court by electronic mail is identical in all respects except the signature to the hard copy filed with the Court, and that a virus check was performed on the electronic version using the Trend Micro OfficeScan software program.

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