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COURT LIMITS USE OF ALIEN TORT STATUTE TO BRING INTERNATIONAL LAW CLAIMS

(Matar v. Dichter)

The U.S. Court of Appeals for the Second Circuit in New York this week reined in activists' use of the Alien Tort Statute (ATS) as a means of attempting to enforce international human rights law in federal courts. The court held that a former Israeli cabinet officer, who was sued by Palestinians for military actions taken in the Gaza Strip, was entitled to immunity from suit under the ATS.

The decision in *Matar v. Dichter* was a victory for the Washington Legal Foundation (WLF), which filed a brief urging the appeals court to dismiss the lawsuit. WLF argued that when it adopted the ATS in 1789, Congress never intended to assign federal courts the role of policing alleged human rights violations throughout the world.

The appeals court agreed that immunity from such suits is not limited to foreign governments and their current leaders. Rather, the court held, former leaders are also entitled to common law immunity -- at least when, as here, the U.S. government submits a statement supporting the immunity claim. The court declined to consider whether former government officials are entitled to immunity under the Foreign Sovereign Immunities Act (FSIA) in cases in which the U.S. government remains silent.

WLF's brief argued that federal court intervention in overseas activities is particularly inappropriate when, as here, adjudication of the case could have negative foreign policy ramifications. Noting that the defendant (Avraham Dichter) was a cabinet member in the Israeli government being sued for actions taken in his official government capacity, WLF argued that the case ought to be dismissed as a nonjusticiable political question. Because of its immunity finding, the appeals court did not need to address the political question issue.

The plaintiffs, Palestinians who live in the Gaza Strip, are close relatives of individuals who were killed or wounded in the Israeli bombing of a Gaza City building in 2002. The attack was carried out by Israel in order to kill a Hamas terrorist leader who was staying in the building. The attack was successful in killing the terrorist leader, but it also killed or wounded a number of civilians living nearby. The plaintiffs alleged that the Israel attack amounted to an "extrajudicial killing" and a war crime, in violation of

customary international law. They filed suit against Dichter under the ATS, which provides jurisdiction to federal courts over tort suits brought by aliens for violations of "the law of nations," and the Torture Victim Protection Act (TVPA).

"The ATS was adopted in 1789 to allow the federal courts to hear cases involving piracy and assaults on ambassadors," said WLF Chief Counsel Richard Samp. "It has been transformed by activist attorneys into a tool for second-guessing American foreign policy and for challenging overseas conduct of which they do not approve. The Second Circuit's decision was a welcome step in bringing to a halt to this perversion of the ATS," Samp said.

A federal district court in New York dismissed the case in 2007. It held that Dichter, by virtue of his status as a former foreign government official, was entitled to immunity from suit under the FSIA. It went on to hold that the suit was also subject to dismissal because it raised nonjusticiable political questions. The Second Circuit affirmed dismissal, citing common law immunity.

WLF is a public interest law and policy center with supporters nationwide. WLF devotes a substantial portion of its resources to opposing expansive private rights of action under the ATS because such litigation generally seeks (inappropriately, in WLF's view) to incorporate large swaths of international law into the domestic law of the U.S. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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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 website, www.wlf.org.