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COURT REVERSES RULING AGAINST IRAQ FOR TORTURING POWs (*Acree v. Iraq*)

The United States Court of Appeals for the District of Columbia Circuit reversed a lower court ruling awarding monetary damages in favor of American servicemen who were unlawfully tortured by Saddam Hussein's regime as Prisoners of War (POWs) of the 1991 Gulf War. The Court ruled that while the district court had jurisdiction in the case, there was no cause of action.

In *Acree v. Iraq*, Colonel Clifford Acree and 16 other American servicemen filed suit against the Republic of Iraq in early 2002 seeking damages against Iraq, Saddam Hussein, and the Iraqi Intelligence Service for injuries they suffered when they were physically and psychologically tortured after being captured by Iraqi forces during the 1991 Gulf War. The district court entered a default judgment in their favor when the Iraqi government failed to contest the charges, and awarded damages.

Two weeks after the district court ruling, the Justice Department sought to intervene in the case, arguing that an April 2003 emergency supplemental appropriation enacted to help rebuild Iraq had the effect of retroactively negating jurisdiction by the trial court over the case. In its brief filed on behalf of U.S. Senators Harry Reid, George Allen, and Patty Murray, and Representatives John Conyers, Howard Berman, and Gregory Meeks, WLF argued that even if the Justice Department could intervene in the case at this late date, the court of appeals should reject the argument that the trial court lacked jurisdiction to enter the judgment in favor of the ex-POWs. In particular, WLF argued that emergency appropriations by Congress to help rebuild Iraq cannot be construed to retroactively oust the district court of jurisdiction to issue the judgment in favor of the ex-POWs.

In its opinion, the Court agreed with WLF that the supplemental appropriations measure did not strip the district court of jurisdiction. In that respect, WLF scored a victory on this major point. However, the Court reversed the district court on other grounds, ruling that while the trial court had jurisdiction over the case, there was no private right of action. In so ruling, the Court relied upon a recently issued decision in a terrorism case, *Cicippio-Puleo v. Islam Republic of Iran*. In *Cicippio*, issued earlier this year but after the briefing in this case, the court of appeals held that the terrorism exception to the Foreign Sovereign Immunities Act (FSIA) is merely a jurisdictional provision and does not provide a cause of action against foreign states. Instead, the so-

called Flatow Amendment to the FSIA allows for a cause of action against any "official, employee, or agent of a foreign state," and not the foreign state itself. Hence, since the *Acree* suit was directed at the Republic of Iraq, Iraqi agencies, and Saddam Hussein in their official capacities, there was no private right of action under the Flatow Amendment. The Court also rejected the alternative suggestion that the common law of torts provided a federal cause of action.

While the majority of the panel agreed with WLF on the issue of whether the supplemental appropriation revoked the jurisdiction of the trial court, Judge John Roberts, in a concurring opinion, indicated that he would have overruled the district court on those grounds, stating that Congress did intend to revoke jurisdiction in actions against Iraq.

The *Cicippio* opinion was authored by Circuit Judge Edwards who also wrote the decision in the *Acree* case. Some legal observers have suggested that the *Cicippio* opinion was wrongly decided, but there was no further review of that decision either in the court of appeals, or in the United Supreme Court. Consequently, since the questionable *Cicippio* decision was the basis of the *Acree* ruling, there is a good possibility that the ex-POWs will seek a rehearing in the case, or pursue further legal action.

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For further information, contact Paul Kamenar, WLF Senior Executive Counsel, at 202-588-0302.