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COURT URGED TO LIMIT USE OF ATS TO BRING INTERNATIONAL LAW CLAIMS

(Matar v. Dichter)

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Second Circuit in New York to rein in activists' use of the Alien Tort Statute (ATS) as a means of attempting to enforce international human rights law in federal courts. 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.

In a brief filed in *Matar v. Dichter*, WLF 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) is 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. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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 allege 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 after filing WLF's brief. "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 federal courts need to step in to bring a halt to this perversion of the ATS," Samp said.

A federal district court in New York dismissed the case earlier this year. It held that Dichter, by virtue of his status as a foreign government official, was entitled to immunity from suit under the Foreign Sovereign Immunities Act (FSIA). It went on to hold that the suit was also subject to dismissal because it raised nonjusticiable political questions. The plaintiffs appealed both rulings.

In its brief, WLF focused solely on the political question doctrine. WLF argued that suits are nonjusticiable under that doctrine when, as here, they raise claims whose resolution has been assigned by the Constitution to the Executive and Legislative branches. WLF argued that foreign policy issues are largely the province of those branches of government, not the judicial branch. WLF noted that the United States is a close ally of Israel and supports the right of the Israeli government to take strong measures to eliminate terrorist attacks on its citizens. WLF argued that the political question doctrine requires the courts to refrain from hearing cases whose adjudication could embarrass the United States by sending conflicting messages regarding United States policy toward Israel and our commitment to fighting terrorism. WLF argued that if federal courts insist on hearing disputes such as this one with no connection to the U.S., then the U.S. will have difficulty maintaining its opposition to efforts in Germany and elsewhere to investigate potential charges against U.S. officials based on their conduct of U.S. foreign policy.

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.

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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.