

December 7, 2001

## **COURTS OVERTURN DECISIONS BARRING DETENTION OF ALIEN TERRORISTS**

*(Al Najjar v. Ashcroft)*  
*(Kiareldeen v. Ashcroft)*

In courtroom victories in the war against terrorism, two separate federal appeals courts this week overturned lower court decisions that had threatened the power of the Immigration and Naturalization Service ("INS") to detain illegal aliens suspected of terrorism pending completion of deportation proceedings. The decisions were victories for the Washington Legal Foundation (WLF), which had filed briefs in both cases, urging reversal of the lower court decisions.

In *Al Najjar v. Ashcroft*, the U.S. Court of Appeals for the Eleventh Circuit in Atlanta vacated the lower court decision -- which had ordered the release of a suspected terrorist pending deportation -- on the ground that the case was moot. Two weeks ago, Mazen Al Najjar (the suspected terrorist) lost his final appeal of the order that he be deported; the INS then took him back into custody because its right to detain him pending final deportation was no longer subject to question once he had exhausted all appeals from the deportation order. In this week's decision, the Eleventh Circuit said that, with Al Najjar back in INS custody, the lower court's determination -- that the INS had acted unconstitutionally in detaining Al Najjar at earlier stages of the proceedings -- was now moot. The appeals court's decision wipes a very dangerous federal court precedent off the law books.

In *Kiareldeen v. Ashcroft*, the U.S. Court of Appeals for the Third Circuit in Philadelphia reversed a district court decision finding that the INS was not even "substantially justified" in detaining a suspected alien terrorist pending deportation. Based on that finding, the lower court had ordered taxpayers to pay the suspected terrorist, Hany Kiareldeen, \$110,000 to cover his attorney fees. In reversing, the Third Circuit held that the district court's decision was "an abuse of discretion."

WLF filed its briefs on behalf of itself; five Members of Congress (U.S. Representatives Sherwood Boehlert, J.D. Hayworth, Lamar Smith, and John Sweeney and U.S. Senator Jesse Helms); the Fraternal Order of Police; the Allied Educational Foundation; the Jewish Institute for National Security Affairs; and Stephen Flatow (the father of Alisa Flatow, an American college student murdered by terrorists from the PIJ in 1996).

Both cases turned on the propriety of detaining illegal aliens pending deportation when: (1) the aliens are suspected of being terrorists; (2) some of the evidence upon which the INS bases

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its suspicions is classified; and (3) the INS is unwilling to reveal the classified evidence in open court. In both cases, the district courts had ruled that detention under those circumstances violated the suspected terrorists' rights under the Due Process Clause of the Constitution, because they did not have an adequate opportunity to rebut the classified evidence. Those district court decisions threatened to undermine the federal government's ability to prevent terrorism.

This week's appeal court decisions, while not directly repudiating the rationales of the earlier district court rulings, are a significant step forward because they largely wipe the district court rulings off the books.

WLF entered the cases because it viewed the now-vacated district court decisions as a significant threat to national security. In briefs filed in the two cases, WLF argued that the INS does not violate the constitutional rights of suspected terrorists even when its detention decisions are based in part on classified evidence not disclosed to the suspected terrorist. WLF argued that such non-disclosure does not violate the rights of illegal aliens under the Due Process Clause, because the government's interest in maintaining confidentiality far outweighs any interest that illegal aliens may have in cross-examining all witnesses.

"If the government is required to disclose publicly the information that leads it to believe that an alien has engaged in terrorism, it of necessity would be revealing both sources of information *and* intelligence-gathering techniques -- thereby assisting terrorist groups in their efforts to thwart future intelligence-gathering activities," said WLF Chief Counsel Richard Samp after this week's decisions. "If the INS had lost these cases, it might have been forced to allow known terrorists to walk the streets while they fight deportation, rather than risk compromising important sources of information," Samp said. Samp noted that the alien-detention provision of the anti-terrorist legislation recently adopted by Congress likely would have been held unconstitutional if the lower court decisions had been affirmed.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to promoting America's national security.

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