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COURT URGED TO PERMIT DETENTION OF SUSPECTED TERRORIST ALIENS

(Al Najjar v. Ashcroft)

The Washington Legal Foundation (WLF) this week urged the U.S. Court of Appeals for the Eleventh Circuit in Atlanta to reject a challenge to the power of the Immigration and Naturalization Service ("INS") to detain -- pending completion of deportation proceedings -- illegal aliens suspected of terrorism.

In a brief filed in *Al Najjar v. Ashcroft*, WLF argued that the INS does not violate the First Amendment rights of illegal aliens by detaining those it believes have engaged in fundraising for terrorist groups. WLF argued that such detention does not interfere with rights to political association, because fundraising goes beyond mere association and is not protected by the First Amendment. WLF also argued that the INS has the unfettered right to detain any alien who is facing a final order of deportation.

WLF filed its brief on behalf of itself, the National 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 Palestinian terrorists in 1996).

The case involves Mazen Al Najjar, a Palestinian who has been fighting the INS's efforts to deport him since 1985. Al Najjar admits that he is here illegally, but he has been seeking adjustment of status on a variety of grounds, including that he has three children who were born in this country and thus are American citizens. All of his petitions have been denied, and the Eleventh Circuit in July 2001 rejected Al Najjar's latest challenge to those denials. Thus, Al Najjar should be deported soon.

In 1996, the INS began receiving evidence that Al Najjar was engaged in fundraising for Palestinian Islamic Jihad ("PIJ"), which is on the Attorney General's list of terrorist organizations. Based on classified evidence that showed Al Najjar's close ties to PIJ, the INS took him into custody in 1997. Al Najjar thereafter became a *cause celebre* for the ACLU, which argued that the INS should not be permitted to detain aliens on the basis of classified evidence. The ACLU won Al Najjar's release in December 2000. Thereafter, WLF joined the battle to have Al Najjar taken back

into custody.

That battle became moot in November 2001, when Al Najjar lost his final judicial appeal of his deportation order. His deportation is imminent but has been delayed while the INS seeks a country willing to accept him. The INS took Al Najjar back into custody in November 2001 to ensure that he did not flee before the INS is able to effect his removal.

In December 2001, Al Najjar filed a new suit seeking release from detention. He argued that the Fifth Amendment's Due Process Clause prohibited his incarceration in the absence of evidence from the INS that he was likely to flee if released. He also argued that the INS was detaining him due solely to his political associations with PIJ, in violation of his First Amendment rights. The district court denied Al Najjar's claims in February 2002, and he has appealed to the Eleventh Circuit.

In its brief, WLF argued that the Constitution does not require the INS to produce individualized evidence of an alien's flight risk before detaining aliens who are subject to a final order of deportation. WLF noted that studies have shown that 89% of those in Al Najjar's situation do flee if released from custody pending final deportation. WLF argued that, in light of those statistics, the INS is justified in detaining *all* aliens facing final deportation orders -- at least if it is likely that the INS will be able to effect deportation within a reasonable period of time.

WLF also argued that even if it is true that the INS is singling out Al Najjar for detention because of his ties to the PIJ, it acted properly in doing so. WLF argued that the INS would be derelict in its duty if it did not do all in its power to detain an illegal alien who it believed was a major fundraiser for a terrorist organization. WLF argued that fundraising for a group designated by the Attorney General as a terrorist organization is not protected by the First Amendment, even when (as Al Najjar asserts) the fundraiser only seeks to support the group's peaceful activities.

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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