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**AL NAJJAR V. RENO**  
**97 F. SUPP. 2D 1329 (S.D. FLA. 2000)**

Mazen Al Najjar , the petitioner, a forty-three year old Palestinian, originally entered the United States in 1981 as a non-immigrant graduate student.<sup>1</sup> His last entry into the U.S. was in 1984 for the completion of his non-immigrant graduate student status.<sup>2</sup> In 1985, Al Najjar's first wife filed a petition with the Immigration and Naturalization Service ("INS") to have his immigration status adjusted.<sup>3</sup> The INS denied the petition.<sup>4</sup> Subsequently, the INS issued an order alleging that the petitioner was deportable under § 241(a)(9) of the Immigration and Naturalization Act<sup>5</sup> ("INA"); on the grounds that he had overstayed his nonimmigrant student visa.<sup>6</sup> In connection with the violation, the INS gave notice to Al Najjar that his deportation hearing was set for June 4, 1986 and also filed a warrant for his arrest.<sup>7</sup> When Al Najjar failed to appear for his hearing, the Immigration Judge ("IJ") closed his case.<sup>8</sup> The petitioner, however, claimed that he did not receive notice of the deportation hearing until June 6, 1986.<sup>9</sup> He subsequently filed to have his case reopened but the INS did not respond.<sup>10</sup>

In 1993, the World of Islam Studies Enterprise ("WISE"), an organization affiliated with the University of South Florida, requested a change of petitioner's status as an alien worker.<sup>11</sup> Given that Al Najjar was the CEO of this non-profit organization, for which he received a yearly salary of \$32,000, the INS reclassified petitioner as "a member of professions with advanced degree or of exceptional ability."<sup>12</sup>

Nearly ten years after Al Najjar filed to reopen his case, the INS rescheduled his deportation hearing for February 8, 1996 based on his violation of INA § 241(a)(9).<sup>13</sup> Al Najjar conceded his deportability as charged under section § 241(a)(9) but argued for discretionary relief seeking suspension of deportation, including asylum and withholding or removal.<sup>14</sup> The IJ denied his motions and found him deportable.<sup>15</sup> Al Najjar subsequently

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1. *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1332 (S.D. Fla. 2000).
  2. *Al Najjar*, 97 F. Supp. 2d at 1332.
  3. *Id.*
  4. *Id.* at 1333.
  5. *Id.*
  6. *Id.*
  7. *Id.*
  8. *Id.*
  9. *Id.*
  10. *Id.*
  11. *Id.*
  12. *Id.*
  13. *Id.*
  14. *Id.*
  15. *Id.*

appealed to the Board of Immigration Appeals ("BIA").<sup>16</sup>

While awaiting his appeal, the petitioner was taken into custody by the INS and detained without bond.<sup>17</sup> When Al Najjar requested redetermination of his bond status based on 8 C.F.R. § 242.2(d),<sup>18</sup> he was informed that the INS would provide classified evidence *in camera* to support its custody determination.<sup>19</sup> The petitioner was told that WISE was known to support Palestinian Islamic Jihad ("PIJ") and that he was to be held without bond based on his relationship to WISE.<sup>20</sup>

In an *ex parte in camera* hearing, the INS presented classified information to the IJ regarding Al Najjar's association with the PIJ.<sup>21</sup> Neither the petitioner nor his counsel were permitted to attend the private hearing before the IJ and no record of the *in camera* proceeding was made.<sup>22</sup> Al Najjar was allowed to introduce evidence to rebut testimony given during the public portions of the hearing, which included an unclassified summary of the classified information.<sup>23</sup> Nevertheless, the IJ found that the classified information was determinative and that Al Najjar posed a threat to national security.<sup>24</sup> Thus, the IJ concluded that the petitioner could continue to be held without bond based on the classified evidence alleging Al Najjar's affiliation with a known terrorist organization, evidence not shown to the petitioner or his counsel and, thus, not subject to confrontation or cross-examination.<sup>25</sup>

Al Najjar then appealed the bond redetermination decision to the BIA, which also examined the classified information and reasoned that the government had a compelling interest in shielding information sensitive to national security.<sup>26</sup> After finding the *ex parte in camera* hearing appropriate, the BIA found Al Najjar to be a threat to national security and the safety of other persons or property.<sup>27</sup> The BIA affirmed the IJ's decision and denied Petitioner's request to be released on bond.<sup>28</sup>

The deportation hearing of Al Najjar was considered by another panel of the BIA.<sup>29</sup> This panel upheld the deportation decision of the IJ.<sup>30</sup> The

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16. *Id.*

17. *Id.*

18. 8 C.F.R. § 242.2(d) (1995).

19. *Al Najjar*, 97 F. Supp. 2d at 1333.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1334.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 1335.

petitioner then filed an appeal to the Eleventh Circuit Court of Appeals to review the final order of deportation.<sup>31</sup> The Eleventh Circuit denied the petition to overrule the BIA's final order of deportation.<sup>32</sup>

Al Najjar filed a Petition for Habeas Corpus and Complaint for Declaratory and Injunctive Relief with the district court.<sup>33</sup> He asked for immediate release pending the outcome of the deportation proceedings and challenged his detention on both statutory and constitutional grounds.<sup>34</sup> The petitioner's statutory arguments were that: (1) the INA prohibits his detention based on evidence he had not had the opportunity to evaluate or confront; and (2) his continued detention based merely on his "association" with the PIJ was not authorized by the INA.<sup>35</sup> He also argued that detention violated his constitutional rights under the Due Process Clause of the Fifth Amendment.<sup>36</sup> Al Najjar argued that these constitutional violations arose from: (1) the denial of a meaningful opportunity to defend himself; (2) an inadequate appellate review due to the IJ's failure to maintain a record of the *in camera* hearing; and (3) the IJ's fundamentally unfair reliance on hearsay.<sup>37</sup>

### HOLDING

The United States District Court for the Southern District of Florida held that: (1) it had jurisdiction over the Petitioner's challenge to the IJ's bond redetermination decision;<sup>38</sup> (2) Petitioner's procedural due process rights were violated in the bond redetermination proceeding because of the *ex parte in camera* presentation of classified evidence;<sup>39</sup> and (3) Petitioner's mere association with a known terrorist organization did not constitute a reasonable foundation under the INA for the conclusion that petitioner was a threat to

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31. *Id.*

32. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1304 (11th Cir. 2001). In upholding the BIA's final order of deportation, the Eleventh Circuit ruled that: (1) BIA was barred from considering new information on appeal according to the Illegal Immigration Reform and Immigrant Responsibility Act; (2) aliens had failed to demonstrate any well-founded fear of persecution; (3) in the absence of a well-founded fear of persecution, the petitioner was unable to meet the greater burden of request to withhold removal; (4) no abuse in determining the country of removal; (5) evidence of continued physical presence is reviewable but evidence to suspend deportation is a discretionary matter and is barred from review; (6) petitioner's continuous physical presence clock stopped when he was served with and ordered to show cause upon the commencement of his removal proceeding; and (7) petitioner could not establish enough likelihood of torture to warrant relief.

33. *Al Najjar* at 1335.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1342.

39. *Id.* at 1356.

national security in order to justify detaining him without bond.<sup>40</sup>

### ANALYSIS

Before addressing Al Najjar's substantive claims, the court first decided whether it had jurisdiction over the claims.<sup>41</sup> The district court exerted jurisdiction on two grounds.<sup>42</sup> First, the court noted that 28 U.S.C.A. § 2241<sup>43</sup> allowed an alien to challenge INS action through a petition for habeas corpus.<sup>44</sup> However, this challenge is only possible so long as the action is not a final order of deportation.<sup>45</sup> Second, the bifurcation of the deportation and bond hearings meant that the bond hearing was distinct from the deportation hearing.<sup>46</sup> Since, the bond determination was separate from the deportation hearing,<sup>47</sup> § 106(a)<sup>48</sup> of the INA, governing the exclusiveness of procedures, did not apply and therefore the court had jurisdiction over a habeas corpus petition filed under 28 U.S.C.A. § 2241.<sup>49</sup>

With jurisdiction established, the court proceeded to consider Al Najjar's substantive claims.<sup>50</sup> The court considered the statutory and constitutional claims raised by the IJ's actions separately.<sup>51</sup> Primarily, the court restricted its analysis to determining if there was statutory or constitutional authority for the IJ to introduce and rely on classified information in petitioner's bond

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40. *Id.* at 1361-1362.

41. *Id.* at 1336.

42. *Id.*

43. (a) Writs of habeas corpus may be granted by the Supreme court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. 28 U.S.C.A. § 2241 (1994).

44. *Al Najjar* at 1336.

45. *Id.* at 1337.

46. *Id.*

47. *Al Najjar*, 257 F.3d at 1304. See also *supra* note 30.

48. Exclusiveness of procedure:

The procedure prescribed by, and all the provisions of chapter 158 of Title 28, shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b)[8 U.S.C.A. § 1252(b)] or comparable provision or any prior Act, except that (1) Time for filing Petition: a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order (2) Venue: the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit. INA §106(a).

49. *Al Najjar*, 97 F. Supp. 2d at 1337.

50. *Id.* at 1345.

51. *Id.*

determination hearing and whether Al Najjar's "association" with the PIJ made him a threat to national security.<sup>52</sup>

The court began its analysis by pointing out that the Attorney General's powers in regards to detaining aliens stem from the INA.<sup>53</sup> The INA gives the Attorney General wide discretion to continue an alien's custody during deportation proceedings.<sup>54</sup> Her decisions can be overridden only if there is no reasonable foundation for them.<sup>55</sup> Thus, the court noted that aliens bear a heavy burden in showing that the Attorney General has abused her discretion.<sup>56</sup>

While the Attorney General may have wide discretion, she is still constrained by the Due Process Clause of the Fifth Amendment, which places limits on the ability of the Executive to detain an alien during the pendency of his deportation proceeding.<sup>57</sup> The court noted that these constitutional rights apply to Al Najjar because he was a "deportable" alien and not an excludable alien.<sup>58</sup> Also, given that the petitioner only challenged his continued detention based on the reliance of classified information, the court restricted its inquiry to this issue.<sup>59</sup>

Al Najjar did not dispute the Attorney General's discretion to detain aliens during deportation proceedings under a properly made finding that they pose a threat to national security.<sup>60</sup> Rather, he only challenged the manner in which his custody was determined.<sup>61</sup> In particular, he argued that there was no express or implied statutory justification in the INA for the use of classified information in a bond redetermination hearing.<sup>62</sup> After reviewing the language of INA § 242, the court agreed with Al Najjar that there was no express authority for the use of classified information in a bond redetermination hearing.<sup>63</sup>

The court then discussed the precedent established in *ex rel Barbour v.*

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 1343.

57. *Id.*

58. An excludable alien is one of a class aliens who have been deemed ineligible to receive visas and are excluded from entering the United States on the basis of legitimate reasons. The classes of excludable aliens are listed in INA § 212.

59. *Najjar* at 1345.

60. *Id.*

61. *Id.*

62. *Id.*

63. § 242 of the INA outlines the parameters of judicial review of orders of removal. It vests the IJ and BIA with discretion to review an initial custody decision and to decide if detention should be continued or if the alien should be released on bond or conditional parole. INA § 242 (2001).

District Director,<sup>64</sup> to determine if there was implied authority in the INA for the use of classified evidence.<sup>65</sup> The *Barbour* court had allowed the use of secret evidence in a bond determination hearing based on regulation 8 C.F.R. § 242.2(b)<sup>66</sup> which allowed custody to be determined on "any information available."<sup>67</sup> The *Barbour* court interpreted this provision to permit the use of classified information in a bond redetermination hearing.<sup>68</sup> This interpretation proved fatal for Al Najjar because the language of 8 C.F.R.

§ 3.19(d),<sup>69</sup> which covered his bond redetermination proceeding, was similar to that of the regulation applicable in *Barbour*.<sup>70</sup> This similarity led the court to conclude that the use of classified information in bond redetermination proceedings is permissible within the implied authority of the INA.<sup>71</sup>

The court then considered whether the introduction and use of using classified information violated Al Najjar's procedural due process rights by: (1) denying him notice of the charges brought against him and a meaningful opportunity to defend himself and (2) depriving him of a meaningful appellate review and the possibility of declassification due to the IJ's failure to keep a record of the *in camera* proceedings.<sup>72</sup> If the court found such violations, it would fashion an appropriate remedy under the circumstances.<sup>73</sup>

The first step in evaluating Al Najjar's procedural due process claims was to determine if a constitutionally protected liberty interest had been implicated.<sup>74</sup> The court noted that while aliens are entitled to due process protections, the status and circumstances of the alien impact the extent of those

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64. See *Barbour v. District Director*, 491 F.2d at 573 (5th Cir. 1974) (holding that the review of and reliance on classified information in making bond determination was within the statutory authority granted by the INA). In *Barbour* the court considered whether the INA provided statutory authority to use classified information. *Id.* at 575. *Barbour*, who was a deportable alien, was being held in custody without bail when the Attorney General presented classified information in order to deny his bond redetermination because he was a threat to national security. *Id.* The court based its ruling on 8 C.F.R. § 242.2(b), which stated that custody decision could be based on any information available or presented, even classified information. *Id.* at 578.

65. *Al Najjar*, 97 F. Supp. 2d at 1346.

66. 8 C.F.R. § 242.2(b) (1993) states "determination of the special inquiry officer as to custody status or bond may be based upon any information which is available to the special inquiry officer, or which is presented to him by the alien or the INS."

67. *Id.*

68. *Al Najjar*, 97 F. Supp.2d at 1346.

69. Consideration by the Immigration Judge of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding. The determination of the Immigration Judge as to custody status or bond may be based upon any information that is available to the Immigration Judge or that is presented to him or her by the alien or the Service. 8 C.F.R. § 3.19(d) (1995).

70. *Najjar* at 1348.

71. *Id.* at 1349.

72. *Id.*

73. *Id.*

74. *Id.*

protections.<sup>75</sup> Based on the precedent established by *Haitian Refugee Center v. Smith*,<sup>76</sup> the court stated that the liberty interests of aliens are tied to the Executive's authority under the statute or regulation at issue.<sup>77</sup> Therefore, a constitutionally protected liberty interest will not exist where the Attorney General's discretion is "unfettered" or "an act of grace."<sup>78</sup> The court relied on the Supreme Court's recognition that the Attorney General's power to detain an alien who is neither a flight risk nor a threat to national security during deportation proceedings is circumscribed, as evidence that the Attorney General's authority to detain an alien during bond redetermination proceedings is not unfettered.<sup>79</sup> Therefore, the petitioner possessed constitutionally protected rights to apply for the redetermination of his custody status.<sup>80</sup>

The recognition of Al Najjar's due process rights led the court to observe that the government's arguments for the use of secret evidence arose only from statutory law and did not consider the constitutional limits of those regulations.<sup>81</sup> In order to determine the extent of the process due to the petitioner, the court applied the *Mathews v. Eldridge*<sup>82</sup> test.<sup>83</sup> Given that the test applies with equal force to aliens, the court proceeded to measure Al Najjar's interest against that of the government.<sup>84</sup> In addressing the petitioner's interest, the court rejected the government's contention that Al Najjar was not entitled to release pending deportation and that his detention was solely a matter of the Attorney General's discretion.<sup>85</sup> The court emphasized that the question at issue was the constitutionality of the process, which determined the petitioner's continued detention.<sup>86</sup> Also, the status of the petitioner as a deportable alien, rather than one subject to a final order of deportation, conferred on him greater rights than enjoyed by other aliens.<sup>87</sup> Therefore, the court declared that the government's reliance on classified information compromised the fairness of the petitioner's hearing by denying

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75. *Id.*

76. 676 F.2d 1023 (5th Cir. 1982).

77. *Najjar* at 1350.

78. *Id.* at 1350.

79. *Id.*

80. *Id.* at 1351.

81. *Id.* at 1352.

82. In *Mathews v. Eldridge*, the Supreme Court established a balancing test to determine the level of procedural due process required in a given situation. The court must consider: (1) the private interest that will be affected, (2) the risk of erroneous deprivation of petitioner's rights through the procedures used and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

83. *Al Najjar*, 97 F. Supp. 2d at 1352.

84. *Id.*

85. *Id.*

86. *Id.* at 1353.

87. There is no limit on the Attorney General's power regarding aliens subject to final orders of deportation. *Id.* at 1353.



him access to review or rebut the evidence used against him and thus implicated core aspects of the Due Process Clause.<sup>88</sup>

Given that the fairness of the procedures used against the petitioner was compromised, the court found that the petitioner had a strong interest in having his request judged fairly so that he could return to his family and community.<sup>89</sup> The court further stated that the failure to provide the petitioner an opportunity to review the *ex parte in camera* proceedings precluded an adversarial check on the information presented, which raised a strong possibility of erroneous determination.<sup>90</sup>

The court then proceeded to analyze the government's interest.<sup>91</sup> The court conceded that the government has a very strong interest in the efficient administration of immigration laws and in safeguarding national security.<sup>92</sup> However, the court also reasoned that the government has an equally strong interest in the integrity and accuracy of administrative proceedings.<sup>93</sup> The court then balanced the government's interest with the petitioner's interest and found that the petitioner's procedural due process right to a fundamental fair hearing to determine his right to release had been violated in that he was not given: (1) notice of the evidence presented in opposition of his release, (2) an opportunity to confront and refute the evidence presented, and (3) a fundamentally impartial hearing to determine the redetermination of his custody status.<sup>94</sup>

Having established a procedural due process violation, the court concluded that the appropriate remedy was to afford the petitioner the opportunity to have his application judged in a fundamentally fair manner.<sup>95</sup> In setting forth the proper procedural requirements, the court stated that the IJ should first try to use only the public record to determine if Al Najjar was a threat to national security.<sup>96</sup> Only when the public record is insufficient to conclude that the petitioner must be detained, as a national security risk, is the government permitted to provide classified information.<sup>97</sup> If the presentation of secret

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88. The court stated that Al Najjar had the right to: (1) petition the government and to have the petition fairly judged, (2) notice of the grounds on which the government continues to detain and (3) the opportunity to present evidence in opposition to the government's reasons. *Id.* at 1353-1354.

89. *Id.* at 1354.

90. *Id.*

91. *Id.* at 1356.

92. *Id.*

93. *Id.*

94. *Id.* at 1357.

95. The court outlined procedures it believes would constitute a fundamental fair hearing: (1) notice of the proposed action and the grounds on which it is based, (2) the individual's right to know the evidence presented against him, (3) a decision based solely on the evidence presented, and (4) a proceeding open to the public. *Id.*

96. *Id.*

97. *Id.* at 1358.

evidence is required, the court stated that the statutes already in existence<sup>98</sup> can provide guidance for the IJ to establish procedures for the introduction of classified evidence in a manner that properly balances petitioner's due process rights and the government's interest in national security.<sup>99</sup>

Finally, the court considered whether the petitioner's detention based on his association with the PIJ violated the INA or the First Amendment.<sup>100</sup> In the absence of statutory authority determining the issue, the court turned to case law that set forth the extent of "association" that must be shown to deport an alien based on his affiliation with an organization deemed threatening to national security.<sup>101</sup> In *Rowoldt v. Perfetto*,<sup>102</sup> the Supreme Court found that mere membership in or affiliation with the Communist Party was not enough to be a cause for deportation.<sup>103</sup> Rather, the association must represent a "meaningful association" with and realization of the "distinct and active political nature" of the organization.<sup>104</sup> Based on the Supreme Court's standard, the district court concluded that "mere association with a known terrorist organization such as the PIJ does not constitute a reasonable foundation under the INA for the conclusion that petitioner was a threat to national security and therefore would not be released from INS custody on bond."<sup>105</sup> Having concluded that the IJ's finding that Petitioner was a threat to national security was unreasonable, the court found there to be no need to address the First Amendment issues raised by petitioner.<sup>106</sup>

## CONCLUSION

On December 15, 2000, Mazan Al Najjar was released from custody after three and half years of imprisonment.<sup>107</sup> Following the District Court's decision, the original Immigration Judge who decided Al Najjar's case reversed himself and also ordered Al Najjar's release.<sup>108</sup> On remand, the IJ

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98. The Classified Information and Procedure Act (CIPA), 18 USCA APP. 3 § 1, and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which set up the Alien Terrorist Removal Court (ATRC) both provide procedures for the use of classified information which take into account the defendant's interests and balance them with the government's interest in safeguarding national security.

99. *Al Najjar*, 97 F. Supp. 2d at 1359.

100. *Id.* at 1360.

101. *Id.*

102. 355 U.S. 115 (1957).

103. *Id.*

104. *Id.*

105. *Id.* at 1362.

106. *Id.*

107. Paul Lomartire, *It's Torture: Freed Teacher Jailed Again*, THE PALM BEACH POST, Dec. 9, 2001, at 1A.

108. *Id.*

found that Al Najjar had no ties to terrorism.<sup>109</sup> On appeal, a three judge panel for the BIA affirmed the order to release Al Najjar.<sup>110</sup> Even Attorney General Janet Reno, whose justice department aggressively used secret evidence,<sup>111</sup> after reading both the open court and secret evidence presented, decided not to pursue the matter further.<sup>112</sup>

At the time of Al Najjar's release there was a great deal of excitement that his case had set a precedent and created a smoother path to challenging secret evidence on due process grounds in the future. However, that all changed on September 11, 2001. One of the people caught in the wide dragnet that the Justice department and FBI launched was Al Najjar.<sup>113</sup> Almost one year after his release in December, Al Najjar was imprisoned yet again.<sup>114</sup> This time he is being held in a maximum-security prison where he is confined to his cell for 23 hours a day.<sup>115</sup> His visitation, telephone, reading and recreation privileges are sharply limited.<sup>116</sup> The irony of Al Najjar's present detention is that when Attorney General Reno permitted his release, the government in effect declared that he had no ties to terrorism and that he was not a flight risk,<sup>117</sup> the two reasons that non-criminal aliens can be detained.<sup>118</sup>

There had already been a developing trend to disallow the use of secret evidence while Al Najjar was being detained.<sup>119</sup> However, since the events of September 11, that effort has come to an end, replaced by far more draconian measures such as the Patriot Act<sup>120</sup> and the establishment of military tribunals.<sup>121</sup> As James Zogby, the president of the Arab-American Institute, has said, "they promised to do away with secret evidence and they did. The

109. *Id.*

110. *Id.*

111. Robyn Blumner, *Reno Was Not a Protector of Immigrant's Basic Rights*, ST. PETERSBURG TIMES, Jan. 28, 2001, at 4D.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Michael Fechter, *Al Najjar Attorneys Present Judge with Freedom Plea*, THE TAMPA TRIBUNE, Thursday, Dec. 20, 2001.

117. Since, Al Najjar as a Palestinian has no country of origin, no travel documents or any country that will take him, he is for all practical purposes incapable of leaving the United States. Lomartire, *supra* note 107, at 1A.

118. See *Reno v. Flores*, 507 U.S. 292, 295 (1993).

119. See Secret Evidence Repeal Act of 1999, H.R. 2121, 106th Cong. (1999).

120. The US Patriot Act was passed after September 11 to give the government expanded legal powers to deal with suspected terrorists and their supporters. 18 U.S.C. § 1231 (2001).

121. The military tribunals were set up to allow the government to try, sentence and execute foreign terrorists in secrecy with no constitutional protection or right of appeal. It could be applied to a non-citizen who is an international terrorist or who aided and abetted or knowingly harbored a terrorist. However, it is believed that the tribunals will only be used against foreign terrorists captured overseas. Michael Isikoff and Stuart Taylor, *Justice in the Shadows*, NEWSWEEK, Nov. 26, 2001, at 39.

only thing is, they've replaced it with no evidence."<sup>122</sup>

Many critics have pointed out that the government has had effective measures to deal with terrorism in place since 1996.<sup>123</sup> Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act which created the Alien Terrorist Removal Court ("ATRC").<sup>124</sup> The ATRC allows the government to use secret evidence but requires it to adhere to a minimum level of due process procedures.<sup>125</sup> For example, the ATRC requires that an unclassified summary of the classified evidence at issue be presented to the alien; and that the proceeding be held before a judge who will hear constitutional claims.<sup>126</sup> However, as Professor Susan Akran of Boston University points out, by using ordinary deportation proceedings instead of the ATRC, the INS has been able to continue to use secret evidence to keep aliens in custody.<sup>127</sup>

While the ATRC offered hope of providing aliens with some constitutional protections, the Patriot Act<sup>128</sup> completely ends any pretense of giving aliens constitutional protections. § 441 of the Patriot Act dramatically expands the types of activities that can be classified as terrorist acts.<sup>129</sup> For example, collecting money, soliciting membership for or providing material support to an organization can constitute terrorist activities.<sup>130</sup> Support for an organization's humanitarian aspects without any knowledge of its terrorist links can now be construed as terrorism.<sup>131</sup>

Also, terrorist organizations are no longer limited to those listed in the Federal Register.<sup>132</sup> Previously, the State Department undertook a very careful analysis before a group was designated a terrorist organization because that designation would have to survive a court challenge.<sup>133</sup> However, § 411 of the Patriot Act designates "two or more individuals organized or which engage in terrorist acts" as a terrorist organization.<sup>134</sup> § 411 also applies retroactively and

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122. Evan Thomas and Michael Isikoff, *Justice Kept in the Dark*, NEWSWEEK, Dec. 10, 2001, at 37-43.

123. Elisabeth Frater, *When the Evidence is Secret*, NATIONAL JOURNAL, Jan. 6, 2001, available at 2001 WL 7181534.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. 18 U.S.C. § 1231 (2001).

129. Chang, Nancy, *What's So Patriotic About Trampling on the Bill of Rights*, Center for Constitutional Change, November 2001.

130. *Id.*

131. *Id.*

132. *Id.*

133. Benjamin Wittes, *One Year Later, Key Enforcement Tools Remain Unused*, LEGAL TIMES, June 2, 1997, at 1.

134. Chang, *supra* note 129.

would allow the removal of any alien who collected funds or assisted an undesignated terrorist organization.<sup>135</sup> Hence, this definition could apply to Al Najjar due to his association with Ramadan Abdullah Shallah, who eventually became the head of the Palestinian Islamic Jihad.<sup>136</sup> Both men had worked at the World and Islamic Studies Enterprise from 1991 to 1995 when Shallah left to take over the PIJ.<sup>137</sup> Previously, this association with a colleague was not sufficient to prove a connection between Al Najjar and terrorism.<sup>138</sup> However, under the Patriot Act's new definition, Al Najjar's previous association with Shallah could be applied to him if he were tried again.<sup>139</sup>

Al Najjar's problems are further compounded by § 412 of the Patriot Act, which allows the Attorney General to hold an immigrant charged with an immigration violation until he is deported or is certified a non-terrorist.<sup>140</sup> While the Attorney General is required to review the alien's status every six months, the Attorney General does not have to provide the evidence to the non-citizen or allow it to be contested at an IJ hearing.<sup>141</sup> Al Najjar's first immigration violation could now be used instead of secret evidence to maintain his continued detention in the future.

While Al Najjar may have won the battle against the INS and the Justice Department over the use of secret evidence in a bond redetermination hearing, he lost the war. September 11 unleashed a whole new arsenal of legal weapons that the government can deploy to detain aliens in custody with tenuous or no charges. While Al Najjar had been able to challenge the Attorney General's level of discretion, the Patriot Act has closed this attack for the foreseeable future. The new laws will not only affect Al Najjar but all aliens whose only crime would have been a minor immigration violation. The irony of course is that 15 of the 19 hijackers responsible for the destruction of the World Trade Center had entered and were residing in America legally.

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135. *Id.*

136. Lomartire, *supra* note 107, at 1A.

137. *Id.*

138. *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1360 (S.D. Fla. 2000).

139. *Id.*

140. Chang, *supra* note 129.

141. *Id.*