

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION, as Next Friend, on behalf of  
Unnamed U.S. Citizen in U.S. Military Detention,

*Petitioner,*

v.

GEN. JAMES N. MATTIS,  
in his official capacity as SECRETARY OF  
DEFENSE,

*Respondent.*

No. 17-cv-2069 (TSC)

**EMERGENCY MOTION FOR ORDER TO SHOW CAUSE ON COUNSEL ACCESS  
AND MEMORANDUM OF LAW IN SUPPORT**

Petitioner and next friend American Civil Liberties Union Foundation (“ACLUF”) hereby moves pursuant to the Federal Habeas Corpus Statute, 28 U.S.C. § 2241, the All Writs Act, 28 U.S.C. § 1651, and the habeas corpus Suspension Clause, U.S. Const., art. I, § 9, cl. 2, for an order directing Respondent James N. Mattis (“Respondent”) to show cause why Respondent should not provide attorneys from the ACLUF with immediate and unmonitored access to the unnamed U.S. citizen (the “Unnamed U.S. Citizen”) in Respondent’s custody to advise the citizen of his legal rights and to afford him legal assistance to challenge his unlawful military detention. Because the U.S. military has detained this American citizen for nearly a month without disclosing his identity or location, without charge, without access to counsel, and without access to a court, and because the U.S. government is interrogating him for law enforcement purposes under extraordinarily coercive circumstances, the ACLUF respectfully requests that the Court resolve this motion on an expedited basis. *See* 28 U.S.C. § 2243

(providing for return to order to show cause within three days in federal habeas proceeding brought under § 2241); Fed. R. Civ. P. 6(c)(1)(C) (authorizing court to establish expedited motion schedule for good cause).<sup>1</sup>

### FACTUAL AND PROCEDURAL BACKGROUND

As set forth in the Petition for a Writ of Habeas Corpus, ECF No. 4 (“Pet.”), Respondent has been holding a U.S. citizen in military detention in Iraq since on or about September 14, without charge, without access to a court, and without access to counsel. Pet. ¶¶ 6–7, 12. Respondent has not disclosed publicly the U.S. citizen’s identity or the name or location of the facility where the Unnamed U.S. Citizen is being detained. *Id.* ¶¶ 9–10.

The U.S. government asserts that it is detaining the Unnamed U.S. Citizen as an “enemy combatant” because he was allegedly fighting for the Islamic State of Iraq and Syria (“ISIS”) in Syria. *Id.* ¶ 8. The U.S. government has said that it is considering all options with respect to the Unnamed U.S. Citizen, including criminal prosecution in federal court or transfer to foreign custody. *Id.* ¶ 21; Eric Schmitt & Charlie Savage, *American Held as ISIS Suspect, Creating a Quandary for the Trump Administration*, N.Y. Times (Oct. 6, 2017), <https://nyti.ms/2xZhenQ>.

After the ACLUF filed the Petition in this matter, the *New York Times* reported that the federal government is conducting an active criminal investigation of the Unnamed U.S. Citizen, and has interrogated this citizen for law enforcement purposes while he is detained at a secret location without access to a court or to counsel. Schmitt & Savage, *supra*. The Unnamed U.S. Citizen has reportedly invoked his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), which includes the right to the assistance of counsel. *Id.*

---

<sup>1</sup> Pursuant to Local Civil Rule 7(m), the ACLUF provided the U.S. Department of Justice with notice of the filing of this motion and with a copy of the Petition for a Writ of Habeas Corpus, filed on October 5, 2017. Counsel for the government indicated that the government will oppose this motion.

## ARGUMENT

The U.S. government's detention of this American citizen violates the Constitution and laws of the United States. Pet. ¶¶ 32–48. The government cannot lawfully imprison an American citizen without charge, without access to a court, and without access to counsel. ACLUF has next friend standing to represent the Unnamed U.S. Citizen's interests here by enforcing a threshold and unquestionable right: access to counsel. It is particularly imperative that this Court ensure that the Unnamed U.S. Citizen has access to counsel because extrajudicial detention and interrogation are extraordinarily coercive and violate the constitutional protections afforded all suspects. Counsel access is also imperative because the U.S. government is reportedly contemplating transferring this citizen to a foreign jurisdiction, including Iraq, where he could face a substantial risk of torture and other abuse. Petitioner and next friend ACLUF accordingly requests that this Court direct Respondent to show cause why he cannot provide attorneys from the ACLUF immediate and unmonitored access to the Unnamed U.S. Citizen, whether in person or via videoconferencing, to inform him of his legal rights and to afford him the opportunity of legal representation to challenge his detention.

### **I. ACLUF Has Standing to Seek the Requested Relief.**

Next friend standing has “long been an accepted basis for jurisdiction in certain circumstances,” *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990), and is codified in the federal habeas statute, 28 U.S.C. § 2242. Next friend standing allows an individual or organization to pursue a habeas petition on behalf of a detained person where that person is unable to seek judicial relief on his own behalf. *Whitmore*, 495 U.S. at 161–63. The Supreme Court has identified two requirements for next friend standing: first, that the detained person cannot

prosecute the action on his own behalf, including because he is inaccessible; and second, that the next friend is dedicated to the best interests of the detainee. *Id.* at 163–64.

The ACLUF satisfies the requirements for next friend standing to seek the requested relief of providing the Unnamed U.S. Citizen with access to counsel. First, Respondent is holding the Unnamed U.S. Citizen at a secret location and has denied him access to a court and to counsel—and any means to secure counsel for himself. The government does not appear to have notified any member of the Unnamed U.S. Citizen’s family of his detention or provided any member of his family with access to him. Pet. ¶ 16; *see also* Schmitt & Savage, *supra*. The government is thus preventing an American citizen from accessing counsel to vindicate his statutory and constitutional rights, including the right to challenge his unlawful detention.

Second, the ACLUF is dedicated to the Unnamed U.S. Citizen’s best interests. As set forth in the Petition, ACLUF is committed to upholding the civil liberties guaranteed by the Constitution. Pet. ¶ 1. Its lawyers have previously represented individuals detained by the United States as “enemy combatants,” including in Iraq, and have sought to vindicate their individual legal and constitutional rights in the federal courts. *Id.* The ACLUF therefore has experience in directly analogous factual circumstances. On September 29, the American Civil Liberties Union wrote to Respondent and to Attorney General Jeff Sessions expressing its deep concern about the unlawful detention of the Unnamed U.S. Citizen and requesting that Respondent provide ACLUF attorneys with access to this citizen to inform him of his rights and afford him the opportunity of legal representation. *Id.* ¶ 18. Respondent and Attorney General Sessions have ignored that request. *Id.*

In many habeas cases, a significant personal relationship to a detained person may demonstrate that the next friend is dedicated to his best interests, but such a relationship is not

required. Habeas has “never been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.” *Jones v. Cunningham*, 371 U.S. 236, 243 (1963); *see also Zadvydas v Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”). To the ACLUF’s knowledge, judges have denied next friend standing in the absence of a significant relationship to the detainee only in instances where the detainee had other means of securing representation and accessing the courts. *See Coalition of Clergy v. Bush*, 310 F.3d 1153, 1160 (9th Cir. 2002) (habeas petitions filed by family members); *Hamdi v. Rumsfeld*, 294 F.3d 598, 606 (4th Cir. 2002) (father had filed habeas petition on detainee’s behalf); *Does v. Bush*, No. Civ. A. 05-313 (CKK), 2006 WL 3096685, at \*5 (D.D.C. Oct. 31, 2006) (“detainees have been able to file [habeas] petitions before the Court in large numbers”). No such course is possible for the Unnamed U.S. Citizen.

In the extraordinary circumstances of this case, it would not only defy the principles governing next friend standing, but also effect a *de facto* suspension of the writ and violate the Due Process Clause to insulate the Executive’s detention of the Unnamed U.S. Citizen from judicial review by preventing any challenges to it by him or by the ACLUF acting on his behalf. No prior relationship with a detainee is therefore required where, as here, “none is practically possible.” *See Coalition of Clergy*, 310 F.3d at 1167 (Berzon, J., concurring); *cf. Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986) (Bork, J., sitting as a single Circuit Judge) (construing federal habeas statute to vest jurisdiction in the D.C. Circuit for a detainee being held in an unknown location because “it is essential that [the] petitioner not be denied the right to petition for a writ of habeas corpus”). As “an institution with an established history of concern

for the rights of individuals in the detainee[’s] circumstances,” there can be no question that the ACLUF “is truly dedicated to the best interest of the detainee[ ].” *Coalition of Clergy*, 310 F.3d at 1167 (Berzon, J., concurring). Next friend standing thus allows the ACLUF, an organization dedicated to preserving and protecting the constitutional rights of individuals, to afford a U.S. citizen detained by his government with access to counsel to ensure his constitutional and statutory rights.<sup>2</sup>

## **II. The Unnamed U.S. Citizen Has the Right to Access Counsel.**

The Unnamed U.S. Citizen held by the U.S. military in Iraq has an unquestionable right to access counsel. This right is rooted firmly in the guarantees of habeas corpus and in the constitutional rights of all U.S. citizens when detained by their own government.

The Supreme Court has made clear that U.S. citizens held as “enemy combatants” have the right to challenge their detention by the U.S. military under the Federal Habeas Corpus Statute, 28 U.S.C. § 2241, and the habeas corpus Suspension Clause, U.S. Const., art. I, § 9, cl. 2 (“Suspension Clause”). *Hamdi v. Rumsfeld*, 542 U.S. 507, 525–26 (2004); *see also id.* at 536 (“[W]e have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining [the separation of powers], serving as an important judicial check on the Executive’s discretion in the realm of detentions.”); *id.* (even “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens”). That right not only includes a meaningful opportunity to contest the basis for a citizen’s detention before a neutral decisionmaker, *id.* at 533, but also access to counsel in

---

<sup>2</sup> It is of course possible that, once provided with counsel, the Unnamed U.S. Citizen might refuse legal assistance. But the U.S. citizen’s invocation of his *Miranda* rights suggests otherwise. In any event, it would eviscerate the guarantees of the federal habeas statute and the Suspension Clause to permit the government to keep a citizen from accessing counsel based on mere speculation that the prisoner might actually prefer not to have the opportunity to consult with counsel.

prosecuting his habeas petition, *id.* at 539. *See also id.* at 531–33 (rejecting the government’s argument that practical obstacles require dispensing with due process and habeas procedures even for wartime detainees captured on a battlefield). U.S. citizens are entitled to these basic protections whether they are held by the military in the United States, as in *Hamdi*, or in Iraq. *See Munaf v. Geren*, 553 U.S. 674, 686 (2008) (holding that U.S. citizens detained by the U.S. military in Iraq have the right to challenge their detention in federal court through habeas corpus); *see also Boumediene v. Bush*, 553 U.S. 723, 767 (2008) (invalidating the government’s proposed substitute for habeas corpus because, *inter alia*, it failed to provide detainees with access to counsel to test the underlying basis for their detention); *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (“Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned . . . save by the judgment of his peers or by the law of the land. . . . [Judges] developed the writ of habeas corpus largely to preserve these immunities from executive restraint.” (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–19 (1953) (Jackson, J., dissenting))).

In line with these principles, a judge in this district took action to ensure that another U.S. citizen held by the U.S. military in Iraq as an “enemy combatant” had access to counsel to pursue a petition for habeas corpus. Judge Urbina found it “clear” that a U.S. citizen detained by the U.S. military in Iraq had the right to counsel. *Omar v. Harvey*, 514 F. Supp. 2d 74, 77 (D.D.C. 2007). Judge Urbina accordingly ordered the government to show cause “why it should not provide safe passage, safe and secure housing and appropriate security for petitioner’s counsel while in Iraq for the purpose of consulting with her client.” Order, *Omar v. Harvey*, Civ. No. 05-2374 (RMU) (D.D.C. Sept. 28, 2007), ECF No. 42. The government subsequently agreed to permit the U.S. citizen detainee access to his counsel. *See Respondents’ Resp. to Order to Show*

Cause at 1, *Omar v. Geren*, Civ. No. 05-2374 (RMU) (D.D.C. Oct. 8, 2007), ECF No. 44 (agreeing to counsel's access to petitioner under the same terms as civilian counsel traveling to Iraq to represent U.S. service members in court-martial proceedings).

Courts in this district have repeatedly held that even non-citizen detainees in military custody have a right to access counsel as a necessary and inextricable part of their habeas corpus rights. *See, e.g., In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d 8, 15 (D.D.C. 2012) (detainees seeking habeas relief from executive detention must have access to counsel for access to the courts to be "adequate, effective, and meaningful" (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)); *Al-Joudi v. Bush*, 406 F. Supp. 2d 13, 22 (D.D.C. 2005) ("access to the Court means nothing without access to counsel"); *Al-Odah v. United States*, 346 F. Supp. 2d 1, 9 (D.D.C. 2004) (petitioners must have the right to access counsel to meaningfully exercise their right to habeas corpus). Former Chief Judge Lamberth found the right of access to counsel so critical that it extended even to Guantanamo detainees whose habeas petitions had been dismissed. *In re Guantanamo Bay Detainee Continued Access to Counsel*, 892 F. Supp. 2d at 18–19 (access to counsel must continue as long as it is possible a detainee might bring a future habeas petition before the court). As Judge Lamberth explained, giving the Executive control over a detainee's access to counsel "does not comport with our constitutional system of government" and violates core separation-of-powers principles by subjecting meaningful access to the courts to "Executive fiat." *Id.* at 19.

The Supreme Court's rulings in *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, reinforce the urgency of counsel access. In *Miranda*, the Supreme Court established constitutionally mandated procedures for custodial interrogations by law enforcement to preserve a suspect's Fifth Amendment privilege against self-incrimination due to the inherently coercive

nature of those interrogations. *Id.* at 467; *accord Dickerson v. United States*, 530 U.S. 428, 435 (2000). Law enforcement agents must accordingly inform a suspect of his right to remain silent and to have counsel present if he so desires. *Miranda*, 384 U.S. at 468–70. The Unnamed U.S. Citizen has reportedly been read his *Miranda* rights *after* custodial interrogation, and the U.S. government is actively considering bringing federal charges against him. Schmitt & Savage, *supra*. The circumstances under which the U.S. government is detaining this U.S. citizen are highly coercive. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 514–15 (1963) (“secret and incommunicado detention and interrogation . . . are devices adapted and used to extort confessions from suspects”); *Reck v. Pate*, 367 U.S. 433, 448 (1961) (Douglas, J., concurring) (“[D]etention incommunicado for days on end is so fraught with evil that we should hold it to be inconsistent with the requirements of that free society which is reflected in the Bill of Rights.”). As the Supreme Court has made clear, detention without access to a court or to counsel even for a few days is “inherently coercive.” *Ashcraft v. Tennessee*, 322 U.S. 143, 153–54 (1944) (detention for thirty-six hours); *accord Payne v. Arkansas*, 356 U.S. 560, 566–67 (1958) (detention for three days).

The Unnamed U.S. Citizen unquestionably has the right of counsel access based on the Constitution and laws of the United States. The government is flouting clearly established law by continuing to hold him as it has for nearly a month. This Court should not countenance any further delay in affording him a right that has been fundamental for centuries.

### **CONCLUSION**

For the reasons stated above, and for those previously stated in the Petition for a Writ of Habeas Corpus, Petitioner and next friend ACLUF respectfully requests that this Court order Respondent to show cause why he should not give ACLUF attorneys access, either in person or

via videoconferencing, to the Unnamed U.S. Citizen in military detention in Iraq to advise him of his rights and to afford him the opportunity of legal representation.

Dated: October 12, 2017

Respectfully submitted,

/s/ Hina Shamsi

Hina Shamsi (D.C. Bar No. MI0071)  
Jonathan Hafetz (admitted *pro bono*)  
(pursuant to LCvR 83.2)  
Dror Ladin  
American Civil Liberties Union Foundation  
125 Broad Street—18th Floor  
New York, New York 10004  
Tel: 212-549-2500  
Fax: 212-549-2654  
hshamsi@aclu.org  
jhafetz@aclu.org  
dladin@aclu.org

Arthur B. Spitzer (D.C. Bar No. 235960)  
American Civil Liberties Union  
of the District of Columbia  
4301 Connecticut Avenue, N.W., Suite 434  
Washington, DC 20008  
Tel: 202-457-0800  
Fax: 202-457-0805  
aspitzer@acludc.org

*Counsel for Petitioner*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION, as Next Friend, on behalf of  
Unnamed U.S. Citizen in U.S. Military Detention,

*Petitioner,*

v.

GEN. JAMES N. MATTIS,  
in his official capacity as SECRETARY OF  
DEFENSE,

*Respondent.*

No. 17-cv-2069 (TSC)

**[PROPOSED] ORDER**

Upon consideration of the Petition for a Writ of Habeas Corpus and the Emergency Motion for Order to Show Cause on Counsel Access, it is hereby:

**ORDERED** that pursuant to 28 U.S.C. § 2243, and Fed. R. Civ. P. 6(c)(1)(C), Respondent shall within 5 days of service of a copy of this Order file any opposition stating why Respondent should not grant Petitioner American Civil Liberties Union Foundation (“ACLUF”) access to the Unnamed U.S. Citizen in Respondent’s custody to advise him of his rights and provide him the opportunity of legal representation. It is further

**ORDERED** that the ACLUF shall file its reply to any opposition filed by Respondent to the ACLUF’s Emergency Motion for Order to Show Cause on Counsel Access within 3 days of service of the opposition. It is further

**ORDERED** that the Court will schedule a hearing on the ACLUF’s Emergency Motion for Order to Show Cause on Counsel Access at the Court’s earliest convenience. It is further

**ORDERED** that the Clerk of this Court will forthwith furnish a copy of this Order, the Petition for a Writ of Habeas Corpus, and Petitioner ACLUF's Emergency Motion for Order to Show Cause on Counsel Access to the United States Marshal for the District of Columbia for the purpose of making service of same on the Respondent, the U.S. Attorney General, and the U.S. Attorney for the District of Columbia. And it is

**FURTHER ORDERED** that the United States Marshal for the District of Columbia shall serve these papers on the Respondent, on the U.S. Attorney General, and on the U.S. Attorney for the District of Columbia, by hand delivery, not later than the next business day after receipt of those papers from the Clerk of the Court.

**SO ORDERED.**

---

Tanya S. Chutkan  
United States District Judge

DATED: October \_\_\_\_, 2017