

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN CIVIL LIBERTIES	.	
UNION FOUNDATION,	.	
	.	CA No. 17-2069 (TSC)
Petitioner,	.	
	.	
v.	.	Washington, D.C.
JAMES N. MATTIS,	.	Thursday, November 30, 2017
	.	10:00 a.m.
Respondent.	.	
. . . . .	.	

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE TANYA S. CHUTKAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioner:	JONATHAN HAFETZ, ESQ. BRETT M. KAUFMAN, ESQ. American Civil Liberties Union Foundation 125 Broad Street, 18th Floor New York, New York 10004 (212) 549-2500
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For the Respondent:	KATHRYN L. WYER, ESQ. TERRY M. HENRY, ESQ. U.S. Department of Justice Civil Division 20 Massachusetts Avenue, NW Washington, DC 20001 (202) 616-8475
Court Reporter:	BRYAN A. WAYNE, RPR, CRR U.S. Courthouse, Room 4704-A 333 Constitution Avenue, NW Washington, DC 20001 (202) 354-3186

## P R O C E E D I N G S

1  
2 THE DEPUTY CLERK: Your Honor, we have Civil Action  
3 17-2069, American Civil Liberties Union Foundation v. James  
4 Mattis. I'll ask counsel to please approach the lectern  
5 identify yourself and those at your respective tables, starting  
6 with the plaintiff's side. Thank you.

7 MR. HAFETZ: Good morning, Your Honor. Jonathan  
8 Hafetz for the ACLU. I'm joined by Brett Kaufman from the ACLU  
9 and Arthur Spitzer from the ACLU of the Capital Area.

10 THE COURT: Good morning.

11 MS. WYER: Good morning, Your Honor. Kathryn Wyer  
12 for the government, and with me at counsel table is Terry Henry,  
13 also with the Department of Justice.

14 THE COURT: Good morning.

15 All right. We are here for a hearing on Petitioner ACLU's  
16 request that this Court order injunctive relief and the  
17 Respondent government's motion to dismiss. Just to sort of  
18 summarize where we are, the American Civil Liberties Union has  
19 filed the petition allegedly as next friend and on behalf of an  
20 unnamed citizen who is currently being detained by United States  
21 military in Iraq within an armed conflict zone.

22 Upon information, I believe this U.S. citizen -- and  
23 actually, I believe based even on an affidavit submitted by  
24 Respondent, this citizen has been in United States custody since  
25 on or around September 14, 2017. That is, by my estimate, two

1 months. Give me a moment. (Court reviewing document.)

2 That's correct. The declaration of Steven Dalbey submitted  
3 by the government states that, "On or around September 12, 2017,  
4 an American citizen surrendered to Syrian Democratic Forces, who  
5 subsequently turned him over to the United States." So we can  
6 assume it happened around that time.

7 The name of this individual has not been disclosed by the  
8 government, and according to the government's filings, however,  
9 representatives from the International Red Cross visited the  
10 detainee -- I'll refer to him as "the detainee" -- on September  
11 29th and again on October 23rd.

12 Certainly, there have been media reports concerning the  
13 factual allegations regarding this case, but they're not on the  
14 record here. So I will certainly have questions for the  
15 government regarding the detainee's status.

16 The ACLU seeks to gain access to the detainee and asks this  
17 Court to order several things, including permitting ACLU counsel  
18 to meet and confer with the detainee in private and unmonitored  
19 attorney-client conversations; for this Court to order the  
20 government to make a prompt return to the writ in accordance  
21 with 28 U.S.C. § 2243 in the Suspension Clause of the U.S.  
22 Constitution; order the government to cease all interrogations  
23 of the detainee while this litigation is pending; to provide  
24 notice to the Court and counsel prior to any transfer of the  
25 detainee to another U.S.-controlled facility or U.S. jurisdiction,

1 or transfer to the control of another nation; and for this Court  
2 to order the government to specify, in the case of the transfer,  
3 the receiving facility, jurisdiction, authority, or country of  
4 transfer.

5 Petitioner has further asked this Court to declare that  
6 the indefinite detention of the detainee in military custody  
7 is unauthorized, arbitrary, unlawful, and a deprivation of  
8 liberty in violation of the Constitution. Petitioners ask  
9 the government to charge the detainee with a federal criminal  
10 offense in an Article III court or to release him, and finally,  
11 to grant such other relief as I request.

12 So Respondent has filed a motion to dismiss. In an  
13 effort to do some housekeeping, I'm going to deal with the  
14 first argument here, which is the government's argument that  
15 Petitioners have improperly proceeded with detainee as a  
16 John Doe without leave of court.

17 It's curious to this Court that the Respondent, the  
18 government, has prevented anyone from finding out the name of  
19 this detainee and refuses to disclose his name, then argues that  
20 the ACLU should not be able to proceed in a John Doe capacity  
21 because they're the ones who control his name. It's sort of  
22 circular reasoning.

23 But, in any event, the Court is going to grant the ACLU's  
24 motion, a request to file pseudonymously *nunc pro tunc*, and they  
25 will be allowed to proceed anonymously since we don't have a

1 name. All right. Mr. Hafetz, I'm going to hear from you.

2 MR. HAFETZ: Good morning, Your Honor. The ruling the  
3 government seeks here on this motion for counsel access is truly  
4 extraordinary and unprecedented. It's asking the Court to  
5 dismiss a habeas petition filed on behalf of an American citizen  
6 who the executive has imprisoned in secret for two and a half  
7 months, without charge, without access to a court, and whose  
8 name the executive has refused to release publicly.

9 A ruling in its favor would give this or any future  
10 administration license to imprison Americans in secret and erect  
11 roadblocks that prevent them from enforcing their most basic  
12 rights under the Constitution.

13 In contrast to the blank check and the unprecedented ruling  
14 this administration is demanding from a court, the relief sought  
15 here could not be narrower: to afford the citizen legal advice  
16 and to give him the opportunity of legal representation to which  
17 he's clearly entitled.

18 Habeas, as Your Honor knows, is an equitable remedy, and  
19 here the equities are tremendously in the favor of the ACLU's  
20 motion. The choice is between endorsing the administration's  
21 effort to create a constitutional black hole for American  
22 citizens or allow the ACLUF to proceed with what is the  
23 unrebutted demand of a U.S. citizen, to speak to a lawyer, and  
24 what has been provided in other circumstances of detained enemy  
25 combatants in the United States, at Guantánamo and in Iraq,

1 which is access to a lawyer.

2 THE COURT: Mr. Hafetz, the government's motion to  
3 dismiss and their opposition to your petition rests almost  
4 entirely on the issue of standing and whether the ACLU has  
5 standing to bring this petition. So I wanted to ask you some  
6 questions about that, and I agree we are in a very unusual  
7 situation.

8 I have not been able to find -- and I'm sure you've done  
9 more looking than I -- a case exactly on all fours with this  
10 one. Nevertheless, it presents some very, very troubling  
11 questions. But before we can get to the merits, I have to  
12 decide on some jurisdictional questions, and standing is  
13 probably the most prominent one and the one the government has,  
14 as I said, based most of its argument on.

15 So let me ask you: Although I could assume that the  
16 detainee would approve of this habeas petition that has been  
17 filed on his behalf, it hasn't been established definitively  
18 that he desires to file a habeas petition. So why should I  
19 grant the ACLU's request prior to having some indication from  
20 the detainee of his desire to file this petition? What of the  
21 government's argument that the detainee met with representatives  
22 of the International Red Cross on two occasions?

23 And I guess the assumption or the inference that the  
24 government asks me to draw is that, if he wanted a petition  
25 to be filed, if he wanted counsel, he would have asked the

1 International Red Cross to contact his lawyer, to obtain a  
2 lawyer for him. We don't know what the substance of his  
3 meetings with the Red Cross are because those are confidential.  
4 But what of that argument?

5 MR. HAFETZ: Your Honor, I think that the visits by  
6 the Red Cross are no barrier to standing and do not indicate one  
7 way or another whether the Petitioner wants counsel.

8 The Red Cross serves an important but limited function,  
9 which is to monitor the conditions of detention. They don't  
10 provide legal representation in court, and there are multiple  
11 reasons why the detainee, assuming he's allowed to send a  
12 message to family through the Red Cross, might want counsel and  
13 might not have -- and his family might not have found counsel  
14 for him.

15 THE COURT: But we have no indication from you or  
16 in the record or from anyone that -- well, obviously, we don't  
17 know who his family is because we don't know who he is. The  
18 government's saying, if he wanted help, legal help, he could  
19 have asked the Red Cross to contact a family member who could  
20 then find him a lawyer, and no lawyer has appeared on behalf of  
21 him. So the conclusion that the government -- or the inference  
22 the government wants me to draw is that he has not -- either he  
23 hasn't requested that his family be contacted, or he hasn't  
24 requested that a lawyer be obtained for him.

25 MR. HAFETZ: As Judge Bates made clear in the *Abu Ali*

1 decision, in this posture, on a motion to dismiss for lack of  
2 jurisdiction, the facts have to be taken as true, and, moreover,  
3 all reasonable inferences have to be drawn in our favor, in  
4 Petitioner's favor. So what we have before you is Red Cross  
5 access, but as the declaration of Gabor Rona makes clear, there  
6 are multiple reasons why the Red Cross might not be able to  
7 fulfill access:

8 The detainee might not have a family. He might not wish  
9 to contact his family for a multitude of reasons. He might not  
10 wish to expose them to retaliation. He might have other reasons  
11 for not wanting to contact them. The family might not want to  
12 assist him because of a fear of retaliation or simply because  
13 he's been associated, allegedly, in the media with ISIS.

14 So there are multiple ways that this could break down and  
15 not lead to counsel. The government has given no indication of  
16 why this could or should have led to counsel, and indeed, would  
17 know. On the other hand, Your Honor, we have the unrebutted  
18 statement by the detainee, by the citizen, that he wants a  
19 lawyer. The government has -- when he was interrogated twice --  
20 on two occasions during his interrogations, once before Miranda  
21 warnings were read and once after, according to the *Washington*  
22 *Post*, he's --

23 THE COURT: As much as I am an avid reader of the  
24 *Washington Post*, I don't think we can call that an unrebutted  
25 statement. I mean, we have a report that he's asked for a

1 lawyer, and I will have some questions for the government on  
2 that.

3 But let me ask you, Mr. Hafetz, does the ACLU believe that  
4 it would still have next friend standing if the detainee had  
5 indeed been in contact with family members, whether or not they  
6 were currently seeking a habeas petition on his behalf? In  
7 other words, if the detainee had been in contact with family  
8 members, would your argument for next friend standing be as  
9 strong?

10 MR. HAFETZ: Our argument for next friend standing  
11 would clearly have a basis, Your Honor, because I would point  
12 you to Judge Bates' decision in the *Al Aulahi* case, where it was  
13 a father who was seeking next friend standing on behalf of his  
14 son. What that decision and other decisions makes clear is a  
15 mere relationship with a family member may enhance the  
16 probability that the next friend seeks to pursue the best  
17 interests of the detainee; but it does not guarantee that, and  
18 there Judge Bates rejected the father as next friend.

19 So the fact that he may have been in contact with a family  
20 member, if the family member didn't want to help him or the  
21 family member wasn't able to help him, his interests would go  
22 unfulfilled. So what's critical -- and all the courts recognize  
23 this; all the decisions recognize this. This is the exceptional  
24 circumstance.

25 This is the nightmare scenario where the government has

1 locked up an American citizen in secret, it's refused to release  
2 even his name, there's no alternative means of vindicating his  
3 rights, and there's no indication --

4 Again, I don't want to -- you know, Your Honor does not  
5 appear to want to hear too much about the article; and you can  
6 ask the government, but they don't dispute it. But in any  
7 event, even if that article didn't exist, there's no evidence  
8 here he does not want a lawyer.

9 So at a minimum -- and again I point to Judge Bates'  
10 decision in the *Abu Ali* case. At a minimum, the Court cannot  
11 dismiss the petition on the current record and has to find out  
12 whether or not this detainee wishes to have this petition filed  
13 and wishes to have access to counsel in connection with that.

14 THE COURT: On the issue of the significant  
15 relationship factor, ACLU argues that an entity with a  
16 relationship that is significant in comparison with others may  
17 serve as a next friend. So I'll assume that is the case.

18 Do you argue with the facts that we currently have, that  
19 your relationship -- that is, the ACLU's relationship with the  
20 detainee -- is more significant in comparison with others?  
21 Because it's obviously not a family member. The ACLU has never  
22 represented this individual before, obviously. Right?

23 MR. HAFETZ: Correct.

24 THE COURT: And there appears to be precedent  
25 that granting next friend standing requires a presence of a

1 relationship between the petitioner and the real party in  
2 interest. So why should this Court find next friend standing in  
3 the absence of such a relationship? Now, I understand we are in  
4 new territory because we don't even know his name. You might  
5 have represented him; you don't know.

6 MR. HAFETZ: It's possible. Your Honor, the Supreme  
7 Court in the *Whitmore* decision does not adopt a requirement of a  
8 family relation, that it be a family member or there be a prior  
9 relationship. The D.C. Circuit has not adopted that requirement.

10 Judge Bates, in the *Al Aulahi* decision, does not. Judge  
11 Kollar-Kotelly, in the *Does* decision, does not. The Eleventh  
12 Circuit has not, nor has the First Circuit. There are multiple  
13 circuits that have rejected that the next friend must have a  
14 prior relationship.

15 Further, even the cases the government cites, the *Coalition*  
16 *of Clergy* case from the Ninth Circuit, which adopts in general a  
17 significant-relationship requirement, says that that requirement  
18 must be interpreted flexibly in light of the practicalities and  
19 the particular facts before the court; and that court, just as  
20 the Fourth Circuit in the *Hamdi* decision, the Fourth Circuit in  
21 *Hamdi* recognized that if there's no other next friend before the  
22 Court, that a prior relationship would not be required.

23 I would also point Your Honor to Judge Mukasey's decision  
24 in the *Padilla* case, which is discussed in the briefs, where  
25 Judge Mukasey recognizes, citing a First Circuit decision,

1 that a complete stranger could be a next friend.

2 Now, in that case, the attorneys did have a relationship  
3 with him because they were representing him when he was declared  
4 an enemy combatant, but that was sort of a fortuitous  
5 circumstance. Under the government's position, they could yank  
6 somebody off the street and not release their name and frustrate  
7 efforts to contact them, and it would be left to chance. This  
8 would undermine the protections of habeas corpus.

9 So, again, it would undermine that protection of habeas  
10 corpus to give the government license to lock up citizens  
11 without providing their name and without making possible --  
12 ensuring an effective way for them to access the courts.

13 THE COURT: All right. Those are all the standing  
14 questions I had for you, and I'm now going to let you proceed.  
15 I'll interrupt you again when I think the moment is right.  
16 I do have some questions --

17 MR. HAFETZ: I'm happy to continue, or if you have  
18 more on standing...

19 THE COURT: I have more questions with regard to  
20 access to counsel. What's your response to the government's  
21 argument in their motion that this Court would be interfering  
22 with the operations of the executive if it were to order  
23 counsel access while the government continues to determine the  
24 detainee's -- and I have no idea what this means, but "his final  
25 disposition." It's an ominous term. I have many questions

1 about that, but what of that argument?

2 MR. HAFETZ: I think it's completely without merit,  
3 Your Honor. These cases, in one form or another, were presented  
4 to the courts after 9/11, and in multiple cases and in each and  
5 every case, the Supreme Court said that you cannot deprive a  
6 citizen of access to habeas. In order for the habeas right to  
7 be meaningful, they must have access to counsel.

8 That's the *Hamdi* decision. That's Judge Mukasey in the  
9 *Padilla* decision, where I would add the government asserted  
10 what it doesn't assert here, that giving the lawyers access  
11 to Padilla, a high-level terrorist, would endanger the national  
12 security and would risk its ongoing interrogations and  
13 intelligence-gathering functions, and Judge Mukasey still  
14 said, under the habeas statute, a citizen has a right of access  
15 to counsel.

16 Now, in terms of the status question, Your Honor, the  
17 Supreme Court, this right has attached, clearly. Whatever one  
18 might think of where -- days or indeed weeks, but certainly --  
19 you know, we are now at two and a half months, and the citizen  
20 clearly has the right to access counsel and to present his  
21 claims, any claims before a court.

22 The *Hamdi* case -- and I think this is very important,  
23 Your Honor. What the *Hamdi* case says is, once the U.S. has  
24 determined the citizen's status -- and they've determined his  
25 status here. He's an enemy combatant. That's the only basis on

1 which they're holding him. Once that status has been determined  
2 and they've made a decision to continue to hold him as opposed  
3 to release him, he has a right to challenge that detention  
4 through habeas corpus. And as all of your fellow judges,  
5 Your Honor -- Judge Lamberth, Judge Kollar-Kotelly, Judge Urbina  
6 -- have said, Judge Kessler as well, the right of habeas corpus  
7 means nothing without a right of access to counsel.

8 THE COURT: Let me ask you, with regard to request for  
9 jurisdictional discovery, the ACLU requests in the alternative  
10 that I order jurisdictional discovery. But isn't Respondent --  
11 how do you respond to the government's argument that, in arguing  
12 that the ACLU bears the burden of establishing standing to file  
13 the petition, why should I order jurisdictional discovery when  
14 you have a burden to meet regarding standing before I can even  
15 get there? So it's kind of a circular argument, right?

16 MR. HAFETZ: Your Honor, this Court has -- just to  
17 start -- and I'll answer your question in one second, but I just  
18 want to clarify one thing. The only jurisdictional question  
19 here is next friend standing. The Supreme Court, in the *Munaf*  
20 decision written by Chief Justice Roberts, was -- it's  
21 unanimously that the courts have jurisdiction over habeas  
22 petitions filed by U.S. citizens in Iraq.

23 So the only jurisdictional question is standing. The  
24 Court, under habeas of the All Writs Act, has the authority  
25 to issue writs and do what is necessary to determine its own

1 jurisdiction. So this is like the *Abu Ali* case, Judge Bates'  
2 decision, but in fact it's much easier.

3 In *Abu Ali*, Judge Bates said the district court has  
4 considerable latitude to ferret out the facts and determine  
5 whether or not it has jurisdiction in accordance with the honor  
6 -- I'm sorry -- to honor the breadth and flexibility of habeas,  
7 right? Now, it was a different jurisdictional dispute, but it  
8 was a jurisdictional dispute nonetheless.

9 The dispute there was whether or not a citizen who was  
10 being held officially in Saudi custody, in foreign custody,  
11 was in fact in the actual or constructive control of the  
12 United States, and Judge Bates ordered jurisdictional discovery  
13 even as he recognized that there was substantial and delicate  
14 interests of foreign relations present in the case.

15 Here there are no such interests. The U.S. is the sole  
16 custodian of this detainee, and the discovery would be quite  
17 simple: Do you want a habeas petition filed to challenge your  
18 detention, which is presently your only potential relief from  
19 unlawful detention? And if so, do you want the ACLU to  
20 represent you pro bono, or, alternatively, would you like the  
21 Court to appoint another attorney pro bono to represent you?

22 It's a very simple, black-and-white series of questions  
23 that would resolve any uncertainty over whether or not this  
24 petition can be filed. Again, we don't think on the record  
25 that their jurisdictional discovery is necessary, but at a

1 minimum, Your Honor, given the magnitude of the equities in this  
2 case, the Court just simply cannot dismiss the petition, but if  
3 there's any uncertainty, has to allow this limited discovery to  
4 go forward so that a citizen is not left in a legal black hole  
5 with no way to challenge the detention.

6 THE COURT: All right. Thank you. Ms. Wyer.

7 MS. WYER: Your Honor, the government is seeking  
8 to have this petition dismissed for lack of standing. The  
9 Petitioner here -- this is an unusual situation, because the  
10 next friend doctrine is itself an unusual doctrine in that it  
11 allows a third party to come in, when it's not that party's  
12 injury, and come in and assert claims on behalf of the real  
13 party in interest.

14 THE COURT: I hate to stop you so early in your  
15 argument, but I want to get some clarification for the record  
16 here. The declaration of Mr. Dalbey states that this detainee  
17 has been declared an enemy combatant. Correct?

18 MS. WYER: My understanding is, according to  
19 Mr. Dalbey's statement, when the detainee was taken into  
20 custody, he was determined to be an enemy combatant.

21 THE COURT: So the answer is yes.

22 MS. WYER: Well, at that point. I mean, to the extent  
23 that that can be determined at that point.

24 THE COURT: I thought that was an easy one.

25 MS. WYER: That's what the declaration says.

1 THE COURT: The declaration says he's an enemy  
2 combatant.

3 MS. WYER: Yes.

4 THE COURT: He's a U.S. citizen. He's being held in  
5 a foreign country; I believe the declaration says it's Iraq.  
6 That's not really relevant for purposes of my ruling, but he is  
7 being held abroad. Correct?

8 MS. WYER: Yes.

9 THE COURT: And he has been held since September.

10 MS. WYER: Yes.

11 THE COURT: Over two months. Correct?

12 MS. WYER: Yes.

13 THE COURT: Has this individual been advised of his  
14 right to counsel?

15 MS. WYER: That is not stated in the declaration.

16 THE COURT: I know.

17 MS. WYER: I have to respond by saying that the ACLU  
18 is relying on statements in a *Washington Post* --

19 THE COURT: I don't want --

20 MS. WYER: -- that say that that is the case. But  
21 even if that were the case, even according to the statements,  
22 even if you assume that the statements in the *Washington Post*  
23 article are accurate, they do not indicate that this detainee is  
24 seeking to file a habeas petition. At most, they indicate that  
25 the detainee invoked his Miranda rights.

1           THE COURT: Let me stop you. I don't want to rely on  
2 a report in any media. I want to rely on representations made  
3 by counsel. Has this individual been advised of their Miranda  
4 rights?

5           MS. WYER: Your Honor, the Department has not given an  
6 official statement on that.

7           THE COURT: So --

8           MS. WYER: Your Honor, I have to urge the Court to  
9 look at the situation here. This is an individual --

10          THE COURT: No. You're not answering my question.  
11 I'm not trying to be impatient, but I am growing impatient  
12 because I've asked a relatively simple question, which is  
13 there's a U.S. citizen in U.S. custody, been declared as an  
14 enemy combatant. I want to know two things: Has the citizen  
15 been advised of his constitutional rights? One. And two, has  
16 he asserted those rights?

17          That's the information that's within the government's  
18 control. We may not know his name, but the government knows his  
19 name and it's within the government's knowledge. So I'd like a  
20 representation. I'd like an answer to those questions.

21          MS. WYER: Your Honor, I don't have an answer to those  
22 questions because the government is not relying on the answers  
23 to those questions for its --

24          THE COURT: This Court feels the need for that  
25 information in order to make an adequate determination in this

1 case. Is it your position, Ms. Wyer, that the government is  
2 not going to provide the Court with that information? Because  
3 I must say, that would be a very extraordinary position indeed.

4 MS. WYER: Your Honor, I would have to seek -- I would  
5 have to confer with the Department of Defense before I can give  
6 an answer to that question.

7 THE COURT: So I therefore assume that the answer  
8 to the second question to that, which is whether this citizen  
9 has requested counsel, you're not prepared to answer either?

10 MS. WYER: It's the same answer, Your Honor. This  
11 situation is what -- this individual was taken into custody as  
12 an enemy combatant because he was fighting against the government  
13 in a foreign country. This is a wartime situation where the  
14 government has a right to detain individuals to remove them from  
15 the battlefield.

16 THE COURT: I'm not disputing that right. I am not  
17 disputing that right. Are you saying that simply because a U.S.  
18 citizen has been declared an enemy combatant they don't have any  
19 constitutional rights?

20 MS. WYER: No. Not at all. Not at all, Your Honor.  
21 After --

22 THE COURT: No, Ms. Wyer. I heard you, but I want  
23 answers to my questions. This individual has been detained,  
24 without anyone knowing his name, in an unknown location  
25 somewhere abroad, by U.S. forces. He's a U.S. citizen.

1           It's been two and a half months, and you can't tell me  
2 whether he's been advised of his rights, whether he's asserted  
3 his rights, and you will not confirm a report that he's  
4 requested a counsel. Is that the government's position here?  
5 I just want to be clear. Because you don't think it's relevant?

6           MS. WYER: Let me address certain parts of your  
7 question, Your Honor. First of all, in regard to this detainee,  
8 in regard to the detainee's identity, it is the Department's  
9 policy not to disclose the names of individuals immediately  
10 after being detained. That is under the Geneva Convention.

11          THE COURT: That's fine.

12          MS. WYER: There is a good reason for that. It is not  
13 that the Department is trying to do anything nefarious with this  
14 individual --

15          THE COURT: And I'm not -- that's not where my concern  
16 lies. I'm not disputing the government's right not to release  
17 his name or information. My concern is with those two questions  
18 that have yet to be answered by you, which is whether he's been  
19 advised of his rights and whether he's asked for counsel.  
20 That's where my concern lies.

21          The fact that you haven't released his name or his location,  
22 that's not where I'm focused on right now. So I'd like you to  
23 tell me if you believe that the answers to those two questions  
24 are not relevant to my determinations here today.

25          MS. WYER: That's what I believe, Your Honor, that

1 they are not relevant to the determination, because this is a  
2 situation where the government has -- the U.S. military has this  
3 individual in custody, and the Supreme Court in *Boumediene*  
4 recognized that the government needs to have a reasonable period  
5 of time --

6 THE COURT: Two and a half months.

7 MS. WYER: -- to -- well, Your Honor --

8 THE COURT: It's been two and a half months.

9 MS. WYER: It is still in the process. It is giving  
10 careful consideration as to what to do with this individual.

11 THE COURT: Okay. Let me stop you. And I can't  
12 imagine what "careful consideration" entails, but I'm intrigued  
13 by a phrase in your brief, in the introduction to your brief,  
14 where you state that "The individual came into the U.S. military  
15 custody less than seven weeks ago," page 5 of 26, "was  
16 identified as an enemy combatant, and is currently detained in  
17 Iraq pending a determination of his further disposition."

18 Can you tell me what that means?

19 MS. WYER: Yes, Your Honor. By reference to other  
20 cases that are Supreme Court cases and other cases, when the  
21 government takes a detainee into custody, there are various  
22 options for what will happen to that detainee. The government  
23 could decide to criminally prosecute the individual; it could  
24 decide to transfer the individual, as happened in *Munaf* and  
25 *Omar*, to another government that has an interest in prosecuting

1 the individual; it could decide to release the individual;  
2 it could decide to further detain the individual. But that  
3 decision has not been made yet.

4 THE COURT: Right. And how long do you think the  
5 government gets to detain a U.S. citizen in custody, without  
6 counsel, with no information as to whether he's received his  
7 rights? How long do you think they get to detain him until they  
8 determine his disposition? Six months? A year?

9 MS. WYER: Your Honor --

10 THE COURT: Do they get to decide what's reasonable  
11 here?

12 MS. WYER: That is not the question before the Court  
13 because --

14 THE COURT: It is the question before this Court.  
15 He's been detained two and a half months, and I would like to  
16 know --

17 MS. WYER: In regard to the standing --

18 THE COURT: I would like to know how long you think  
19 you should be able to continue to do this to a United States  
20 citizen.

21 MS. WYER: Your Honor, in regard to standing, standing  
22 must exist at the time the petition is filed. This petition was  
23 filed on October 5. Now, under *Boumediene*, the government can  
24 have a reasonable time to decide what to do with a detainee, and  
25 unless the Petitioner can prove that there is undue delay, the

1 Petitioner has not shown any evidence of the government's bad  
2 faith in its decision-making process.

3 The government is diligently attempting to make this  
4 determination and resolve -- and reach a final disposition  
5 regarding this individual, but that process is still underway.

6 THE COURT: How long is that process going to take?

7 MS. WYER: I don't have a prediction on that,  
8 Your Honor. The government is diligently attempting to reach  
9 that determination.

10 THE COURT: And what are the limits? Can you tell me  
11 the limits on how long the government should have to determine  
12 this individual's disposition as he sits somewhere abroad  
13 without a lawyer?

14 MS. WYER: For purposes of the standing determination,  
15 Your Honor, it is the Petitioner's burden to clearly establish  
16 that it meets the standing requirements.

17 THE COURT: Do you not see the circularity of  
18 this argument, Ms. Wyer? The U.S. military forces took this  
19 individual into custody, are keeping him in an undisclosed  
20 location, will not release his name, and will not let him have  
21 access to a lawyer.

22 Under those circumstances, isn't it a bit rich for the  
23 government to come in here and say, well, the ACLU didn't file  
24 this petition till October, so really it hasn't been that much  
25 time at all, when the entity that's responsible for him being

1       incommunicado is the government?

2               MS. WYER: Your Honor, this individual is not  
3       incommunicado. This individual has been visited, as allowed  
4       under Department of Defense policy and the Geneva Convention,  
5       by the International Red Cross Committee.

6               THE COURT: Then I come back to my question which  
7       remains unanswered: Has this individual been advised of their  
8       constitutional rights?

9               MS. WYER: Your Honor, I don't have a different answer  
10      to that question, but this individual --

11              THE COURT: Well, I am going to order you, Ms. Wyer,  
12      or some representative of the government, to provide this Court  
13      with the answer to those two questions: whether the individual  
14      has been advised of their rights, and whether the individual has  
15      requested legal counsel or that a petition for habeas corpus be  
16      filed on his behalf. I want the answers to those questions by  
17      5 p.m. today.

18              MS. WYER: Your Honor, this is an unprecedented  
19      situation --

20              THE COURT: It is.

21              MS. WYER: -- because there is no case where an  
22      organization has been allowed to proceed as next friend of an  
23      individual without -- to a stranger, with no prior relationship  
24      at all to that individual. To the contrary, courts have  
25      consistently rejected next friend standing assertions in those

1       circumstances, and Judge Bates and Judge Kollar-Kotelly of this  
2       court have clearly stated that it is inappropriate to assume  
3       that a detainee wants to pursue habeas relief. You cannot just  
4       assume that from the facts.

5               THE COURT: Well, I wouldn't assume it if the  
6       government would answer my questions.

7               MS. WYER: But it is not the government's -- this is  
8       -- the problem here, Your Honor, is that this Court does not  
9       have jurisdiction to make these inquiries unless this Petitioner  
10      has standing, and the Petitioner must -- has the burden to  
11      clearly establish its standing.

12              It would be inappropriate for this Court to exercise some  
13      supervisory authority over what the Department of Defense is  
14      doing in wartime in a foreign country unless it has jurisdiction  
15      based on this Petitioner's petition, and this Petitioner lacks  
16      standing.

17              THE COURT: I understand that's your position.  
18      Let me ask you about the significant-relationship issue.  
19      The ACLU is an organization -- and its stated purpose is in  
20      its pleading; I don't have to repeat it here. But is it the  
21      government's position that the ACLU is here to advance some  
22      other agenda?

23              I mean, the Supreme Court talks about that issue in  
24      *Whitmore*, and there are cases also that discuss, you know,  
25      the ACLU isn't some person who has walked off the street and

1 filed a petition with no institutional basis. I mean, this is  
2 what they do.

3 Is it the government's position that they can't file a next  
4 friend brief simply because the detainee hasn't asked them to or  
5 because they're doing it for some other purpose other than to  
6 effectuate the individual's rights?

7 MS. WYER: Your Honor, we are not questioning the  
8 Petitioner's good faith, but the Petitioner here is interested  
9 in vindicating the Constitution as it interprets the  
10 Constitution. It has no specific interest in this individual,  
11 and it cannot because it has no relationship with this  
12 individual. It does not know the individual.

13 THE COURT: No one can know this individual.  
14 The problem we have here is the government's argument is  
15 circular. They have taken this individual into custody and not  
16 allowed him to meet with anybody other than the International  
17 Red Cross, and we don't know the substance of his conversations  
18 with the International Red Cross because they're confidential.

19 Moreover, and what I find unusual, the government refuses  
20 to say whether this individual has been advised of their  
21 constitutional rights and whether they requested counsel or  
22 asserted their rights. And then, when an organization, based  
23 on, frankly, a report in the press that someone was being  
24 detained, has stepped forward to file a next friend brief, the  
25 government says, well, you don't have standing to do it because

1 you don't have any contact or relationship to him, you have no  
2 standing, when the lack of contact is the government's doing.

3 Under this scenario, Ms. Wyer, as I see it, the government  
4 could snatch any U.S. citizen off the street, hold them as an  
5 enemy combatant in another country for as long as it took to  
6 come to some final disposition, during which time they would  
7 not allow them to meet with a lawyer, a family member, or even  
8 release their name.

9 That scenario, that kind of unchecked power, is, quite  
10 frankly, frightening. And I would like to know if the  
11 government is really here today to say that they can do that.  
12 How else would the detainee get a lawyer if not through some  
13 organization stepping forward on his behalf when you won't even  
14 tell me if he's asked for a lawyer?

15 MS. WYER: Your Honor, there's at least three points  
16 I need to make here. First of all, that is not the situation  
17 here. The U.S. military did not snatch this person off the  
18 street in Kansas. He was picked up, or he was turned over by  
19 forces in wartime on a battlefield. He was removed from the  
20 battlefield under the law of war. He has been detained pursuant  
21 to the law of war and DOD policies.

22 THE COURT: I mean no criticism as to the reason for  
23 his detention. I will accept Mr. Dalbey's declaration that this  
24 individual, the government had reason to believe that he is an  
25 enemy combatant and has held him lawfully as an enemy combatant.

1 That is not where my concern lies. My concern lies with his  
2 access to counsel.

3 MS. WYER: Your Honor, the second point is, he's not  
4 being held incommunicado. And what could happen -- we're not --  
5 we are not attempting to use the Red Cross as a vehicle for  
6 habeas rights; we're just simply pointing out that he is not  
7 incommunicado. And because it is the Department's policy not to  
8 release the name of this individual at this time, that does not  
9 mean that this detainee could not communicate to the Red Cross,  
10 who would communicate with his family, and the family would have  
11 the ability to identify him publicly and things could proceed  
12 from there. That could happen.

13 THE COURT: So is it your position that the fact that  
14 the detainee has been allowed access to the Red Cross is  
15 sufficient for him, if he wishes to, to effectuate his desire  
16 for counsel? Is that your position?

17 MS. WYER: We are simply making the point that it  
18 is inaccurate to say that this person is incommunicado.

19 THE COURT: Well, what is accurate, Ms. Wyer?  
20 That's what I've been trying to get at. What is accurate?  
21 Has this person asked for a lawyer? Have they been advised of  
22 their rights?

23 We are sitting here, and this is maybe the fourth time I've  
24 asked this question without an answer. Whether or not that  
25 individual would have been able to tell the Red Cross, "Contact

1 my family; I need a lawyer," I can make that assumption that he  
2 had that opportunity. Before I even get there, I'd like to know  
3 if he wants a lawyer.

4 MS. WYER: Well, Your Honor, you have ordered us to  
5 provide that information, and so I plan to comply with the  
6 Court's order, certainly, by 5 p.m. today.

7 However, let's assume that this individual asked for a  
8 lawyer or invoked his right under Miranda during questioning as  
9 described in the *Washington Post* article. That would not mean  
10 that he wants to pursue habeas relief in an American court, and  
11 there are documented instances where individuals detained after  
12 having been -- after having fought against the United States in  
13 another country, they do not want to invoke American court  
14 relief. They do not want to pursue that option.

15 THE COURT: But you're making a bit of a jump here.  
16 You're making a bit of a jump, because you're saying let's  
17 assume -- if we assume, for purposes of argument, that the  
18 individual has asked for counsel, that that doesn't mean they  
19 want to pursue a habeas petition. And that's true. That's a  
20 leap, though. If they've asked for counsel, how are they to get  
21 counsel with whom they could then discuss whether or not they  
22 wanted to file a habeas petition? They haven't been allowed to  
23 talk to a lawyer.

24 MS. WYER: Your Honor, if this individual asked for  
25 counsel, under Miranda in the context of being questioned, that

1 does not confer a right or a requirement for the government to  
2 immediately provide a lawyer.

3 THE COURT: No, it doesn't.

4 MS. WYER: What it requires is that the government  
5 stop questioning that individual. So there is no reason to  
6 assume that that would not have happened in this scenario.

7 THE COURT: I have some familiarity with Miranda  
8 rights. And certainly if -- you're right. The fact that an  
9 individual says, I don't want to be questioned, I want a lawyer,  
10 doesn't mean that the government gives them a lawyer immediately,  
11 but it does mean that they have to stop questioning them.

12 I find it unlikely that during the two and a half months  
13 that this individual has been in the government's custody that  
14 he's not been questioned. But I don't know because I don't know  
15 if he's been advised of his rights and whether he's asserted his  
16 rights. And, frankly, whether or not he's been questioned right  
17 now is not my concern.

18 My concern is his access to counsel, and a habeas petition  
19 may simply be a way of bringing him, "bringing the body forward"  
20 as the term goes, so that the person can assert their rights;  
21 because right now what we know is this person has had no contact  
22 with anyone other than the government and the International Red  
23 Cross.

24 MS. WYER: Your Honor --

25 THE COURT: So your assertion that just because he

1 hasn't been given a lawyer doesn't mean he wouldn't want a  
2 habeas petition is correct, but if they have asked for a lawyer,  
3 don't they have a right not to be questioned until they have a  
4 lawyer?

5 MS. WYER: Yes. They have a right not to be  
6 questioned. Your Honor --

7 THE COURT: And don't they have a right, then, if  
8 they've asserted their constitutional rights, to be either  
9 brought before a judicial officer or have some sort of a hearing  
10 or be charged? I mean, if they've asserted their rights, there  
11 are then steps which then must take place. Correct?

12 MS. WYER: Yes. Ultimately, yes --

13 THE COURT: When?

14 MS. WYER: After this initial, temporary situation  
15 ends and the government makes a determination regarding this  
16 individual's disposition. We are still in this preliminary,  
17 temporary stage.

18 THE COURT: Of two and a half months.

19 MS. WYER: And for purposes of standing, Your Honor,  
20 it is less than a month, because the Petitioner filed its  
21 petition on October 5, and that's the point where you have to  
22 determine whether this case presents extraordinary circumstances  
23 so as to deviate from the next friend standing principles that  
24 the Supreme Court set forth in *Whitmore*.

25 The Petitioner is relying on this notion that within two

1 months or within three and a half weeks this individual should  
2 have been able, if he had family members, that if he wanted to  
3 file a habeas petition he would have somehow gotten that to  
4 happen within three and a half weeks. But it is hardly unusual.

5 This individual could have a family member. He could  
6 proceed to file a habeas claim at some point in the future  
7 through a proper next friend. The fact that that has not  
8 happened yet is no reason to deviate from every case that has  
9 ever decided a next friend standing issue and to allow this  
10 Petitioner to have standing to assert next friend standing on  
11 behalf of a stranger.

12 The Petitioner, it says if -- under its theory, any third  
13 party could come into court and assert next friend standing on  
14 behalf of anyone who is detained and who has not yet filed a  
15 petition or who has not yet filed a habeas petition in any  
16 context. They could argue that you have to infer --

17 THE COURT: How could the detainee file a habeas  
18 petition? What you just said is, "any third party could come  
19 into court and assert next friend standing on behalf of anyone  
20 who is detained and who has not yet filed a petition." That  
21 makes no sense. How can someone who is detained without access  
22 to counsel, in an undisclosed location, how could he be expected  
23 to file a petition?

24 What the government is saying is, we're going to keep this  
25 person, not allow them to talk to anybody other than the Red

1 Cross, with whom his conversations are confidential, and then --  
2 and then when somebody files a petition on his behalf, we're  
3 going to say, well, you can't file on his behalf because you  
4 don't know him and he hasn't asked you. How is that not the  
5 most circular argument?

6 MS. WYER: Your Honor, the next friend standing  
7 doctrine requires that the friend petitioner have a significant  
8 relationship with the real party in interest and know enough  
9 about this individual to know what that individual's actual  
10 wishes are.

11 THE COURT: Why shouldn't I order jurisdictional  
12 discovery in this case? Why shouldn't I propound the following  
13 questions to the detainee: whether he wishes a lawyer; whether  
14 he wishes a habeas petition to be filed on his behalf at no  
15 cost; whether he wishes to be represented by the ACLU, or if he  
16 wishes the Court to appoint counsel. Why shouldn't I do that?

17 MS. WYER: Because, Your Honor, the Petitioner has  
18 not come forward with any evidence of this actual individual's --

19 THE COURT: But why should --

20 MS. WYER: -- situation.

21 THE COURT: Right. Okay.

22 MS. WYER: They don't have any --

23 THE COURT: Why shouldn't --

24 MS. WYER: -- discovery.

25 THE COURT: -- I, as the Court, get that information?

1 Why shouldn't I propound those questions to the detainee so  
2 I can know -- so this Court will have on the record, without  
3 recourse to the media or to any other party, whether he wishes  
4 to have a habeas petition filed on his behalf? What would be  
5 the government's position with regard to that procedure?

6 MS. WYER: First of all, Your Honor, in the *Abu Ali*  
7 case, the Court did not allow jurisdictional discovery -- or the  
8 Court relied on the fact, in allowing jurisdictional discovery,  
9 that the petitioner in that case had presented undisputed  
10 evidence regarding the fact that the United States had some  
11 control over the detention of the individual at issue there.  
12 Here there is no evidence presented --

13 THE COURT: But there's no other case on all fours  
14 with this one. This case presents an unusual circumstance  
15 for which I have not been able to locate a case on point.

16 MS. WYER: Your Honor --

17 THE COURT: So why should I not get the information  
18 that I need to determine whether this detainee actually does in  
19 fact wish the ACLU to represent him or whether he wishes this  
20 Court to appoint counsel for him since he does have certain  
21 rights?

22 MS. WYER: Because the standing issue is a  
23 prerequisite, Your Honor.

24 THE COURT: Standing is a prerequisite for  
25 jurisdictional discovery?

1 MS. WYER: The jurisdictional discovery that the  
2 Petitioner is seeking here would not allow the Court to find  
3 next friend --

4 THE COURT: Why doesn't the Court have the power to  
5 get that information?

6 MS. WYER: Even if the -- the Petitioner asked that  
7 jurisdictional discovery consist of two questions: first, whether  
8 in fact the individual did invoke his right to counsel under  
9 Miranda as reported by the *Washington Post*, and second, whether  
10 the individual has other family members who could assert --

11 THE COURT: That's not my question, though, Ms. Wyer.  
12 My question is, why can't this Court propound those questions?

13 MS. WYER: The questions that Petitioner proposed  
14 would not mean that this Petitioner has next friend standing.

15 THE COURT: No. I understand. But why can't this  
16 Court ask of the Petitioner the two questions: Do you wish to  
17 be appointed counsel? Do you wish a petition for habeas corpus  
18 to be filed on your behalf? Why can't I ask those questions of  
19 the detainee in this case?

20 MS. WYER: Because jurisdictional discovery is  
21 inappropriate unless the discovery would settle the matter  
22 of the Court's jurisdiction and --

23 THE COURT: Wouldn't it? Wouldn't the answer  
24 determine whether the ACLU can represent him or whether I have  
25 to appoint counsel for him, a federal defender or someone else?

1 MS. WYER: No, Your Honor, because this is a case  
2 where Petitioner has filed a petition. Unless this Petitioner  
3 has next friend standing, this Court does not have jurisdiction  
4 to do anything in regard to this detainee. It does not have a  
5 supervisory power over, as I said, over U.S. military operations  
6 regarding detainees in foreign countries.

7 Unless this Petitioner has filed an appropriate petition  
8 with next friend standing on behalf of this individual, this  
9 petition must be dismissed under *Whitmore*, under the principles  
10 that courts in the Fourth Circuit and the Ninth Circuit and  
11 every court to have considered next friend standing. If the  
12 Petitioner does not have next friend standing, the Court cannot  
13 simply proceed with another -- cannot substitute in a more  
14 appropriate petitioner on behalf of this individual. It simply  
15 must dismiss the petition.

16 Your Honor, again, this is -- I think the reason that the  
17 Court is seeing this as an unusual situation is because we are  
18 in this preliminary stage. It is in this temporary preliminary  
19 stage that the Supreme Court in *Boumediene* recognized would be  
20 the case.

21 THE COURT: My concern, Ms. Wyer, is that the  
22 government seems to not be able to give me any estimation of  
23 what this temporary preliminary stage is. You're asking this  
24 Court to allow the government to continue to hold a U.S. citizen  
25 without access to counsel in an undetermined location for

1       whatever time the U.S. government thinks is necessary to  
2       determine his further disposition.

3               I find this to be an extraordinary situation, and I  
4       understand what the government's position is. But you haven't  
5       given me any kind of estimate or boundary for what this  
6       temporary preliminary situation is. Basically, it's just,  
7       "Trust us, we know what we're doing."

8               MS. WYER: No, Your Honor. We are not saying that  
9       this situation will go on indefinitely. What we are saying is  
10      that the Petitioner, at the time it filed the petition, it did  
11      not have next friend standing. And even now it cannot establish  
12      extraordinary circumstances that justify this Court, for the  
13      very first time, allowing an organization to come in and assert  
14      next friend standing on behalf of a stranger.

15              It would be inappropriate in this situation where it has  
16      been a short time. And the Supreme Court in *Boumediene*, the  
17      rationale behind those statements in *Boumediene* is that the  
18      Supreme Court recognized that when you're in this context, this  
19      military context in wartime in other countries, it is going to  
20      take some time for the government to decide, when it detains an  
21      individual, what to do with that individual and what the  
22      disposition of that individual should be.

23              And in *Boumediene*, the Court even said that the government  
24      would have the time it took to go through a whole administrative  
25      process, which presumably would be more than two months.

1 So the time that has passed here is not inordinate; it is not  
2 unjustified. The government is diligently pursuing this  
3 decision and is going to reach a decision in as expeditious a  
4 fashion as it can, and it fully intends to do that.

5 THE COURT: Thank you, Ms. Wyer.

6 Ms. Wyer, I would like the answer to those questions:  
7 whether the detainee has been advised of his rights, and whether  
8 he has asserted his rights including whether he wished the  
9 petition to be filed on his behalf.

10 I would like the answer to those two questions by three  
11 o'clock today, not by five o'clock today. I just don't think  
12 it should take you that long, and I'm frankly amazed that you  
13 didn't come to this hearing with this information.

14 MS. WYER: Your Honor, I have a doctor's appointment  
15 at 3 p.m. today, so I would ask it to be 5:00.

16 THE COURT: Okay. Five o'clock.

17 MS. WYER: Your Honor, I would just like to emphasize  
18 again that this would be an unprecedented holding if this Court  
19 were to find a next friend standing to a stranger in this  
20 situation. The Fourth Circuit in *Hamdi* stated that there is all  
21 the difference in the world than the next friend who represents  
22 the interest of someone with whom he has a significant  
23 relationship and a next friend who files suit on behalf of a  
24 total stranger. This is a situation where the Petitioner here  
25 has filed a suit on behalf of a total stranger, and it would not

1 be appropriate to allow next friend standing in this situation.

2 THE COURT: Thank you, Ms. Wyer.

3 Briefly, Mr. Hafetz.

4 MR. HAFETZ: Your Honor, just let me start with the  
5 directive the Court has issued. Just to be clear, he is not --  
6 the government has no -- would not have any obligation to have  
7 -- we don't know whether they've advised him of his habeas  
8 rights. But even if they haven't, he might still want a habeas  
9 petition.

10 I think that, you know, for -- just on the question of  
11 whether they advised him of his rights under Miranda, the issue  
12 is -- what it suggests is that, if that is true, is the one time  
13 the government is obligated by law to advise him that he has a  
14 right to counsel, he asked for counsel. And the inference there  
15 is that he wants access, but --

16 THE COURT: I understand.

17 MR. HAFETZ: Yeah. But even if the answer were no,  
18 Your Honor, I think we're light years -- even if he did not  
19 invoke it, we're light years from *Whitmore*. As Your Honor  
20 knows, you had a prisoner who wanted to be executed and a fellow  
21 prisoner who was trying to stop him. So you had the interests  
22 where, you know, the prisoner had said, effectively, I don't  
23 want this. So not silence, but I don't want this.

24 THE COURT: I understand the distinction between  
25 *Whitmore*, and I do emphasize that those two questions are not

1 contingent. Number 2 does not flow from number 1. He could  
2 still -- he could not have asserted his right to counsel and  
3 still wanted a petition to be filed on his behalf. So they're  
4 independent questions.

5 MR. HAFETZ: And for any questions that are  
6 subsequently asked to him, just -- you know, we don't need to  
7 decide it now, but just wanted to raise a couple of questions  
8 that we don't know whether what language --

9 THE COURT: Slow down for the court reporter.

10 MR. HAFETZ: Yeah, sorry. We don't know what language  
11 he speaks. He'd have to be able to understand, be able to read.  
12 There would be have, you know, absence of coercion, inducement  
13 and pressure. So, basically, because -- you know, at bottom,  
14 the issue here is self-determination. It's what does he want  
15 and to be able to get that answer.

16 I don't want to take more of Your Honor's time, just two  
17 very brief points on what the government raised. The ACLU, as  
18 Your Honor noted, is not just any third party. And I  
19 particularly direct you to the distinctions between this and the  
20 *Coalition* case, where here that was a group -- an ad hoc group  
21 of well-intentioned but loosey-goosey, and many non-lawyers,  
22 religious individuals who did not have experience in this area.

23 This is -- the ACLU has a, you know, a hundred year-old  
24 civil liberties organization that's provided not just  
25 representation to individuals, but representation in these

1 cases, detainees held as enemy combatants. And, in addition,  
2 we also attempted to contact the detainee prior to filing the  
3 petition, but they made that impossible.

4 And lastly, Your Honor, on *Boumediene*, just two points.  
5 First of all, *Boumediene* involved noncitizens. We're talking  
6 about an American citizen. And second of all -- three points.  
7 Second of all, any reasonable period has long elapsed, certainly  
8 for an American citizen. And third of all, what the Court  
9 referenced there was where the government had created a process  
10 to determine that person's status.

11 Here they've determined his status, and they've essentially  
12 done so through the process that the Supreme Court clearly  
13 rejected in *Hamdi*, which is you have a right to challenge your  
14 detention before your interrogator and your captor. That is not  
15 due process, and that is directly contrary to the *Hamdi* decision  
16 and the other Supreme Court decisions in this area. Thank you.

17 THE COURT: Thank you, Mr. Hafetz. All right.  
18 I await the government's response to the questions I have  
19 propounded, and I appreciate the arguments and will try and  
20 rule expeditiously. Thank you.

21 (Proceedings adjourned at 11:07 a.m.)  
22  
23  
24  
25

\* \* \* \* \*

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan A. Wayne  
BRYAN A. WAYNE