

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,	.	Monday, December 11, 2017
	.	10:00 a.m.
Respondent.	.	
. . . . .	.	

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

APPEARANCES:

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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 versus James  
4 Mattis. Will counsel please stand and identify yourselves for  
5 the record.

6 MR. HAFETZ: Hi. Good morning. It's Jonathan Hafetz  
7 from the ACLU, and I'm joined by Art Spitzer from the ACLU for  
8 the District of Columbia.

9 THE COURT: Good morning.

10 MR. HAFETZ: Good morning.

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

14 THE COURT: Good morning, Ms. Wyer.

15 We are here for further proceedings in this habeas case  
16 filed by the ACLU. I thank the parties, both sides, for their  
17 prompt response to my inquiries into my supplemental briefing  
18 schedule. I appreciate it. It's been very helpful.

19 Unfortunately, as I'm sure both sides are aware, the case  
20 law does not point in a clear direction, which is why we're  
21 having all these arguments. There's nothing that's precisely  
22 on point, and therefore -- there are a lot of cases out there  
23 dealing with various permutations of this issue, but none that  
24 deal directly with it. So, I do -- having read the parties'  
25 briefs, I understand their positions.

1           Mr. Hafetz, if you would want to address anything that you  
2 haven't already in your brief, please feel free to do so. I'm  
3 going to let you have some additional argument on that issue,  
4 and I might have some questions for you as well.

5           MR. HAFETZ: Your Honor, good morning.

6           While it may be true that there's no case precisely on  
7 point, I think the case law strongly and undeniably points in  
8 the direction that where an American citizen has a right to  
9 habeas corpus, he has a right to access counsel as sure as night  
10 follows day.

11           THE COURT: What of the government's argument that  
12 this is not a law enforcement -- I mean, he's not being  
13 questioned for law enforcement purposes and that *Miranda* -- in  
14 other words, he may have asserted his *Miranda* rights, but he's  
15 not being questioned for law enforcement purposes, and therefore  
16 that invocation does not control here?

17           How do you respond to that point?

18           MR. HAFETZ: Your Honor, as we made clear in the  
19 briefs, we recognize that the right at issue here, it's not a  
20 *Miranda* right; it's a habeas right. But he unquestionably,  
21 under *Munaf*, which says there's habeas jurisdiction over U.S.  
22 citizens detained in Iraq, and *Hamdi*, which says that as part of  
23 that habeas jurisdiction, the detainee must have an opportunity  
24 to challenge his detention, he has a right, a habeas right, to  
25 challenge his detention and to do so effectively.

1           As literally every judge in this district has concluded,  
2 he has right to have counsel access. So the invocation of  
3 *Miranda* is relevant to this extent: It suggests that the one  
4 occasion where we know where the government advised this citizen  
5 that he has a right to a lawyer, he said, "I want to speak to a  
6 lawyer."

7           We think that under the cases -- and again, I call your  
8 attention to Magistrate Judge Kay's decision, the *Adem* decision  
9 we cite, as well as the Judge Roberts' decision denying the  
10 government's motion for reconsideration -- this is plainly  
11 sufficient to grant us access to him.

12           THE COURT: Let me ask you this; let's see what we  
13 agree on: Do you agree that as his detention with the  
14 government currently stands, the law allows the government to  
15 detain him for a reasonable time until they decide what to do  
16 with him as an enemy combatant? Do you agree that they're  
17 allowed to do that?

18           Now, obviously, we have some issue with what a reasonable  
19 time is, but do you agree that, having designated him as an  
20 enemy combatant, the government is allowed to detain him for a  
21 reasonable time before deciding whether to charge him, to  
22 release him, move -- you know -- how, as they call it, further  
23 dispose of him?

24           MR. HAFETZ: I mean, "further dispose" is just an  
25 invention. There is no support in the case law. I don't know

1 where it's coming from. There are people at Guantánamo who have  
2 been sitting there for 16 years without further disposition.

3 THE COURT: But they have been moved to Guantánamo.  
4 There are procedures in place for them. In other words, what  
5 the government is saying, I believe -- and Ms. Wyer can correct  
6 me if I'm wrong -- is we have a reasonable time to decide how  
7 we're going to proceed with him, and then, depending on what we  
8 do with him, procedural safeguards will kick in. I think that's  
9 what they're saying.

10 MR. HAFETZ: Yeah. No, Your Honor. We don't agree.  
11 We don't see the issue this way, and I think this is what the  
12 cases suggest. Once the government has determined that person's  
13 status, at a minimum, he has the right to challenge that status  
14 in habeas. That's what *Hamdi* says, and then *Boumediene*, where  
15 the habeas right was available to challenge once the status  
16 determination had been made. Now, whatever time they may have  
17 to make that status determination for a U.S. citizen, that has  
18 -- you know -- would have long ago passed anyway.

19 THE COURT: I guess I'm beginning to see that there  
20 may be a disconnect -- and again, I could be wrong, but I was  
21 reviewing these pleadings again last night and the cases, and  
22 it seems that there may be a disconnect in determining what that  
23 status means.

24 In other words, the affidavit filed by the government says  
25 that, to the government, he is an enemy combatant, and I think

1 the ACLU's position is that his status has been determined. It  
2 appears that the government may be saying -- and again, I'll ask  
3 Ms. Wyer to elucidate when she gets up -- that notwithstanding  
4 that, his status has not been determined until we decide what to  
5 do with him. So what's your response to that if that's their  
6 position?

7 MR. HAFETZ: Well, they've -- I mean -- Your Honor,  
8 I mean, status is status, and they've called him an enemy  
9 combatant. And once he's held as an enemy combatant, they may  
10 or may not be able to hold him, but the habeas right exists.

11 And I'll also note he's been moved from the -- you know,  
12 wherever his place of -- you know, wherever he was seized on the  
13 battlefield to a detention center. And what *Hamdi* suggests,  
14 what *Munaf* suggests, what the Guantánamo cases suggest, is once  
15 the government has classified you as an enemy combatant, you  
16 have a right to challenge that detention.

17 Now, the government may or may not decide to release you  
18 after that. It may decide to charge you after that, or it may  
19 hold you until the end of hostilities, which is -- but the point  
20 is, even though this is a habeas right, not a *Miranda* right, the  
21 Supreme Court, in case after case, makes clear that a U.S.  
22 citizen has a right to challenge his status and his detention as  
23 an enemy combatant. It can't be -- that ability can't be  
24 reduced as a government, you know, say-so.

25 THE COURT: Let me ask you another question that

1 arises after review of the pleadings. So the government argues  
2 that this Court shouldn't order jurisdictional discovery because,  
3 even if the Court obtained answers to your proposed questions,  
4 you would still be unable to meet your burden of showing that it  
5 had next-friend status at the time the petition was filed.

6 Their position is, if you don't have standing at the time  
7 the petition is filed, then everything that happens after that  
8 is meaningless because there's no case or controversy before  
9 this Court.

10 You address this argument very briefly in a footnote in  
11 your pleading. I'd like to hear a little more from you  
12 regarding your position on this argument, that is, whether --  
13 obviously, you'll say no or not, but whether you're required to  
14 show that as of October 5, when you filed this petition, that  
15 you had next-friend standing.

16 MR. HAFETZ: Your Honor, we had next-friend standing  
17 on October 5th because we met the two prongs of the *Whitmore*  
18 test.

19 THE COURT: Unavailability.

20 MR. HAFETZ: Correct. And dedication to the  
21 prisoner's best interest.

22 Now, whatever -- even accepting the government's argument  
23 on the time of filing, which I'll get to in a second, we met the  
24 standard at the time of filing because the issue was whether  
25 then, as it is now, whether we are dedicated to the detainee's

1 best interest. And all the jurisdictional discovery would  
2 ascertain is just proof on that point, that we were dedicated to  
3 the detainee's best interest.

4 THE COURT: Do you think the government's argument  
5 would be stronger had the record not indicated that the detainee  
6 has asked for a lawyer? Because there are cases where the  
7 detainee, for whatever reason, distinctly did not want a  
8 petition filed on his behalf or did not want to avail himself  
9 of the United States justice system.

10 Do you think that, had the record not been supplemented to  
11 include the fact that the detainee had requested counsel, that  
12 you would have a more difficult argument?

13 MR. HAFETZ: I think the request for counsel is  
14 additional authority, but I think that it's an overwhelming case  
15 at a minimum for jurisdictional discovery, absent at least when  
16 there's no means for the citizen to avail himself his right,  
17 and absent an indication that he does not want that right.

18 THE COURT: So you think he has to show -- so you're  
19 saying there's a presumption that anyone who's being detained  
20 would want a habeas petition to be filed on their behalf, and  
21 then they'd have to rebut that presumption by actually  
22 affirmatively saying, no, I don't? Is that what you're arguing?

23 MR. HAFETZ: What I'm arguing, Your Honor, is if a  
24 U.S. citizen is being detained in secret without access to a  
25 court for months, and there's no indication that the U.S. citizen

1 does not want to proceed, at a minimum, a court has to ensure  
2 that the writ is available. Maybe the citizen doesn't want to  
3 proceed. It's ultimately the citizen's choice.

4 You know, it's a little bit rich, Your Honor, for the  
5 government to come in and say, oh, the ACLU is making these  
6 decisions on behalf of the detainee, when it's not letting the  
7 detainee speak. It's ultimately the detainee's choice.

8 Now we have confirmed evidence that he asked for a lawyer  
9 the one time he was told he could have one, but even without  
10 that, you've locked up an American citizen in secret. The  
11 government cannot deny him his right to habeas corpus by cutting  
12 off access to a lawyer in the courthouse.

13 At a minimum, if the Court is confronted with a habeas  
14 petition, it has to ensure itself that the citizen's, you  
15 know -- it has to assure itself of whether the citizen wants to  
16 exercise that right. And that's a right, Your Honor, that's  
17 guaranteed by statute. I mean, we're talking about 2241, 2243,  
18 2246, giving the court broad power to ensure that the writ is  
19 maintained as interests of justice require.

20 It's also a right that's guaranteed under the Suspension  
21 Clause of the United States Constitution, and it's a right that  
22 the Supreme Court has over and over again said is the -- one of  
23 if not the most central rights in the Constitution.

24 Now, I do want to address, though, the Article III standing  
25 point, because Your Honor referenced the case-or-controversy

1 requirement, and I think the government confuses the issue here.  
2 There's no question that there's Article III standing. The  
3 detainee here, the real party in interest, unquestionably meets  
4 the Constitutional minimum for Article III standing. You have  
5 injury, causation, and redressability.

6 The question, the standing question, is a prudential one.  
7 It's a prudential one that's up to judicial administration.  
8 So the -- and I think when you look at the cases that the  
9 government relies on, cases like the *Hamdi* case, the *Coalition*  
10 *of the Clergy* case, those were -- whether we agree with the  
11 outcome or not, those were ultimately exercises in the  
12 administration of the prudential standing doctrine.

13 In *Hamdi*, the detainee surely met Article III standing  
14 requirements, and as a matter of prudential standing, it denied  
15 next-friend standing to the attorney because the father was  
16 there to assert his rights.

17 In the *Coalition of Clergy* case, it denied standing to a  
18 group that was an ad hoc group, not a group devoted to legal  
19 representation, that had filed a mass petition on behalf of  
20 numerous detainees without even trying to speak with them and  
21 because the right at issue was being effectively litigated by  
22 lawyers in other cases, that is, whether there was jurisdiction.  
23 So, as a prudential matter, the court could deny standing  
24 without essentially eviscerating the habeas right.

25 Here, if the Court denies standing and denies jurisdictional

1 discovery, which I think is just an incredible claim the Court  
2 can't even inquire about the citizen's wishes, it would be a  
3 constructive suspension of the writ.

4 THE COURT: I asked for supplemental briefing as to  
5 whether -- given the detainee's express desire for counsel,  
6 whether the government had an independent obligation to provide  
7 counsel for him, and I guess we're sort of going back and forth  
8 between this. Does it make any difference to you that this is a  
9 habeas issue and not a *Miranda* issue?

10 MR. HAFETZ: I'm sorry? Difference in what sense,  
11 Your Honor?

12 THE COURT: In whether the government, as opposed to  
13 the Court, has any independent obligation to provide counsel,  
14 counsel having been requested. Would it be different -- if this  
15 were a simple law enforcement detention *Miranda* issue, the law  
16 is clear that, you know, questioning has to cease until he is  
17 produced to a magistrate and so on. We're not in that scenario.

18 Does that affect the government's obligation, if it has  
19 any, to provide this detainee with counsel? In other words,  
20 does the government have any obligation?

21 MR. HAFETZ: I think the government has an obligation  
22 to allow for access for the exercise of the right. I think  
23 that's very clear from the *Rasul* decision and the decisions  
24 of Judge Kollar-Kotelly, Magistrate Judge Kay after that, where  
25 once jurisdiction was recognized, the government had to make

1 that right available. And, in fact, notices were sent to the  
2 detainees, advising them of their right to file a petition and  
3 allowing them to exercise that right.

4 Once the right exists -- and there's no -- there, for  
5 years, it was whether they even had a right at Guantánamo, but  
6 once the right exists, as it does here unquestionably, it's an  
7 American citizen.

8 THE COURT: So we're jumping ahead because we're still  
9 at the jurisdictional issue, right? This case rises and falls,  
10 in the government's view, on standing. And, yeah, I agree with  
11 you that should I find that the ACLU has next-friend standing,  
12 then the next steps go to access of counsel. But the  
13 government's position is we don't ever get there because you all  
14 have no standing.

15 MR. HAFETZ: Your Honor, again, I direct you to Judge  
16 Kay's opinion in the *Adem* case where he rejects exactly that  
17 circular argument, that you can't -- in other words, you can't  
18 access -- the habeas petition can't proceed on standing grounds  
19 because the detainee -- because you don't have any connection to  
20 the detainee, but we don't have to give you access to the  
21 detainee. And that kind of circularity was rejected.

22 And I'd note there, too, that the request made by the  
23 detainee in that case, which was communicated through another  
24 prisoner because there were other prisoners there, was not that  
25 they wanted to file a habeas petition. If you go back to the

1 declaration in that case, it was just simply, "I want to speak  
2 to a lawyer."

3 So once the -- with that evidence, it's just simply  
4 unconscionable, I think, to deny -- "unconscionable" is the word  
5 Magistrate Judge Kay used. It'd be unconscionable to deny the  
6 citizen the right -- the ability to exercise -- to exercise his  
7 right under the federal statutes and here under the Constitution  
8 to habeas corpus.

9 I mean, in fact, what the opinion in the *Adem* case says is  
10 that, even the notice, which I think is the bare minimum that  
11 must be done here, is not necessarily effective because the one  
12 effective way, right, to know whether this detainee wants to  
13 challenge his detention is to actually give access to the  
14 detainee via an attorney.

15 And this has been done, like literally now, in hundreds of  
16 cases, of enemy-combatant cases, cases where the government were  
17 involved -- you know, detention of individuals seized on a  
18 battlefield.

19 And to suggest that, after literally three months, the  
20 government can continue to hold, there's no end date, they  
21 haven't said tomorrow, they haven't said next week, they haven't  
22 said next month or next year, their position is they can hold  
23 him indefinitely.

24 THE COURT: Well, to be fair, they said they can hold  
25 him for a reasonable time. The problem is that remains

1 undefined to this Court.

2 MR. HAFETZ: I don't think they said they can hold him  
3 for a reasonable time. I think they said they have a reasonable  
4 time to figure out what they want to do with him.

5 THE COURT: Right.

6 MR. HAFETZ: But that may be to hold him indefinitely.

7 THE COURT: Right.

8 MR. HAFETZ: But whatever box this goes in, whether  
9 this is a criminal law-enforcement box, ultimately, or this is  
10 an enemy combatant, stays in an enemy-combatant box, he has a  
11 right to an attorney, and the right is to challenge his very  
12 detention as an enemy combatant, to challenge the authority that  
13 he's being held under, and to challenge the facts.

14 What's happened so far is exactly what happened in *Hamdi*.  
15 The only opportunity that this citizen has had to challenge his  
16 detention is to be able to talk to government interrogators.  
17 And eight justices of the Supreme Court, eight justices, said  
18 that is unacceptable, and the only way to have that kind of  
19 power is to suspend the writ of habeas corpus. And as long as  
20 the habeas statutes are in effect, the citizen has a right to  
21 challenge his detention, and in order to effectuate that right,  
22 he needs access to counsel.

23 THE COURT: Thank you, Mr. Hafetz.

24 Ms. Wyer. Good morning.

25 MS. WYER: Good morning.

1           THE COURT: I hate to jump right in, but I just want  
2 to ask a couple of questions while I have them at the forefront  
3 of my list here. So the government has a U.S. citizen in  
4 custody, whose name is unknown, and you heard my questions to  
5 Mr. Hafetz about his classification. He's described in your  
6 affidavit as an enemy combatant.

7           Is your position that the government has a reasonable  
8 time -- as I understand it, your position is the government has  
9 a reasonable time to determine his further disposition; that is,  
10 whether to charge him, release him, to make a decision as to  
11 what they want to do with him. Is that right?

12           MS. WYER: Yes, Your Honor.

13           THE COURT: So my question, though, is what is a  
14 reasonable time? Regardless of when the petition was filed,  
15 he's been held since early October, correct? He was turned over  
16 to the U.S. in early October. Is that right?

17           MS. WYER: I believe it was mid to late September.

18           THE COURT: Okay. Mid to late September he was turned  
19 over the U.S. So that's almost three months that he's been in  
20 the custody of the U.S. armed forces, and his identity is  
21 unknown, and your position is the government should be given  
22 reasonable -- additional reasonable time to determine how to  
23 proceed with him.

24           What guidance is there? What assurance do I have as to  
25 what constitutes a reasonable time? I mean, I don't want to use

1 phrases like "blank checks", but it really does seem that the  
2 government is saying, you know, it'll happen when we think it  
3 should happen, and that's for us to decide.

4 I understand that there are questions of intelligence and  
5 military tactics that -- you know, I'm not sitting here now  
6 saying that the government doesn't have a right to hold him or  
7 doesn't have a right to classify him as an enemy combatant.  
8 That's not before me, and that's not an area I want to delve  
9 into. My concern is this is a United States citizen who's been  
10 held for almost three months, and now the record indicates that  
11 he has asked for a lawyer.

12 So my question is, what's reasonable here? What can the  
13 government tell me to support their statement that they're  
14 allowed to hold him for additional time and that would be  
15 reasonable? Are there comparable cases where people have been  
16 held for five months, for six months? What do you have to tell  
17 me on that?

18 MS. WYER: Yes, Your Honor. There are -- I think if  
19 the Court looks at the cases that have been in the courts and  
20 where the Supreme Court has given decisions, just to give an  
21 idea of how long it can take for the government to -- that it  
22 does take some time to go through this decision-making process.  
23 For example, in *Munaf*, the individual ended up being held for  
24 15 months from the time he was first taken into custody.

25 THE COURT: Was Munaf a U.S. citizen?

1 MS. WYER: Yes. I'm only talking about U.S. citizens  
2 here.

3 THE COURT: Okay.

4 MS. WYER: So Munaf was taken into custody in May 2005  
5 in Iraq, and then his sister ultimately did not file a petition  
6 on his behalf as next friend until August 2006. So that was a  
7 15-month --

8 THE COURT: But that's not my question. My question  
9 is really how much time does the government have to determine  
10 his further disposition? I mean, not when a petition can be  
11 filed, because it could have been that he was allowed to talk to  
12 his sister after two months, who decided, you know, for whatever  
13 reason -- or maybe he didn't want a petition filed, and then he  
14 changed his mind.

15 What I want to know is how long does the government get to  
16 keep this detainee without providing access to counsel, without  
17 letting him contact his family, with only visits from the  
18 International Red Cross? How long is reasonable given that  
19 we're almost three months in?

20 MS. WYER: Your Honor, that is always going to depend  
21 on the circumstances. I can't give an exact time period that  
22 would apply to every circumstance. Here there's no indication  
23 that the government is acting in bad faith or that it is not  
24 acting expeditiously as much as --

25 THE COURT: I have no evidence either way. I have a

1 U.S. citizen in custody for three months with -- we don't even  
2 know who he is. His family may not know where he is. We don't  
3 know what his language is. We don't know what his medical  
4 condition is. We know nothing.

5 So you're asking me to dismiss this case, walk away, and  
6 say, "The government has a reasonable time to decide what to do  
7 with him, and I'm sure they're being reasonable." I'm not sure  
8 that that's conscionable. Is that what you're asking me to do?

9 MS. WYER: Under the circumstances here, yes, Your  
10 Honor, because, for example, in *Munaf*, the time period -- I think  
11 that he was allegedly held for five months before he had access  
12 to his family. And in *Hamdi*, I think in the *Hamdi* case, he was  
13 taken into custody in 2001 after he surrendered, and then he was  
14 ultimately transferred to Norfolk, Virginia, in April 2002, and  
15 I believe it was around that time that his identity became known.

16 So that was at least four or five months. I mean, this  
17 three-month period that has passed so far, it's not out of line  
18 with other situations. The *Omar* case was another situation  
19 involving a U.S. citizen that was arrested in Iraq in October  
20 2004, and ultimately his wife and son filed the next-friend  
21 petition in December 2005. So, again, that was around a  
22 14-month period.

23 So this does not present a circumstance where it's so  
24 extraordinary that it warrants taking this unprecedented step  
25 that allows a third party to come in. And that's the

1 government's concern here, because the petitioner has argued  
2 that there is Article III standing because the detainee would --  
3 there would be jurisdiction if the detainee had filed a habeas  
4 petition, but the detainee has not filed a habeas petition.

5 THE COURT: The detainee can't do anything. The  
6 detainee is sitting in a detention facility somewhere, and the  
7 only contact he's being allowed to have, as far as the record  
8 indicates, other than contact with the government, is that he's  
9 been allowed two visits with the International Red Cross.

10 And I have a question about that. The visits with the Red  
11 Cross, did they happen before or after he asked for a lawyer?

12 MS. WYER: I would have to look at these materials.

13 THE COURT: And that makes a difference, would you  
14 agree? Because your argument last week was that if this  
15 detainee wanted a habeas petition to be filed on his behalf,  
16 he could have asked -- he could have communicated that to the  
17 International Red Cross when he had a visit with them, or his  
18 two visits with them. But if, in fact, he was only informed of  
19 his right to counsel, *Miranda* or otherwise, after these visits,  
20 then that would be an impossibility. Isn't that correct?

21 MS. WYER: I don't think one can assume that's the  
22 case, Your Honor.

23 THE COURT: That's what I'm asking you. Can you tell  
24 me if his stated request for a lawyer happened before or after  
25 his Red Cross visits?

1 MS. WYER: I'm not sure that this filing that we  
2 provided gives a date when he invoked his *Miranda* rights.  
3 I don't think it does, so I don't have that information.

4 But I think the other thing that this filing shows is that  
5 when -- this is an individual who voluntarily surrendered, and  
6 then he ended up in U.S. military custody; and then he was given  
7 his *Miranda* rights, and he invoked those *Miranda* rights,  
8 indicating he didn't want to be questioned --

9 THE COURT: He didn't voluntarily surrender to the  
10 U.S. armed forces, did he?

11 MS. WYER: No. He voluntarily surrendered to the  
12 Syrian forces, but he ended up in United States custody. And  
13 when he was given the *Miranda* warnings and he invoked those  
14 rights and then he asked, When will I see you again? Will I see  
15 you again here or somewhere else? And the government, the FBI  
16 agents, told him they did not know. And at that point, he did  
17 not say, well, I really need to talk to someone right away  
18 because I want to file a habeas petition. He didn't give any  
19 indication of urgency or that he wanted to avail himself of the  
20 courts.

21 THE COURT: Well, hold on a second, Ms. Wyer. Here's  
22 what the government told me, which is paragraph 2 of Document  
23 21-1: "The individual stated he understood his rights, and said  
24 he was willing to talk to the agents but also stated that since  
25 he was in a new phase, he felt he should have an attorney

1 present. The agents explained that due to his current situation,  
2 it was unknown when he would be able to have an attorney, and  
3 the individual stated that it was ok and that he is a patient  
4 man." And I'm going to paraphrase from here.

5 He then asked "whether when he saw the agents next with  
6 his attorney, would it be at his current location or somewhere  
7 else," which indicates to me that he is sitting in a detention  
8 center awaiting his lawyer.

9 And the question is, can I ignore that? I have a U.S.  
10 citizen, held in detention for over three months, who has said,  
11 I would like counsel. I'm in a new phase. I want counsel, and  
12 I'm patient, and I'm going to wait for my lawyer.

13 Now, can the Court say, okay, you don't have standing; he's  
14 just going to have to wait? Does it make any difference to you  
15 that -- should it make any difference to me, I guess, that it  
16 was a *Miranda* or -- he's not a lawyer. He doesn't know whether  
17 he's been questioned for *Miranda* law-enforcement purposes or  
18 whether he has a right to a habeas petition. He wants counsel,  
19 which is an assertion and a request that I don't think I can  
20 ignore.

21 MS. WYER: Well, Your Honor, I don't think that his  
22 statement invoking his *Miranda* rights that he did not want to  
23 be questioned without a lawyer is evidence that he wants --

24 THE COURT: But what about his statement about whether  
25 when I see you next with his lawyer, would it be here or

1 somewhere else, and that he's a patient man? To me that  
2 indicates that he doesn't -- two things. One, that he doesn't  
3 feel comfortable answering questions without a lawyer. Fine.  
4 But it also indicates that he feels he needs the assistance of  
5 counsel for whatever reason.

6 I'm not going to parse it that narrowly because I don't  
7 think that the average layperson knows the difference between  
8 *Miranda* and -- they just want the assistance of a lawyer, because  
9 they don't know the difference. He may not even realize that  
10 habeas is available to him, but he realizes enough to know that  
11 he needs a lawyer.

12 MS. WYER: Well, Your Honor, I think it just goes back  
13 to the fact that all of these cases that petitioner has cited  
14 where courts have addressed appointing counsel or the right to  
15 access counsel, those were all cases where the court already had  
16 jurisdiction.

17 For example, in *Adem*, which the petitioner is heavily  
18 relying on here, that case was not discussing some free-standing  
19 right to access counsel. It was talking about a protective  
20 order that was already in place, and the court had jurisdiction  
21 over the issue in that case because there was a pending motion  
22 seeking to hold the government in contempt of the order. That  
23 was the basis for the jurisdiction there.

24 In *Al Odah* the court had jurisdiction because the  
25 petitioners who were Guantánamo detainees had filed habeas

1 petitions. So there was already existing jurisdiction there  
2 when the court discussed their right to access their existing  
3 counsel, but it was not new counsel, and discussed the right to  
4 appoint counsel for someone who had already filed a habeas  
5 petition.

6 *Abdullah* was the same, Your Honor. There was already --  
7 in that case there was next-friend standing because the attorney  
8 who filed the next-friend petition already had a preexisting  
9 relationship. That's just very different from the situation  
10 here. This is the government's problem here, because here this  
11 third-party stranger is coming in and effectively attempting to  
12 use this proceeding without establishing jurisdiction to gain  
13 access.

14 THE COURT: Can I take into consideration, in  
15 determining one of the prongs of next-friend standing, that this  
16 is not some person off the street? I mean, whether or not you  
17 agree with the ACLUF's agenda or the positions that they take,  
18 would you agree with me that this is an organization that has  
19 extensive experience in these kinds of cases? They're not just,  
20 you know, a concerned citizen.

21 MS. WYER: Your Honor, I don't think that's at all  
22 relevant, and I think that courts, for example --

23 THE COURT: Are you telling me that there's no basis  
24 for --

25 MS. WYER: Not in the next-friend standing analysis,

1 Your Honor. I think courts have emphasized the important issue  
2 in next-friend standing is whether the next friend, the would-be  
3 next friend, has a relationship with a specific individual it's  
4 seeking to act on behalf of and whether there is some evidence  
5 and a relationship with that individual that would allow the  
6 would-be next friend to pursue that interest.

7 THE COURT: Ms. Wyer, would your position be the same  
8 had the Red Cross not been allowed to interview the detainee,  
9 to meet or to see the detainee? In other words, if the detainee  
10 had been held, his name not released, and not been allowed to  
11 see anyone other than the people in whose custody he remained,  
12 would your argument be the same? Because how on earth would  
13 this person be expected to exercise their habeas rights if  
14 they're effectively incommunicado?

15 MS. WYER: Well, that would be a different  
16 circumstance, Your Honor. And, again, I think the question here  
17 is whether this case presents such extraordinary circumstances  
18 that the Court should --

19 THE COURT: How are these --

20 MS. WYER: -- taken unprecedented --

21 THE COURT: There has not been a case that I've been  
22 able to find where the government has held a U.S. citizen for a  
23 substantial period of time without access to anyone other than  
24 the Red Cross, and therefore where he hasn't been afforded any  
25 right to counsel. I mean, I can't --

1 MS. WYER: Well, Your Honor --

2 THE COURT: No. Let me finish, Ms. Wyer. If this  
3 isn't extraordinary, can you tell me a situation that would be  
4 extraordinary? Can you give me an example of what would truly  
5 be extraordinary?

6 MS. WYER: Well, Your Honor, it is not different from  
7 the other cases I mentioned, from *Munaf*, *Hamdi*, *Omar*. This time  
8 period that has passed is a shorter time period than ultimately  
9 transpired in those cases before the individual ultimately had a  
10 chance to seek habeas relief, and I think it goes back to the  
11 Supreme Court's recognition in *Boumediene* that, in this wartime  
12 situation, the government is going to have -- needs this  
13 discretionary period to figure out what to do in this kind of  
14 circumstance.

15 THE COURT: But as far as I know, the All Writs  
16 Act remains in effect. The right to habeas corpus remains  
17 in effect. That hasn't been suspended. Correct?

18 MS. WYER: It has not been suspended --

19 THE COURT: So how on earth is this man to exercise  
20 his habeas rights? If he wants a petition for habeas corpus on  
21 his behalf, a right which he continues to have, how is he to do  
22 that?

23 MS. WYER: There is the avenue that we mentioned,  
24 which, since he is not being held incommunicado, he would have  
25 a way to do it --

1           THE COURT: The only basis for your assertion that he's  
2 not being held incommunicado is the fact that the Red Cross has  
3 been allowed to see him. Correct? I don't know how those visits  
4 happened, the circumstances of those visits. The Red Cross  
5 certainly isn't saying, because those visits are confidential.

6           I don't know if he speaks the same language. I don't know  
7 what his medical condition is. I don't know anything about the  
8 circumstances of those visits. Most importantly, I don't know  
9 if those visits took place before or after he even was told that  
10 he has a right to counsel.

11           So I have no information regarding the International Red  
12 Cross visits, other than they happened, and that's the only  
13 contact he's been allowed to have with anyone other than his  
14 captors. So other than that, he has been incommunicado.  
15 Correct?

16           MS. WYER: Well, Your Honor, this is reversing the  
17 burdens and the analysis, because here we have a third party  
18 coming in. So what the situation is here is does the Court want  
19 to exercise oversight over the wartime detention of an individual  
20 in the absence of established jurisdiction, and the only way  
21 that jurisdiction could be established is if a proper next  
22 friend had come forward --

23           THE COURT: What the government is suggesting --

24           MS. WYER: -- has not happened.

25           THE COURT: -- is that -- no. It's an end-run around

1 the right to habeas. Because if I should dismiss this case  
2 because of lack of jurisdiction as you're suggesting, then the  
3 government would always be able to detain a U.S. citizen as an  
4 enemy combatant, hold them for as long as they thought was  
5 reasonable till they decided, and they would not be able to  
6 challenge their right to habeas because they'd be held without  
7 contact to family, friends, or organizations that could assist  
8 them. Under those circumstances, the right to habeas is  
9 meaningless.

10 MS. WYER: But, Your Honor, that is not this case.  
11 We're not saying that the government has the right to just  
12 arbitrarily determine what is reasonable and snatch someone off  
13 the street and hold them for indefinitely, saying that's a  
14 reasonable time. We're saying that the government, when it's  
15 diligently trying to resolve this matter expeditiously, and  
16 there's no indication that it isn't, and there's --

17 THE COURT: There's no indication either that it is,  
18 Ms. Wyer. But let's say -- for the purposes of this hearing,  
19 let's say that the government is being diligent and is in its --  
20 you know, let's say that the government is trying to resolve  
21 this expeditiously, although one would question how three months  
22 is expeditious.

23 What if during that time this detainee is saying, I want a  
24 lawyer. I have a right. I want to be brought before -- you  
25 know -- in some inarticulate way is saying, I need a lawyer to

1 help me during that time.

2 Is it your position that that's too bad; you don't get to  
3 exercise your habeas right because you can't be in contact with  
4 anybody -- you don't get to exercise your habeas right until we  
5 have decided what to do with you? Is that your position?  
6 Because that is what would happen here.

7 MS. WYER: Well, there's no indication -- the thing  
8 is, here, Your Honor, is that there is no evidence either way  
9 about whether this detainee wants to pursue habeas --

10 THE COURT: And that was my big question. You say  
11 repeatedly in your brief that the proposition or the assertion  
12 that this detainee wants to exercise his habeas right is "mere  
13 speculation." You use that phrase several times in your brief.

14 I find that remarkable given what you say in paragraph 2 of  
15 your pleading, that he has requested a lawyer, he has asked when  
16 he's going to see the lawyer, and he has indicated a willingness  
17 to wait for his lawyer. How is that mere speculation to say  
18 that he would -- we're just speculating as to whether he would  
19 assert his habeas rights?

20 He's not a lawyer. So maybe he doesn't even understand  
21 what a petition for habeas corpus is, but he understands enough  
22 to say: I want a lawyer, I don't want to answer any questions  
23 without a lawyer, and I'm going to wait for my lawyer. I'm a  
24 patient man.

25 I'm not sure at all how it's speculation that he doesn't

1 want to avail his rights under the justice system.

2 MS. WYER: Well, Your Honor, that is simply a  
3 different context. The *Miranda* context is different, and it  
4 doesn't indicate whether he wants to avail --

5 THE COURT: Are you saying a citizen would know -- a  
6 nonlawyer would know the difference between availing himself of  
7 his *Miranda* rights and availing himself of his habeas rights?  
8 He says he wants counsel. Isn't that enough?

9 MS. WYER: When he's sitting in a room being  
10 questioned and he says that he does not want to be questioned  
11 without a lawyer, that is different from saying that he wants  
12 to access a judicial system that is thousands of miles away and  
13 attempt to make arguments in a United States court. The other  
14 cases have emphasized that you can't simply assume from the fact  
15 of detention what an individual wants to do.

16 THE COURT: I'm not assuming from the facts of  
17 detention. I'm assuming that this person wants the assistance  
18 of counsel, and I think the record is pretty clear that I can  
19 make that inference. Having made that inference, I don't think  
20 the government can say that it is -- or having provided the  
21 information that I got last Friday, I don't think the government  
22 can say -- or on the 4th -- that it's speculation that he'd want  
23 a habeas petition.

24 In other words, what you're saying is, he asked for a  
25 lawyer present while he was questioned, but he didn't ask for a

1 lawyer to file a habeas. Isn't that kind of cutting a fine  
2 distinction for a nonlawyer to make?

3 MS. WYER: I would not say so, Your Honor. After all,  
4 there's no reason to assume that this individual does not know  
5 about the fact that, for example, Guantánamo detainees have  
6 filed these cases in U.S. courts. I think it's been fairly well  
7 publicized that there have been lawsuits in U.S. courts.

8 THE COURT: Why shouldn't I assume that's what he's  
9 asking for here?

10 MS. WYER: Well, he did not --

11 THE COURT: -- habeas corpus?

12 MS. WYER: He did not say that he wanted to go to  
13 court. All he said was that -- in response to being given his  
14 *Miranda* warnings, he said he did not want to be questioned  
15 without a lawyer present.

16 THE COURT: Well, I'm not surprised that he didn't say  
17 he wanted to go to court, because he's in Iraq. But he wants a  
18 lawyer. I mean, he may not even know of the availability of  
19 habeas. That doesn't mean he doesn't have this right.

20 So let me ask you this: Why can't this Court issue  
21 questions to determine my own jurisdiction? In other words,  
22 there are cases that say that you can exercise jurisdictional  
23 discovery to clarify whether you have jurisdiction. And if  
24 there is clarification needed, why can't I get that through the  
25 issuance of questions?

1 MS. WYER: Well, Your Honor, I would like to point out  
2 that the petitioner, in its description of the *Harris v. Nelson*  
3 case, it actually mischaracterized what that case said.

4 That case stated that courts had authority under the All  
5 Writs Act to take necessary actions to fashion appropriate modes  
6 of procedure, but it said the habeas corpus jurisdiction and the  
7 duty to exercise it being present, which means that it was  
8 saying that the courts had that authority if jurisdiction was  
9 already present, not that --

10 THE COURT: Don't I have authority to assure myself of  
11 my own jurisdiction?

12 MS. WYER: Your Honor, I think the standards for  
13 jurisdictional discovery are --

14 THE COURT: No, no. My question is do I have the  
15 authority -- and it's a liberal authority -- to assure myself  
16 of my own subject matter jurisdiction absent -- you know,  
17 regardless of the ACLU's petition, don't I have the authority  
18 to determine that?

19 MS. WYER: Your Honor, I'm not aware of an instance  
20 where a court actually, essentially took discovery on its own,  
21 if that's what you're suggesting.

22 THE COURT: You don't know of any case where the  
23 court issued jurisdictional discovery to clarify whether it  
24 had jurisdiction?

25 MS. WYER: Where the standards were not met and it was

1 simply doing it for -- I think what the Court's obligation is,  
2 is to look at the record before it and determine whether there  
3 is jurisdiction based on that record.

4 THE COURT: Right.

5 MS. WYER: And here the record does not establish that  
6 this petitioner has next-friend standing. And in order -- even  
7 if you -- even if normal jurisdictional discovery rules apply in  
8 the habeas context, here the petitioner has not made a case for  
9 jurisdictional standing because it has not provided evidence  
10 that this individual wants to seek --

11 THE COURT: Okay. But that is in the control of the  
12 government, because you have the body. So --

13 MS. WYER: Well, Your Honor --

14 THE COURT: No. Let me finish. If your position is  
15 that the ACLUF's request for jurisdictional discovery is based  
16 on mere speculation because they don't know whether the detainee  
17 wishes to pursue habeas relief -- you agree that the ACLU  
18 doesn't claim to know whether the detainee wishes to pursue  
19 habeas relief. Right? They don't know.

20 MS. WYER: Yes, Your Honor. They don't know.

21 THE COURT: Okay. So that is information that the  
22 ACLU seeks to elicit through its proposed questions. Correct?

23 MS. WYER: Well, Your Honor --

24 THE COURT: I'm not saying it's right or wrong. I'm  
25 saying that's the information they're trying to get. Right?

1 MS. WYER: Yes.

2 THE COURT: Okay. It appears to me that the ACLUF's  
3 request for jurisdictional discovery is based on the government's  
4 own representation that the detainee has requested access to  
5 counsel. So what I'm pondering is, the only entity that can  
6 find out definitively whether the detainee wants to pursue  
7 access to habeas is the government. Right? And the government  
8 controls the body in this case.

9 So should the government be -- and we do know that the  
10 detainee has asked for access to a lawyer. Now, you may say  
11 it's for purposes of questioning. They say it's for habeas.  
12 Who knows? Maybe all this detainee wants is a lawyer to help  
13 him navigate the legal quagmire in which he finds himself.

14 But should the government be able to keep this prisoner  
15 from having access or expressing his wish to have a habeas  
16 petition filed on his behalf and then saying no one has standing  
17 because he hasn't asked for a habeas petition to be filed on his  
18 behalf? I mean, aren't we left there with a completely circular  
19 argument?

20 MS. WYER: Well, Your Honor, in our view it's the  
21 inverse, because it's the petitioner that is attempting to  
22 circumvent next-friend standing requirements by coming in and  
23 using the court as a way to get access to the detainee with whom  
24 it has no preexisting relationship.

25 THE COURT: No one can effectuate the detainee's habeas

1 rights. No one. Because the government's not letting him.

2 MS. WYER: Well, again, Your Honor, this is a  
3 temporary situation. At the time that the petitioner filed this  
4 petition, this individual had only been in custody for at most  
5 three weeks, and at that time there was simply no basis to  
6 consider this an extraordinary circumstance.

7 THE COURT: Right, but we're past that now. But  
8 even at three weeks, the petitioner had habeas rights. Correct?

9 At three weeks, if he had been allowed a visit with his  
10 family, he could have said, Get a lawyer; I want -- get me out  
11 of here, or somebody to, you know, go to court and get me out of  
12 here. The habeas rights don't depend on the length of custody.  
13 Correct?

14 MS. WYER: Well, Your Honor, we would still have an  
15 argument that --

16 THE COURT: Am I correct? The right to habeas corpus  
17 does not depend on how long the person has been held.

18 MS. WYER: Well, in *Boumediene* the Supreme Court did  
19 say that the court should not pursue a habeas petition until  
20 this time had passed, until this initial period had passed.  
21 So even in that context, the government might make that argument.

22 THE COURT: Well, are you making the argument that,  
23 because of *Boumediene*, this detainee does not have a right to  
24 habeas corpus until the government decides on his further  
25 disposition? Is that your position?

1           I mean, I'm trying to understand what your position is  
2 regarding the scope of his habeas rights. Is it that he always  
3 has them but he hasn't exercised them? Or he doesn't have them  
4 till we've decided what to do with him? Or, option No. 3, he  
5 has them after some period of time? I'm trying to -- I'm trying  
6 to get your position on that issue.

7           MS. WYER: Well, Your Honor, I don't know that I have  
8 an answer in that circumstance exactly what the government's  
9 position would be, but that is not --

10          THE COURT: In what circumstance?

11          MS. WYER: If this detainee had filed a habeas  
12 petition, then certainly there would be a much stronger case for  
13 this Court's jurisdiction. That would definitely be the case,  
14 but the problem here is that he hasn't filed such a petition,  
15 and here --

16          THE COURT: He cannot. He can't. Because you don't  
17 let him have access to anyone. And so my --

18          MS. WYER: But, Your Honor, that does not provide this  
19 court with oversight authority over the wartime detention of  
20 this individual. There must be a basis for a jurisdiction.

21          THE COURT: Okay. So can the government frustrate  
22 jurisdiction of an enemy combatant by simply holding him or her  
23 without access to counsel until such time as they decide on his  
24 or her further disposition? In other words, it's the government  
25 who basically controls access to this person, and no one would

1 have jurisdiction to file any petition on his behalf, because  
2 they can't communicate with him. So, what, is the Court  
3 basically to say there's nothing we can do?

4 MS. WYER: Well, we're asking the Court to consider  
5 that there have been similar circumstances in the past, in *Omar*,  
6 in *Hamdi*, in *Munaf*. This is not that far afield from those  
7 cases. And of course, in Guantánamo, years went by before those  
8 individuals were able to pursue habeas relief.

9 THE COURT: But they had representation.

10 MS. WYER: Not initially, Your Honor. I assume that  
11 more than three months passed in many instances before those  
12 individuals reached Guantánamo.

13 I mean, this is simply -- I think the reason that this  
14 situation is presenting Your Honor with this kind of structural  
15 difficulty is just by function, by virtue of the fact that it is  
16 so early on and the government is still in this initial period.  
17 It's much earlier than any other habeas petition was filed in  
18 any of these other detainee cases.

19 So it's simply in that sense, because it has been filed so  
20 early by individuals who have no relationship with this person  
21 who's being detained, that is the unusual circumstance here.  
22 But the fact remains that this case does not present such  
23 extraordinary circumstances taking into account that we are  
24 still in this early phase and that the government is still  
25 expeditiously trying to determine what to do with this

1 individual.

2 The Court -- it just does not present a circumstance where  
3 the Court should ignore all of the cases that have not allowed  
4 next-friend standing for entities or people with no relationship  
5 at all with the person they are trying to -- on whose behalf  
6 they are trying to act.

7 THE COURT: Thank you, Ms. Wyer.

8 Mr. Hafetz, five minutes.

9 MR. HAFETZ: Thank you, Your Honor.

10 Your Honor, I'm flabbergasted. Flabbergasted. It's really  
11 hard to do this in five minutes, both in the misrepresentations  
12 of the Supreme Court and the total disregard for the decisions  
13 of the courts that were fought.

14 This is the argument that was made after 9/11: Enemy  
15 combatants, including U.S. citizens, have no rights. No rights.  
16 The courts rejected that. It was not months. The petitions  
17 were filed right away. The only reason that it took time for  
18 the rulings to come out was because the government fought them  
19 all the way up to the Supreme Court. And the Supreme Court  
20 rejected it.

21 This is a blank check: "We will decide when we decide."  
22 If that's not a blank check, Your Honor, I don't know what is.  
23 And the great writ, in statute, says that it shall not be  
24 suspended unless by Congress. Congress has not suspended the  
25 writ, and it's not up to this government, this administration,

1 or these lawyers to suspend a U.S. citizen's right to habeas  
2 corpus.

3 The ICRC, again, you know, it might be interesting to find  
4 out when, you know, when the ICRC access came, but it doesn't  
5 matter, because a habeas right can't turn on ICRC access. The  
6 constitutional rights of an American citizen are not like a  
7 message in a bottle that you send out and hope it reaches the  
8 shores of a court. And at GTMO, they had ICRC access from the  
9 beginning, in 2002, but that wasn't sufficient.

10 The *Adem* case, again, the government completely  
11 misrepresents what happened there. The attorney there, if Your  
12 Honor reviews the record, had no relationship with the detainee.  
13 All that happened was that another detainee said, "I want a  
14 lawyer." That detainee did not actually say, "File a habeas for  
15 me." He just said, "I want a lawyer," and that was sufficient.

16 This detainee may have studied the decisions of the Supreme  
17 Court and know of the Guantánamo habeas litigation? Maybe, but  
18 probably not. And the government has not advised him of his  
19 right to habeas corpus. And so we don't know. And the only way  
20 to know -- there are two ways to know: one, to provide an  
21 attorney access, or to ask yourself or to have the government  
22 ask yourself [sic]. But without knowing, I think it's  
23 unconscionable to dismiss this petition.

24 As Judge Lamberth said, the courts have an obligation to  
25 assure that those seeking to challenge their executive detention

1 have adequate, meaningful access to the courts. And those were  
2 noncitizens.

3 I'd just remind you, Your Honor, the government has not  
4 answered your question, either. They have not answered whether  
5 if this detainee actually said, "I want to challenge my  
6 detention by habeas corpus," that the government would concede  
7 that he has a right to challenge his detention. So I would  
8 submit this next-friend argument, in addition to being erroneous,  
9 is a complete smoke screen for what's basically an effective  
10 suspension of the writ of habeas corpus.

11 Lastly, Your Honor, in terms of the timing, *Boumediene*, a  
12 case involving noncitizens, said the government has a reasonable  
13 time to determine status. Status has been determined, and  
14 they've offered nothing, other than convenience, for why this  
15 access shouldn't happen now or why we should not at least find  
16 out if the detainee wants a habeas.

17 There's no prejudice. They can continue to hold him until  
18 the Court, you know, decides that detention is unlawful if it  
19 ultimately decides that. There's no prejudice.

20 And I would just remind Your Honor that Judge Mukasey,  
21 in the early days after 9/11 where they had a U.S. citizen in  
22 detention who was alleged to be a high-level terrorist and the  
23 government resisted access, saying they were interrogating him  
24 to get valuable intelligence, that providing access to a lawyer  
25 would endanger American lives, none of which the government has

1 argued here, Judge Mukasey still said the court has authority to  
2 order access under the habeas statute in the All Writs Act.

3 And, sorry, one final point, Your Honor. In addition to  
4 the next-friend standing, Your Honor, as we note in the brief,  
5 has authority to appoint counsel under the Criminal Justice Act,  
6 which gives the Court authority to appoint counsel in a habeas  
7 action under 2241 where the interests of justice require.

8 And if the interests of justice don't require providing an  
9 American citizen a lawyer after he's been locked up for three  
10 months and he's asked for a lawyer, frankly, I don't know what  
11 does.

12 THE COURT: Thank you, Mr. Hafetz.

13 All right. Thank you all. I will come to a decision as  
14 quickly as I can. Thank you.

15 (Proceedings adjourned at 11:09 a.m.)  
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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