

Notes

NEXT FRIEND STANDING AND THE WAR ON TERROR

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INTRODUCTION

Three years after the terrorist attacks of September 11, 2001, nearly six hundred men remain imprisoned at the U.S. Naval Base at Guantanamo Bay, Cuba.¹ During this time they have existed in a state of legal limbo, held for questioning about terrorist activity, but with no charges filed against them and no knowledge of when the interrogations might end.² The United States government refuses to reveal even their identities.³ On the surface, the conditions at Guantanamo Bay seem adequate: the prisoners receive three hot meals daily, copies of the Koran, and medical treatment, and loudspeakers lead Muslim prayers five times a day.⁴ The uncertainty

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1. At last count there were 585 inmates. *US Fights Hostile Reaction to Guantanamo 'War on Terror' Detentions*, AGENCE FRANCE PRESSE, Aug. 5, 2004, LEXIS, Nexis Library, Agence France Presse File.

2. In August 2004, the U.S. military initiated hearings to determine whether each detainee was being properly held as an "enemy combatant." *Guantanamo Detainees Boycott "Enemy Combatant" Hearings*, AGENCE FRANCE PRESSE, Aug. 4, 2004, LEXIS, Nexis Library, Agence France Presse File. For these administrative hearings, the military will give the detainees access to the unclassified information relating to their detentions, but not to any classified information. *Id.* It will also provide them with a "personal representative" for assistance, but not with lawyers or other advocates. George Edmonson, *Pentagon to Review Detainees in Cuba*, THE ATLANTA JOURNAL-CONSTITUTION, July 17, 2004, at A3. Earlier this year, the military showed signs of expanding its use of interrogations at Guantanamo Bay. For example, although the current facilities have free space to accommodate up to 350 additional prisoners, the military has contracted to build an additional camp that could accommodate up to 100 more. This new facility will also contain advanced interrogation rooms. M. Horrock & Anwar Iqbal, *Waiting for Gitmo*, PITTSBURGH POST-GAZETTE, Mar. 28, 2004, at E1.

3. Identities have not been released, and reporters observing the administrative hearings will not be allowed to identify any of the inmates. *Guantanamo Detainees Boycott "Enemy Combatant" Hearings*, *supra* note 2.

4. Horrock & Iqbal, *supra* note 2. There have been allegations of abuse. *See, e.g.*, Vikram Dodd & Tania Branigan, *Questioned at Gunpoint, Shackled, Forced to Pose Naked. British Detainees Tell Their Stories of Guantanamo Bay*, THE GUARDIAN, Aug. 4, 2004, at 1; Fergus

surrounding their fate, however, has caused a considerable amount of stress and has been blamed for over thirty suicide attempts.⁵ The International Committee of the Red Cross (ICRC), normally silent about all but the most severe problems, spoke out in October 2003 to complain that the “lengthy detention without hope, trial, charges or human contact outside of guards or interrogators has caused ‘a worrying deterioration’ in the prisoners’ mental health.”⁶ Some international experts have alleged that U.S. allies, such as the Australian and British governments, have been more successful at pressing the United States for action regarding their citizens held at Guantanamo Bay, although the United States rejects the assertion of preferential treatment.⁷

Family members, attorneys, and concerned citizens have attempted to bring legal resolution to the prisoners’ fates by filing habeas corpus petitions for them in the federal courts.⁸ One of the

Shiel, *Hicks and Habib Abused, Allege Ex-Inmates*, THE SYDNEY MORNING HERALD, Aug. 5, 2004, at 1.

5. Horrock & Iqbal, *supra* note 2. The official count stands at thirty-two, but officials have switched from tracking suicide attempts to tracking instances of “manipulative self-injurious behavior.” Tania Branigan & Vikram Dodd, *Fight Against Terror: Afghanistan to Guantanamo Bay—The Story of Three British Detainees*, THE GUARDIAN, Aug. 4, 2004, at 5. A report titled “Detention in Afghanistan and Guantanamo,” authored by the lawyers for three British detainees released in March 2004, alleges that the true suicide count reaches “several hundred.” *Id.*

6. Horrock & Iqbal, *supra* note 2. ICRC President Jakob Kellenberger took the organization’s concerns to U.S. officials in January 2004, lamenting the “seemingly indefinite detention” of the Guantanamo detainees and “not[ing] that the ICRC’s concerns regarding certain aspects of the conditions and treatment in Guantanamo have not yet been adequately addressed.” Press Release, International Committee of the Red Cross, United States: ICRC President Urges Progress on Detention-Related Issues (Jan. 16, 2004), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/774F1B35A7E20CC9C1256E1D007741C1>.

7. John Mintz, *U.S. Faces Quandary in Freeing Detainees*, WASH. POST, Mar. 22, 2004, at A1. Of the six detainees for whom military tribunals had been authorized in March 2004, two were British and one was Australian. Horrock & Iqbal, *supra* note 2. Of the nine British men in custody at that time, five had been released and two of the four who remained in detention were scheduled to face military tribunals. *Id.* Australian David Hicks will also face a military tribunal. *Terror Suspect Will Get Day in Court*, L.A. TIMES, Mar. 26, 2004, at A4. The United States has returned 134 detainees of various nationalities since the Guantanamo Bay facility opened in January 2002, but nearly 600 detainees remain. *U.S. Releases 15 More from Guantanamo*, L.A. TIMES, Apr. 3, 2004, at A16. Most recently, four Frenchmen were released to French authorities in late July 2004, Elaine Sciolino, *Four Terror Suspects Returned to France*, HOUSTON CHRON., July 28, 2004, at 13, and five Moroccans were returned to Morocco in August 2004, *News: Around the World*, HOUSTON CHRON., Aug. 3, 2004, at 10.

8. See, e.g., *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) (habeas corpus petition brought by detainee’s attorney), *rev’d*, 124 S. Ct. 2711 (2004); *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002) (habeas corpus petition brought by a coalition

obstacles these litigants have faced involves a little-known, technical doctrine called “next friend standing.”⁹ Next friend standing allows a third person to file a claim in court on behalf of someone who is unable to file on his or her own. For decades, litigants have predominantly asserted next friend standing to bring habeas corpus petitions on behalf of state criminal inmates in attempts to overturn convictions or block imposition of the death penalty. In these cases, which raise issues of federalism and interference with state criminal convictions, courts are especially concerned with preventing anti-death penalty activists from filing claims to pursue political goals.¹⁰ The petitions of the Guantanamo Bay prisoners, however, are very different: they are not seeking review of state court judgments but are instead requesting that an impartial tribunal perform some kind of review in the first instance.¹¹ Their cases raise questions of separation of powers and deference to the political branches in time of war.

Although the concerns surrounding the petitions of the Guantanamo Bay prisoners differ greatly from those in the state criminal-conviction context, the courts have applied the same rules for habeas corpus petitions in both circumstances—specifically, the doctrine of next friend standing. In the military cases, however, the need for judicial relief is in line with the original purpose of the writ of habeas corpus—to ensure that the government has just cause for the confinement—and next friend standing should be applied more liberally.

of concerned professors, clergy, and lawyers), *cert. denied*, 123 S. Ct. 2073 (2003); *Hamdi v. Rumsfeld* (*Hamdi II*), 296 F.3d 278 (4th Cir. 2002) (habeas corpus petition brought by detainee’s father); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (habeas corpus petitions brought by various family members), *aff’d sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

9. *See infra* notes 12–17 and accompanying text (explaining the uses and origins of the doctrine); *see also* RONALD P. SOKOL, *FEDERAL HABEAS CORPUS* 55–56 (2d ed. 1969) (“The practice of having next of friend applications is not common, but it is occasionally useful and sometimes necessary.”).

10. *See, e.g.*, *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000) (noting “reservations” that a prisoner’s would-be next friends were not acting in his best interests but only out of “their own desires to block imposition of the death penalty in an ‘attempt to define justice as they [saw] fit’”).

11. *See, e.g.*, *Rasul*, 215 F. Supp. 2d at 58 (“Plaintiffs . . . ask this Court to enter a preliminary and permanent injunction prohibiting the government from refusing to allow the Kuwaiti nationals to ‘meet with their families,’ ‘be informed of the charges, if any, against them,’ ‘designate and consult with counsel of their choice,’ and ‘have access to the courts or some other impartial tribunal.’” (citations omitted)).

This Note argues that the current rule of next friend standing, developed in reaction to specific problems of state death row appeals, will be adequate to deal with the habeas corpus petitions of military prisoners only if the courts continue to consider the underlying goals of both the writ of habeas corpus and next friend standing. Part I highlights the history of habeas corpus and the current two-pronged rule for next friend standing. Part II discusses recent cases arising out of the military response to the September 11 attacks in which next friend standing has been an issue. Part III looks at the first prong of the test for next friend standing and argues that a person detained by the military need not be held completely incommunicado to warrant a finding of inaccessibility. Specifically, when the government's actions contribute to the detainee's inability to secure other avenues of relief, this should *contribute* to a finding of inaccessibility. Part IV argues that in assessing the second prong of the test for next friend standing, a significant relationship should not be required in evaluating the appropriateness of a would-be next friend but should instead be only one factor.

I. HISTORY AND BACKGROUND OF NEXT FRIEND STANDING

Next friend standing, which dates back to English common law, was originally created as a procedural device by which detained or imprisoned persons could challenge the validity of their confinement through the writ of habeas corpus.¹² It was recognized that detained persons were often unable to sign their own petitions for relief, so third persons, acting on behalf of the detainees, were allowed to bring the writ.¹³ Today, next friend standing still provides access to judicial review to persons who are unable to bring cases on their own behalves. The common law doctrine of next friend standing is often invoked when the real party in interest has some disability, such as mental disability or minority, which inhibits access to the court.¹⁴ The most popular use of next friend standing, however, is in the context of

12. *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990).

13. *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921).

14. *See, e.g., Blumenthal v. Craig*, 81 F. 320, 320 (3d Cir. 1897) (real party in interest was a minor child); *In re Kronberg*, 208 F. 203, 205 (E.D. Ark. 1913) (real party in interest was *non compos mentis*); *Garnett v. Garnett*, 114 Mass. 379, 380 (1874) (real party in interest was insane); *see also* *Hoston v. Silbert*, 681 F.2d 876, 878 (D.C. Cir. 1982) (real party in interest was deceased).

habeas corpus petitions; the federal habeas corpus statute,¹⁵ as well as many state constitutions and statutes,¹⁶ explicitly authorize next friend standing for imprisoned persons who are physically inaccessible to the court. This Part first describes the history of the writ of habeas corpus, focusing on recent efforts to limit its availability. This Part then outlines the doctrine of next friend standing and presents the current test for next friend standing, as pronounced by the Supreme Court in *Whitmore v. Arkansas*.¹⁷

A. *Habeas Corpus: The Greatly Abused Writ*

The writ of habeas corpus, which traces its roots to the Magna Carta,¹⁸ developed centuries ago as a check on the exercise of executive power against the individual.¹⁹ It is widely referred to as the “the Great Writ”—indeed, Blackstone characterized it as “the most celebrated writ in the English law.”²⁰ It is a challenge to government custody and underscores the fundamental importance of freedom from unlawful physical restraint. The goal of habeas corpus is not just to release the prisoner, but to ensure due process of law.²¹ If a court grants a habeas corpus petition, the government must produce the

15. See 28 U.S.C. § 2242 (2000) (“Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.”).

16. See, e.g., ARIZ. CONST. art. VI, § 5 (“Each justice of the Supreme Court may issue writs of habeas corpus to any part of the State upon petition by or on behalf of a person held in actual custody”); ALA. CODE § 15-21-4 (1975) (“Application for a writ of habeas corpus must be made by petition, signed either by the party himself for whose benefit it is intended or by some other person on his behalf”); COLO. REV. STAT. ANN. § 13-45-101 (2003) (“If any person is committed or detained for any criminal or supposed criminal matter, it is lawful for him to apply to the supreme or district courts for a writ of habeas corpus, which application shall be in writing and signed by the prisoner or some person on his behalf”); GA. CODE ANN. § 9-14-4 (1993) (“The petition for the writ of habeas corpus must be verified by the oath of the applicant or some other person in his behalf.”).

17. 495 U.S. 149, 163–64 (1990).

18. *Sec’y of State for Home Affairs v. O’Brien*, [1923] A.C. 603, 646 (appeal taken from K.B.) (Lord Shaw’s opinion); *The King v. Halliday*, [1917] A.C. 260, 272 (appeal taken from K.B.) (Lord Atkinson’s opinion).

19. See *Ex parte Yenger*, 75 U.S. (8 Wall.) 85, 101 (1868) (stating that the intent of the writ of habeas corpus “is that every citizen may be protected by judicial action from unlawful imprisonment”).

20. 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

21. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4261 (2d ed. 1988).

prisoner so the court can consider the lawfulness of the confinement.²² The Supreme Court has described the writ as both a symbol of individual liberty and the best defense of personal freedom.²³ The writ also recognizes that true freedom means individuals must know the certainty of their legal status. It is precisely the sort of “legal limbo” created by custody without charge that habeas corpus is designed to avoid.

The writ and the ability to petition through a third party are well established in American law.²⁴ The writ’s importance is evidenced in the U.S. Constitution, which prohibits suspension of the writ except when Congress determines that “in Cases of Rebellion or Invasion the Public Safety may require it.”²⁵ American courts allowed next friends to bring habeas corpus petitions for at least a century²⁶ before Congress amended the habeas corpus statute in 1948 to permit explicitly “someone acting in [the prisoner’s] behalf” to sign and verify applications.²⁷ This uncontroversial change merely formalized the availability of next friend standing and was enacted to “follow[] the actual practice of the courts.”²⁸

22. SOKOL, *supra* note 9, at 36–37. The court may inquire into the lawfulness of the confinement without requiring the government to produce the person in court, for example when lawfulness turns solely on questions of law. In this case, the court would not actually grant the writ but, in finding the confinement unlawful, would grant the relief requested in the petition for the writ. *Id.*

23. *Yerger*, 75 U.S. (8 Wall.) at 95 (“The great writ of *habeas corpus* has been for centuries esteemed the best and only sufficient defence of personal freedom.”); *Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (“[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.” (citation omitted) (alteration in original)).

24. *See, e.g., United States ex rel. Funaro v. Watchorn*, 164 F. 152, 153 (S.D.N.Y. 1908):

[I]t has been the frequent practice in this district to present habeas corpus petitions in deportation cases signed and verified by others than the person detained. In such cases, often for lack of time, as well as because of infancy or incompetency, it would be impossible to present a petition signed and verified by the person detained . . .

25. U.S. CONST. art. I, § 9. At the time of the founding, the constitutions of several states also provided some form of suspension clause. BADSHAH K. MIAN, *AMERICAN HABEAS CORPUS: LAW, HISTORY, AND POLITICS* 73 (1984). The writ was last suspended during the Civil War. Habeas Corpus Suspension Act of 1863, Act of March 3, 1863, c.81, §§ 1, 4, 12 Stat. 755, 756.

26. For example, in 1843, next friends were allowed to file habeas corpus petitions on behalf of minors who had unlawfully enlisted in the U.S. military. *In re Keeler*, 14 F. Cas. 173, 174 (D. Ark. 1843) (No. 7,637).

27. Pub. L. No. 80-773, § 2242, 62 Stat. 869, 965 (1948) (codified at 28 U.S.C. § 2242 (2000)).

28. 28 U.S.C. § 2242 revision note (2000).

Although habeas corpus relief has been available to federal prisoners since the Judiciary Act of 1789,²⁹ it was not until 1867 that state prisoners were allowed to secure habeas corpus relief in federal court by showing that their custody violated the U.S. Constitution or federal law.³⁰ In the 1950s and 1960s, the Warren Court significantly expanded the rights of state prisoners to seek federal habeas corpus review.³¹ Although the Burger and Rehnquist Courts halted this expansion and in some situations even retracted it, many commentators continued to argue that the availability of federal habeas corpus review was too broad.³² For instance, there had never been a statute of limitations for filing habeas corpus petitions, and it was generally understood that the principles of *res judicata* did not apply.³³ A leading treatise deemed federal habeas corpus review of state criminal convictions “[t]he most controversial and friction-producing issue in the relation between the federal courts and the states.”³⁴ Its wide availability was seen as opening the floodgates to last-minute appeals by death row inmates seeking only to postpone their execution dates, thus interfering with the ability of states to carry out executions.³⁵ In addition, state courts resented the review of their decisions by federal judges.³⁶ One exasperated federal judge finally wrote in a filed opinion that “applications for The Great Writ have become so inappropriately routine and commonplace in criminal litigation today that some might understandably refer to it as the ‘Great(Iy Abused) Writ.’”³⁷

29. Ch. 20, § 14, 1 Stat. 73, 81 (1789).

30. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

31. Burke W. Kappler, *Small Favors: Chapter 154 of the Antiterrorism and Effective Death Penalty Act, the States, and the Right to Counsel*, 90 J. CRIM. L. & CRIMINOLOGY 469, 475 (2000). Justice Frankfurter, in his concurrence in *Brown v. Allen*, 344 U.S. 443 (1953), concluded that federal courts hearing habeas corpus appeals by state prisoners need not give deference to state courts on questions of law or mixed questions of law and fact. *Id.* at 504–09. The case has come to stand for this proposition. Kappler, *supra*, at 475. In *Fay v. Noia*, 372 U.S. 391, 438 (1963), the Court held that only a deliberate omission of a claim on direct state or in-state post conviction review would preclude federal review of that claim.

32. Kappler, *supra* note 31, at 476–84 (describing the case history, the academic debate on the issues, and the ensuing reforms adopted by Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)).

33. SOKOL, *supra* note 9, at 156–59.

34. WRIGHT ET AL., *supra* note 21, § 4261.

35. Kappler, *supra* note 31, at 478.

36. WRIGHT ET AL., *supra* note 21, § 4261.

37. *Galtieri v. Wainwright*, 582 F.2d 348, 365 (1978) (Hill, J., specially concurring). The opinion goes on to lament the “piecemeal presentation of endless applications for the writ of

In response to this frustration, Congress enacted in 1996 the Antiterrorism and Effective Death Penalty Act (AEDPA).³⁸ The law was designed to increase the powers of law enforcement after the Oklahoma City terrorist bombing, but it also contains provisions that significantly restrict the availability of federal habeas corpus review for state prisoners.³⁹ The AEDPA establishes a one-year statute of limitations on filing a petition,⁴⁰ limits the violations for which review is allowed,⁴¹ and tightens the state-remedy exhaustion requirement.⁴² An additional piece of legislation, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,⁴³ restricts the ability of criminal immigrants to file habeas corpus petitions to review deportation orders.⁴⁴

B. *Next Friend Standing*

The doctrine of next friend standing permits persons unable to prosecute their own actions—the “real parties in interest”—to have third persons—“next friends”—stand in for them.⁴⁵ The doctrine

habeas corpus” that has thwarted the “needs of society for some semblance of finality in the administration of criminal justice” and calls for a rule of complete exhaustion of all state relief before the writ can be sought in federal court. *Id.* at 365.

38. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 28 U.S.C. §§ 2244–2261 (2000)); see also Kappler, *supra* note 31, at 486–88 (describing the legislative history of the AEDPA).

39. Kappler, *supra* note 31, at 469.

40. 28 U.S.C. § 2244 (2000).

41. *Id.* § 2254; see also Kappler, *supra* note 31, at 471:

To win federal habeas relief for a state conviction, a petitioner must show that the state’s adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or that resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

42. 28 U.S.C. § 2261; see also Kappler, *supra* note 31, at 470–71 (“Generally, a state prisoner may only seek federal habeas corpus review for violations of the Constitution, laws, or treaties of the United States, and can only do so after exhausting all state remedies.”).

43. Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

44. Matthew J. Droskoski, Casebrief, *Issues In The Third Circuit: Criminal Aliens Get Pinched: Sandoval v. Reno, AEDPA’s And IIRIRA’s Effect On Habeas Corpus Jurisdiction*, 45 VILL. L. REV. 711, 717–18 (2000).

45. See generally SOKOL, *supra* note 9, at 55–56. Relatively little has been written about this doctrine in its own right. Scholars have addressed their concerns toward the underlying substantive issues of habeas corpus, such as ensuring that capital defendants are given adequate appeals, and they have discussed this doctrine only as a tangential issue. See, e.g., Carol A. Fitzsimmons, Whitmore v. Arkansas: *Execution of an Individual, Without a Prior Mandatory Appellate Review, Denied Scrutiny*, 18 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 203, 215–

dates back to the English Habeas Corpus Act of 1679, which allowed the filing of the writ of habeas corpus by anyone acting on behalf of a detained person.⁴⁶ In 1704 the House of Lords announced “[t]hat every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law.”⁴⁷ Courts have recognized the availability of next friend standing as necessary in the interests of “liberty”⁴⁸ and as “ancient and fully accepted.”⁴⁹

In U.S. courts, next friend standing is authorized by common law and, in the context of habeas corpus proceedings, by statute.⁵⁰ In both contexts, “next friends” with no claimed injuries of their own can bring suit on behalf of persons with qualifying injuries who are unable to prosecute their own actions. Next friend standing constitutes an exception to traditional standing rules, which generally require that litigants bring suit only for their own injuries and prohibit suits on behalf of third parties.⁵¹

Standing doctrine consists of both constitutional requirements, which are designed to ensure that the courts hear only “cases and controversies” as required by Article III of the U.S. Constitution, and prudential requirements imposed by the courts.⁵² The general prohibition against suits brought on behalf of third parties is largely prudential, which means that the courts and Congress may fashion

17 (1992). Admittedly, the substantive issues in habeas corpus proceedings are generally more fundamental and far-reaching, and, in comparison, the doctrine of next friend standing is a relatively minor technicality. Given, however, that this threshold issue must be passed before a court will address the fundamental issues, it warrants more attention than it has received.

46. 31 Car. 2, c. 2, § 2 (Eng.).

47. *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990) (citation omitted) (alteration in original).

48. *See King v. McLean Asylum (McLean Asylum I)*, 64 F. 325, 328 (1st Cir. 1894) (stating that “[i]n favor of liberty” the court should “admit the prochein ami [next friend]” and that “the aid of a prochein ami . . . is necessary for the protection of those who, on account of the rigorous nature of their detention, or of their mental ability, are incapable of acting for themselves”).

49. *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921).

50. 28 U.S.C. § 2242 (2000).

51. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975) (“[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”).

52. Generally, Article III limits the jurisdiction of the federal courts to cases and controversies. U.S. CONST. art. III, § 1. Standing doctrine, together with other doctrines such as mootness and ripeness, ensures that Article III requirements are met in all cases, and also includes other, prudential limitations on the federal courts’ authority.

exceptions, such as next friend standing and third-party standing.⁵³ Though based on Article III concerns,⁵⁴ the prohibition is essentially an exercise of judicial self-restraint.⁵⁵ It manifests a general preference for plaintiffs who have personal stakes in the outcome of cases to ensure that courts properly resolve the issues presented.⁵⁶

The preference for plaintiffs with a personal stake in the case has become an important aspect of the law of next friend standing. The courts have long worried that next friends without this personal stake may fail to act in the best interests of those whom they purport to represent.⁵⁷ The courts applying the rules of next friend standing recognize that “[i]t was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends.”⁵⁸

1. *The Whitmore Rule of Next Friend Standing.* In 1990, the Supreme Court decided *Whitmore v. Arkansas*⁵⁹ and set out the current rule for next friend standing. There are two requirements to properly assert such standing: (1) the “‘next friend’ must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action;”⁶⁰ and (2) “the ‘next friend’ must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a

53. In most third-party claims, the litigant has come to court to redress individual injury *as well as* the injury of a third party, and it is for these latter claims that the litigant must seek third-party standing. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991). With next friend standing, however, the litigant has *no individual injury* and seeks only to assist someone else in redressing that person’s injury. By nature of the circumstances, a next friend has no personal injury and acts only as a “mouthpiece” of sorts for the real party in interest. Because the limits on third-party and next friend standing are prudential, Congress can authorize third-party and next friend standing by statute. *Warth*, 422 U.S. at 501; *see, e.g.*, 28 U.S.C. § 2242 (authorizing next friend standing in the habeas corpus statute).

54. *See Whitmore*, 495 U.S. at 164 (noting that parties might attempt to use next friend standing to “circumvent the jurisdictional limits of Art. III”); *see also Warth*, 422 U.S. at 499 (stating that the prohibition on third-party standing is “closely related to Art. III concerns”).

55. *Warth*, 422 U.S. at 500.

56. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1994).

57. *See, e.g., King v. McLean Asylum (McLean Asylum II)*, 64 F. 331, 356 (1st Cir. 1894) (discussing, with approval, the rule that “next friends” must establish that they act for the benefit of the real parties in interest and not merely to promote their own causes).

58. *Whitmore*, 495 U.S. at 164 (alteration in original) (quoting *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921)).

59. 495 U.S. 149.

60. *Id.* at 163.

‘next friend’ must have some significant relationship with the real party in interest.”⁶¹ The burden is on the “next friend” to justify her status and, thereby, the jurisdiction of the federal courts.⁶²

In *Whitmore*, the real party in interest was Ronald Gene Simmons. Simmons had been sentenced to death twice for two separate murders.⁶³ In each case, Simmons waived his right to appeal his sentence, and the State of Arkansas found him competent to do so.⁶⁴ Another death row inmate, Jonas Whitmore, requested permission of the Supreme Court of Arkansas to intervene in the Simmons case as a third party with his own claims and also to intervene on Simmons’ behalf as his next friend to take up Simmons’ appeal.⁶⁵

The Supreme Court of Arkansas held that Whitmore did not have next friend standing,⁶⁶ and the U.S. Supreme Court affirmed.⁶⁷ Whitmore had not brought a habeas corpus petition on Simmons’ behalf but instead had sought to intervene in a state court proceeding.⁶⁸ The Supreme Court of Arkansas recognized the availability of “next friend” standing under state law but denied such standing to Whitmore.⁶⁹ Although there was no congressional authorization for asserting such standing in a federal court, the U.S. Supreme Court held that a federal common law doctrine of next friend standing existed and was “no broader than what is permitted by the habeas corpus statute.”⁷⁰ Because Whitmore was unable to demonstrate that Simmons had a disability that prevented him from bringing his own appeal, Whitmore’s assertion of next-friend standing failed and the writ of certiorari was dismissed for lack of jurisdiction.⁷¹

2. *Next Friend Standing and Article III’s “Cases and Controversies” Requirement.* The *Whitmore* decision reiterated that the general doctrine of standing serves to limit the jurisdiction of

61. *Id.* at 163–64 (citation omitted).

62. *Id.* at 164.

63. *Id.* at 151–53.

64. *Id.* at 152–53.

65. *Id.* at 153–54, 164–65.

66. *Id.* at 153.

67. *Id.* at 166.

68. *Id.* at 164.

69. *Id.*

70. *Id.* at 164–65.

71. *Id.* at 165–66.

federal courts to the “cases or controversies” allowed by Article III.⁷² The Court expressed concern that suits by “next friends” with only a generalized interest in the case could circumvent the jurisdictional limits imposed by Article III.⁷³ Despite this reference to Article III, the *Whitmore* discussion of next friend standing does not render the limitations on next friend standing a constitutional requirement. In fact, the Court stated that its next friend standing rule derived from “[d]ecisions applying the habeas corpus statute.”⁷⁴ For the most part, the *Whitmore* decision merely reaffirms the rule that the courts had used previously.⁷⁵

The cases preceding *Whitmore* did not turn on Article III, except to the extent they required that the real party in interest meet constitutional requirements and that the parties not otherwise circumvent Article III limits. Consequently, it is more appropriate to think of next friend standing requirements as prudential limitations, which can be changed by statute or may evolve with the common law.⁷⁶ The Court’s concern with avoiding next friends who have only a generalized interest in the case relates to Article III requirements,⁷⁷ but the exact content of the rule achieving this result remains a product of common law.⁷⁸

72. *Id.* at 154–55.

73. *Id.* at 164; *see also* *Gusman v. Marrero*, 180 U.S. 81, 87 (1901) (holding that friendliness and sympathy for the “doomed man” and concern about unconstitutional laws do not create a cause of action).

74. *Whitmore*, 495 U.S. at 163. The habeas corpus statute itself does not include any requirements for asserting next friend standing.

75. *See, e.g.*, *Weber v. Garza*, 570 F.2d 511, 513–14 (5th Cir. 1978) (stating the rule that would-be next friends must establish why the prisoners on whose behalf they act could not sign their own habeas corpus petitions, and also requiring that the next friends explain their relationship to and interest in the prisoners); *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921) (stating that the would-be next friend must show the detainee has some disability and also demonstrate “who the ‘next friend’ is”).

76. Importantly, Congress authorized next friend standing *by statute* when it amended 28 U.S.C. § 2242 in 1948. Judicial Code and Procedure Act of 1948, Pub. L. No. 80-773, Ch. 646, § 2242, 62 Stat. 869, 965 (codified as amended at 28 U.S.C. § 2242 (2000)). Prudential limitations on Article III jurisdiction may be changed by Congress, but constitutional limitations cannot.

77. *Whitmore*, 495 U.S. at 164.

78. *Id.* at 177 (Marshall, J., dissenting) (“The requirements for next-friend standing are creations of common law, not of the Constitution.”). Importantly, the doctrine of next friend standing predates the U.S. Constitution.

II. THE RECENT RESURGENCE OF NEXT FRIEND STANDING FOR CHALLENGES TO MILITARY CUSTODY

Given the recent resurgence of next friend standing asserted in challenges to military custody in the wake of the September 11 attacks, it is worth examining in detail how the courts have applied the prongs of the *Whitmore* rule—developed in a criminal context—in the military context. The *Whitmore* rule sets out a staged analysis that requires a court to determine, first, whether a next friend is necessary, and, second, whether the would-be next friend is an appropriate one. This section discusses three representative cases: (1) the habeas corpus petition of Yaser Esam Hamdi brought by his father; (2) the habeas corpus petition of Jose Padilla brought by his attorney; and (3) the habeas corpus petitions of all detainees held at Guantanamo Bay, Cuba, brought by a “Coalition of Clergy, Lawyers, and Professors.”

For the first prong of the *Whitmore* test,⁷⁹ the citizenship of the detainee is an important factor. The courts have consistently found that enemy combatants who are U.S. citizens and who are held by the military are “inaccessible” under the first prong. In contrast, the courts disagree as to whether detainees who are not U.S. citizens or residents are “inaccessible.” For the second prong of *Whitmore*,⁸⁰ courts have struggled to delineate how a would-be next friend satisfies the requirements. Specifically, the opinions have centered on the question of what type of “significant relationship” is needed to show that the next friend is acting in the detainee’s best interests rather than as an intruder or uninvited meddler.

A. *Yaser Esam Hamdi*

Yaser Esam Hamdi was captured in Afghanistan during the fall of 2001, when the United States overthrew that country’s Taliban regime.⁸¹ Shortly after transferring Hamdi to the U.S. Naval Base at

79. *Id.* at 163 (“[A] ‘next friend’ must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action.”).

80. *Id.* at 163–64 (“[T]he ‘next friend’ must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate . . . and it has been further suggested that the ‘next friend’ must have some significant relationship with the real party in interest.”).

81. *Hamdi v. Rumsfeld (Hamdi II)*, 296 F.3d 278, 280 (4th Cir. 2002), *rev’d*, 316 F.3d 450 (4th Cir. 2003), *vacated by* 124 S. Ct. 2633 (2004), *remanded to* 378 F.3d 426 (4th Cir. 2004). When the Supreme Court heard Hamdi’s case, it decided he must be given the ability to challenge his confinement before an impartial tribunal. *Hamdi v. Rumsfeld*, 123 S. Ct. 2633, 2635 (2004). Pursuant to this decision, the U.S. government agreed to release him to the custody of

Guantanamo Bay, Cuba, the military learned that he was a U.S. citizen, born in Louisiana, and that he may not have renounced his citizenship.⁸² In April 2002, Hamdi was transferred from Cuba to the Norfolk Naval Station Brig in Norfolk, Virginia, where the government held him as an enemy combatant.⁸³ The federal public defender for the Eastern District of Virginia, Frank Dunham, filed a habeas corpus petition on Hamdi's behalf, naming himself as next friend.⁸⁴ The district court found the petition to be properly filed "in the interest of justice" and determined that "technical issues regarding who [was] best situated to be next friend [would] not be allowed to interfere with having the 'mind of the public be put at rest' by a swift resolution of the substance of this petition."⁸⁵ While that decision was on appeal, Hamdi's father, Esam Fouad Hamdi, filed a separate writ of habeas corpus for his son, naming himself next friend.⁸⁶ The district court allowed the father's petition to proceed and appointed Dunham as counsel.⁸⁷

On appeal, the standing issue turned on the existence of a "significant relationship" with the prisoner. The Fourth Circuit affirmed the validity of Esam Fouad Hamdi's petition brought on behalf of his son and concluded that Dunham's petition should be dismissed.⁸⁸ It was undisputed that Hamdi was sufficiently inaccessible under the first prong of the *Whitmore* test.⁸⁹ In considering the second prong, however, the court of appeals concluded that only Hamdi's father could claim next friend standing because he was the only litigant who could show a "significant relationship" with the real party in interest.⁹⁰ The court read *Whitmore* as requiring a significant relationship between the would-be next friend and the real party in interest for two reasons. First, this requirement was the only way to

Saudi Arabia. Morning Edition (NPR radio broadcast, Sept. 23, 2004), available at 2004 WL 56914919.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Hamdi v. Rumsfeld (Hamdi I)*, 294 F.3d 598, 601–02 (4th Cir. 2002) (quoting the district court).

86. *Hamdi II*, 296 F.3d at 280.

87. *Id.* at 281.

88. *Hamdi I*, 294 F.3d at 607. The court also dismissed another, unrelated petition filed by a concerned citizen from New Jersey. *Id.*

89. *Id.* at 603.

90. *Id.* at 606–07.

avoid “opening the floodgates . . . to the very ‘intruders or uninvited meddlers’” about whom the *Whitmore* Court had expressed concern.⁹¹ Although the Fourth Circuit did not doubt Dunham’s sincerity or his dedication to Hamdi’s best interests, it expressed an inability to distinguish a public defender from “someone who seeks simply to gain attention by injecting himself into a high-profile case.”⁹² Additionally, because some districts do not have a public defender, and because a prisoner might see even a public defender as an intruder, there was no basis to treat a public defender differently from any other concerned citizen.⁹³

A second and related reason for the significant relationship requirement, according to the Fourth Circuit, was the desire to stay true to the jurisdictional limits imposed by Article III.⁹⁴ Someone asserting only a generalized interest in constitutional governance lacks the “personal stake in the outcome” that courts traditionally require of litigants to ensure a sharpened presentation of the issues and to prevent parties from “utilizing the real party’s injury as an occasion for entry into policy-laden proceedings.”⁹⁵ Indeed, even though Hamdi himself met Article III requirements, this was not enough on its own.⁹⁶ Recognizing that next friend doctrine provides limited access to the courts for next friends, the Fourth Circuit concluded that there must be some “middle ground between allowing no one to serve as a next friend, and allowing anyone to serve.”⁹⁷ The court was concerned about the “significant danger” that, without a significant relationship requirement, many litigants motivated only by political or policy concerns would flood the courts with next friend filings.⁹⁸ Indeed, in this very case, a concerned citizen from New Jersey had filed a habeas corpus petition as Hamdi’s next friend “out of concern only for the unlawful nature of his incarceration.”⁹⁹ The court, however, refused to recognize any distinction between this New Jersey resident and the district’s public defender, especially

91. *Id.* at 605.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 606.

98. *Id.*

99. *Id.*

given that Hamdi's father was present in the litigation.¹⁰⁰ Finally, the Fourth Circuit emphasized that, because a familial relationship existed here, it was not necessary to address the case of someone with no significant relationships at all.¹⁰¹

B. *Jose Padilla*

Like Hamdi, Jose Padilla was also a U.S. citizen linked to terrorist activity against the United States. Padilla, born in New York, was arrested by the Federal Bureau of Investigations in Chicago in May 2002, pursuant to a material witness warrant.¹⁰² The government had evidence that Padilla was in extensive contact with al Qaeda members and was involved in plans for possible future attacks against the United States and other countries.¹⁰³ Initially, he was transferred to New York and held as a civilian under the authority of the U.S. Marshal Service and the Bureau of Prisons.¹⁰⁴ Donna Newman was appointed as Padilla's counsel, and, for the next several weeks, she conferred with Padilla, his family, and government officials.¹⁰⁵ In June, the government notified the district court *ex parte* that the president had designated Padilla an enemy combatant and had directed the secretary of defense to take custody.¹⁰⁶ Padilla was then transferred to the Consolidated Naval Brig in South Carolina.¹⁰⁷ Two days later, Newman filed a habeas corpus petition on Padilla's behalf as his next friend.¹⁰⁸

The Second Circuit had little trouble in holding that Newman had next friend standing to bring the habeas corpus petition. Since June 2002, Padilla had been held incommunicado, denied access to any nonmilitary personnel, including his family and Newman.¹⁰⁹ In

100. *See id.* (noting the "stark contrast" between the complete "absence of a connection to Hamdi on which the Public Defender and Peregrim [the New Jersey resident] attempted to proceed" and "the close familial connection [of Hamdi's father] that was right around the corner").

101. *Id.* at 604 n.3, 606.

102. *Padilla v. Rumsfeld*, 352 F.3d 695, 699–700 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 571–72 (S.D.N.Y. 2002).

103. *Padilla ex rel. Newman*, 233 F. Supp. 2d at 572–73.

104. *Padilla*, 352 F.3d at 700.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

addition, Newman, as his attorney, was “duty-bound” to represent and protect him zealously.¹¹⁰ In the district court, the government had conceded both that Padilla was inaccessible under the first prong of *Whitmore*’s test and that Newman was dedicated to his best interests.¹¹¹ Thus, the only issue was whether Newman had a “significant relationship” with Padilla that was sufficient to justify her standing. The government relied on *Hamdi*¹¹² and *Coalition of Clergy*¹¹³ in arguing that only members of Padilla’s family were able to sign a petition on his behalf, but the Second Circuit distinguished both cases on the ground that they involved would-be next friends (a public defender with no prior contacts with the prisoner and an ad-hoc coalition) who had no relationship at all with the real party in interest.¹¹⁴ Although the duration of Newman’s relationship with Padilla had been brief, the court found that it was significant enough and that she was neither an “intruder” nor an “uninvited meddler.”¹¹⁵ Thus, she was able to sign a habeas corpus petition on his behalf.

C. Coalition of Clergy, Lawyers, and Professors v. Bush

Unlike *Hamdi* and *Padilla*, *Coalition of Clergy, Lawyers, and Professors v. Bush*¹¹⁶ presented the issue of a real party in interest who has no significant relationships at all, perhaps the most difficult and unresolved issue of next friend standing. The petitioners were a “Coalition of Clergy, Lawyers, and Professors,” including three rabbis, a Christian pastor, ten lawyers and two journalists, who filed a habeas corpus petition on behalf of all “Persons Held Involuntarily at Guantanamo Naval Air Base, Cuba.”¹¹⁷ The Ninth Circuit held that the Coalition did not have next friend standing under *Whitmore*.¹¹⁸ On

110. *Id.* at 703.

111. *Padilla ex rel. Newman*, 233 F. Supp. 2d 564, 576 (S.D.N.Y. 2002), *aff’d on reconsideration*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *aff’d in part and rev’d in part*, 352 F.3d 695 (2d Cir. 2003), *rev’d*, 124 S. Ct. 2711 (2004).

112. *Hamdi v. Rumsfeld (Hamdi I)*, 294 F.3d 598 (4th Cir. 2002).

113. *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003). For a discussion of *Coalition of Clergy*, see *infra* Part II.C.

114. *Padilla*, 352 F.3d at 704 n.8.

115. *Id.* at 704.

116. 310 F.3d 1153.

117. *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002), *aff’d in part, vacated in part*, 310 F.3d 1153 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2073 (2003).

118. *Coalition of Clergy*, 310 F.3d at 1163. The court applied its prior interpretation of *Whitmore*, elucidated in *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192 (9th Cir. 2001). See *Coalition of Clergy*, 310 F.3d at 1159–60.

the question of accessibility, the court rejected the “hyperbolic argument” that the detainees were truly held “incommunicado” as the petition alleged.¹¹⁹ The detainees had been allowed to write letters to relatives, some had been in contact with diplomatic officials from their home countries, and they had been visited by the ICRC.¹²⁰ Importantly, the court found that diplomatic channels were a viable means of addressing the detainees’ claims and that these channels had remained open.¹²¹ In addition, the parents of some of the detainees had filed suit on behalf of their children in the U.S. District Court for the District of Columbia.¹²² Nevertheless, the detainees were unable to litigate their own causes because they were not allowed to meet with lawyers and were denied access to file on their own.¹²³ Indeed, the court noted that the detainees were “held in a secure facility in an isolated area of the world, on a United States Naval Base in a foreign country, to which United States citizens are severely restricted from traveling.”¹²⁴ However, the court declined to make any express holding on inaccessibility because it determined that the Coalition did not have standing under *Whitmore*’s second prong.¹²⁵

The court held that, because the Coalition had no relationship with any of the detainees, it could not claim next friend standing.¹²⁶ In assessing this second prong, the court looked to whether the Coalition was dedicated to the detainees’ best interests *and* whether there was a “significant relationship” with the detainees. The Coalition argued that *Whitmore* did not require a significant relationship but instead merely suggested it as a factor.¹²⁷ The Coalition contended that a petitioner who was truly dedicated to the best interests of the detainee would satisfy the requirements under *Whitmore*’s second prong, and that a “significant relationship” should be construed only

119. *Coalition of Clergy*, 310 F.3d at 1160.

120. *Id.*

121. *Id.*

122. *Id.* That case is *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff’d sub nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

123. *Coalition of Clergy*, 310 F.3d at 1161.

124. *Id.*

125. *Id.* at 1161–62.

126. *Id.* at 1163.

127. *Id.* at 1161.

as an “additional consideration” in assessing the appropriateness of a would-be next friend.¹²⁸

The Ninth Circuit rejected this argument and held that, consonant with prior circuit precedent, the *Whitmore* test should be understood to require a significant relationship between the would-be next friend and the real party in interest.¹²⁹ It relied on the rationale in *Whitmore* that someone without a “significant relationship” “does not suffer a sufficient grievance” to confer standing, noting that such grievance and “injury-in-fact” requirements were necessary to prevent the circumvention of Article III’s limitations.¹³⁰ It also expressed concern with “‘intruders or uninvited meddlers’”¹³¹ whose motives, however worthy, “run the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case.”¹³²

Although holding that a “significant relationship” was a requirement for next friend standing, the court recognized that the requirement could be relatively flexible.¹³³ The court declined to define the contours of this requirement, however, describing

128. *Id.*; see also Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 LOY. L.A. L. REV. 1, 5–9 (2003) (explaining that neither the statute nor any case law from the Supreme Court or the Ninth Circuit supported the notion that a significant relationship should be required). Professor Erwin Chemerinsky was one of the attorneys in this litigation.

129. *Coalition of Clergy*, 310 F.3d at 1162.

130. *Id.* at 1161. The court’s rationale is problematic because it appears to confuse the requirements of third-party standing with those of next friend standing and assumes that a next friend must meet the same requirements as those of a typical third-party litigant. In general, Article III requires that a plaintiff establish an “injury in fact” that is concrete, distinct, and palpable—as opposed to abstract—and “actual or imminent.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1989) (internal quotations and citations omitted). The usual rule is that litigants must assert such injury to themselves and are not allowed to bring suit on behalf of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Exceptions to this rule have evolved, and the Supreme Court has set out rules for allowing third-party claims. To properly bring such a claim on behalf of third parties, a litigant must demonstrate (1) “she has suffered a concrete, redressable injury,” (2) “she has a close relation with the third party,” and (3) there is “some hindrance to the third party’s ability to protect his or her own interests.” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629 (1991). Next friend standing is a type of third-party standing but is unique in its history and underlying purpose. In most third-party claims, litigants seek to redress their own injuries by asserting the rights of third parties, whereas in next friend claims, the next friends have no injuries of their own and only assert the real parties’ rights. It is possible that the *Coalition of Clergy* court failed to see this distinction and was conflating the “best interests/significant relationship” prong with the injury-in-fact requirements of other third-party claims.

131. *Coalition of Clergy*, 310 F.3d at 1161 (quoting *Whitmore*, 495 U.S. at 164).

132. *Id.* (quoting *Lenhard v. Wolff*, 443 U.S. 1306, 1312 (1979)).

133. *Id.* at 1162.

“significance” as a “relative concept, dependent on the individual prisoner’s plight.”¹³⁴ It explained that a detainee who had no relatives, friends, or diplomatic officials willing or able to petition on his behalf could be represented by “a person with ‘some’ relationship conveying some modicum of authority or consent, ‘significant’ in comparison to the detainee’s other relationships.”¹³⁵ “Some” relationship could be “an objective basis for discerning the ‘intruder’ or ‘uninvited meddler’ from the true ‘next friend.’”¹³⁶ Here, however, the Coalition members had no relationships at all with the detainees and had not attempted to establish any.¹³⁷ Although it was possible that some situations would warrant relaxing the *Whitmore* requirement of an actual relationship, the court did not see this as such a situation.¹³⁸

In contrast to the *Coalition of Clergy* majority, Judge Marsha Berzon, in her concurrence, disagreed that a significant relationship was required under *Whitmore*.¹³⁹ Judge Berzon pointed out that the Supreme Court stated the rule as containing two requirements: (1) that the real party in interest is unable to litigate his own cause, and (2) that the would-be next friend is “truly dedicated” to the prisoner’s best interests.¹⁴⁰ Only after delineating this rule did the Supreme Court state that the case law “suggested” the requirement of a “significant relationship.”¹⁴¹ Judge Berzon argued that subsequent Ninth Circuit cases were not decided on the basis of *Whitmore*’s second prong, and so any language indicating that a significant relationship was required “was simply dicta.”¹⁴² Additionally, the present case did not require any holding that a significant relationship was either required or was only one of many considerations, because under any analysis the Coalition had not demonstrated that it would best serve the detainees’ interests.¹⁴³ Although direct communication

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1166 (Berzon, J., concurring).

140. *Id.* at 1165 (Berzon, J., concurring).

141. *Id.*; see also *Whitmore*, 495 U.S. at 163–64 (“[T]he ‘next friend’ must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that the ‘next friend’ must have some significant relationship with the real party in interest.” (internal citation omitted)).

142. *Coalition of Clergy*, 310 F.3d at 1166 (Berzon, J., concurring).

143. *Id.* at 1166–67 (Berzon, J., concurring).

with the prisoners was not required, “the complete lack of any *attempt* to communicate counsel[ed] against next friend standing.”¹⁴⁴ Additionally, the “ad-hoc” nature of the Coalition worked against it.¹⁴⁵ An organization with a history of helping people in similar situations, such as Amnesty International or the ICRC, would have stood in a much stronger position.¹⁴⁶ Finally, in other cases, such as *Rasul v. Bush*,¹⁴⁷ the litigants’ claims addressed concerns shared by all of the Guantanamo Bay detainees.¹⁴⁸ The interests of the *Rasul* detainees and their next friend family members were so closely in line with the interests of the remainder of the detainees that, for the time being, there was no need for another “next friend” to litigate common threshold issues.

D. *The Significance of the Three Military Cases*

As *Hamdi*, *Padilla*, and *Coalition of Clergy* demonstrate, a U.S. citizen held as an enemy combatant is “inaccessible.” In the *Hamdi* and *Padilla* cases, U.S. citizens held incommunicado by the military met the first prong of the *Whitmore* test. It was clear in both cases that the real party in interest was unable to litigate his own claim. The *Coalition of Clergy* court was confronted with the more difficult situation of alien detainees with limited outside contact, and it declined to make any express holding on inaccessibility.

In these military cases, courts have split on what is required to meet the second prong of *Whitmore* that the would-be next friend be qualified to bring the petition. *Hamdi* presented a typical situation of a parent filing on behalf of a child, and *Padilla* concerned another common circumstance of an attorney, already on the case, filing on behalf of her client. In both cases, no one doubted that the next friends were acting in the best interests of the prisoners or that Esam Hamdi and Donna Newman were appropriate choices within the

144. *Id.* at 1167 (Berzon, J., concurring).

145. *Id.*

146. *Id.*

147. 215 F. Supp. 2d 55 (D.D.C. 2002), *aff’d sub nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d sub nom.* Rasul v. Bush, 124 S. Ct. 2686 (2004). In *Rasul v. Bush*, the parents of Shafiq Rasul, Asif Iqbal, and David Hicks brought habeas corpus petitions on behalf of their children held at Guantanamo Bay. Rasul and Iqbal were citizens of the United Kingdom, and Hicks was an Australian citizen. *Rasul*, 215 F. Supp. at 57. In the related case of *Al Odah v. United States*, family members brought habeas petitions on behalf of twelve Kuwaiti nationals also held at Guantanamo Bay. *Id.* at 58.

148. *Coalition of Clergy*, 310 F.3d at 1167–68 (Berzon, J., concurring).

prisoners' circles of relationships. Although Frank Dunham, the public defender in Hamdi's case, was not allowed to proceed as next friend, it was likely the availability of a closer next friend—Hamdi's father—that was driving the court's decision.¹⁴⁹ The *Padilla* court recognized that close relatives were not necessarily the only potential litigants, but this merely affirmed prior opinions indicating that a prisoner's attorney, even one appointed by the court, would be well-suited to the job.¹⁵⁰ The *Coalition of Clergy* case presented the most difficult situation—a detainee with no relationships at all.¹⁵¹

This Note address two questions that the cases left open: (1) for noncitizens and nonresidents, should any situation short of being held completely incommunicado by the military warrant a finding of inaccessibility; and (2) under *Whitmore*, is a significant relationship between a next friend and a detainee required?

III. THE FIRST PRONG OF THE *WHITMORE* TEST: WHEN IS A PERSON UNABLE TO SUE?

The first prong of the two-prong *Whitmore* test requires that the would-be next friend “provide an adequate explanation . . . why the real party in interest cannot appear on his own behalf to prosecute the action.”¹⁵² This prong requires courts to consider whether real parties in interest are *unable* to sue, that is, whether they lack meaningful access to the courts to vindicate their own rights.

Although a few of the Guantanamo Bay detainees have other means of securing relief, the most important being diplomatic channels,¹⁵³ most have no comparable available alternatives.¹⁵⁴

149. Arguably, the claims of both Dunham and Hamdi's father made it a simple matter to throw out the petition of the concerned New Jersey resident.

150. Even Justice William Rehnquist, now Chief Justice, noted that “from a purely technical standpoint a public defender may appear as ‘next friend’ with as much justification as the mother of [a prisoner].” *Lenhard v. Wolff*, 443 U.S. 1306, 1310 (1979); *see also, e.g., Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000) (explaining that for the particular prisoner “the most logical next friend is [the prisoner's] court-appointed counsel”).

151. *Hamdi v. Rumsfeld (Hamdi I)*, 294 F.3d 598, 604 n.3 (4th Cir. 2002) (“In holding a significant relationship to be a requirement for next friend standing, we reserve the case of someone who possesses no significant relationships at all.”).

152. *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990).

153. *See supra* note 7 and accompanying text.

154. *See Chemerinsky, supra* note 128, at 8–9 (2003) (arguing that because the Guantanamo Bay detainees are from foreign nations, probably do not speak English, and have been refused any means of communication with courts or attorneys, it is preposterous to think they have voluntarily chosen not to file lawsuits).

Especially given that the United States maintains significant control over Afghanistan and Iraq, and thus can influence their diplomatic channels, it would be unjust to treat Afghani and Iraqi detainees the same as, for example, Australian or Kuwaiti citizens. In particular, the U.S. invasions of Afghanistan and Iraq should be considered in assessing whether Afghani and Iraqi detainees at Guantanamo Bay are able to vindicate their own rights. There may be other, particular circumstances worthy of consideration, but because the military has not released the names of any of the prisoners,¹⁵⁵ it is difficult to make individual assessments.

A. *The Meaning of Inaccessibility*

Recent cases have questioned whether nonresident aliens held outside the United States are truly inaccessible. In *Coalition of Clergy*, the detainees were “denied access to file petitions in United States courts on their own behalf,”¹⁵⁶ but the court still questioned whether the detainees were really “inaccessible” because they had had limited contact with the ICRC, diplomatic officials, and relatives.¹⁵⁷ The District Court for the District of Columbia has also questioned the inaccessibility of the same Guantanamo detainees. In *Rasul v. Bush*, where the family members of several detainees petitioned for habeas corpus relief, the court pointed out “the notion that these aliens could be held *incommunicado* from the rest of the world would appear to be inaccurate.”¹⁵⁸ The court cited evidence that the Australian government had been in contact with David Hicks, one of the detainees.¹⁵⁹

So long as detained nonresident enemy aliens have access to some relief—be it a federal court, a military tribunal, or some diplomatic avenue—they do not have a disability that warrants third-party interference. Indeed, in *Coalition of Clergy*, the court determined that inaccessibility was in doubt, even though the government had admitted the detainees were prevented from accessing the courts. Although it is clear that these detainees lack access to civilian courts, the recent opinions have shown a willingness

155. *Id.* at 9.

156. 310 F.3d at 1164.

157. *Id.* at 1160.

158. *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff'd sub nom.* Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

159. *Id.* at 57 n.1.

to look to other possible avenues of relief in assessing their true “inaccessibility.”

The courts’ treatment of this issue relies, in part, on the recently invalidated notion that access to the domestic courts is an entitlement of citizenship. The definition of “access” in these opinions is tied up with questions of whether a person *should* have access to the civilian courts and, if so, what level of access the person ought to have. There has been substantial revision of Supreme Court authority on this since the cases discussed here were decided. In June 2004, in *Rasul v. Bush*,¹⁶⁰ the Supreme Court affirmed that all persons detained by the United States have the ability to challenge their custody before the judicial branch. Before *Rasul*, controlling precedent in *Johnson v. Eisentrager*¹⁶¹ denied any right of access to the domestic courts for nonresident enemy aliens.¹⁶² In *Rasul*, the Court distinguished *Eisentrager* from the Guantanamo Bay situation because the detainees in Cuba were “not nationals of countries at war with the United States,” denied any “acts of aggression against the United States[,] . . . [had] never been afforded access to any tribunal[,] . . . and for more than two years [had] been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”¹⁶³ In addition, *Eisentrager* may have been relevant to the “prisoners’ constitutional entitlement to habeas corpus” but did not control statutory entitlement.¹⁶⁴ Thus, nonresident enemy aliens are no longer precluded from invoking federal court jurisdiction under the habeas corpus statute, and a prisoner’s status as an alien or a citizen is no longer controlling.¹⁶⁵

160. 124 S. Ct. 2686 (2004).

161. 339 U.S. 763 (1950).

162. *Id.* at 781. The petitioners in *Eisentrager* had been tried and convicted in China by a military commission and were imprisoned in Germany. *Id.* at 765–66. Several factors were important to the Court’s holding: concerns that bringing the petitioners before a domestic court might burden the military; the petitioners had never been inside the U.S.; the acts for which they had been tried and convicted were committed abroad; and the potential for allowing enemies to create a conflict between the civil and military courts. *Id.* at 778–79.

163. 124 S. Ct. at 2693.

164. *Id.* Since *Eisentrager*, the Court had overturned precedent concerning the statutory authorization for habeas corpus jurisdiction upon which it relied in *Eisentrager*, and so the case no longer could be regarded as rejecting the ability of a court to exercise jurisdiction over these claims. *Id.* at 2695.

165. *See id.* at 2696 (“Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority.”).

B. *The Guantanamo Bay Detainees*

Although some of the detainees at Guantanamo Bay have had the benefit of relatives' and diplomats' intervention on their behalves, the mere fact that the detainment has continued for so long suggests that, practically speaking, virtually all of the detainees have no avenues of securing relief.¹⁶⁶ Although the U.S. government has spoken publicly about its intent to review each prisoner's status,¹⁶⁷ it has only in the last few months identified the first six inmates who will stand trial.¹⁶⁸ It is only after the Supreme Court affirmed that the detainees could challenge their imprisonment in the courts that the military initiated administrative hearings to determine the validity of each prisoner's status as an enemy combatant.¹⁶⁹ The detainees continue to be denied access to lawyers,¹⁷⁰ and the Bush Administration asserts it may hold them until the war on terror ends, which may never happen.¹⁷¹

In addition to the circumstances of their detention, the Afghani and Iraqi prisoners face another obstacle. They are in a difficult bargaining position against the United States. Although the U.S. government has been working with the North Atlantic Treaty Organization (NATO) and the United Nations to restore a viable Afghani government to power, Afghanistan is still largely under U.S. control.¹⁷² Iraq is still dependent on the U.S. military as it strives to

166. Certainly, if they had some means of challenging their custody they would have done so. Although Judge Berzon's concurrence in *Coalition of Clergy* listed organizations that she would deem qualified to bring suit on behalf of the detainees as a group, such as the ICRC or Amnesty International, no such organizations had done so. One commentator took Judge Berzon to task for her analysis, stating, "[T]he absence of any lawsuit by the vast majority of [the Guantanamo Bay prisoners] shows the flaw in Judge Berzon's argument. Why would those detainees in cages bring no challenge? Certainly it is not that they are pleased with their captivity." Chemerinsky, *supra* note 128, at 8.

167. Guantanamo Prisoners to Get Reviews; Rumsfeld says a panel will consider the threat posed by each detainee on an annual basis, L.A. TIMES, Feb. 14, 2004, at A29.

168. Horrock & Iqbal, *supra* note 2. Military tribunals have been authorized for two Britons, an Australian, and three unnamed detainees. *Id.*

169. *Two Guantanamo Detainees Challenge 'Enemy Combatant' Status*, AGENCE FRANCE PRESSE, Aug. 2, 2004, LEXIS, Nexis Library, Agence France Presse File.

170. The detainees will be provided with "personal representatives," who will provide assistance but will not function as advocates. Any statements made to a personal representative may be used against the detainee. *Id.*; Edmonson, *supra* note 2.

171. Toni Locy, *Human Rights Groups Denied Seats at Tribunals; Space Is Limited, Pentagon Says*, USA TODAY, Feb. 24, 2004, at A3.

172. See Tim McGirk, *Terrorism's Harvest*, TIME AUSTRALIA, Aug. 9, 2004 (noting that there are twenty thousand U.S. troops in Afghanistan); Fareed Zakaria, *Warlords, Drugs and*

rebuild itself.¹⁷³ The relationship the United States has with Afghanistan and Iraq suggests that Afghani and Iraqi detainees lack diplomatic officials able to fight the U.S. government on their behalves. It is also unlikely, practically speaking, that any relatives whom the detainees might have in their home countries could litigate for them in U.S. courts. Both Iraq and Afghanistan remain dangerous and unstable.¹⁷⁴ Regardless of whether a few of these prisoners have been able to secure some mode of redress, the courts should find the remaining majority, especially the Afghani and Iraqi detainees over whom the United States has the most control, “inaccessible” under *Whitmore’s* first prong.

There are further reasons for finding inaccessibility. The goal of next friend standing is to allow the adjudication of habeas corpus petitions on the merits. If a court had decided to hear these cases on the merits, it would have afforded the detainees an opportunity to hear the charges against them, consult with counsel, perhaps refute the government’s evidence,¹⁷⁵ and in some cases publicly proclaim their innocence.¹⁷⁶ Importantly, it would have given them a chance to bring their situation to light before an impartial tribunal, as well as furnishing some hope of clarifying their legal status. Denying the

Votes; Drugs Have Become the Dominating Feature of Afghanistan’s Economy, and Corruption Has Infected Every Aspect of Afghan Political Life, NEWSWEEK INT’L, Aug. 9, 2004, at 39 (describing the substantial effects of U.S. government policy on the stability of Afghanistan).

173. See *UK’s Hoon Says NATO Mission Key for Coalition Troops Iraq Exit Strategy*, AGENCE FRANCE PRESSE, Oct. 13, 2004, LEXIS, Nexis Library, Agence France Presse File (quoting a British defense official as saying that the U.S.-led forces’ “exit strategy is dependent on the ability of the Iraqis to organize their own security”); see also *Worse Than the Usual Bad*, L.A. TIMES, Oct. 26, 2004 at B10 (noting that the U.S. still maintains 140,000 troops in Iraq).

174. See Carlotta Gill, *Humanitarian Aid Group Abandons Afghan Effort*, HOUSTON CHRONICLE, July 29, 2004, at 22 (reporting that the international aid agency Médecins Sans Frontières was pulling out of Afghanistan after twenty-four years, citing government failure to take proper action after the killings of five of its workers and the high risk of future attacks); *Road Show Observer*, FIN. TIMES, Mar. 31, 2004, at 12 (“[H]alf of Afghanistan’s population . . . lives in severe poverty.”). Much of the south and east of the country is considered “off limits” even to aid workers. Gill, *supra*. Regarding the dangers in Iraq, see, e.g., *Dexter Filkins, 2 Bombers Kill 5 in Guarded Area in Baghdad*, N.Y. TIMES, Oct. 15, 2004, at A1; Edward Wong, *Rebels Kidnap 2 Americans and a Briton in Baghdad*, N.Y. TIMES, Sept. 17, 2004 at A11.

175. See, e.g., *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (“Plaintiffs . . . ask . . . to ‘meet with their families,’ ‘be informed of the charges, if any, against them,’ ‘designate and consult with counsel of their choice,’ and ‘have access to the courts or some other impartial tribunal.’”), *aff’d sub nom.* *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev’d sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

176. *Id.* at 63 (“Plaintiffs have told the Court that they seek access to an impartial tribunal in order to ‘expeditiously establish their innocence and be able to return to Kuwait and their families.’”).

filing of a petition dismisses the case on a technical issue and resolves nothing. Review on the merits here is also compelling because of the undefined nature of the war on terror. The congressional authorization for the use of force¹⁷⁷ is open-ended. There is no definable end point to the conflict and no closing event that could mark the point at which the Guantanamo Bay detainees will be no longer needed for questioning.

Next friend standing in habeas corpus review is fundamentally a procedure to ensure that someone can challenge government action. Its role is to guarantee that the government has followed due process of law—any law, whether civilian or military, domestic or international—and that it has some good reason to hold a party in custody. It is an ancient check on a government’s power to capture and detain, which is the ultimate abrogation of individual rights. A stronger standard of “access” is called for when it becomes obvious that the detaining government not only holds custody of an individual but also controls all other viable means of securing relief. The role of the United States in detaining men at Guantanamo Bay and the level of control that the U.S. has over the detainees’ alternate means of securing relief should have been considered in determining whether they were able to litigate their own causes.

IV. THE SECOND PRONG OF THE *WHITMORE* TEST: HOW SHOULD A NEXT FRIEND BE CHOSEN?

Under *Whitmore*’s second requirement for next friend standing, the would-be next friend “must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a ‘next friend’ must have some significant relationship with the real party in interest.”¹⁷⁸ The desire to avoid giving standing to intruders or uninvited meddlers is an important factor in assessing this prong.¹⁷⁹ The issue is whether a “significant

177. Authorization for Use of Military Force, Pub. Law No. 107-40, 115 Stat. 224 (2001).

178. *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) (citation omitted).

179. See, e.g., *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000) (noting “reservations” that the prisoner’s would-be next friends were not acting in his best interests but only out of “their own desires to block imposition of the death penalty in an ‘attempt to define justice as they [saw] fit’”); *United States ex rel. Bryant v. Houston*, 273 F. 915, 917 (2d Cir. 1921) (affirming the dismissal of a habeas corpus application for failure to show that the real party in interest “authorized or desired” it); *In re Poole*, 9 D.C. (2 MacArth.) 583, 590 (D.C. 1876) (discussing the invalidity of the habeas proceedings because the petitioner was “a mere stranger to the infant” and was not invited by the child, a parent, or a guardian to bring the writ).

relationship” is required between the next friend and the real party in interest (as the *Hamdi* and *Coalition of Clergy* courts held), or whether, as this Note argues, the existence or nonexistence of a significant relationship is merely one factor among many to consider in assessing whether a would-be next friend is “truly dedicated.”¹⁸⁰ In practice, the facts of each case often determine the most relevant considerations.

A. *For Most Courts, Whitmore’s Second Prong Involves a Case-by-Case, Factual Analysis*

In practice, courts are likely to assess each would-be next friend on the facts of each situation. The courts consistently approve next friend status for next friends with objectively observable relationships with the real parties in interest. Often this is a family relationship, but it may also be appointed or hired counsel.¹⁸¹ In many cases, this type of significant relationship, especially a family relationship, is an obvious indicator of a would-be next friend’s good faith and appropriateness.

There is often no need for skepticism when a family relationship exists; some family members, however, may have only a generalized interest in a case. For example, in *Hauser ex rel. Crawford v. Moore*, the Eleventh Circuit questioned whether a birth mother who had given up a prison inmate for adoption and had no prior involvement in the case was truly dedicated to the prisoner’s best interests.¹⁸² Both the court and the inmate believed the petitioner’s motivations were based on her personal views of the death penalty, rather than on concerns about justice for the prisoner.¹⁸³ Similarly, in *Davis v.*

180. It is also important to remember that the “true dedication” requirement of next friend standing doctrine is not the same as the personal injury requirement of Article III standing. See *supra* note 130 and Part I.B.

181. See, e.g., *Evans v. Jeff D.*, 475 U.S. 717, 721 (1986) (permitting without question a private attorney), replaced by *Jeff D. v. Andrus*, 899 F.2d 753 (9th Cir. 1989); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 n.3 (1955) (sister); *Hamdi v. Rumsfeld (Hamdi I)*, 294 F.3d 598, 600 n.1 (4th Cir. 2002) (father); *Vargas v. Lambert*, 159 F.3d 1161, 1168 (9th Cir. 1998) (mother); *Warren v. Cardwell*, 621 F.2d 319, 321 n.1 (9th Cir. 1980) (hired counsel); *Ex parte Zimmerman*, 132 F.2d 442, 443 (9th Cir. 1942) (wife); *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 578 (S.D.N.Y. 2002) (appointed counsel), *aff’d on reconsideration*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003), *aff’d in part and rev’d in part*, 352 F.3d 695 (2d Cir. 2003), *rev’d*, 124 S. Ct. 2711 (2004).

182. *Hauser*, 223 F.3d at 1322.

183. *Id.* For an extreme example, see *Gardner v. Green*, Civil Action 99-0246-RV-S, 1999 U.S. Dist. LEXIS 10206 (S.D. Ala. May 17, 1999), adopted by Civil Action 99-0246-RV-S, 1999

Austin,¹⁸⁴ a Georgia district court found that the prisoner's minister and first cousin did not have a sufficient relationship with him to confer standing.¹⁸⁵ The court based its finding on the minister's and cousin's lack of involvement with the inmate during his adult life prior to his conviction, which made their status similar to that of anyone who becomes personally involved in a particular case because of a philosophical opposition to capital punishment.¹⁸⁶ In addition to family members who have only a generalized or theoretical interest, some family members have interests in direct conflict with those of a confined person¹⁸⁷ or simply fail to act in the party's best interests.¹⁸⁸

In short, the existence of a relationship generally creates a presumption of standing that may be rebutted by other information. If a family member seems to have only a generalized interest in the case, or if it appears that the family member's personal interests may conflict with those of the real party in interest, next friend standing will be denied. Although having a family relationship, or being hired or appointed as counsel, may be strong evidence of the "best interests" prong, in practice most courts are willing to look at other evidence.

B. The Test Should Not Require a Significant Relationship

The analysis under *Whitmore's* second prong should not require a significant relationship. A reading of the plain language of *Whitmore* indicates that an appropriate next friend is someone acting in good faith and in the best interests of the detainee. Judge Berzon's

U.S. Dist. LEXIS 10202 (S.D. Ala. June 8, 1999). A mentally incompetent adult was removed from her mother's home by police and sent to an adult foster home. The home in which the mother and daughter were living had been partly destroyed by fire and was determined uninhabitable. Additionally, police found the daughter locked inside the home by chains that had been wrapped around the house several times and padlocked from the outside. *Id.* at *4. The mother filed a habeas corpus petition on behalf of her daughter, but the court held, in part, that she did not meet the best interests prong of the *Whitmore* test. *Id.* at *8-9.

184. 492 F. Supp. 273, 275-76 (N.D. Ga. 1980).

185. *Id.*

186. *Id.*

187. *See, e.g., In re Hop*, 623 P.2d 282, 285 (Cal. 1981) (applying state law to hold that a public defender had next friend standing to challenge the family's placement of a mentally incompetent adult in a restrictive hospital facility).

188. *See, e.g., McCraney v. Boyd*, Civil Action 95-0383-BH-M, 1995 U.S. Dist. LEXIS 9111, at *6 (S.D. Ala. May 30, 1995) (denying a husband's standing to file a habeas petition on his wife's behalf because he was acting inconsistently and was "not committed to [her] best interests").

concurrence in *Coalition of Clergy* stated that the language used by the *Whitmore* court in describing the second prong of its test did not make a “significant relationship” a requirement but merely stated it as an additional consideration.¹⁸⁹ This analysis is correct. The Supreme Court described a “significant relationship” as a “suggestion” and did not incorporate it into the rule.¹⁹⁰ A significant relationship is more appropriately read as an objective indicator of good faith and true dedication, and as evidence of actual authorization by the real party in interest to have the would-be next friend act as his agent in court.

Even under the majority’s decision in *Coalition of Clergy*, the test for “significance” is so fluid that, as a would-be next friend departs further and further from the traditional scenario of a close relative, the analysis increasingly turns into a fact-based inquiry. Having held that a “significant relationship” was required, *Coalition of Clergy* treated the contours of the requirement as subjective, changing with the circumstances of each detainee.¹⁹¹ The requirement would also apply only very loosely to detainees with no relatives, friends, or diplomats able to act on their behalves. In such cases, the *Coalition of Clergy* court said that only “some” relationship would be necessary—one which would be “significant” only when compared to a detainee’s other relationships.¹⁹²

A major concern for the Ninth Circuit, and for all courts that have addressed this issue, is the need for some relationship to serve as an objective indicator of who might be an “intruder or uninvited meddler” posing as a next friend. An intruder or uninvited meddler—someone with only a generalized interest in the case—would be inappropriate because of Article III concerns and because of her inability to prosecute the case in a manner serving the best interests of the *detainee* (as opposed to serving a larger political cause). This concern is entirely valid, and the *Coalition of Clergy* court was correct in finding that the particular litigants in that case were waging a political battle in the courts. Nevertheless, their fight was in the best interests of at least some of the detainees.

189. 310 F.3d 1153, 1165 (9th Cir. 2002) (Berzon, J., concurring), *cert. denied*, 123 S. Ct. 2073 (2003).

190. See *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990) (“[T]he ‘next friend’ must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate . . . and it has been further suggested that a ‘next friend’ must have some significant relationship with the real party in interest.” (citation omitted)).

191. 310 F.3d at 1162.

192. *Id.*

Given the facts of *Coalition of Clergy*, the court did not have to rule that a significant relationship was required. The real issue in that case was that the Coalition had filed on behalf of all detainees, including those who were already represented in other actions or who may have preferred to pursue diplomatic channels over judicial ones. The prospect of duplicative or unwelcome litigation did not sit well with the Ninth Circuit, and rightly so. Had the Coalition been able to limit its petition to those detainees with no other avenues for relief, perhaps by filing an anonymous petition limited to the detainees from certain countries, the petition should have been allowed and the case should have been heard on the merits, despite the absence of any relationship with the detainees. After all, it must be remembered that the government transferred the detainees to a naval base in Cuba, a place where U.S. citizens face severe travel restrictions and where attorneys were very publicly denied access to the prisoners.¹⁹³ Any attempt at creating a relationship would have been futile.

The doctrine of next friend standing gives access, not merely to the next friend, but to the *detained person*. The requirements of Article III should and do apply with full rigor to the real party in interest. The next friend, however, is a mere surrogate, and turning away the next friend actually closes the door on the real party in interest. In determining whether to allow next friend standing, courts should focus on whether the would-be next friend plays a legitimate role in bringing the claim on the prisoner's behalf.

The existence of a significant relationship should be just one factor for consideration in assessing a would-be next friend. A third party with no objectively identifiable relationship, then, would have a heavier burden in establishing the appropriateness of next friend standing. A significant relationship *requirement* would effectively preclude anyone from even trying to meet the burden for detainees like those at Guantanamo Bay. The *Hamdi* and *Coalition of Clergy* courts held that lack of a significant relationship was evidence of an "intruder" or "uninvited meddler."¹⁹⁴ A better rule is that, although a significant relationship may evidence good faith and appropriateness,

193. See Chemerinsky, *supra* note 128, at 9 (outlining the impediments preventing attorneys or other individuals from contacting the prisoners); Horrock & Iqbal, *supra* note 2 (reporting that the detainees are held "without access to family, friends or legal counsel").

194. *Coalition of Clergy*, 310 F.3d at 1162; *Hamdi v. Rumsfeld* (Hamdi I), 294 F.3d 598, 606–07 (4th Cir. 2002).

the lack of such a relationship means only that the would-be next friend continues to bear the burden of establishing her standing.

CONCLUSION

Fundamentally, next friend standing is about granting an individual access to the courts when access is most difficult to obtain and yet also most needed. When a would-be next friend is denied standing, the detained person may lose his only option for gaining access to an impartial review of his confinement. The device of next friend standing was created in the context of habeas corpus to allow more prisoners to seek judicial process. Especially for cases in which the original purposes of the Great Writ are at stake, the device of next friend standing should not be used to deny access. In these situations, the courts are called upon to ensure the rights of individuals deprived of the most basic freedom in Anglo-American law—freedom from unlawful governmental restraint. In these cases, the courts should remain available to hear petitioners' arguments on the merits. The ultimate decision should be based not on a technicality surrounding standing, but on a meaningful consideration of the claim.

To this end, the federal courts should consider the context of military detainees' situations when reviewing habeas corpus petitions brought on their behalves. Two considerations are important. First, in assessing a detainee's inaccessibility, the role of the military in taking custody and in undermining other avenues of relief should favor a finding of inaccessibility. Second, in analyzing a would-be next friend's appropriateness to act on a prisoner's behalf, the courts should conduct a case-by-case assessment of whether the would-be next friend is truly dedicated to the prisoner's best interests. The existence of an objectively identifiable relationship between the prisoner and the would-be next friend should be treated as only one factor in making this assessment.