# ARTICLE

## Unnamed & Uncharged: Next Friend Standing and the Anonymous Detainee

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Abstract

Since before the founding of the United States, the writ of habeas corpus has been an important tool for challenging executive detention. The Supreme Court has carefully limited who may petition for a writ of habeas corpus. Pursuant to a doctrine called "next friend standing," third parties are sometimes allowed to petition for the release of detainees who are unable to litigate on their own behalf. In *Whitmore v. Arkansas*, the Supreme Court held that in order for a federal court to exercise jurisdiction over a next friend petition, the third party must demonstrate a significant connection with the detainee. But it is, of course, impossible to establish a significant connection to a detainee without knowing his identity. Thus, by withholding a detainee's identity and precluding that detainee from accessing judicial process, the government can constructively suspend access to habeas corpus. In one recent case, the U.S. government attempted to exploit this doctrinal shortcoming: In late 2017, the government detained a U.S. citizen for three months without access to judicial process—a constructive suspension of the detainee's right to access habeas corpus. Protracted litigation was ongoing when the government announced and executed an agreement to release the detainee to a third country, without judicial resolution of the lawfulness of his detention. This Article examines how courts can respond to similar situations when they arise in the future. It argues that courts can address this problem by exercising the power to ascertain their own jurisdiction. This power, the Article contends, can be used to require the government to answer series of simple questions. These questions will facilitate expedient determinations by federal courts on the question of whether a next friend exists and will protracted jurisdictional disputes between a putative next friend and the government. Ultimately, the Article contends that it is possible for federal courts to remain faithful to both the Constitution's promise of access to habeas corpus and the Supreme Court's opinion in *Whitmore*.

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## Introduction

For nearly three months beginning in September 2017, the United States detained a U.S. citizen "unnamed, uncharged, and, despite his request, without access to counsel."[1] The government asserted that John Doe was detained as an enemy combatant in Iraq and that no party had Article III standing to seek judicial review of Doe's detention.[2] The American Civil Liberties Union ("ACLU") contested the legality of Doe's ongoing detention by seeking a writ of habeas corpus on Doe's behalf, pursuant to a doctrinal exception called "next friend standing."[3] The government countered that the ACLU was not John Doe's "next friend" because it could not demonstrate the "significant relationship" to Doe required by *Whitmore v. Arkansas*.[4] The government's claim was factually correct, but only because it had withheld Doe's identity.

Doe remained anonymous until his release on October 28, 2018, after more than a year of detention, when the government identified him as Abdulrahman Ahmad Alsheikh.[5] The government's implicit claim in *ACLU v. Mattis* was that it may detain a U.S. citizen without any prospect of access to judicial process. Such a position is particularly alarming both because of its novelty but also the likelihood of similar facts reoccurring—leading to more U.S. citizens detained in violation of their constitutional right to seek judicial review. As of February 2019, it was estimated that approximately 300 Americans had attempted to join ISIS.[6] While ISIS's territorial power has largely been curtailed,[7] the facts of *ACLU v. Mattis* could easily recur in future conflicts when an American travels abroad to join a non-state terrorist organization and is captured.

Detainees have long faced barriers to petitioning for relief on their own behalf.[8] Next friend standing allows a third party to seek a writ of habeas corpus on behalf of a detainee when the detainee cannot do so himself.[9] The doctrine is a longstanding exception to the general rule that to enjoy standing, parties must assert *their own* rights—not the rights of others.[10] In most cases, next friend standing is

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[1] ACLU *ex rel.* Unnamed U.S. Citizen v. Mattis, 286 F. Supp. 3d 53, 54 (D.D.C. 2017) [hereinafter *ACLU v. Mattis*].
[2] *Id.* at 54–55.
[3] *Id.*
[4] 495 U.S. 149, 163–64 (1990).
[5] Charlie Savage et al., *American ISIS Suspect Is Freed After Being Held More Than a Year*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html [https://perma.cc/Y3RU-7QQM].
[6] *What Happens When Americans Who Joined ISIS Want To Come Home*, NPR (Feb. 21, 2019), https://www.npr.org/2019/02/21/696769808/what-happens-when-americans-who-joined-isis-want-to-come-home [https://perma.cc/Q59L-ULD8].
[7] *Timeline: The Rise, Spread, and Fall of the Islamic State*, WILSON CENTER (Oct. 28, 2019), https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state [https://perma.cc/CP78-W278].
[8] Whitmore v. Arkansas, 495 U.S. 149, 162 (1990).
[9] *Id.*
[10] *See* Singleton v. Wulff, 428 U.S. 106, 114–16 (1976); *Whitmore*, 495 U.S. at 162.

an adequate solution to a detainee's inability to access the judicial process.[11] But in some military or quasi-military contexts—when a suspected enemy combatant is denied outside contact—the *Whitmore v. Arkansas* doctrine can create disquieting results.[12] That need not be the case, but virtually no scholarship has addressed what steps courts should take when these scenarios arise. This Article is the first piece of scholarship to roadmap how courts can faithfully apply *Whitmore* but nonetheless vindicate a detainee's constitutional right to access habeas corpus.

This Article examines cases demonstrating the requirements that courts have placed on parties attempting to litigate as next friends. For example, courts have interpreted *Whitmore* as requiring a party invoking next friend standing to establish a significant connection to the detainee.[13] But establishing a significant connection to a detainee is, of course, impossible without knowing the detainee's identity.[14] Incommunicado detention therefore allows the government to undermine the Constitution's guarantee of access to habeas corpus. Absent a meaningful judicial check, the government would be heavily incentivized to hold every detainee incommunicado. This Article argues that the next friend standing doctrine was *designed* to preclude unconnected individuals from representing a detainee. But taken in isolation, *Whitmore*'s requirement of a significant connection between a detainee and a next friend means that if a detainee's identity is withheld, no party can be identified to serve as a next friend—a doctrinal wrinkle the U.S. government attempted to exploit in *ACLU v. Mattis*.[15]

But *Whitmore* cannot be read in a vacuum. Federal courts are far from helpless when presented with facts like *ACLU v. Mattis*. Federal courts enjoy substantial latitude to ascertain their jurisdiction, a power that equips courts with all of the tools they need to remedy *Whitmore*'s doctrinal shortcomings. For instance, courts could require the government to identify a detainee's potential next friend. Courts have this power because the existence of a putative next friend informs the court's jurisdiction, and federal courts always have power to ascertain

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[11] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 511 (2004); *see also* Kuman v. Obama, 725 F. Supp. 2d 72, 77 (D.D.C. 2010); Noori v. Obama, 664 F. Supp. 2d 116, 117–20 (D.D.C. 2009); Fenstermaker v. Bush, No. 05 Civ. 7468(RMB), 2007 WL 1705068, at *4–6 (S.D.N.Y. June 12, 2007); *see generally* Adem v. Bush, 425 F. Supp. 2d 7 (D.D.C. 2006) (discussing, at length, how next friend status works in the context of detainee litigation).

[12] *See Whitmore*, 495 U.S. at 162; Coal. of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153, 1162 (9th Cir. 2002) [hereinafter *Coal. of Clergy*] (noting that some cases would present unworkable facts under *Whitmore*).

[13] *Whitmore*, 495 U.S. at 163–64.

[14] *See* Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002) [hereinafter *Hamdi I*]; *Coal. of Clergy*, 310 F.3d at 1161–63. In both cases the next friend claimant had never met the detainee. The courts rejected both actions.

[15] *See, e.g.*, *The Pentagon Has Detained a U.S. Citizen for More Than Two Months — and Said Little*, WASH. POST (Nov. 16, 2017), https://www.washingtonpost.com/opinions/the-pentagon-has-detained-a-us-citizen-for-more-than-two-months--and-said-little/2017/11/16/4d4e5ec6-ad17-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.43d6c967c924 [https://perma.cc/Z8NE-BJFT]; *see also* Steve Vladeck, *The Increasingly Unsettling Indifference Toward the U.S. Citizen "Enemy Combatant"*, JUST SECURITY (Oct. 4, 2017), https://www.justsecurity.org/45607/increasingly-unsettling-indifference-citizen-enemy-combatant/ [https://perma.cc/QE6C-ENLB].

their own jurisdiction.[16] For example, by identifying and alerting a detainee's immediate family, the government notifies parties who in all likelihood *could* properly challenge the detainee's continuing detention. If a proper next friend, apprised of his right to challenge the detention, chooses not to proceed, that is his prerogative. The Court's obligation is not to guarantee that an individual *files* a petition for a writ of habeas corpus, only that a proper individual *could* file such a petition. So long as some individual is able to file a petition, the Constitution's guarantee of access to habeas corpus has been vindicated.

This Article proceeds in three parts. Part I describes the history and current requirements next friend standing imposes on purported next friends. Part II examines how courts have precluded third parties from litigating on behalf of a detainee, incommunicado or otherwise, if they do not satisfy the test outlined in *Whitmore*. Here, I argue that these cases demonstrate that *Whitmore*'s requirements are inflexible and, save for exceptionally rare circumstances, unavoidable. Part II concludes by examining *ACLU v. Mattis*. I argue that although the court arrived at the correct policy outcome—affording Doe the opportunity to challenge his detention—its legal reasoning, which is predicated entirely on *Whitmore v. Arkansas*, is flawed in several respects and therefore leaves the door open for future constructive suspensions of habeas corpus. Part III elaborates on one possible solution to prevent the constructive suspension of habeas corpus described above: requiring the government to identify and notify a potential next friend. Here, this Article examines why an easily administrable solution upholds a detainee's rights without abandoning next friend standing jurisprudence, and is thus the best course of action to prevent the constructive suspension of habeas corpus.

## I. Habeas Corpus and Next Friend Standing

Next friend standing has roots in English law and has long been recognized by the American judicial system.[17] This section begins with a brief history of habeas corpus in the United States. Next, it explores how habeas corpus has returned to the fore in the wake of the September 11 attacks. It then considers the test articulated in *Whitmore v. Arkansas* for ascertaining whether a party is a proper next friend. Finally, it examines how courts have applied *Whitmore* to detention during the War on Terror.

### A. *History of the Writ of Habeas Corpus*

The Writ of Habeas Corpus traces its roots to English law. Blackstone described habeas as "the most celebrated Writ in English Law," and "another Magna Carta."[18] Next friend standing was first authorized in England by the Habeas

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[16] United States v. Ruiz, 536 U.S. 622, 628 (2002) (citing United States v. Mine Workers of Am., 330 U.S. 258, 291 (1947)).
[17] *See, e.g.*, Collins v. Traeger, 27 F.2d 842, 843 (9th Cir. 1928).
[18] 3 WILLIAM BLACKSTONE, COMMENTARIES *129, *135.

Corpus Act of 1679.[19] In seventeenth century England, Parliament alone had the power to declare a "suspension" of the writ.[20] The writ was used to challenge government detention and ensure that the executive had a lawful basis to imprison any individual.[21] In their earliest form, writs were "scrap[s] of parchment, about one or two inches by eight or ten inches in size" issued by English courts, "directing the jailer to produce the body of the prisoner along with an explanation of the cause of the prisoner's detention."[22]

From their landing in America, English settlers claimed "all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England."[23] However, that rarely played out in practice.[24] For example, in 1692, the Massachusetts Bay Colony attempted to pass a nearly identical version of the 1679 Habeas Corpus Act, only to have the Privy Council overrule it in 1695.[25] By 1774, the denial of Habeas protections had become a major point of frustration for American colonists.[26] The Continental Congress complained colonists were "the subjects of an arbitrary government, deprived of trial by jury, and when imprisoned cannot claim the benefit of the habeas corpus Act, that great bulwark and palladium of English liberty."[27]

During the American Revolution, British Parliament suspended the writ in the colonies in two unprecedented ways. First, Parliament made no reference to domestic emergency, and second, the suspension lasted entire calendar years with the option to renew.[28] When the Framers convened the Constitutional Convention in 1787, the question was not whether but how the new charter would protect habeas

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[19] Habeas Corpus Act of 1679, 31 Car. 2. c. 2, § 2 (authorizing third parties or "any one on . . . behalf" of prisoners to seek a writ of habeas corpus).

[20] AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY 35 (2017) ("[T]he suspensions during [the late 17th century] confirm that the protections inherent in the Habeas Corpus Act placed significant constraints on the executive's authority to detain persons, even in times of war.").

[21] BLACKSTONE, *supra* note 18, at *132–33. The Habeas Corpus Act of 1679 was the culmination of a five-decade effort to curtail the Crown's power to detain a citizen outside of the criminal process. The Act "contemplated the common law writ of habeas corpus, using the preexisting writ as a vehicle for enforcing its terms." TYLER, *supra* note 20, at 21, 24–25.

[22] Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 598 n.52 (2008) ("In 1628, the language of the writ changed, to require the return of 'the day and the cause of the arrest and detention.' This led to the making of longer returns, as more detailed information was now required. As returns lengthened, the practice increasingly was to attach another piece of parchment to the writ on which a more full return might be written.").

[23] Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CAL. L. REV. 635, 645 (2015) (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 68 (Worthington Chauncey Ford ed., 1904) (replicating 1774 Statement of Violation of Rights)).

[24] *Id.*

[25] *Id.* at 646.

[26] *Id.* at 647.

[27] 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 88 (Worthington Chauncey Ford ed., 1904).

[28] *See* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 957 (2011) (reviewing HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)).

corpus.[29] John Rutledge proposed making the right of habeas corpus "inviolable," because the need for a suspension "could never" arise.[30] Early proposals at the constitutional convention were criticized for not sufficiently protecting access to habeas corpus.[31] Eventually, the drafters revised the Suspension Clause,[32] precluding the government from suspending access to the writ except during "Cases of Rebellion or Invasion."[33]

In 1789, the First Congress granted federal courts the power to issue writs of habeas corpus in all cases of individuals detained "under or by color of the authority of the United States."[34] Modern discussions of habeas corpus usually address federal judicial review of state court convictions.[35] But habeas corpus as a collateral review of state criminal proceedings and habeas corpus as a challenge of executive detention should not be conflated. The former rose to prominence in the middle part of the twentieth century,[36] the latter is the form of judicial review used to challenge unilateral executive detention.[37] This piece addresses only the latter

[29] *See* DYCUS ET AL., NATIONAL SECURITY LAW 834 (6th ed. 2016) ("Neither the debates at Philadelphia nor those that took place in the ratification conventions that followed shed specific light onto what the Constitution's drafters understood 'the privilege of the writ of habeas corpus' to encompass."). The Founders were intimately familiar with the Habeas Corpus Act and the rights that it afforded. *See* THE FEDERALIST No. 83 (Alexander Hamilton). In fact, at the time of the ratification debates, some argued that the Suspension Clause should not have been included in the Constitution and that the availability of habeas corpus should have been absolute. TYLER, *supra* note 20, at 132–33.

[30] James Madison, *Notes on the Constitutional Convention* (Aug. 20, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 438 (Max Farrand ed., 1911).

[31] *See* Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 970 (2012) ("When debate ensued eight days later over Pinckney's proposal, speakers tended toward questioning whether the new Constitution should recognize any suspension power in the federal government.").

[32] U.S. CONST. art. I, § 9, cl. 2. ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[33] *Id.*; *see also* Boumediene v. Bush, 553 U.S. 723, 745 (2008) ("In our own system the Suspension Clause is designed to protect against these cyclical abuses. The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, *except during periods of formal suspension*, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty.") (emphasis added) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004)).

[34] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81 (1789).

[35] *See* Brown v. Allen, 344 U.S. 443, 463 (1953) ("Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more, if the court is satisfied, by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion."); *see also* Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977) (holding that a defendant must show "cause" and "prejudice" to litigate a procedurally defaulted claim on federal habeas corpus). Combined these two cases animate a great deal of litigation in the federal system.

[36] Indeed, before *Brown v. Allen*, habeas corpus was not available to individuals who had been properly convicted under a state criminal statute. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 832 (8th ed. 2014).

[37] *See* Carbo v. United States, 364 U.S. 611, 615 (1961) ("The Great Chief Justice noted, however, that when used in the Constitution, that is, when used singly—when we say the writ of habeas corpus, without addition, we most generally mean that great writ traditionally used to test restraint of liberty.") (quoting *Ex parte* Bollman, 8 U.S. 75, 95 (1807)) (quotations omitted).

type of habeas corpus, best understood as "constitutional" habeas corpus. Throughout history, the Supreme Court has demonstrated a far greater willingness to scrutinize restrictions on the availability of habeas review to military detainees.[38]

B. *Military Detention and Habeas Corpus Today*

After the September 11 attacks, Congress passed the 2001 Authorization for the Use of Military Force ("AUMF"). The AUMF authorizes the President to use "all necessary and appropriate force" against nations, organizations, or persons who planned, executed, or aided the September 11 attacks.[39] In *Hamdi v. Rumsfeld*,[40] the Supreme Court held that the 2001 AUMF authorized the President to detain both citizens and foreign nationals suspected of involvement in the attacks.[41] Although the AUMF provides the President with the power to detain, it does not empower the President to unilaterally suspend habeas corpus.[42]

Detainees who the government held pursuant to the AUMF have challenged certain restrictions on the availability of habeas corpus.[43] Granting detainees access

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[38] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 575–77 (2006) (concluding that it was unnecessary to decide the constitutional questions because the Detainee Treatment Act was insufficiently clear as to withdraw jurisdiction); *Hamdi*, 542 U.S. at 533 (plurality opinion) ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."); *see also Ex parte* Yerger, 75 U.S. 85, 102–03 (1868) ("We agree that it is given subject to exception and regulation by Congress; but it is too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the decisions of courts of original jurisdiction.").

[39] *See* Authorization for the Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

[40] 542 U.S. 507 (2004).

[41] *Id.* at 517 (plurality opinion); *id.* at 589 (Thomas, J., dissenting) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because [the 2001 AUMF] has authorized the President to do so.").

[42] *Id.* at 525 (plurality opinion) (noting that all parties agreed the AUMF does not constitute a "suspension of the writ"). Chief Justice Taney's opinion in *Ex parte Merryman*, suggests that the President does not have the authority to declare a suspension of the writ. The Chief Justice held that "[i]t is the parliament only or legislative power that, whenever it sees proper, can authorize the crown by suspending the habeas corpus for a short and limited time, to imprison suspected persons without giving any reason for so doing.' If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First." *Ex parte* Merryman, 17 F. Cas. 144, 151 (C.C. Md. 1861) (quotation omitted). For a discussion of executive suspensions of the writ, see TYLER, *supra* note 20, at 212–18.

[43] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 739 (2008). For a discussion of the use of habeas corpus in the aftermath of the September 11th attacks, see JONATHAN HAFETZ, HABEAS CORPUS AFTER 9/11: CONFRONTING AMERICA'S NEW GLOBAL DETENTION SYSTEM (2011). There is a substantial argument that the Court's Suspension Clause jurisprudence has veered sharply away

to habeas at the moment of their capture is generally understood as a non-viable solution.[44] Accordingly, the Supreme Court has afforded the executive branch some flexibility regarding when it must grant a detainee access to judicial process. In *Hamdi*, *Rasul*, and *Boumediene* the Court made clear that detainees do have a constitutional right to petition for a writ of habeas corpus.[45]

The Court also held that the AUMF authorizes the detention of both U.S. citizens and foreign nationals as enemy combatants.[46] But exactly when a detainee's right to habeas attaches is a separate question. A U.S. citizen detained as an enemy combatant has a right to habeas corpus when the executive decides "to *continue* to hold" him.[47] In the case of a non-citizen, the President has wider latitude to prevent a detainee from seeking judicial review. Indeed, the government has the power to preclude non-citizen detainees from *ever* petitioning for a writ of habeas corpus.[48] To bar a non-citizen detainee from accessing judicial process, the executive need only detain the individual outside the United States and other territories where the United States exercises *de facto* sovereignty.[49] For example, while foreign nationals have a constitutional right to bring a habeas petition at Guantanamo Bay,[50] they do not have the right to habeas at Bagram Air Base, Afghanistan because the United States does not exercise *de facto* sovereignty over the base.[51]

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from its traditional understanding. After World War II, the Court began to conflate habeas corpus and factors traditionally understood as inherent to the provision of Due Process. *See* TYLER, *supra* note 20, at 250–51. Justice Scalia dissented in *Hamdi* and argued, "[a]bsent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge." *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting). While the court's treatment of what constitutes due process versus habeas corpus is an important topic, this Article is concerned only with *access* to habeas corpus not *what constitutes* habeas corpus.

44 *See, e.g.*, Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1409 (2008) ("At the moment of capture, military necessities dominate: Amid imperfect information, engaged forces need latitude to combat and destroy or capture those they believe are threatening them.").

45 *See Boumediene*, 553 U.S. at 771–73.

46 *See Hamdi*, 542 U.S. at 587 (2004) (Thomas, J., dissenting). It remains an open question whether U.S. citizens captured inside the United States can be detained as enemy combatants. *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004). Central to this determination is how far the AUMF extends and whether it confers the power to detain a *particular* individual. This Article assumes that all detention of American citizens is pursuant to a valid legal authority that satisfies 18 U.S.C. § 4001. For a discussion of how courts have read the 2001 AUMF to broadly confer the power to detain individuals who are members of "associated forces," see Robert M. Chesney, *Who May be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769 (2011).

47 *Hamdi*, 542 U.S. at 534 (plurality opinion) (alteration in original).

48 The legality of indefinite incommunicado detention under international law is not relevant to the habeas corpus analysis.

49 *Boumediene*, 553 U.S. at 771.

50 *Id.* at 794–95.

51 Al Maqaleh v. Gates, 605 F.3d 84, 98–99 (D.C. Cir. 2010) (noting that the government's decision to keep the detainees outside of the United States and Guantanamo Bay effectively "turn[ed] off" their right to habeas corpus). For a critique of *Al Maqaleh* and *Boumediene*, see Saurav Ghosh, *Boumediene Applied Badly: The Extraterritorial Constitution After Al Maqaleh v. Gates*, 64 STAN. L. REV. 507 (2012).

However, the executive branch lacks the analogous power to preclude judicial review when the detainee is a U.S. citizen. It is quite clear that a U.S. citizen's status as an enemy combatant does not eliminate his right to habeas corpus.[52] The only constraint on a U.S. citizen's ability to challenge his detention is a temporal one. The executive branch may only restrict access to judicial process until the government determines that it intends to "continue to hold" the citizen-detainee.[53] And so, regardless of where a U.S. citizen is detained, he must be afforded his right to petition for habeas corpus once the government decides to "*continue* to hold [him]."[54] The government's *only* means to preclude a citizen from petitioning for a writ, once the right attaches, is to seek a formal suspension of habeas corpus.[55]

Courts can determine whether a detainee's right to habeas corpus has attached by considering four questions:

> (1) Is the individual a U.S. citizen or a foreign national?[56]
> (2) Has the government determined that he is an enemy combatant?[57]
> (3) Has the government decided to hold him until the end of the conflict?[58]
> (4) Is the detainee held in a territory over which the United States exercises *de facto* sovereignty?[59]

A detainee's right to habeas is a fact-specific inquiry. If the detainee is a U.S. citizen, he must be granted access to habeas if the answer to questions (2) and (3) are "yes."[60] If the detainee is a foreign national, habeas is only available if the answer to questions (2), (3), and (4) are all "yes."[61] Absent a formal suspension of habeas corpus, a U.S. citizen-detainee must have access to judicial process to vindicate the right to challenge detention—be it directly or through a next friend.

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[52] *Compare Boumediene*, 553 U.S. at 771–73, *with Hamdi*, 542 U.S. at 532–34.
[53] *Hamdi*, 542 U.S. at 534 (plurality opinion) (alteration in original).
[54] Admittedly, there is some debate about *when* the right to habeas attaches. These questions should be reserved for another day when greater debt of consideration can be afforded. While the debate has important implications for the scope of the right to habeas, it is largely beyond the scope of this Article. Rather, it takes as given that *Ex parte* Hull, 312 U.S. 546 (1941), would preclude the government from withholding a detainee's access indefinitely. As Justice Murphy noted, "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." *Ex parte* Hull, 312 U.S. at 642. Though Justice Murphy's language raises important questions about whether action that abridges *access* to habeas corpus is a violation of the suspension clause or of due process, these questions should be reserved for another day when greater debt of consideration can be afforded. For a brief discussion of when the right attaches see Robert M. Chesney, *ACLU v. Mattis and Constructive Suspension of Habeas Corpus*, LAWFARE (Dec. 4, 2017), https://www.lawfareblog.com/aclu-v-mattis-and-constructive-suspension-writ-habeas-corpus [https://perma.cc/9F24-QPE8].
[55] *Boumediene*, 553 U.S. at 745.
[56] *See* Rasul v. Bush, 542 U.S. 466, 476 (2004).
[57] *See Hamdi*, 542 U.S. at 587 (Thomas, J., dissenting).
[58] *See id.* at 518 (plurality opinion).
[59] *See Boumediene*, 553 U.S. at 771.
[60] *See Hamdi*, 542 U.S. at 534 (plurality opinion).
[61] *See Boumediene*, 553 U.S. at 771.

C. *Habeas Corpus and Next Friend Standing*

Next friend standing allows a third party to petition for habeas corpus on behalf of the real party in interest: the detainee.[62] While next friend standing originated in the United Kingdom, federal courts in the United States have long recognized that there were situations where the real party in interest would be unable to litigate on their own behalf.[63] For example, in 1869, *In re Ferrens*[64] rejected a claim that a petition for a writ of habeas corpus necessitated dismissal because it was brought by the detainee's wife and was not "prosecuted by the recruit himself."[65] The court held, "It has never been understood that, at common law, *authority from a person unlawfully imprisoned or deprived* of his liberty was necessary to warrant the issuing of a habeas corpus, to inquire into the cause of his detention. . . ."[66] More simply, *In re Ferrens* recognized that consent from a detainee has never been required in a petition for a writ of habeas corpus. In 1948, Congress explicitly codified next friend standing in the habeas corpus statute.[67] Since 1948, the courts have taken affirmative steps to clarify who is considered a proper next friend under that statute.

This subpart describes the Supreme Court's opinion in *Whitmore v. Arkansas*, which established the requirements of next friend standing. It provides a brief description of each of the central prongs of *Whitmore*. First, a detainee must be unavailable, which requires more than an unwillingness to prosecute rights. Second, the next friend must possess a true dedication to the best interest of the detainee. Third, the next friend must also have a preexisting "significant" relationship with the detainee. There has been some confusion about whether the second and third prongs are distinct and so they are discussed together.

1. Whitmore v. Arkansas

*Whitmore* was the Supreme Court's first major pronouncement on next friend standing, establishing the test for ascertaining whether a party can proceed as a detainee's next friend.[68] Ronald Simmons was convicted of multiple murders

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[62] Whitmore v. Arkansas, 495 U.S. 149, 162 (1990) ("Most frequently, next friends appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.").
[63] Collins v. Traeger, 27 F.2d 842, 843 (9th Cir. 1928) (holding that the petition, filed by G.D. Cole on behalf of and at the request of the prisoner was acceptable because the prisoner himself was "in peril of being removed from the jurisdiction of the court before he could act in person").
[64] 8 F. Cas. 1158 (S.D.N.Y. 1869).
[65] *Id.* at 1159.
[66] *Id.* ("In the present case, the petitioner states, in her petition, that she is the wife of the recruit, and is dependent upon him for support. This is, I think, sufficient to authorize her to prosecute the writ.") (emphasis added).
[67] 28 U.S.C. § 2242 (2012) ("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*") (emphasis added).
[68] *Whitmore*, 495 U.S. at 161–62 ("As an alternative basis for standing to maintain this action, petitioner purports to proceed as 'next friend of Ronald Gene Simmons.' Although we have never

and waived his right to direct appeal of his conviction and death sentence.[69] Jonas Whitmore, another death row inmate in Arkansas, attempted to intervene on behalf of Simmons.[70] The Supreme Court concluded that Whitmore could not proceed.[71] Chief Justice Rehnquist, writing for the seven justice majority, determined that Whitmore lacked standing.[72] The Court held that next friend standing, whether in the context of a habeas petition or other proceeding, is "no broader than what is permitted by the habeas corpus statutes" and historical practice.[73]

The Court's opinion created three substantive requirements for a party to be a proper next friend in any proceeding. First, a detainee must be unavailable to proceed on his own behalf.[74] The purported next friend must provide proof of unavailability and an "adequate explanation . . . why the real party in interest cannot appear on his own behalf to prosecute the action."[75] Second, the putative next friend must be "truly dedicated" to the detainee's best interests.[76] The purported next friend must show "some significant relationship" with the detainee.[77] *Whitmore* made clear that next friend standing is "by no means granted automatically to whomever seeks to pursue an action on behalf of another."[78]

Finally, the Court's opinion also clarified that the purported next friend bears the burden "to establish the propriety of his status and thereby justify the jurisdiction of the court."[79] Thus, if *Whitmore* is taken at face value, next friend standing is jurisdictional. Accordingly, absent a party who can establish he is a proper next friend, a court lacks jurisdiction to entertain a petition for habeas on behalf of another in federal court.[80]

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discussed the concept of 'next friend' standing at length, it has long been an accepted basis for jurisdiction in certain circumstances. Most frequently, 'next friends' appear in court on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.").

[69] *Id.* at 153.

[70] *Id.*

[71] *Id.* at 151.

[72] *Id.* at 164–65 ("Whitmore, of course, does not seek a writ of habeas corpus on behalf of Simmons. He desires to intervene in a state-court proceeding to appeal Simmons' conviction and death sentence. . . . [W]e think the scope of any federal doctrine of 'next friend' standing is no broader than what is permitted by the habeas corpus statute, which codified the historical practice.").

[73] *Id.* at 164-65. For examples of next friend standing outside of the habeas context, see Cetacean Community v. Bush, 386 F.3d 1169 (9th Cir. 2005) and Naruto v. Slater, No. 15-cv-04324-WHO, 2016 WL 362231 (N.D. Cal. Jan 28, 2016).

[74] *See Whitmore*, 495 U.S. at 163.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 164.

[78] *Id.* at 163.

[79] *Id.* at 164.

[80] *See id.*; *see also Singleton*, 428 U.S. at 114–16.

a. Unavailability

The first requirement for next friend standing the Court established in *Whitmore* is that the detainee, who is the true party in interest, be unavailable.[81] As a general rule, parties can only assert their own rights and not the rights of others in federal courts.[82] The requirement of an unavailable party protects litigants who *are* available from a third party usurping their decision whether or not to assert their rights.[83] Only if a party *could not* assert his rights is an exception to standing required. The Court's opinion in *Whitmore* gave examples of why an individual would be unavailable to litigate his own case: "mental incapacity, lack of access to court, or other similar disability."[84] The determination whether a party is unavailable is a fact-specific determination that requires case-by-case consideration.[85]

Lower courts have read *Whitmore*'s unavailability requirement stringently. For example, in *Idris v. Obama*,[86] a federal district court held that "mere speculation . . . is insufficient to demonstrate" a detainee is unavailable.[87] Or consider *Coalition of Clergy*,[88] in which the Ninth Circuit recognized that a detainee is not unavailable simply because he has not been afforded access to a lawyer.[89] Lower courts are hesitant to recognize a detainee as unavailable because it is the

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[81] *See id.* at 163.
[82] *See* Singleton v. Wulff, 428 U.S. 106, 114–16 (1976) ("Like any general rule, however, this one should not be applied where its underlying justifications are absent. With this in mind, the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. The first is the relationship of the litigant to the person whose right he seeks to assert. . . .The other factual element to which the Court has looked is the ability of the third party to assert his own right.").
[83] *Whitmore*, 495 U.S. at 164 (internal quotation omitted) (citing United States *ex rel* Bryant v. Houston, 273 F. 915, 916 (2d Cir. 1921)) ("These limitations on the next friend doctrine are driven by the recognition that it was not intended that the writ of habeas corpus should be availed of, as matter of course, by intruders or uninvited meddlers, styling themselves next friends.").
[84] *Id.* at 165.
[85] *Compare* Vargas v. Lambert, 159 F.3d 1161, 1167–71 (9th Cir. 1998) (holding that the evidence surrounding the competence of a death row inmate was sufficient to support a finding of unavailability under *Whitmore*), *and In re* Heidnik, 112 F.3d 105, 111–12 (3d Cir. 1997) (holding that the record presented no rational explanation for why a defendant would waive his right to challenge his sentence, supporting a conclusion he was unavailable to prosecute his own interests), *with* Demosthenes v. Baal, 495 U.S. 731, 735–37 (1990) (per curiam) (holding that the record was not sufficiently clear to support a finding of unavailability).
[86] 667 F. Supp. 2d 25, 29 (D.D.C. 2009).
[87] *Id.* at 29.
[88] Coal. of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002)
[89] *Id.* at 1160 (quotations omitted) ("The Coalition does not urge that the detainees suffer a mental or physical disability precluding their representation of their interests before the court, rather it argues that the first prong of the *Whitmore–Massie* test is satisfied because the detainees appear to be held incommunicado, and thus are physically blocked from the courts. This hyperbolic argument fails because it lacks support in the record; in fact, the prisoners are not being held incommunicado.").

detainee "whose rights will be affected by a petition for writ of habeas corpus. These rights, once lost, cannot be regained."[90]

In the War on Terror, a detainee's next friend will most often claim inaccessibility to courts as the justification for unavailability.[91] After *Coalition of Clergy*, it is clear that a detainee must be denied nearly all contact and avenues to a court to be unavailable.[92] At the margins there are, of course, difficult questions about whether a particular detainee is unavailable.[93] But if a detainee was in regular contact with a court, a lawyer, or his family, he would not be unavailable under *Whitmore*.[94]

b. "Truly Dedicated" & "Significant Relationship"

The second and third requirements, that a party be "truly dedicated" to the best interests of the detainee, is more exacting. *Whitmore* stated that in order to be "truly dedicated," the next friend must have "some significant relationship with the real party in interest."[95] The Court's language in *Whitmore* could create confusion about whether "significant relationship" is a freestanding requirement or whether it is subsumed under the "truly dedicated" prong. However, after *Whitmore*, courts have almost universally interpreted "significant relationship" to be an independent, necessary condition for valid next friend standing.[96] Thus, a person must demonstrate a pre-existing connection with the detainee *and* a true dedication to the detainee's interests.

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90 Arocho v. Camp Hill Correctional Facilities, 417 F. Supp. 2d 661, 662 (M.D. Pa. 2005).

91 *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 476 (2004). In *Rasul*, the government did not contest that the family members of the detainees had next friend standing to litigate on their behalf. Instead, the government argued that the federal courts lack jurisdiction over any suit filed by an alien in military detention. *See* Brief for Respondent at 14, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334).

92 310 F.3d at 1160.

93 The questions concern whether a detainee's contact with an international aid organization (e.g. the International Committee of the Red Cross) would render a detainee ineligible for next friend standing. However, *ongoing* contact is the touchstone of the *Whitmore* analysis. *Cf. Whitmore*, 495 U.S. at 163. Thus it appears unlikely that a single contact with the Red Cross would disrupt a detainee's status as unavailable.

94 *See* Coal. of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153, 1160 (9th Cir. 2002).

95 Whitmore v. Arkansas, 495 U.S. 149, 164 (1990) (citations omitted).

96 Tracy B. Farrell, Annotation, *Next Friend Standing for Purposes of Bringing Federal Habeas Corpus Petition*, 5 A.L.R. FED. 2D 427, at 2 (2005) ("The second prerequisite for next friend standing is that 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 next friend must have some significant relationship with the real party in interest."); *see, e.g.*, Centobie v. Campbell, 407 F.3d 1149, 1151 (11th Cir. 2005) (per curiam); T.W. *ex rel* Enk v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997). Federal courts have scrutinized the relationship between the next friend and detainee closely. In some situations, courts have held that parents and siblings have sufficiently close relationships to serve as next friends. *See* Vargas v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998). But even parents are not *necessarily* proper next friends. *See* Tate v. United States, 72 F. App'x 265, 267 (6th Cir. 2003) (order dismissing the petition for lack of jurisdiction) ("Cockrell and Young *did not demonstrate* that they are truly dedicated to Tate's best interests.") (emphasis added).

For example, in *In re Cockrum*,[97] an inmate's attorney, Alan Rich, was appointed his next friend.[98] The court held Rich's longstanding dedication to his client and efforts to prevent his execution were sufficient to demonstrate a significant relationship to the inmate.[99] Or consider *Al Odah v. United States*,[100] where the D.C. Circuit held that affidavits attesting to significant connections and true dedication were sufficient to establish next friend standing.[101] What emerges from next friend jurisprudence is that courts carefully examine the facts when deciding next friend standing.

In sum, *Whitmore* and its subsequent interpretations establish a three-prong inquiry for next friend standing: (1) unavailability of the detainee; (2) dedication of the purported next friend to the detainee's best interests; and (3) significant connection between the detainee and the party claiming next friend standing.

## II. Whitmore and Military Detention

Litigation involving military detention is a subset of the numerous next friend standing cases.[102] But these cases often present difficult questions about the scope of next friend standing.[103] This Part argues that three cases, *Hamdi*, *Padilla*, and *Coalition of Clergy*, exemplify courts' strict enforcement of the jurisdictional requirements of next friend standing in military detention cases. Part II also discusses how *ACLU v. Mattis* revealed that *Whitmore*'s traditional functioning is not well equipped to address incommunicado detention.

### A. Whitmore *in Practice*

Since the September 11 attacks, courts have been confronted with issues surrounding military detention and next friend standing. They have been unwilling, however, to explicitly or implicitly relax the requirements laid out in *Whitmore* and the line of cases interpreting it. This section argues that *Hamdi*, *Padilla*, and *Coalition of Clergy* are properly understood as unwavering applications of *Whitmore*'s requirements.

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[97] 867 F. Supp. 494 (E.D. Tex. 1994).
[98] *Id.* at 495.
[99] *Id.*
[100] 321 F.3d 1134 (D.C. Cir. 2003).
[101] *Id.* at 1138.
[102] It is assumed, for the purposes of this section, that individuals in military detention are precluded from litigating on their own behalf. If a detainee was *not* barred from litigating their own claims, he would not be unavailable under *Whitmore*, and next friend standing would not be necessary.
[103] *See, e.g.*, Coal. of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153, 1162 (9th Cir. 2002); *but see* Tate v. United States, 72 F. App'x 265, 267 (6th Cir. 2003).

1. Hamdi v. Rumsfeld

In 2002, the Fourth Circuit considered two separate petitions on behalf of Yaser Hamdi.[104] In *Hamdi I*, a public defender and a private citizen filed separate habeas petitions on behalf of Hamdi, who was being detained at the Norfolk Naval Station Brig.[105] The petition asked the district court to allow Frank Dunham (a public defender) and Christian Peregrim (a private citizen) to proceed as Hamdi's next friend.[106] Neither party claimed to have any prior relationship with Hamdi.[107]

While the government argued that *Whitmore* required a significant relationship,[108] Dunham and Peregrim argued that *Whitmore* required only a demonstration of "true dedication" to a detainee's best interests.[109] The Fourth Circuit disagreed with Dunham and Peregrim, holding that the "significant relationship" requirement was a prerequisite to next friend standing.[110] The court reasoned that without a requirement of a significant relationship, there would be no guarantee of a purported next friend's sincere dedication to the detainee's interest.[111] As the Fourth Circuit put it, "there is all the difference in the world between a next friend who represents the interests of someone with whom he has a significant relationship and a next friend who files suit on behalf of a total stranger."[112] The Fourth Circuit was unequivocal in its holding: allowing a stranger to act as a next friend "is in irreconcilable conflict with basic constitutional doctrine."[113]

2. Padilla v. Rumsfeld

On May 8, 2002, Jose Padilla was apprehended in Chicago's O'Hare Airport.[114] Seven days after Padilla's arrest, a federal judge appointed Donna R.

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[104] Hamdi v. Rumsfeld, 294 F.3d 598, 598 (4th Cir. 2002); Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002) [hereinafter *Hamdi II*].
[105] *Hamdi I*, 294 F.3d at 600.
[106] *Id.* at 601 ("On May 29, the district court held a hearing and consolidated the Public Defender's habeas petition with Peregrim's.").
[107] *Id.* at 604 ("The Public Defender does not contest the government's contention that he had no relationship whatever with the detainee—let alone 'some significant relationship'—before seeking to insert himself in the public controversy over Hamdi's detention. In addition, Peregrim has conceded that he too had no relationship at all with the detainee.").
[108] *Id.* at 603.
[109] *Id.* at 604 ("The Public Defender responds that the requirement that the putative next friend have some significant relationship with the real party in interest is not necessarily an independent requirement, but instead 'may be one means by which the would-be next friend can show true dedication to the best interests of the person on whose behalf he seeks to litigate.'").
[110] *Id.* (citing Massie *ex rel.* Kroll v. Woodford, 244 F.3d 1192 (9th Cir. 2001); *Brophy*, 124 F.3d at 893; Amerson v. Iowa, 59 F.3d 92 (8th Cir. 1995); Zettlemoyer v. Horn, 53 F.3d 24 (3d Cir. 1995) ("*Whitmore* is thus most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest. This is certainly the view taken by a number of our sister circuits.")).
[111] *Id.* at 605.
[112] *Id.* at 607.
[113] *Id.*
[114] Padilla v. Rumsfeld, 352 F.3d 695, 699 (2d Cir. 2003).

Newman to represent him.[115] Over the course of several weeks, Newman met with Padilla and his family multiple times to discuss how to end his confinement.[116] On June 9, 2002, President Bush directed Secretary of Defense Donald Rumsfeld to detain Padilla as an enemy combatant.[117] The Department of Defense took Padilla into its custody and moved him to a naval brig in South Carolina.[118] Newman subsequently filed a habeas petition on Padilla's behalf in the Southern District of New York.[119]

The government moved to dismiss the action, arguing *inter alia* that Newman lacked the necessary relationship with Padilla to constitute a proper next friend, and the dispute made its way to the Second Circuit.[120] The government maintained that next friends must have a "longstanding" relationship with the detainee.[121] The Second Circuit disagreed: "A next friend 'resembles an attorney, or a guardian ad litem, by whom a suit is brought or defended in behalf of another.'"[122] The court held that, as Padilla's court-assigned attorney, Newman had a professional obligation to zealously represent him.[123] Together with the fact that Newman had met with Padilla and his family to secure his release and may have been the "only person" to know his wishes before his military detention, the court held that Newman's relationship with Padilla met the *Whitmore* standard.[124]

In approving Newman's appointment, *Padilla* held that a next friend need not be a detainee's immediate family member.[125] Yet the court did not deviate from the model of rigidly adhering to *Whitmore*'s requirements when evaluating a potential next friend. While *Padilla* recognized that the field of potential next friends is broader than a detainee's eligible immediate family members,[126] it cannot

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[115] *Id.* at 700.
[116] *Id.*
[117] *Id.* ("[T]he President directed Secretary Rumsfeld to detain Padilla based on findings that Padilla was an enemy combatant who (1) was 'closely associated with al Qaeda, an international terrorist organization with which the United States is at war'; (2) had engaged in 'war-like acts, including conduct in preparation for acts of international terrorism' against the United States; (3) had intelligence that could assist the United States to ward off future terrorist attacks; and (4) was a continuing threat to United States security.").
[118] *See id.*
[119] *Id.*
[120] *Id.* at 701.
[121] *Id.* at 702. The government's argument that next-friend standing demands a "longstanding relationship" merits suspicion because Whitmore does not describe any temporal requirements, only that the relationship be "significant." Whitmore v. Arkansas, 495 U.S. 149, 162–64 (1990).
[122] *Padilla*, 352 F.3d at 703 (internal quotations omitted) (quoting Morgan v. Potter, 157 U.S. 195, 198 (1895)).
[123] *Id.*
[124] *Id.* at 704.
[125] *See id.* ("She filed motions on his behalf that attacked the legal basis of his confinement, *met with his family* and appeared in court with him.") (emphasis added). While Newman was not Padilla's family, she did have contact with family members who *undoubtedly did* have next friend standing to challenge his detention. It is unclear whether she would have had a sufficiently significant relationship to act as a next friend if she had not had contact with Padilla's family.
[126] For examples of a family member who was not permitted to act as a next friend see Tate v. United States, 72 F. App'x 265, 267 (6th Cir. 2003); *see also* Brown v. Brown, 541 F. Supp. 688, 689–90

be understood as a substantial expansion of who can proceed as a next friend under *Whitmore*.

3. Coalition of Clergy, Lawyers, & Professors v. Bush

In *Coalition of Clergy*, the Ninth Circuit considered whether a group of clergy, lawyers, and professors had standing to file habeas petitions on behalf of detainees at Guantanamo Bay.[127] The military was holding the detainees at the Camp X-Ray facility and had not allowed them to contact lawyers.[128] The detainees had, however, been visited by members of the International Committee of the Red Cross ("ICRC") and diplomats from their home countries; they had also been permitted to write letters to family members.[129] While the plaintiffs knew the detainees' identities, they did not claim relationships of any kind with the detainees.[130]

The Coalition argued that *Whitmore* did not require the coalition to have a significant relationship with the detainee.[131] The Ninth Circuit disagreed.[132] The court held that allowing the Coalition to litigate the case would allow individuals to bring lawsuits on behalf of strangers for purely ideological reasons.[133] The court noted that while "there may be some extreme circumstances necessitating relaxation of the *Whitmore–Massie* standard," this case presented no such facts.[134] In concurrence, Judge Berzon agreed that the Coalition had failed to satisfy *Whitmore* and also stated, "In the extreme case, where there is no next friend under traditional criteria, the showing required to meet Whitmore's second prong should be relaxed, to the degree that no relationship should be required if none is practically possible."[135] The fact that a detainee is not afforded the ability to contact the outside world does not, under *Coalition of Clergy*, suggest that unconnected third parties can proceed as next friends.

All three cases illustrate that *Whitmore* applies to parties seeking to represent military detainees. Moreover, they show that courts do not regard

(N.D. Ind. 1982). In *Tate*, the court held the inmate's mother provided "no evidence" that she was dedicated to her son's interest. In *Brown* the court held that because a mother was in the custody of a sibling, a child could not proceed as next friend of their elderly mother because the sibling already "harbor[ed] similar feelings." These cases confirm that the requirements of next friend standing are independent from one another. Under current doctrine, a "significant relationship" is a necessary but not a sufficient condition to proceed as a next friend.

[127] 310 F.3d 1153, 1156 (9th Cir. 2002).

[128] *Id.* at 1157.

[129] *Id.*

[130] *Id.* at 1162.

[131] *Id.* at 1161.

[132] *Id.* at 1161–62.

[133] *Id.* at 1163 (quoting Coal. of Clergy v. Bush, 189 F. Supp. 2d 1036, 1044 (C.D. Cal. 2002) (noting that granting the Coalition next friend standing "would invite well-meaning proponents of numerous assorted 'causes' to bring lawsuits on behalf of unwitting strangers")).

[134] *Id*. at 1162. The court did not define the precise circumstances which would require relaxing the demands of *Whitmore*.

[135] *Id.* at 1167 (Berzon, J., concurring).

*Whitmore*'s "significant relationship" requirement as a mere suggestion. Rather, proper next friends must have at least *some* pre-existing relationship with a detainee, and courts strictly observe each of *Whitmore*'s requirements.[136] Ideological objections to a detainee's confinement are not a sufficient connection to justify next friend standing.[137] Courts who fail to properly police the criteria *Whitmore* establishes are, under that precedent, acting in excess of their Article III jurisdiction.[138]

B. Whitmore *and Constructive Suspension of Habeas Corpus*

A straightforward application of *Whitmore* suggests that an anonymous detainee has no proper next friend because no party can demonstrate the required significant relationship. Doctrinally, then, the government can effectively suspend an individual's access to habeas corpus by refusing to release his identity. The result of this principle; government having the capability to subvert access to habeas corpus by holding an individual incommunicado seems an improper result. The following section explains how *Whitmore* precludes an unconnected party from claiming next friend standing on behalf of an incommunicado detainee using the facts of *ACLU v. Mattis* as a case study,[139] and applying the holding of *Whitmore*. The section argues that under current doctrine an incommunicado detainee has no proper next friend.

Underlying every next friend standing case is an important principle: "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing."[140] The fact that there is no party to serve as a detainee's next friend is not a legal reason to find standing. If current doctrine does not allow any party to serve as a detainee's next friend, the Supreme Court has made clear that that is simply a feature of Article III.[141] *Whitmore* acknowledged and reaffirmed *Schlesinger v. Reservists Committee to Stop the War*'s command.[142] The party who seeks to proceed as a next friend bears the burden to "*clearly establish* the . . . jurisdiction of the court."[143] "The question of next friend standing

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136 *See* Hamdi v. Rumsfeld, 294 F.3d 598, 607 (4th Cir. 2002) ("*Hamdi I*").
137 *Coal. of Clergy*, 310 F.3d at 1163.
138 Whitmore v. Arkansas, 494 U.S. at 149, 154–55 (1990) ("It is well established, however, that before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue. Article III, of course, gives the federal courts jurisdiction over only 'cases and controversies,' and the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process. Our threshold inquiry into standing in no way depends on the merits of the petitioner's contention that particular conduct is illegal.") (quotations and citations omitted); *see Hamdi I*, 294 F.3d at 607 ("The question of next friend standing is not merely technical . . . [r]ather, it is jurisdictional and thus fundamental.").
139 286 F. Supp. 3d 53 (D.D.C 2017).
140 Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974).
141 *See id.* (finding respondents lacked standing and the unavailability of judicial review to any party was not a reason to find standing).
142 *Whitmore*, 495 U.S. at 164.
143 *Id.* (emphasis added).

is not merely technical . . . Rather, it is jurisdictional and thus fundamental."[144] Accordingly, without a proper next friend before the court, federal courts lacks the Article III power to proceed.[145] While alarming, the possibility of a constitutional violation—if that is what incommunicado detention represents[146]—without a remedy is not a new feature of our judicial system.[147]

In October 2017, the United States confirmed that it had been holding a U.S. citizen as an enemy combatant.[148] The detainee was captured while fighting for ISIS in Syria and subsequently transferred to a detention facility in Iraq.[149] The government categorically refused to make public either the detainee's name or other

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[144] Hamdi v. Rumsfeld, 294 F.3d 598, 607 (4th Cir. 2002) ("*Hamdi I*").

[145] *Id.* ("The Court in *Whitmore* rejected the idea of employing notions of what might be good public policy to expand our jurisdiction in an appealing case. Because neither the Public Defender nor Peregrim has any prior relationship whatever with Hamdi, each fails to satisfy an important jurisdictional prerequisite for next friend standing. And because [a] federal court is powerless to create its own jurisdiction, it follows that neither this court nor the court below possesses any authority to entertain the habeas petitions they have filed on behalf of the detainee. Jurisdictional limitations have their roots in the respect courts owe the other branches of our government.") (quotations and citations omitted).

[146] This Article sets aside the preliminary question of whether the government possesses the power to detain an American citizen, but for a consideration of the barriers involved, see Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004).

[147] *See* United States v. Richardson, 418 U.S. 166, 179 (1974) ("It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. . . . Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them."); *see also* Webster v. Doe, 486 U.S. 592, 614 (1988) (Scalia, J., dissenting) ("Once it is acknowledged, as I think it must be, (1) that not all constitutional claims require a judicial remedy, and (2) that the identification of those that do not can, even if only within narrow limits, be determined by Congress, then it is clear that the 'serious constitutional question' feared by the Court is an illusion."). *Richardson* suggests that the Constitution not only contemplates but endorses violations that have no judicial remedy and if citizens believe the Constitution has been violated by government action, they should exercise their constitutionally assigned role of oversight at the polls. It also bears stating that courts have not shied away from giving full effect to doctrines whose *purpose* is to deny citizens a remedy for their constitutional injuries. One clear example is the doctrine of qualified immunity, which all but guarantees that citizens are left without a legal remedy. *See* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 475 (2016); *see also* David Rudovsky, *The Qualified Immunity Doctrine in The Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 27 (1989). To suggest that *Whitmore* is somehow different than these other areas of constitutional litigation would ring untrue.

[148] Respondent's Motion to Dismiss at 5–6, ACLU *ex rel.* Unnamed U.S. Citizen v. Mattis, 286 F. Supp. 3d 53 (D.D.C. Oct. 30, 2017) (No. 17-cv-2069).

[149] Declaration of Steven W. Dalbey, ACLU *ex rel.* Unnamed U.S. Citizen v. Mattis, 286 F. Supp. 3d 53 (D.D.C. Oct. 30, 2017) (No. 17-cv-2069); Marc Smith et al., *American ISIS Fighter in U.S. Custody After Surrender in Syria*, NBC News (Sept. 14, 2017, 5:06 PM), https://www.nbcnews.com/news/world/american-isis-fighter-u-s-custody-after-surrender-syria-n801411 [https://perma.cc/5YAL-KBEZ].

identifying information.[150] When the ACLU brought a habeas petition on behalf of the unnamed detainee, the government argued that the ACLU lacked standing.[151] The government also asserted that because Doe had been visited by the ICRC, he had been afforded an opportunity to (albeit indirectly) contact family members.[152] Over the course of three months, Judge Chutkan of the U.S. District Court for the District of Columbia ordered briefing and held hearings about the question of the ACLU's next friend standing. During that time, the unnamed detainee was denied access to a lawyer, provided no judicial process, and held incommunicado.[153] By withholding Doe's identity and denying him access to an attorney, the government made it all but impossible for the ACLU to satisfy *Whitmore*'s two prong test.[154] Although the district court ultimately ruled that the ACLU did have next friend standing,[155] that holding appears to be a novel (and flawed) application of the doctrine.

After a lengthy deliberation, Judge Chutkan found that *Whitmore*'s requirements were not categorical.[156] Judge Chutkan approvingly cited Judge Berzon's concurrence in *Coalition of Clergy* and held that this case presented the correct facts to relax *Whitmore*'s requirements.[157] The court cited the ACLU's repeated attempts to gain an audience with the detainee as evidence that it was dedicated to Doe's best interest.[158] But the court did not explain why it was empowered to recognize an exception to the jurisdictional requirements imposed by *Whitmore*.[159] Other than Judge Berzon's concurrence from *Coalition of Clergy*,

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[150] Respondent's Motion to Dismiss, *supra* note 148, at 8; Steve Vladeck, *Whatever Happened to the US Enemy Combatant? We Don't Even Know His Name*, NEWSWEEK (Nov. 2, 2017), http://www.newsweek.com/whatever-happened-us-enemy-combatant-we-dont-even-know-his-name-699827 [https://perma.cc/8J3X-S95X].

[151] *See* Respondent's Motion to Dismiss, *supra* note 148, at 4–14.

[152] In accordance with Department of Defense policy, the ICRC also visited John Doe, in *ACLU v. Mattis*. Respondent's Motion to Dismiss, *supra* note 148, at 7; Declaration of Steven W. Dalbey, *supra* note 149, at 1–2. The government argued that the ICRC's contact with the detainee was sufficient to alleviate any concern about Doe's incommunicado status. *Id.* ("[T]he detainee has been visited on two separate occasions by representatives of the International Committee of the Red Cross (ICRC) and thus has been afforded an opportunity to have ICRC contact his family, if he so wished."). The ICRC *does* offer to contact detainee's families if the detainee wishes but it does not contact family members without explicit consent from a detainee. *See* Declaration of Gabor Rona at 1–3, ACLU *ex rel.* Unnamed U.S. Citizen v. Mattis, 286 F. Supp. 3d 53 (D.D.C. 2017) (No. 17-cv-2069). But it is unclear whether Doe's family was ever contacted. For a discussion of the ICRC and its role in the enforcement of international humanitarian law, see Michel Veuthey, *Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of The International Committee of The Red Cross*, 33 AM. U. L. REV. 83 (1983).

[153] *ACLU*, 286 F. Supp. 3d at 54.

[154] Recall that *Whitmore* requires a demonstration that the detainee is "unavailable," and that the purported next friend is "truly dedicated" to the detainee's best interests. The second requirement has been understood to require a "significant connection" to the detainee.

[155] *ACLU*, 286 F. Supp. 3d at 57–59.

[156] *Id.* at 59.

[157] *Id.* at 59–60.

[158] *Id.* at 58–59.

[159] *See id.* at 56–57.

the court cited no judicial authority for the proposition that courts may abandon the requirements of next friend standing.[160] Indeed, the district court's holding is only possible if *Whitmore* is not a jurisdictional requirement. But the Supreme Court could hardly have been more clear in *Whitmore* that "before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue."[161] The requirement that a party have a significant connection to a detainee has been substantially litigated and universally held to be a prerequisite to the court's exercise of jurisdiction.[162] Until *ACLU v. Mattis*, it does not appear that any court had ever recognized that circumstances justified an abandonment of *Whitmore*.

With the emergence of organizations that actively recruit Americans to fight against the United States, the odds that *ACLU v. Mattis*'s facts will recur are not negligible—two Americans fighting for ISIS were captured in January, 2019, alone.[163] We are likely to reencounter scenarios like the scenario in *ACLU v. Mattis*. The U.S. government will likely detain a U.S. citizen incommunicado outside of the United States, as an enemy combatant. The government will admit it has John Doe in custody but refuse to provide his identity. In turn, a private citizen,[164] with no clear connection to John Doe, will bring a habeas petition as next friend of the detainee. In response, the government will argue the citizen fails the *Whitmore* test because he lacks a significant relationship with the detainee.

*Whitmore*'s application to incommunicado detention is difficult because the Supreme Court has never addressed similar facts.[165] As evidenced by *Hamdi*,

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[160] *See id.* at 56–60.

[161] Whitmore v. Arkansas, 495 U.S. 149, 154 (1990) (emphasis added).

[162] Hamdi v. Rumsfeld, 294 F.3d 598, 607 (4th Cir. 2002) ("*Hamdi I*") ("The question of next friend standing is not merely technical . . . [r]ather, it is jurisdictional and thus fundamental.").

[163] *See* Rukmini Callimachi, *American Boy, 16, Caught Fighting for ISIS in Syria, Militia Says*, N.Y. TIMES (Jan. 9, 2019), https://www.nytimes.com/2019/01/09/world/middleeast/isis-american-teen-captured.html [https://perma.cc/VU9R-BHSC]; Rukmini Callimachi, *American ISIS Member Caught on Syrian Battlefield, Militia Says*, N.Y. TIMES (Jan. 6, 2019), https://www.nytimes.com/2019/01/06/world/middleeast/isis-syria-warren-christopher-clark.html?module=inline [https://perma.cc/KTG6-CNWY]. *See generally* MELEAGROU-HITCHENS ET AL., THE TRAVELLERS: AMERICAN JIHADISTS IN SYRIA AND IRAQ 5 (Geo. Wash. Univ. 2018) ("Since the outbreak of the Syrian conflict in 2011, the Federal Bureau of Investigation (FBI) has reported that 300 Americans attempted to leave or have left the U.S. with the intention of fighting in Iraq and Syria."). For a compilation of cases charging Americans with involvement with the Islamic State, see Hong et al., *ISIS-Related Arrests in the U.S.*, WALL ST. J., https://graphics.wsj.com/table/arrests_2015 (last updated Feb. 11, 2016) [https://perma.cc/ZMF6-9CPV]. *See also* Munaf v. Geren, 553 U.S. 674 (2008); Dan De Luce et al., *John Walker Lindh, Detainee #001 in the Global War On Terror, Will Go Free In Two Years. What Then?*, FOREIGN POL'Y (June 23, 2017), https://foreignpolicy.com/2017/06/23/john-walker-lindh-detainee-001-in-the-global-war-on-terror-will-go-free-in-two-years-what-then/ [https://perma.cc/4M9E-4DMN].

[164] Though the party bringing suit on behalf of Doe in *ACLU v. Mattis* was the American Civil Liberties Union, the analysis is unchanged.

[165] *See* Coal. of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1160 (9th Cir. 2002), *cert. denied*, 538 U.S. 1031 (2003). The court in *Coalition of Clergy* admonished the petitioners for claiming the detainees were incommunicado when they were not: "The Coalition does not urge that the detainees suffer a mental or physical disability precluding their representation of their

*Padilla*, and *Coalition of Clergy*, next friends must have had at least some contact with a detainee. The courts have not indicated that family members are the only individuals who are able to litigate on behalf of a detainee.[166] Nonetheless, courts have not been willing to recognize individuals who have no relationship or contact with a detainee as next friends.[167] Admittedly, courts—other than the district court in *ACLU v. Mattis*—have not yet been forced to grapple with the difficult question of incommunicado detention.[168] But we do know that "concerned citizen" is not a synonym for "next friend" under current doctrine.[169]

The government's position suggests that habeas corpus can be constructively suspended by incommunicado detention, a disturbing result given the important function of habeas corpus in the Anglo-American legal tradition. While the government's argument correctly applies current jurisprudence on next friend standing, courts should not blindly accept a legal regime that allows the constructive suspension of habeas corpus. It is possible to remain faithful to *Whitmore* while resisting the denial of access to habeas corpus to incommunicado detainees.

Courts are faced with three options. The first option is to accept that some detainees will not be afforded access to habeas corpus. However, as has been discussed at length, this would allow the government to constructively suspend habeas corpus.[170] The second option would be to allow courts to decide, on a case by case basis, whether the facts necessitate a relaxation of *Whitmore*. This option is likely undesirable because it would require a change in doctrine by the Supreme Court and would lead to substantial delay as the parties litigate questions of standing. A third, more desirable option is to identify how courts can prevent a constructive suspension of habeas corpus without affecting a radical change to *Whitmore*.

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interests before the court, rather it argues that the first prong of the *Whitmore–Massie* test is satisfied because the detainees 'appear to be held incommunicado,' and thus are physically blocked from the courts. This hyperbolic argument fails because it lacks support in the record; in fact, the prisoners are not being held incommunicado." The Supreme Court declined to resolve the factual or legal disputes surrounding incommunicado detention.

[166] *See* Padilla v. Rumsfeld, 352 F.3d 695, 702–04 (2d Cir. 2003), *rev'd on other grounds*, Rumsfeld v. Padilla, 542 U.S. 426 (2004).

[167] *See Coal. of Clergy*, 310 F.3d at 1162–63.

[168] *See id.* at 1160.

[169] *See* Whitmore v. Arkansas, 495 U.S. 149, 164 (1990); *see also Coal. of Clergy*, 310 F.3d at 1163.

[170] For extensive discussions of the framer's concerns regarding the suspension of habeas corpus see Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 CAL. L. REV. 635 (2015) and Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 911 (2012).

## III. Beyond *Whitmore*: Mobilizing Jurisdictional Discovery

Although Courts have recognized that there could be circumstances where next friend standing would not function properly,[171] there is scarce scholarship on what steps courts should take when these shortcomings arise.[172] Proposals must, of course, address *Whitmore*'s shortcomings without creating new ones. Proposed courses of action must also leave in place the principles of next friend standing that have developed a rich body of jurisprudence through *Whitmore*'s progeny.

This Part considers how courts can prevent the constructive suspension of habeas corpus while remaining faithful to *Whitmore* and next friend standing jurisprudence. Courts can achieve this goal by utilizing their power to ascertain their own jurisdiction. By using jurisdictional discovery to disclose the identity of a potential next friend, courts can combat nearly all cases of constructive suspension. This Part begins by considering, but ultimately dismissing, a solution proposed by the ACLU in *ACLU v. Mattis*. It then proposes a new solution and articulates several steps courts should take to vindicate the Suspension Clause's guarantees without disturbing *Whitmore*. The section concludes by offering a proposal for a modest doctrinal correction by which the Supreme Court could address *Whitmore*'s shortcomings.

### A. *The Bypass of* Whitmore*: An Inadequate Solution*

Several actors have proposed modifications to next friend standing to address incommunicado detention.[173] The first solution, proposed by the ACLU in *ACLU v. Mattis*, was to provide the ACLU with immediate access to the detainee.[174] But the ACLU's proposal cannot be reconciled with *Whitmore* and existing doctrine.

In *ACLU v. Mattis*, the ACLU sought "prompt access to Unnamed U.S. Citizen to inform him of his legal rights and to afford him the opportunity of legal assistance."[175] The ACLU's proposal is, undoubtedly, a possible solution to the government's constructive suspension of habeas corpus. When the government denies access to a detainee by withholding that individual's identity, courts could simply grant immediate access. Because the ACLU's proposal would effectively

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[171] *Coal. of Clergy*, 310 F.3d at 1162; *see* Hamdi v. Rumsfeld, 294 F.3d 598, 606 (4th Cir. 2002) ("*Hamdi I*").
[172] Caroline N. Belk, Note, *Next friend Standing and the War on Terror*, 53 DUKE L.J. 1747, 1775–76 (2004). Belk's piece represents the *only* major law review piece on next friend standing in the context of the War on Terror. Moreover, Belk argues that next friend standing requires *no* doctrinal shift to adequately deal with detainees from the War on Terror. *Id.*
[173] Petition for a Writ of Habeas Corpus at 2, ACLU *ex rel.* Unnamed U.S. Citizen v. Mattis, 286 F. Supp. 3d 53 (D.D.C. 2017) (No. 17-cv-2069); Steve Vladeck, *How to Solve the Standing Problem in ACLU Foundation v. Mattis*, JUST SECURITY (Oct. 30, 2017), https://www.justsecurity.org/46524/solve-standing-problem-aclu-foundation-v-mattis/ [https://perma.cc/5RQJ-HPEU].
[174] Petition for a Writ of Habeas Corpus, *supra* note 173, at 2.
[175] *Id.*

require courts to abandon *Whitmore*, it cannot be regarded as a viable option. The proposal distorts the longstanding purpose and understanding of next friend standing.[176] If the ACLU's position were adopted, it would require an abandonment next friend standing doctrine that has been recognized since at least the 19th century.[177] Additionally, the ACLU's solution would do little to shorten delays because the government undoubtedly has the power, for at least some period of time, to withhold access to an enemy combatant in a war zone.[178] Even if the doctrinal inconsistencies are set aside, there are at least two additional issues with the ACLU's proposal rendering it inoperable.

The first shortcoming of the ACLU's proposal is that a rule allowing immediate access would be difficult to apply in cases that involve military detention.[179] The ACLU's proposal does not comport with the traditional recognition that cases which involve matters of national security are different.[180] It fails to recognize the difficulties associated with providing immediate access to a detainee in a war zone. While an American may have a right to challenge his detention, allowing for immediate access would require the courts to determine when that right attaches, a question that courts have declined to definitively decide.[181]

The second problem with the ACLU's proposed solution is that it effectively abolishes long-standing principles of how next friend standing functions. If the ACLU were granted "immediate access," then John Doe would no longer be unavailable under *Whitmore*.[182] Next friend petitions do not involve the next friend consulting with the detainee; rather, the next friend litigates the entirety of the case without the detainee.[183] The ACLU's reading of *Whitmore* suggests next friend petitions can be used to allow a potential litigant to gain access to a detainee.[184]

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[176] *See Whitmore*, 495 U.S. at 162–64.
[177] *See In re* Ferrens, 8 F. Cas. 1158, 1159 (S.D.N.Y. 1869).
[178] *See Boumediene*, 553 U.S. at 795 ("The Executive is entitled to a reasonable period of time to determine a detainee's status before a court entertains that detainee's habeas corpus petition. . . . *Except* in cases of undue delay, federal courts *should refrain from entertaining an enemy combatant's habeas corpus petition* at least until after the Department, acting via the CSRT, has had a chance to review his status.") (emphasis added).
[179] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion).
[180] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities."); *see also* The Prize Cases, 67 U.S. 635 (1863) (holding that it is for the executive to decide whether the nation is at war)
[181] *See Hamdi*, 542 U.S. at 534 (plurality opinion).
[182] Whitmore v. Arkansas, 495 U.S. 149, 164–65 (1990) ("And in keeping with the ancient tradition of the doctrine, we conclude that one necessary condition for next friend standing in federal court is a showing by the proposed next friend that the real party in interest is unable to *litigate* his own cause due to mental incapacity, lack of access to court, or other similar disability.") (emphasis added).
[183] *Id.*
[184] *See id.*

Such an interpretation would render *Whitmore* nothing more than a doctrine allowing a detainee to choose his legal counsel. Next friend petitions have, since 1679, never been understood in this way.[185] *Whitmore* and next friend standing are not doctrines to facilitate a detainee's appraisal of his rights.[186] Next friend petitions are brought on the behalf of the detainee, not by a party who the detainee has selected.[187]

The ACLU's proposal does not address next friend standing's shortcomings because it is not a next friend petition.[188] Although it would ensure a detainee could challenge the merits of his confinement, this proposal is inconsistent with *Whitmore* and a broad body of next friend standing jurisprudence. Ideally, a solution should maintain *Whitmore*'s core holding while addressing the issue of constructive suspension of habeas corpus through incommunicado detention.

B. *Jurisdictional Discovery: Laying a Foundation*

In lieu of the ACLU's solution, this Article proposes a different approach. It builds upon a proposal by Professor Stephen Vladeck.[189] Vladeck argues that by posing three simple questions to the detainee, the Court can ascertain whether he wishes to have the purported next friend represent him.[190] Vladeck's proposal is inadequate without modification, however, because like the ACLU's proposal his solution would require a departure from at least some principles of the *Whitmore* doctrine.

Underlying every case is an important background principle: federal courts have broad power to ascertain their jurisdiction.[191] Professor Vladeck has argued this principle should form the basis for how *Whitmore*'s shortcomings may be resolved.[192] Vladeck contends that when the government holds a detainee who has a right to habeas corpus incommunicado, the court's power to ascertain its jurisdiction is capable of vindicating the detainee's rights.[193] The foundation of Vladeck's proposal is intuitive and elegantly simple. A solution based upon the existing power of federal courts to ascertain jurisdiction can be implemented

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[185] *See* Habeas Corpus Act of 1679, 31 Cha. 2. C. 2 § II (Eng.).
[186] *Whitmore*, 495 U.S. at 164–65.
[187] *Id.* at 163 ("A 'next friend' does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest.").
[188] *See id.* at 164 ("A next friend does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest.") (quotations omitted); Belk, *supra* note 172, at 1750.
[189] Vladeck, *supra* note 173.
[190] *Id.*; *Episode 39: It is More Likely Than Not That Our FARRA Discussion Will Bore You*, NAT'L SEC. L. PODCAST (Oct. 4, 2017), https://www.nationalsecuritylawpodcast.com/episode-39-it-is-more-likely-than-not-that-our-farra-discussion-will-bore-you [https://perma.cc/D8KT-ZFJE].
[191] *See, e.g.*, Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 68–69 (D.D.C. 2004); *see generally* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489 (2010).
[192] Vladeck, *supra* note 173.
[193] *Id.*

without change to existing doctrine and does not require an expansion of the judiciary's power.

While theoretically desirable, Vladeck's proposal does not adhere to the next friend doctrinal framework established in *Whitmore*. Vladeck proposes that in a case like *ACLU v. Mattis*, a court should require the government to ask a detainee three questions:

1. "Do you consent to the filing of a habeas petition on your behalf?
2. If so, do you consent to having [the third party] represent you in this matter on a *pro bono* basis?
3. If not, do you consent to having the court appoint a different, qualified lawyer to represent you in this matter?"[194]

Posing these questions would address the majority of individuals who are outside the reach of habeas corpus. Indeed, the answers to these questions would indisputably resolve whether a detainee wished to challenge his detention. But in practice, the suggestion is similarly inconsistent with *Whitmore*.

This inconsistency derives from the fact the jurisdictional discovery questions are addressed to the detainee. The first shortcoming of Vladeck's proposal is that, like the ACLU's, it does away with a central feature of next friend standing: unavailability. If a detainee can access a court to provide answers to jurisdictional questions, he is not unavailable under *Whitmore.*[195] And once a detainee is no longer "unavailable," next friend standing is inappropriate.[196] Thus, Vladeck's proposal cannot be reconciled with existing doctrine. But a second flaw is also latent in Vladeck's proposal. It neglects that there are certain expediencies to maintaining a detainee as "unavailable." Namely, because next friend standing allows a party who is *not* detained to prosecute the litigation, there is less chance of delay. Conversely, if a detainee is no longer unavailable then he must be the one to pursue the litigation.

Despite its shortcomings, Vladeck's proposal is an excellent starting point and requires only a small change to bring the model into conformity with *Whitmore*. By addressing the questions to the government rather than the detainee, *Whitmore* will be satisfied. By simply changing the party to whom the questions are addressed, the detainee continues to be unavailable and next friend standing remains appropriate.

### C. *Mobilizing Jurisdictional Discovery*

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[194] *Id.*
[195] Whitmore v. Arkansas, 495 U.S. 149, 163 (1990).
[196] *Id.*

To combat constructive suspension of habeas, courts should address jurisdictional questions to the government and require them to notify, when possible, a detainee's immediate family or acquaintance. This course of action alone would address the vast majority of next friend standing problems. Of course, if a detainee has no family members or social connections this solution would, admittedly, not prevent constructive suspension of habeas corpus. But detainees without a single connection who could be informed are likely a null-set.[197] Accordingly, a jurisdictional discovery solution, alone, could cure *Whitmore*'s shortcomings.

When a court is made aware that the United States is subjecting an individual to incommunicado detention, it should immediately require the government to respond to two questions. The two questions are as follows:

> 1. Does the detainee have any family members or close personal connections?
> 2. If yes to (1), has the government informed one of the identified connection his/her right to challenge the detainee's confinement?[198]

These questions aim to identify and inform a possible next friend. By informing the detainee's immediate family[199] or a close personal connection, the government has informed a party who can, in almost all cases serve as a next friend.[200] The Suspension Clause does not demand that a petition actually be brought. Rather, the Clause promises only *access* to habeas corpus. Accordingly, if it is possible for a petition for habeas corpus to be brought on behalf of a detainee, then the Constitution's promise has been fulfilled. But if the government's actions create conditions that guarantee no party can bring a challenge, the Constitution's promise is empty.[201]

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[197] Padilla v. Rumsfeld, 352 F.3d 695, 700–04 (2nd Cir. 2003).

[198] The government has argued that allowing a detainee to visit with the ICRC, who is free to contact a detainee's family, is sufficient to satisfy contacting next of kin. *See* Vladeck, *supra* note 173. The government's argument should not be accepted because it creates the possibility for delay, obfuscation, and confusion. Forcing an affirmative declaration about whether a detainee's family has been informed of their capture imposes no burden on the government.

[199] "Immediate family" is defined as parents, wife, husband, children and brothers and sisters. *Immediate Family*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[200] This Article does not purport to propose a particular hierarchy of potential next friends. Indeed, the government should be afforded some flexibility to determine which parties can be informed without compromising operational security. As such, this Article proposes only that the government must inform someone, not any specific party. For a discussion of the security risks associated with disclosure, see *infra* notes 205–212 and accompanying text.

[201] Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 SUP. CT. REV. 1, 18 (2008) ("In *Boumediene,* the Court appears to have passed entirely over this set of questions, simply assuming that if the congressional regime denied the detainees a constitutionally guaranteed right of access to habeas review, that constitutionally required review should be undertaken in federal court."); Hamdi v. Rumsfeld, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting) ("If the Suspension Clause does not guarantee the citizen that he will either be tried or released [in the absence of a suspension] . . . ; if it merely guarantees the citizen that he will not be

But the access to habeas corpus that these questions aim to provide is unachievable unless the putative next friend understands the scope of their rights to challenge the detainee's confinement. Accordingly, when the government contacts a potential next friend, it should be required to provide more information than simply stating that the detainee is being held. When the government publicly provides an individual's identity, organizations and attorneys are able to contact potential next friends to apprise them of their right to challenge the detention. By keeping the identity of the detainee a secret, the government receives a benefit—operational security—which should be counterbalanced by providing more information to the next friend. To ensure that next friends are clear about the implications of the detainee's status, they should be informed of their legal rights as next friends. In practice, the government should not be allowed to provide the family with cursory information. An appraisement of legal rights and remedies should be offered to facilitate the family's understanding of the situation. Government provided counsel could be a, but certainly not the only, means of satisfying this requirement.

It is not uncommon for the government to afford parties with information about their rights. For example, since *Miranda v. Arizona*,[202] police have provided arrestees with a basic set of information geared towards making parties aware of their rights.[203] If police question an individual, without providing a *Miranda* warning, the evidence may be suppressed.[204] The goal of *Miranda* warnings is to ensure respect for the rights of the accused and to ensure that the balance of power is not disproportionately tilted in favor of law enforcement. Similarly, providing a next friend with information about his right to challenge the detainee's confinement would result in a more equitable distribution of power in a context—military detention—where the government already enjoys significant informational and legal advantages.

Of course, the government may have valid operational security concerns about informing civilians of ongoing military operations. These government concerns are presumably based on a fear of revealing sensitive information to outside parties. For example, such disclosures could reveal or suggest the existence of covert facilities or certain intelligence gathering methods.[205] Indeed, allowing a next friend's attorney to view highly sensitive—and likely classified—materials to demonstrate the basis of Doe's detention would be a risk for the government. Concerns about security, however, should not necessarily triumph over a vital

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detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.").
202 384 U.S. 436 (1966).
203 *Id.* at 444–45.
204 *Id.*
205 David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 630–31 (2005) (describing government agencies as hesitant to reveal even innocuous information for fear it will harm the national security in the context of Freedom of Information Act requests).

liberty interest like access to habeas corpus. Former Attorney General Roberto Gonzalez has even argued that merely designating someone an enemy combatant is a sufficiently serious action to warrant review by a neutral decision maker.[206] The deprivation of liberty in cases of incommunicado detention is similarly acute. Governmental concerns regarding information security may be alleviated by two supplementary measures to the proposal above.

First, the government could require that a detainee's next friend sign a non-disclosure agreement ("NDA") to receive certain details. It is generally accepted that the government is within its rights to require non-disclosure agreements from people with access to sensitive information.[207] Much like employees of the intelligence service, a next friend would be afforded information in exchange for his agreement to not disclose it publicly. Of course, the incentives between a next friend and a government employee are obviously different. A government employee faces larger consequences if he discloses information. The main threat is, undoubtedly, his potential termination. NDAs are not a perfect solution but would represent an important step towards resolving the government's valid information security concerns.

Second, the government could provide counsel to a next friend if particularly sensitive information is involved. The practice of using attorneys with security clearances is not novel. Attorneys with security clearances have been entrusted to litigate while serving outside government in the context of FISA,[208] Guantanamo Bay,[209] and in sensitive national security litigation.[210] The benefit of using attorneys with clearance to view sensitive information is plain. It reduces the informational risk for the government without sacrificing the quality of advocacy for a detainee. Attorneys with clearances are, unsurprisingly, well positioned to deal with the complex nature of challenging the merits of military detention.[211] There clearly are sufficient tools to minimize—if not eliminate—any risks associated with informing a detainee's next friend.

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[206] Alberto Gonzalez, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 52–53 (2014).

[207] *See generally* Snepp v. United States, 444 U.S. 507 (1980) (enforcing a contract that required a former CIA employee to submit a book manuscript for prepublication review).

[208] 50 U.S.C. § 1803(i) (2018). Section 1803(i) allows the Foreign Intelligence Surveillance Court to appoint, when needed, attorneys to brief positions contrary to that of the government. *See id.* The FISC designates outside lawyers as potential amici and then granted a security clearance to perform their duties if they do not already possess one. *See* § 1803(i)(1)–(2).

[209] Neil A. Lewis, *In Rising Numbers, Lawyers Head for Guantánamo Bay*, N.Y. TIMES (MAY 30, 2005), https://www.nytimes.com/2005/05/30/politics/in-rising-numbers-lawyers-head-for-guantanamo-bay.html [https://perma.cc/6KGH-ZHVM].

[210] *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 283 (4th Cir. 2010); *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 93, 115–30 (2nd Cir. 2008).

[211] For example, current FISC amicus Amy Jeffress spent a decade in the Department of Justice's National Security Section. *See Amy Jeffress*, ARNOLD & PORTER, https://www.arnoldporter.com/en/people/j/jeffress-amy [https://perma.cc/N57D-ENP3].

Courts have already employed jurisdictional discovery in next friend habeas cases with no major consequences.[212] In *Abu Ali v. Ashcroft*, Ahmed Abu Ali, a U.S. citizen, was detained on allegations that he was a member of Al Qaeda.[213] Acting on behalf of their son, Abu Ali's parents brought a petition for a writ of habeas corpus.[214] Over strong objections by the government, the district court ordered jurisdictional discovery to afford Abu Ali's next friends "an opportunity to establish the jurisdiction" of the court over the petition.[215] As the district court in *Abu Ali* noted, jurisdictional discovery can be completed in a manner that is "expeditious but cautious, consistent with the substantial and delicate interests of foreign relations potentially involved."[216]

Applying jurisdictional discovery in the next friend context vindicates the constitutional right to habeas corpus. By informing a detainee's potential next friend, and providing that individual with enough information to make a reasoned and informed choice, the government has apprised a party who has valid standing to challenge the detainee's continuing detention.[217] If the government apprises the detainee's next friend and he chooses not to challenge the detention, that is his prerogative. If the next friend does not challenge the detention, that is the end of the matter because once access to habeas corpus is afforded, the Constitution's promise has been fulfilled. So long there is a plausible means to secure habeas corpus then there has been no constructive suspension and the Constitution's promise of minimum access has been satisfied.

This proposal would resolve the vast majority of incommunicado detention cases in which *Whitmore* presently creates problems. If courts employ the proposal as stated, it will be a substantial step towards preventing the constructive suspension of habeas corpus. This proposal is consistent with *Whitmore* and requires no changes to existing doctrine. It is possible, however, that in a small number of cases, a detainee's next friend may not be contacted. For instance, there may be no party who could serve as a next friend, or security concerns may prevent informing third parties. Absent a change to doctrine, there is no way to guard against these possibilities.

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[212] *See, e.g.*, Abu Ali v. Ashcroft, 350 F. Supp. 2d 28, 68–69 (D.D.C. 2004) ("The Court will therefore authorize jurisdictional discovery in this case. This discovery will be expeditious but cautious, consistent with the substantial and delicate interests of foreign relations potentially involved.").

[213] *Id.* at 32.

[214] *Id.* at 37.

[215] *Id.* at 69.

[216] *Id.*

[217] There is a possibility that the family of the detainee would be unwilling to expose themselves to the public scrutiny of admitting their family member was being held abroad. The proper response to this is to allow the family members to proceed as anonymous next friends, representing a rare exception to Federal Rules of Civil Procedure. *See* United States v. Microsoft Corp., 56 F.3d 1448, 1464 (D.C. Cir. 1995).

D. *Doctrinal Correction: How and Why*

It must be conceded, at the outset, that only the Supreme Court could adjust the categorical language of *Whitmore*. A situation in which no potential next friend exists could arise. In such a case, *Whitmore* and the proposed steps of jurisdictional discovery would prove insufficient and the detainee would be unable to access habeas corpus. Though a doctrinal shift is not necessary to address the vast majority of cases involving constructive suspension of habeas, an extreme set of facts *could* arise that would necessitate a doctrinal shift. If the Supreme Court endeavors to adjust *Whitmore*, the good cause exception, proposed by Judge Berzon in *Coalition of Clergy*, should be adopted.[218] Any exception must be circumscribed such as to ensure the exception does not swallow the rule. The only category of cases that, at present, evade review are cases where a detainee has no connection to a potential next friend. The exception would thus be a narrow one.

The only prong of *Whitmore* that leads to the suspension of habeas corpus is the requirement of a significant connection. If the Court eliminated the requirement entirely, the suspension of habeas would no longer be possible. But the significant connection requirement is longstanding and well understood in other next friend contexts.[219] There is no need to indiscriminately abandon a portion of the doctrine that works well in most cases. Notwithstanding these facts, courts should be permitted to bypass the requirement if a detainee has no potential next friends. If these facts arise, courts should have the authority to allow the party who initially filed to proceed.[220] The party who initially filed would, of course, still be required to demonstrate that he satisfied *Whitmore*'s other requirements, namely the detainee's unavailability and true dedication to the detainee's best interests.[221]

Allowing courts the freedom, in extreme cases, to step past the significant relationship prong of *Whitmore* would guarantee that access to habeas corpus is afforded to all outside of cases where the writ is formally suspended. Importantly, other jurisdictional doctrines recognize narrow exceptions when the underlying conditions that necessitate a rule are not present.[222] When no party has a significant

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[218] Coal. of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153, 1168 (9th Cir. 2002) (Berzon, J., concurring).

[219] *See, e.g.*, Centobie v. Campbell, 407 F.3d 1149, 1151 (11th Cir. 2005) (per curiam); T.W. *ex rel.* Enk v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997).

[220] Although it could be possible that no party would be interested in representing a detainee, it is unlikely given the recent history of organizations like the ACLU stepping in to detention cases. Alternatively, the court could be allowed to appoint counsel. But that would mean that the exception would be to more than just the "significant relationship" requirement. The appointment of counsel does not appear to be a viable proposal for this exception.

[221] This is a derivative of the approach that the court took in *ACLU v. Mattis*. However, the court in *ACLU* did not attempt to determine whether the case fell within the narrow set of facts identified above. Instead, the district court held that there was a *generalized* good cause exception. The district court's holding is far broader than this proposed exception.

[222] *See* Honig v. Doe, 484 U.S. 305, 319–20 (1988) (holding an injury which is otherwise moot and is capable of repetition yet evading review is, for the purposes of Article III, not moot); United

connection to the detainee, the "underlying justifications" for *Whitmore*'s "significant relationship" requirement are less pressing and a narrow exception is justifiable.[223] *Whitmore*'s general function would remain essentially unchanged in the vast majority of cases. *Whitmore* would continue to require a detainee be unavailable and that his next friend be truly dedicated to his best interests.[224]

## Conclusion

This Article has aimed to address the major failures in next friend standing with two proposals. The first, is to require the government to notify, when possible, a next friend. The second, is to create a good cause exception to allow courts, when no next friend exists, to depart from *Whitmore*'s unwavering language. The first proposal can be implemented by lower federal courts alone, while the second requires intervention of the United States Supreme Court. While the first proposal alone does not solve every issue with *Whitmore*, it is more desirable than inaction. Through its utilization of jurisdictional discovery, the proposal allows *Whitmore's* doctrinal roots to remain unchanged and leaves in place as much of *Whitmore's* substance as possible. The solutions prevent the possibility of competing petitions on behalf of a single detainee. Rather than requiring courts to entertain multiple habeas petitions, each from an organization purporting to be a better representative than the other, this article's proposals allow courts to dispense with the jurisdictional question with ease.

Additionally, this Article's proposal curtails the constructive suspension of habeas corpus and undue delay in reaching the merits of a detainee's confinement. If a valid next friend under the proposed regime chooses not to proceed, then the Constitution's guarantee of access to habeas corpus has been vindicated. If no proper next friends exist, courts should retain a residual "good cause" power to promptly advance to the merits rather than entertain prolonged jurisdictional disputes. The Constitution's promise falls flat when courts allow the executive to engage in jurisdictional gamesmanship. Such a circumvention of the suspension clause's aims merits a course correction in existing habeas corpus jurisprudence.

Courts have, when vital to the national interest, made corrections to important doctrines when the executive has strayed too far afield.[225] The incommunicado detention of a U.S. citizen in an attempt to thwart judicial review should alarm even the most passive observer. The question is not whether next friend standing should be adjusted to preclude de facto suspension of habeas corpus through such detention, but rather what form the adjustment should take. American citizens accused of waging war against the United States are seldom sympathetic

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States v. W.T. Grant Co., 345 U.S. 629, 630–32 (holding that the voluntary cessation of illegal activity does not deprive a federal court of the power to hear a case).

[223] Singleton v. Wulff, 428 U.S. 106, 114 (1976) ("Like any general rule, however, this one should not be applied where its underlying justifications are absent.").

[224] *See supra* notes 68–101 and accompanying text.

[225] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 798 (2008).

parties; but the Constitution's promises are empty if they fail to protect the least sympathetic amongst us.