



# Friends *de jure*, Friends *du jour*

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SOMETIMES COURTS ARE CALLED upon to decide not who may be counted among the ranks of their own friends – be it as *amicus*, *amica*, *amicæ*, or *amici*<sup>1</sup> – but rather who is legally entitled to declare himself to be the friend of a litigant. While the court’s own friends are bequeathed fancy Latin titles subject to impenetrable rules of declension, aspiring pals of litigants are generally required to assume the rather pedestrian appellation of “next friend.”

The doctrine of “next friend” standing is most frequently invoked in the criminal context, where its use dates back to the beginning of the 18th century, if not earlier.<sup>2</sup> The British House of Lords resolved in 1704 that “every Englishman, who is imprisoned by any

authority whatsoever, has an undoubted right, by his agents, or *friends*, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law.”<sup>3</sup> The U.S. Congress formally codified the doctrine when it amended the federal habeas corpus statute in 1948, providing that “[a]pplication 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.”<sup>4</sup>

The habeas statute’s grant of authority to file habeas petitions on behalf of others seems quite broad, but in fact has always been understood to have certain implicit limitations. First, a putative “next friend” must show that the real party in interest is inca-

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- 1 For a discussion of the proper nomenclature for friend-of-the-court briefs, see David Gossett, *Friendship*, 8 GREEN BAG 2D 363 (2005).
- 2 “Next friend” standing is also sometimes invoked on behalf of non-incarcerated individuals, such as minors or the disabled, who do not themselves have the capacity to bring suit. See, e.g., *Fox v. Wills*, 151 Md.App. 31, 822 A.2d 1289 (2003) (representation of minor); *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581 (1999) (representation of mentally disabled patients).
- 3 See *Ashby v. White*, 14 How.St.Tr. 695, 814 (Q.B. 1704), quoted in *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990) (emphasis added).
- 4 28 U.S.C. § 2242 (emphasis added).

pable of litigating on his or her own behalf.<sup>5</sup> Second, although Congress dropped the House of Lords' explicit reference to friendship when it enacted the habeas statute, the Supreme Court reintroduced that concept in *Whitmore v. Arkansas*, reading into Section 2242 a requirement that "the 'next friend' must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate," and further suggesting that "a 'next friend' must have some significant relationship with the real party in interest."<sup>6</sup> The Court noted that "if there were no restriction on 'next friend' standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Article III by assuming the mantle of 'next friend.'"<sup>7</sup> Or, as famed British explorer Sir Richard Burton more poetically put the point nearly a century ago, "False friendship, like the ivy, decays and ruins the walls it embraces."<sup>8</sup>

Who can be counted as the friend of a litigant proved to be a central issue in the very first War on Terror case filed in federal court. A group called "Coalition of Clergy, Lawyers, and Professors" – including former LBJ Attorney General Ramsey Clark and constitutional law professor Erwin Chemerinsky – filed a habeas petition in January 2002 on behalf of the detainees held at the naval base in Guantanamo Bay, Cuba, arguing that their close confinement violated the Constitution.<sup>9</sup>

The government moved to dismiss, asserting that the petitioners – who had never met or even communicated with any of the detainees – could not as a matter of law be deemed their "friends," and therefore had no standing to bring suit.<sup>10</sup>

As would-be friends are wont to do, petitioners took considerable umbrage at the government's questioning of the bonds of amity between them and the detainees. In a section of their brief entitled "Introduction: Shakespeare, a Recipe for Tyranny, and Lucifer in Need of Some Restraint," petitioners lashed out at the government's attorneys – "not," they explained, "the lawyers of whom William Shakespeare in *King Henry VI* remarked "The first thing we do, let's kill the lawyers[]" – but instead that not so intrepid flock of government gulls and toadies – assistant United States Attorneys all – who will do the political leaders' bidding, damn the Constitution, no matter what they do may be wrong."<sup>11</sup> Indeed, petitioners perceived a cunning ploy in the government's challenge to their camaraderic credentials:

As with all bad, mean-spirited government action, when that action is challenged, the government does not respond on the merits, but first tries mightily, as here, to avoid answering at the bar of justice: it says, as here, to the federal courts, "you don't have any jurisdiction and those rabble who come

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5 See, e.g., *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001).

6 495 U.S. at 163–64.

7 *Id.* at 164.

8 As quoted in Michael A. West, *EFFECTIVE TEAMWORK: PRACTICAL LESSONS FROM ORGANIZATIONAL RESEARCH* 155 (2d ed. 2004).

9 See First Amended Verified Petition for Writ of Habeas Corpus (January 20, 2002), filed in *Coalition of Clergy, Lawyers and Professors v. Bush*, 189 F.Supp.2d 1036 (C.D. Cal. 2002) (No. CV 02–570-AHM), available at [news.findlaw.com/hdocs/docs/terrorism/cltnbsho12002pet.pdf](http://news.findlaw.com/hdocs/docs/terrorism/cltnbsho12002pet.pdf).

10 See Government's Response to Order to Show Cause Re: Jurisdiction and Motion to Dismiss for Lack of Jurisdiction, available at [news.findlaw.com/hdocs/docs/terrorism/cltnbusho13102usrspns.pdf](http://news.findlaw.com/hdocs/docs/terrorism/cltnbusho13102usrspns.pdf).

11 See Response to Respondents' Response to Order to Show Cause Regarding Jurisdiction at 3, available at [news.findlaw.com/hdocs/docs/terrorism/cltnbsho20802rsp2osc.pdf](http://news.findlaw.com/hdocs/docs/terrorism/cltnbsho20802rsp2osc.pdf).

here for relief are 'meddlers.'" Shame on respondents who say that and double shame on their lawyers who say that.<sup>12</sup>

Having meted out these no-doubt cathartic shaming penalties (and a few double-shaming penalties to boot), petitioners shifted their focus to the legal merits of their standing argument. Oddly for a group so freely offering its friendship, petitioners conceded that the detainees were "persons some of us ultimately might not like when the actual facts of their actions become known."<sup>13</sup> Nevertheless, they contended that their feelings of friendship were sufficiently sincere to create a genuine controversy between them and the government:

The touchstone of "case," "controversy," "justiciability," and "standing," one and all, is "adversariness," that is, courts do not take jurisdiction of matters in which there is not a real issue that will be fought out hard between parties who do not truly have an adversary relationship. American law, in this respect, contemplates a pre-Marxian, non-dilatectice [sic] kind of Leibnizian dialectic: thesis, antithesis, and thesis.<sup>14</sup>

If petitioners had the court at Henry VI, they lost it at Leibniz. Perhaps reasoning that with friends like these, enemy combatants just might not need enemies, the court ruled that the Coalition did not have standing to bring a habeas petition on behalf of

the detainees.<sup>15</sup>

Aristotle is said to have asserted that "[w]ishing to be friends is quick work, but friendship is a slow-ripening fruit."<sup>16</sup> Ripeness had not really been the gravamen of the petitioners' problem in the district court, but a chance for a second bite at the apple in the left-leaning Ninth Circuit was simply too much for them to resist. On appeal, they opened their brief with the following emotional plea:

Recent history is replete with now-very obviously bad things done at prior points in time at which times those things were not condemned but which, at later times, too-late times, received virtually universal condemnation. ... This is a case in point. This point in time in future will be a prior point in time, but now is the time at which that which is complained of here must be condemned and redressed: later will be too late.<sup>17</sup>

Surprisingly, reading petitioners' brief was not enough to dissuade the Ninth Circuit from approving the medicinal use of marijuana.<sup>18</sup> It was, however, sufficient to convince the panel to affirm the district court's ruling. "Rabble," perhaps. "Meddlers," maybe. But friends, definitely not. If Emerson was right that "[e]very man passes his life in the search after friendship,"<sup>19</sup> petitioners may be looking still.

12 *Id.* at 3–4.

13 *Id.* at 12–13. *But see* Sidonie-Gabrielle Colette, as quoted in Karen Casey, *EACH DAY A NEW BEGINNING: DAILY MEDITATIONS FOR WOMEN* 30 (2d ed. 1991) ("And what a delight it is to make friends with someone you have despised!").

14 *Id.* at 8.

15 *Coalition of Clergy, Lawyers and Professors v. Bush*, 189 F.Supp.2d 1036 (C.D. Cal. 2002).

16 *THE BOOK OF FRIENDSHIP: MAKING LIFE BETTER* 257 (Cindy Haynes, ed. 2001).

17 Appellant's Brief at 1, *Coalition of Clergy, Lawyers and Professors v. Bush*, filed in 310 F.3d 1153 (9th Cir. 2002) (No. 02–55367).

18 *See Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *reversed* 125 S.Ct. 2195 (2005).

19 Ralph Waldo Emerson, *Friendship*, in *RALPH WALDO EMERSON: SELF-RELIANCE AND OTHER ESSAYS* 42 (Stanley Applebaum, ed. 1993).



But should the petitioners have been thrown out of court so summarily? In her concurring opinion, Judge Berzon suggested that had circumstances been different, petitioners would have had standing. Despite the assurances of Carole King, James Taylor, and the State of Pennsylvania that “you’ve got a friend,” Judge Berzon fretted that some time, some where, some alleged terrorist might not.<sup>20</sup> Under such unfriendly circumstances, Judge Berzon argued, *Whitmore’s* significant relationship requirement should be substantially relaxed, “to the degree that no relationship should be required if none is practically possible.”<sup>21</sup>

Judge Berzon’s bold statement seems to suggest that to qualify as a “next friend,” one actually need not be even a casual acquaintance. Upon closer examination, however, friendship would continue to mean something before the bar of justice even in Judge Berzon’s world; she would not do away with the significant relationship test entirely. Before allowing total strangers to file habeas petitions on behalf of detainees, she would require them to show that (1) “the circumstances entirely preclude ... the appearance as next friend of anyone with any relationship to the detainees” and (2) “they have made a reasonable effort to establish a relationship if none exists.”<sup>22</sup> This could be dubbed the “best-available friendship” test, designed to ensure that perfect strangers cannot be ad-

judicated *de jure* bosom buddies unless there truly are no better alternatives available.

Judge Berzon failed to persuade her Ninth Circuit colleagues to relax *Whitmore’s* significant relationship test, but might she, as a matter of policy, have been on to something? There is an old Spanish proverb that “life without a friend is death without a witness.”<sup>23</sup> That proverb, read literally, almost perfectly expresses Judge Berzon’s fears – namely, that an individual without friends could be detained by the government indefinitely, left to rot in prison without hope of ever having his or her basic right to liberty adjudicated before a neutral tribunal. Although such cases would be rare, the fact that requiring a significant-relationship for “next friend” standing makes them at least *possible* is clearly a legitimate cause for concern.

Juxtaposed against that concern, however, is *Whitmore’s* suggestion that doing away with the significant relationship requirement could undermine some of the judicial system’s core foundational principles, such as that of standing. The significant relationship test ensures that surrogate litigants do not merely represent a detainee’s rights *in the abstract*, but rather are aware of and can pursue the particular interests and inclinations of the specific individual that they represent. Not every detainee wants a habeas petition brought on his behalf; not every detainee wants every conceivable legal claim pursued. If one believes that the primary purpose of the judicial system is to vindi-

20 *Coalition of Clergy*, 310 F.3d at 1167 (Berzon, J., concurring) (“Not all detainees have a relative, friend, private attorney, or other suitable person to act on their behalf.”).

21 *Id.* There is, of course, a wee bit of a problem with this argument: a judge on a Circuit Court of Appeals is not in a position to overrule the Supreme Court, or even to “relax” the requirements it has set. Judge Berzon finessed the point, however, asserting that the Supreme Court did not actually *hold* in *Whitmore* that a significant relationship is required for “next friend” standing, but instead merely noted that “it has been *suggested*” that there is such a requirement. *Id.* at 1165, quoting *Whitmore*, 495 U.S. at 164 (emphasis added to original by Judge Berzon).

22 *Id.* at 1168.

23 CONCISE DICTIONARY OF EUROPEAN PROVERBS 1399 (Emanuel Strauss, ed. 1998).

cate abstract legal principles – such as the Coalition of Clergy’s belief that the President does not have inherent constitutional authority as Commander in Chief to detain enemy combatants – then one is likely to be sympathetic to the position of Judge Berzon. If, on the other hand, one believes that the primary purpose of the justice system is

to protect the concrete and particularized rights of individuals, then one is likely to be skeptical of the ability of perfect strangers to discern and pursue such claims fairly. Call me old fashioned, but it seems to me that friendships – *de facto*, *de jure*, or otherwise – should not see their births in the pages of the federal reporters. *GB*