

To Members of Congress:

The undersigned retired federal judges write to express our deep concern about the lawfulness of Section 6 of the proposed Military Commissions Act of 2006 (“MCA”). The MCA threatens to strip the federal courts of jurisdiction to test the lawfulness of Executive detention at the Guantánamo Bay Naval Station and elsewhere outside the United States. Section 6 applies “to all cases, *without exception*, pending on or after the date of the enactment of [the MCA] which relate to any aspect of the detention, treatment, or trial of an alien detained outside of the United States . . . since September 11, 2001.”

We applaud Congress for taking action establishing procedures to try individuals for war crimes and, in particular, Senator Warner, Senator Graham, and others for ensuring that those procedures prohibit the use of secret evidence and evidence gained by coercion. Revoking habeas corpus, however, creates the perverse incentive of allowing individuals to be detained indefinitely on that very basis by stripping the federal courts of their historic inquiry into the lawfulness of a prisoner’s confinement.

More than two years ago, the United States Supreme Court ruled in *Rasul v. Bush*, 542 U.S. 466 (2004), that detainees at Guantánamo have the right to challenge their detention in federal court by habeas corpus. Last December, Congress passed the Detainee Treatment Act, eliminating jurisdiction over *future* habeas petitions filed by prisoners at Guantánamo, but expressly preserving existing jurisdiction over pending cases. In June, the Supreme Court affirmed in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the federal courts have the power to hear those pending cases. These cases should be heard by the federal courts for the reasons that follow.

The habeas petitions ask whether there is a sufficient factual and legal basis for a prisoner’s detention. This inquiry is at once simple and momentous. Simple because it is an easy matter for judges to make this determination – federal judges have been doing this every day, in every courtroom in the country, since this Nation’s founding. Momentous because it safeguards the most hallowed judicial role in our constitutional democracy – ensuring that no man is imprisoned unlawfully. Without habeas, federal courts will lose the power to conduct this inquiry.

We are told this legislation is important to the ineffable demands of national security, and that permitting the courts to play their traditional role will somehow undermine the military’s effort in fighting terrorism. But this concern is simply misplaced. For decades, federal courts have successfully managed both civil and criminal cases involving classified and top secret information. Invariably, those cases were resolved fairly and expeditiously, without compromising the interests of this country. The habeas statute and rules provide federal judges ample tools for controlling and safeguarding the flow of information in court, and we are confident that Guantánamo detainee cases can be handled under existing procedures.

Furthermore, depriving the courts of habeas jurisdiction will jeopardize the Judiciary's ability to ensure that Executive detentions are not grounded on torture or other abuse. Senator John McCain and others have rightly insisted that the proposed military commissions established to try terror suspects of war crimes must not be permitted to rely on evidence secured by unlawful coercion. But stripping district courts of habeas jurisdiction would undermine this goal by permitting the Executive to detain without trial based on the same coerced evidence.

Finally, eliminating habeas jurisdiction would raise serious concerns under the Suspension Clause of the Constitution. The writ has been suspended only four times in our Nation's history, and never under circumstances like the present. Congress cannot suspend the writ at will, even during wartime, but only in "Cases of Rebellion or Invasion [when] the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Congress would thus be skating on thin constitutional ice in depriving the federal courts of their power to hear the cases of Guantánamo detainees. At a minimum, Section 6 would guarantee that these cases would be mired in protracted litigation for years to come. If one goal of the provision is to bring these cases to a speedy conclusion, we can assure you from our considerable experience that eliminating habeas would be counterproductive.

For two hundred years, the federal judiciary has maintained Chief Justice Marshall's solemn admonition that ours is a government of laws, and not of men. The proposed legislation imperils this proud history by abandoning the Great Writ to the siren call of military necessity. We urge you to remove the provision stripping habeas jurisdiction from the proposed Military Commissions Act of 2006 and to reject any legislation that deprives the federal courts of habeas jurisdiction over pending Guantánamo detainee cases.

Respectfully,

Judge John J. Gibbons  
U. S. Court of Appeals for the Third Circuit (1969 – 1987)  
Chief Judge of the U.S. Court of Appeals for the Third Circuit (1987 – 1990)

Judge Shirley M. Hufstedler  
U. S. Court of Appeals for the Ninth Circuit (1968 – 1979)

Judge Nathaniel R. Jones  
U. S. Court of Appeals for the Sixth Circuit (1979 – 2002)

Judge Timothy K. Lewis  
U. S. District Court, Western District of Pennsylvania (1991 – 1992)  
U. S. Court of Appeals for the Third Circuit (1992 – 1999)

Judge William A. Norris  
U.S. Court of Appeals for the Ninth Circuit (1980 – 1997)

Judge George C. Pratt  
U. S. District Court, Eastern District of New York (1976 – 1982)  
U. S. Court of Appeals for the Second Circuit (1982 – 1995)

Judge H. Lee Sarokin  
U.S. District Court for the District of New Jersey (1979 – 1994)  
U.S. Court of Appeals for the Third Circuit (1994 – 1996)

William S. Sessions  
U.S. District Court, Western District of Texas (1974 – 1980)  
Chief Judge of the U.S. District Court, Western District of Texas  
(1980 – 1987)

Judge Patricia M. Wald  
U.S. Court of Appeals for District of Columbia Circuit (1979 – 1999)  
Chief Judge of the U.S. Court of Appeals for District of Columbia Circuit  
(1986 – 1991)