

To Members of Congress:

The undersigned retired federal judges write to express our deep concern about the Amendment to the Defense Authorization bill, section 1092 of S.1042, which threatens to strip federal courts of their historic habeas corpus jurisdiction on behalf of prisoners detained at the Guantánamo Naval Base. This Amendment was first introduced by Senator Lindsey Graham. The Amendment raises constitutional, legal, and practical concerns of immense moment. Yet the Senate curtailed consideration to two fleeting floor debates, depriving the House and Senate Judiciary Committees of their proper jurisdiction to consider these issues. If passed without serious Committee consideration, this Amendment would shout profound disrespect by Congress of our Nation's federal courts, the United States Supreme Court in particular.

The Amendment concerns the habeas corpus jurisdiction of the federal courts to hear cases arising from the detentions at Guantánamo Bay. It could affect appeals from the status tribunals that have designated individuals as "enemy combatants" as well as appeals from the military commissions established to try war crimes. The Amendment potentially alters a long established tradition governing where challenges to detention may be brought and the claims that may be raised.

To be sure, Congress has a legitimate role in addressing the complex relationship between the Guantánamo Naval Base and the federal courts. But it should not rush to enact ill-fashioned provisions affecting the habeas corpus jurisdiction of the federal courts without even conducting hearings. We urge you to exclude the Amendment from the Defense Authorization bill. As Senator Arlen Specter, the Chairman of the Senate Judiciary Committee, powerfully argued, these issues should instead be referred to the House and Senate Judiciary Committees for their careful and expert consideration.

We appreciate the goal of avoiding an influx of frivolous claims, but no judge has found any filing of a Guantánamo detainee to be frivolous. In any event, federal judges are well-experienced and well-equipped in the task of sifting out frivolous claims from meritorious ones. Moreover, even cursory examination of the Amendment suggests that it raises more questions than it settles, and will increase litigation rather than limiting it. For example, in plain defiance of our long separation-of-powers tradition, the Amendment casts a cloud over ongoing cases, including *Hamdan v. Rumsfeld*, which the Supreme Court of the United States accepted for review only weeks ago. Congress has not attempted to short-circuit Supreme Court review of a habeas case since 1867, and there is no evidence that it considered the consequences of such a momentous decision here.

The Amendment could also shift the forum in pending habeas cases from the district court, where they are currently under review, to the court of appeals. These cases all seek to challenge the factual and legal basis for detentions at Guantánamo, and were filed after the Supreme Court's decision last year in *Rasul v. Bush*. The Government's forum-shopping in the midst of litigation is highly irregular, and inevitably creates a public

impression that the Government is manipulating the jurisdiction of the federal courts to achieve favored results.

This potential forum-shift raises deep concerns for another reason. In cases of executive detention, district court review of habeas petitions is central to fulfilling the Great Writ's historic purpose: to ensure that individuals are not unlawfully detained. Eliminating that critical district court function would jeopardize the Judiciary's ability to ensure that detention decisions by the federal executive are not grounded on torture or cruel, inhuman or degrading treatment. Indeed, the overwhelming endorsement of Senator John McCain's anti-abuse provision demonstrates that Congress recognizes the importance of this worthy goal. However, the Senate, in its haste, overlooked that habeas corpus is central to vindicating Senator McCain's provision.

For more than two hundred years, the federal courts have been key to maintaining our rule of law under the Constitution. This Amendment could erode long-exercised federal court review of military tribunals and executive detention. We urge you to subject this stark departure from our best legal traditions to the scrutiny and skepticism it deserves. We urge you to remove the Amendment from the Defense Authorization bill so that the House and Senate Judiciary Committees can exercise their proper jurisdiction in the manner that Senator Specter has rightly urged.

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. Hufstедler

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 John S. Martin, Jr.

U. S. District Court, Southern District of New York (1990 – 2003)

Judge Abner J. Mikva

U. S. Court of Appeals for District of Columbia Circuit (1979 – 1994)

Chief Judge of the Court of Appeals for District of Columbia Circuit  
(1986 – 1994)

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

Judge Layn R. Phillips  
U.S. District Court, Western District of Oklahoma (1987 – 1991)

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  
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Judge Abraham D. Sofaer  
U. S. District Court, Southern District of New York (1979 – 1985)  
Legal Advisor, State Department (1985 – 1990)

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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  
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