

111TH CONGRESS
2D SESSION

S. 3707

To provide for habeas corpus review for certain enemy belligerents engaged in hostilities against the United States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 4, 2010

Mr. GRAHAM introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for habeas corpus review for certain enemy belligerents engaged in hostilities against the United States, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Terrorist Detention
5 Review Reform Act”.

6 **SEC. 2. HABEAS CORPUS REVIEW FOR CERTAIN**
7 **UNPRIVILEGED ENEMY BELLIGERENTS.**

8 (a) IN GENERAL.—Chapter 153 of title 28, United
9 States Code, is amended by striking section 2256, as
10 added by section 250 of the Act entitled “An Act to estab-

1 lish a uniform Law on the Subject of Bankruptcies”, ap-
2 proved November 6, 1978 (Public Law 95–598; 92 Stat.
3 2672), and inserting the following:

4 **“§ 2256. Habeas corpus review for certain**
5 **unprivileged enemy belligerents**

6 “(a) DEFINITIONS.—In this section—

7 “(1) the term ‘attorney for the Government’
8 means the attorney representing the United States
9 in a habeas corpus proceeding under this section;

10 “(2) the term ‘coalition partner’, with respect
11 to hostilities engaged in by the United States, means
12 any State or armed force directly engaged along
13 with the United States in such hostilities or pro-
14 viding direct operational support to the United
15 States in connection with such hostilities;

16 “(3) the term ‘covered individual’ means an in-
17 dividual who—

18 “(A) is held by the United States at Naval
19 Station, Guantanamo Bay, Cuba, or the United
20 States seeks to hold as an unprivileged enemy
21 belligerent; and

22 “(B) is subject to the habeas corpus juris-
23 diction of the Federal courts;

24 “(4) the term ‘hostilities’ means any conflict
25 subject to the laws of war;

1 “(5) the term ‘privileged belligerent’ means an
2 individual belonging to one of the eight categories
3 enumerated in Article 4 of the Geneva Convention
4 Relative to the Treatment of Prisoners of War, done
5 at Geneva August 12, 1949 (6 UST 3316); and

6 “(6) the term ‘unprivileged enemy belligerent’
7 means an individual (other than a privileged belligerent)
8 who before, on, or after September 11,
9 2001—

10 “(A) has engaged in hostilities against the
11 United States or its coalition partners;

12 “(B) has purposefully and materially supported
13 hostilities against the United States or
14 its coalition partners; or

15 “(C) was a member of, part of, or operated
16 in a clandestine, covert, or military capacity on
17 behalf of the Taliban, al Qaeda, or associated
18 forces.

19 “(b) STATEMENT OF AUTHORITY.—

20 “(1) IN GENERAL.—Congress reaffirms that the
21 United States is in an armed conflict with the
22 Taliban, al Qaeda, and associated forces and that
23 those entities continue to pose a threat to the United
24 States and its citizens, both domestically and
25 abroad.

1 “(2) AUTHORITY.—Congress reaffirms that the
2 President is authorized to detain unprivileged enemy
3 belligerents in connection with the continuing armed
4 conflict with the Taliban, al Qaeda, and associated
5 forces, regardless of the place of capture, until the
6 termination of hostilities.

7 “(3) RULE OF CONSTRUCTION.—The authority
8 under this section shall not be construed to alter or
9 limit the authority of the President under the Con-
10 stitution of the United States to detain belligerents
11 in the continuing armed conflict with the Taliban, al
12 Qaeda, and associated forces, or in any other armed
13 conflict.

14 “(c) JURISDICTION AND VENUE.—

15 “(1) IN GENERAL.—The United States District
16 Court for the District of Columbia (in this section
17 referred to as the ‘District Court’) shall have exclu-
18 sive jurisdiction of, and shall be the exclusive venue
19 for consideration of, all applications for habeas cor-
20 pus by or on behalf of any covered individual that
21 is pending on or filed on or after the date of enact-
22 ment of the Terrorist Detention Review Reform Act.

23 “(2) SCOPE OF JURISDICTION.—An application
24 for habeas corpus filed under paragraph (1) by or on
25 behalf of a covered individual—

1 “(A) may challenge the legality of the con-
2 tinued detention of the covered individual; and

3 “(B) may not include any other claim re-
4 lating to the detention, transfer, treatment,
5 trial, or conditions of confinement of the cov-
6 ered individual or any other action against the
7 United States or its agents.

8 “(3) CONSOLIDATED MOTIONS PRACTICE.—All
9 applications for a writ of habeas corpus by or on be-
10 half of a covered individual brought after the date
11 of enactment of the Terrorist Detention Review Re-
12 form Act shall be consolidated before the Chief
13 Judge of the District Court or a designee of the
14 Chief Judge for consolidated proceedings and deter-
15 minations on common questions of fact or law, in-
16 cluding questions concerning the procedures to be
17 conducted on the applications.

18 “(4) TRANSFER.—Consistent with section
19 1404(a) of this title, any court of the United States
20 shall transfer a case within the exclusive jurisdiction
21 of the District Court under this section.

22 “(d) NOTICE OF ORGANIZATIONS CONSIDERED AS-
23 SOCIATED FORCES.—

24 “(1) IN GENERAL.—In a proceeding instituted
25 by an application for habeas corpus by or on behalf

1 of a covered individual under subsection (c)(1), the
2 Government may provide notice to the District Court
3 that the Government considers a particular organi-
4 zation or organizations to be among the associated
5 forces of the Taliban or al Qaeda.

6 “(2) DEFERENCE TO THE EXECUTIVE.—In de-
7 termining whether a particular organization is
8 among the associated forces of the Taliban or al
9 Qaeda, the District Court shall give utmost def-
10 erence to the inclusion of the organization in a no-
11 tice under this subsection.

12 “(e) PROCEDURES.—

13 “(1) STATUS OF COVERED INDIVIDUAL.—

14 “(A) IN GENERAL.—In a proceeding insti-
15 tuted by an application for habeas corpus by or
16 on behalf of a covered individual under sub-
17 section (c)(1), the burden shall be on the Gov-
18 ernment to submit a return in the form of a
19 written declaration describing the factual basis
20 upon which the Government is detaining the
21 covered individual.

22 “(B) BURDEN OF PROOF.—The burden
23 shall be on the Government to prove by a pre-
24 ponderance of the evidence that the covered in-
25 dividual is an unprivileged enemy belligerent.

1 “(C) RULE OF CONSTRUCTION.—The
2 standard and burden under this paragraph shall
3 not be construed to impose or imply the exist-
4 ence of a standard or burden on the detention
5 power of the President for any other purpose or
6 in any other proceeding.

7 “(D) EVIDENCE.—The District Court shall
8 consider the totality of the circumstances and
9 the evidence as a whole in determining whether
10 the Government has carried its burden. Any
11 evidence relied upon by the Government in its
12 declaration shall be subject to a rebuttable pre-
13 sumption that such evidence is authentic.

14 “(E) PRESUMPTIONS RELATED TO MEM-
15 BERSHIP.—

16 “(i) PRESUMPTION RELATED TO MILI-
17 TARY TRAINING.—Upon a showing that a
18 covered individual knowingly obtained mili-
19 tary-style training from the Taliban, al
20 Qaeda, or associated forces, there shall be
21 a rebuttable presumption that the covered
22 individual is an unprivileged enemy bellig-
23 erent.

24 “(ii) PRESUMPTION AGAINST WITH-
25 DRAWAL OF MEMBERSHIP.—

1 “(I) IN GENERAL.—Upon a de-
2 termination that the Government has
3 proved by a preponderance of the evi-
4 dence that a covered individual was an
5 unprivileged enemy belligerent at a
6 particular time before capture, there
7 shall be a rebuttable presumption that
8 the covered individual remained an
9 unprivileged enemy belligerent at the
10 time of capture.

11 “(II) REBUTTAL OF PRESUMP-
12 TION RELATED TO MEMBERSHIP.—A
13 covered individual may rebut the pre-
14 sumption under subclause (I) only by
15 proving by clear and convincing evi-
16 dence that the covered individual
17 withdrew from the organization in
18 question prior to capture.

19 “(III) LIMITATION.—A covered
20 individual who was an unprivileged
21 enemy belligerent at the time of cap-
22 ture shall remain subject to detention
23 under this chapter, without regard to
24 any argument or evidence that the
25 covered individual sought to withdraw

1 from the organization in question
2 after capture.

3 “(2) DISCOVERY.—

4 “(A) SCOPE OF DISCOVERY.—Subject to
5 subparagraph (B), a covered individual may re-
6 quest from the Government as the discovery re-
7 lating to a habeas corpus proceeding under this
8 section, and if requested by a covered indi-
9 vidual, the Government shall provide—

10 “(i) any documents or objects directly
11 and specifically referenced in the return
12 submitted by the Government;

13 “(ii) any evidence known to the attor-
14 ney for the Government that tends materi-
15 ally to undermine evidence presented in the
16 return submitted by the Government; and

17 “(iii) all statements, whether oral,
18 written, or recorded, made or adopted by
19 the covered individual that are known to
20 the attorney for the Government and di-
21 rectly related to the information in the re-
22 turn submitted by the Government.

23 “(B) PROTECTION OF NATIONAL SECURITY
24 INFORMATION.—

1 “(i) GENERALLY.—Classified informa-
2 tion shall be protected and is privileged
3 from disclosure in habeas corpus pro-
4 ceedings relating to a covered individual.
5 The rule under this subparagraph applies
6 to all stages of any proceeding relating to
7 an application for habeas corpus filed
8 under subsection (c)(1).

9 “(ii) SUBSTITUTE.—If any informa-
10 tion described in subparagraph (A) is clas-
11 sified, the attorney for the Government
12 shall either—

13 “(I) provide the covered indi-
14 vidual with an adequate substitute, to
15 the extent practicable and consistent
16 with national security; or

17 “(II) make the classified infor-
18 mation available to properly cleared
19 counsel for the covered individual.

20 “(iii) NONDISCLOSURE OF CLASSIFIED
21 INFORMATION.—Under no circumstances
22 shall the Government be required to pro-
23 vide a covered individual, or any other per-
24 son detained as an unprivileged enemy bel-
25 ligerent, with access to classified informa-

1 tion as part of a habeas corpus proceeding
2 under this section.

3 “(iv) SOURCES AND METHODS.—The
4 Government shall not be required to dis-
5 close to anyone outside the Government
6 the classified sources, methods, or activi-
7 ties by which the Government acquired in-
8 formation described in subparagraph (A).
9 The District Court may require the Gov-
10 ernment to present, to the extent prac-
11 ticable and consistent with national secu-
12 rity, an unclassified summary of the
13 sources, methods, or activities by which the
14 Government acquired such information.

15 “(v) ORDER.—Upon motion of the
16 Government, the District Court shall issue
17 an order to protect against the disclosure
18 of any classified information.

19 “(vi) EX PARTE AND IN CAMERA RE-
20 VIEW.—If the Government seeks to protect
21 classified information from disclosure pur-
22 suant to the protections of this subpara-
23 graph, the court may review the Govern-
24 ment’s submission *ex parte* and *in camera*.

1 “(vii) INTERLOCUTORY APPEAL.—The
2 Government may take an interlocutory ap-
3 peal from a decision of the District Court
4 relating to the disclosure of classified in-
5 formation subject to the same expedited
6 procedures that would apply to such an ap-
7 peal pursuant to section 7 of the Classified
8 Information Procedures Act (18 U.S.C.
9 App.).

10 “(3) WITNESS PRODUCTION.—

11 “(A) IN GENERAL.—To the maximum ex-
12 tent possible, habeas corpus proceedings under
13 this section shall be decided on the basis of a
14 written return and a written declaration. The
15 rules concerning the admissibility of evidence in
16 civil or criminal trials shall not apply to the
17 presentation and consideration of information
18 at any evidentiary hearing under this section.
19 The District Court may consider any probative
20 evidence, including hearsay from military, intel-
21 ligence, and law enforcement sources. The Dis-
22 trict Court may consider the reliability of hear-
23 say evidence, as determined by the totality of
24 the circumstances, for the purposes of deter-

1 mining its probative weight, but not its admissi-
2 bility.

3 “(B) BASIS FOR IN-PERSON TESTIMONY.—

4 The District Court may grant a motion for oral
5 testimony relating to an evidentiary hearing
6 pursuant to paragraph (1)(D) only if the Dis-
7 trict Court finds by clear and convincing evi-
8 dence that military and intelligence operations
9 would not be harmed by the production of the
10 witness and oral testimony would be likely to
11 provide a material benefit to the resolution by
12 the District Court of the disputed matter.

13 “(4) VOLUNTARINESS.—

14 “(A) EXCLUSION OF STATEMENTS OB-
15 TAINED BY TORTURE OR CRUEL, INHUMAN, OR
16 DEGRADING TREATMENT.—No statement ob-
17 tained by the use of torture or by cruel, inhu-
18 man, or degrading treatment (as defined by sec-
19 tion 1003 of the Detainee Treatment Act of
20 2005 (42 U.S.C. 2000dd)), whether or not
21 under color of law, shall be admissible in a pro-
22 ceeding to consider an application for habeas
23 corpus by or on behalf of any covered individual
24 under this section, except against a person ac-

1 cused of torture or such treatment as evidence
2 that the statement was made.

3 “(B) IN GENERAL.—A statement of the
4 covered individual applying for habeas corpus
5 may be admitted into evidence in a proceeding
6 considering the application for habeas corpus
7 only upon a finding that—

8 “(i) the statement was made incident
9 to lawful conduct during military oper-
10 ations at the point of capture or during
11 closely related active combat engagement,
12 and the interests of justice would best be
13 served by admission of the statement into
14 evidence; or

15 “(ii) the statement was voluntarily
16 given.

17 “(C) DETERMINATION OF VOLUNTARI-
18 NESS.—In determining whether a statement
19 was voluntarily given, the District Court shall
20 consider the totality of the circumstances, in-
21 cluding, as appropriate, the following:

22 “(i) The details of the taking of the
23 statement, accounting for the cir-
24 cumstances of the conduct of military and
25 intelligence operations during hostilities.

1 “(ii) The characteristics of the appli-
2 cant, such as military training, age, and
3 education level.

4 “(iii) The lapse of time, change of
5 place, or change in identity of the ques-
6 tioners between the statement sought to be
7 admitted and any prior questioning of the
8 applicant.

9 “(D) PRESUMPTION OF VOLUNTARINESS
10 FOR CERTAIN STATEMENTS AGAINST INTER-
11 EST.—There shall be a rebuttable presumption
12 in favor of the voluntariness of statements
13 against interest given before a Combat Status
14 Review Tribunal, Administrative Review Board,
15 or comparable review board or as a result of
16 treatment in compliance with the Army Field
17 Manual.

18 “(5) RELIABILITY.—There shall be a rebuttable
19 presumption in favor of the reliability of statements
20 against interest given before a Combat Status Re-
21 view Tribunal, Administrative Review Board, or
22 comparable review board or as a result of treatment
23 in compliance with the Army Field Manual.

24 “(6) ATTORNEYS.—

1 “(A) IN GENERAL.—For the purposes of
2 habeas corpus proceedings under this section
3 only, a covered individual shall be represented
4 by an attorney if the attorney—

5 “(i) is retained by or on behalf of the
6 covered individual or appointed by the Dis-
7 trict Court;

8 “(ii) has been determined to be eligi-
9 ble for access to classified information that
10 is classified at the level Secret or higher,
11 as required; and

12 “(iii) has signed a written agreement
13 to comply with all applicable regulations or
14 instructions for attorneys in habeas corpus
15 proceedings before the District Court, in-
16 cluding any rules of court for conduct dur-
17 ing the proceedings.

18 “(B) CLASSIFIED INFORMATION.—Any at-
19 torney for a covered individual—

20 “(i) shall protect any classified infor-
21 mation received during the course of rep-
22 resentation of the covered individual in ac-
23 cordance with all applicable law governing
24 the protection of classified information;
25 and

1 “(ii) may not divulge such information
2 to any person not authorized to receive it.

3 “(7) VIDEO HEARINGS.—The District Court
4 shall not require the physical presence of a covered
5 individual detained at Guantanamo Bay, Cuba, or
6 elsewhere, for the purpose of any proceeding under
7 this section, including an evidentiary hearing pursu-
8 ant to paragraph (1)(D), although the District
9 Court in its discretion may permit a detainee to par-
10 ticipate from Guantanamo Bay, Cuba, or elsewhere,
11 in certain proceedings through available techno-
12 logical means, if appropriate and consistent with the
13 procedures for the protection of classified informa-
14 tion and national security under this section.

15 “(f) EXHAUSTION OF MILITARY COMMISSION PROCE-
16 DURES AND STAY PENDING EXECUTIVE TRANSFER EF-
17 FORTS.—

18 “(1) STAY OF APPLICATIONS PENDING MILI-
19 TARY COMMISSIONS.—Any application for habeas
20 corpus that is pending on or after the date of enact-
21 ment of the Terrorist Detention Review Reform Act
22 by or on behalf of a covered individual against whom
23 charges have been sworn under chapter 47A of title
24 10 shall be stayed pending resolution of the pro-
25 ceedings under chapter 47A of title 10.

1 “(2) HABEAS PROCEDURES FOR PERSONS CON-
2 VICTED BY FINAL JUDGMENT OF A MILITARY COM-
3 MISSION.—

4 “(A) IN GENERAL.—Subject to the restric-
5 tions under sections 950g and 950j of title 10,
6 an application for a writ of habeas corpus by or
7 on behalf of a covered individual in custody
8 pursuant to a final judgment of a military com-
9 mission shall not be granted unless the appli-
10 cant has exhausted the remedies available under
11 chapter 47A of title 10.

12 “(B) FAILURE TO EXHAUST.—An applica-
13 tion for a writ of habeas corpus by or on behalf
14 of a covered individual may be denied on the
15 merits, notwithstanding the failure of the appli-
16 cant to exhaust the remedies available under
17 chapter 47A of title 10.

18 “(C) REMEDIES NOT EXHAUSTED.—A cov-
19 ered individual shall not be determined to have
20 exhausted the remedies available under chapter
21 47A of title 10, within the meaning of this sec-
22 tion, if the covered individual has the right
23 under chapter 47A of title 10 to raise, by any
24 available procedure, the question presented in
25 an application for a writ of habeas corpus.

1 “(D) LIMITATIONS.—An application for a
2 writ of habeas corpus by or on behalf of a cov-
3 ered individual in custody pursuant to the judg-
4 ment of a military commission under chapter
5 47A of title 10 shall not be granted with re-
6 spect to any claim that was adjudicated on the
7 merits in military commission proceedings
8 under chapter 47A of title 10 or that could
9 have been raised before the military commis-
10 sion, except where the commission was without
11 jurisdiction to impose such a judgment.

12 “(E) SCOPE OF REVIEW.—Subject to the
13 restrictions under subparagraph (D), in review-
14 ing any other claim on an application for a writ
15 of habeas corpus on behalf of a covered indi-
16 vidual in custody pursuant to the sentence of a
17 military commission under chapter 47A of title
18 10, the District Court shall apply the same def-
19 erence applicable to a court reviewing an appli-
20 cation on behalf of a person in custody pursu-
21 ant to the sentence of a court martial.

22 “(3) STAY PENDING EXECUTIVE TRANSFER EF-
23 FORTS.—Any application for habeas corpus that is
24 pending on or after the date of enactment of the
25 Terrorist Detention Review Reform Act by or on be-

1 half of a covered individual who has been designated
2 for transfer or release to another country, and for
3 whom good faith efforts are being made to facilitate
4 such transfer by the Executive Branch, shall be
5 stayed pending resolution of the transfer efforts.

6 “(g) LIMITS ON SECOND OR SUCCESSIVE APPLICA-
7 TIONS.—

8 “(1) IN GENERAL.—A claim presented in a sec-
9 ond or successive application for habeas corpus
10 under this section that was presented in a prior ap-
11 plication shall be dismissed.

12 “(2) CLAIMS NOT INCLUDED IN PRIOR APPLICA-
13 TION.—A claim presented in a second or successive
14 application for habeas corpus under this section that
15 was not presented in a prior application shall be dis-
16 missed unless—

17 “(A) the factual predicate for the claim
18 could not have been discovered previously
19 through the exercise of due diligence; and

20 “(B) the facts underlying the claim, if
21 proven and viewed in light of the evidence as a
22 whole, would be sufficient to establish by clear
23 and convincing evidence that no reasonable
24 factfinder would have found that the covered in-
25 dividual was lawfully detained.

1 “(3) PROCEDURES FOR SECOND AND SUCCES-
2 SIVE APPLICATIONS.—

3 “(A) IN GENERAL.—The District Court
4 may only consider a second or successive appli-
5 cation for habeas corpus under this section if
6 the court determines that the covered individual
7 makes a prima facie showing that the applica-
8 tion satisfies the requirements under paragraph
9 (2) for consideration of a second or successive
10 application for habeas corpus.

11 “(B) APPEAL.—The Government may take
12 an interlocutory appeal from a decision by the
13 District Court to grant consideration of a sec-
14 ond or successive habeas corpus application
15 under this paragraph to the United States
16 Court of Appeals for the District of Columbia
17 Circuit. The District Court shall stay pro-
18 ceedings pending the decision on an interlocu-
19 tory appeal.

20 “(h) RELEASE.—

21 “(1) COVERED INDIVIDUALS ORDERED RE-
22 LEASED.—

23 “(A) IN GENERAL.—No court shall order
24 the release of a covered individual into the
25 United States, its territories, or possessions.

1 “(B) VISAS AND IMMIGRATION.—The Sec-
2 retary of State shall not issue any visa and the
3 Secretary of Homeland Security shall not admit
4 or provide any type of immigration status to a
5 covered individual described in subparagraph
6 (A) that may permit the covered individual to
7 enter, be admitted, or otherwise be at liberty in
8 the United States.

9 “(2) TRANSFER.—

10 “(A) IN GENERAL.—If the District Court
11 grants an application for a writ of habeas cor-
12 pus and orders the release of a covered indi-
13 vidual, the covered individual shall be released
14 into the custody of the Secretary of Homeland
15 Security for the purpose of transferring the in-
16 dividual to the country of citizenship of the in-
17 dividual or to another country.

18 “(B) TRANSFER.—An individual in the
19 custody of the Secretary of Homeland Security
20 pursuant to subparagraph (A) shall be housed
21 separately from aliens detained as unprivileged
22 enemy belligerents by the Department of De-
23 fense and in a manner consistent with safety
24 and security of United States personnel and
25 citizens. A transfer made pursuant to subpara-

1 graph (A) shall be effected as expeditiously as
2 possible and in a manner that is consistent with
3 the policy set out in section 2242 of the For-
4 eign Relations Authorization Act, Fiscal Years
5 1998 and 1999 (subdivision B of division G of
6 Public Law 105–277; 8 U.S.C. 1231 note), and
7 with the national security interests of the
8 United States.”.

9 (b) CLERICAL AMENDMENT.—The table of sections
10 at the beginning of chapter 153 of such title is amended
11 by adding at the end the following new item:

“2256. Habeas corpus review for certain unprivileged enemy belligerents.”.

12 (c) EFFECTIVE DATE.—The amendments made by
13 this section shall take effect on the date of enactment of
14 this Act, and shall apply to all cases, without exception,
15 pending on or after the date of enactment of this Act.

○