

110TH CONGRESS
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S. 1876

To prohibit extraterritorial detention and rendition, except under limited circumstances, to modify the definition of “unlawful enemy combatant” for purposes of military commissions, to extend statutory habeas corpus to detainees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 25, 2007

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

A BILL

To prohibit extraterritorial detention and rendition, except under limited circumstances, to modify the definition of “unlawful enemy combatant” for purposes of military commissions, to extend statutory habeas corpus to detainees, 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 “National Security with
5 Justice Act of 2007”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act—

1 (1) the term "aggrieved person"—

2 (A) means any individual subject by an of-
3 ficer or agent of the United States either to
4 extraterritorial detention or rendition, except as
5 authorized in this Act; and

(B) does not include any individual who is
an international terrorist;

21 (5) the term "Geneva Conventions" means—

22 (A) the Convention for the Amelioration of
23 the Condition of the Wounded and Sick in
24 Armed Forces in the Field, done at Geneva Au-
25 gust 12, 1949 (6 UST 3114);

(C) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

9 (D) the Convention Relative to the Protec-
10 tion of Civilian Persons in Time of War, done
11 at Geneva August 12, 1949 (6 UST 3516);

12 (6) the term "international terrorist" means—

13 (A) any person, other than a United States
14 person, who engages in international terrorism
15 or activities in preparation therefor; and

16 (B) any person who knowingly aids or
17 abets any person in the conduct of activities de-
18 scribed in subparagraph (A) or knowingly con-
19 spires with any person to engage in activities
20 described in subparagraph (A);

15 SEC. 3. TABLE OF CONTENTS.

16 The table of contents for this Act is as follows:

Sec. 1. Short title.

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Sec. 2. Definitions.

TITLE I—EXTRATERRITORIAL DETENTION AND RENDITION

Sec. 101. Prohibition on extraterritorial detention.

Sec. 102. Prohibition on rendition.

Sec. 103. Application for an order of rendition.

Sec. 104. Issuance of an order of rendition.

Sec. 105. Authorizations and orders for emergency detention.

Sec. 106. Uniform Standards for the Interrogation of Individuals Detained by the Government of the United States.

Sec. 107. Protection of United States Government Personnel Engaged in an Interrogation.

Sec. 108. Monitoring and reporting regarding the treatment, conditions of confinement, and status of legal proceedings of individuals rendered to foreign governments.

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Sec. 111. Additional resources for foreign intelligence surveillance court.

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TITLE II—ENEMY COMBATANTS

Sec. 201. Modification of definition of “unlawful enemy combatant” for purposes of military commissions.

TITLE III—HABEAS CORPUS

Sec. 301. Extending statutory habeas corpus to detainees.

1 **TITLE I—EXTRATERRITORIAL 2 DETENTION AND RENDITION**

3 **SEC. 101. PROHIBITION ON EXTRATERRITORIAL DETEN- 4 TION.**

5 (a) IN GENERAL.—Except as provided in subsection
6 (b), no officer or agent of the United States shall engage
7 in the extraterritorial detention of any individual.

8 (b) EXCEPTIONS.—This section shall not apply to—
9 (1) an individual detained and timely trans-
10 fered to a foreign legal jurisdiction or the legal ju-
11 risdiction of the United States under an order of
12 rendition issued under section 104 or an emergency
13 authorization under section 105;

14 (2) an individual—
15 (A) detained by the Armed Forces of the
16 United States in accordance with United States
17 Army Regulation 190–8 (1997), or any suc-
18 cessor regulation certified by the Secretary of
19 Defense; and

(B) detained by the Armed Forces of the
United States—

3 (i) under circumstances governed by,
4 and in accordance with, the Geneva Con-
5 ventions;

6 (ii) in accordance with United Nations
7 Security Council Resolution 1546 (2004)
8 and United Nations Security Council Reso-
9 lution 1723 (2004);

10 (iii) at the Bagram, Afghanistan de-
11 tention facility; or

12 (iv) at the Guantanamo Bay, Cuba
13 detention center on the date of enactment
14 of this Act;

20 (4) an individual detained by the Armed Forces
21 of the United States subject to an agreement with
22 a foreign government and in accordance with the rel-
23 evant laws of that foreign country when the Armed
24 Forces of the United States are providing assistance
25 to that foreign government; or

5 SEC. 102. PROHIBITION ON RENDITION.

6 (a) IN GENERAL.—Except as provided in subsection
7 (b), no officer or agent of the United States shall render
8 or participate in the rendition of any individual.

9 (b) EXCEPTIONS.—This section shall not apply to—

10 (1) an individual rendered under an order of
11 rendition issued under section 104;

12 (2) an individual detained and transferred by
13 the Armed Forces of the United States under cir-
14 cumstances governed by, and in accordance with, the
15 Geneva Conventions;

16 (3) an individual—

23 (B) who is timely transferred to the United
24 States for trial;

25 (4) an individual—

3 (B) who—

4 (i) escaped from custody prior to the
5 expiration of the sentence imposed; or

6 (ii) violated the terms of parole, pro-
7 bation, or supervised release; and

8 (C) who is promptly returned to the
9 United States—

10 (i) to complete the term of imprison-
11 ment; or

12 (ii) for trial for escaping imprisonment
13 or violating the terms of parole or
14 supervised release; or

15 (5) an individual detained by the United States
16 at the Guantanamo Bay, Cuba detention center on
17 the date of enactment of this Act who is transferred
18 to a foreign legal jurisdiction.

19 SEC. 103. APPLICATION FOR AN ORDER OF RENDITION.

20 (a) IN GENERAL.—A Federal officer or agent may
21 make an application for an order of rendition in writing,
22 upon oath or affirmation, to a judge of the Foreign Intel-
23 ligence Surveillance Court, if the Attorney General of the
24 United States or the Deputy Attorney General of the

1 United States determines that the requirements under this
2 title for such an application have been satisfied.

3 (b) CONTENTS.—Each application under subsection
4 (a) shall include—

5 (1) the identity of the Federal officer or agent
6 making the application;

7 (2) a certification that the Attorney General of
8 the United States or the Deputy Attorney General
9 of the United States has approved the application;

10 (3) the identity of the specific individual to be
11 rendered;

12 (4) a statement of the facts and circumstances
13 relied upon by the applicant to justify the good faith
14 belief of the applicant that—

15 (A) the individual to be rendered is an
16 international terrorist;

17 (B) the country to which the individual is
18 to be rendered will not subject the individual to
19 torture or cruel, inhuman, or degrading treat-
20 ment, within the meaning of the United Na-
21 tions Convention Against Torture and Other
22 Cruel, Inhuman or Degrading Treatment or
23 Punishment, done at New York on December
24 10, 1984;

1 (C) the country to which the individual is
2 to be rendered will timely initiate legal pro-
3 ceedings against that individual that comport
4 with fundamental notions of due process; and

5 (D) rendition of that individual is impor-
6 tant to the national security of the United
7 States; and

8 (5) a full and complete statement regarding—

(A) whether ordinary legal procedures for the transfer of custody of the individual to be rendered have been tried and failed; or

12 (B) the facts and circumstances that jus-
13 tify the good faith belief of the applicant that
14 ordinary legal procedures reasonably appear to
15 be—

16 (i) unlikely to succeed if tried; or
17 (ii) unlikely to adequately protect in-
18 telligence sources or methods.

19 (c) TECHNICAL AND CONFORMING AMENDMENT.—
20 Section 103 of the Foreign Intelligence Surveillance Act
21 of 1978 (50 U.S.C. 1803) is amended by adding at the
22 end the following:

“(g) The court established under subsection (a) may hear an application for and issue, and the court established under subsection (b) may review the issuing or de-

1 nial of, an order of rendition under section 104 of the Na-
2 tional Security with Justice Act of 2007.”.

3 **SEC. 104. ISSUANCE OF AN ORDER OF RENDITION.**

4 (a) IN GENERAL.—Upon filing of an application
5 under section 103, a judge of the Foreign Intelligence Sur-
6 veillance Court shall enter an ex parte order as requested
7 or as modified approving the rendition, if the judge finds
8 that—

9 (1) the Attorney General of the United States
10 or the Deputy Attorney General of the United States
11 has approved the application for rendition;

12 (2) the application has been made by a Federal
13 officer or agent;

14 (3) the application establishes probable cause to
15 believe that the individual to be rendered is an inter-
16 national terrorist;

17 (4) ordinary legal procedures for transfer of
18 custody of the individual have been tried and failed
19 or reasonably appear to be unlikely to succeed for
20 any of the reasons described in section 103(b)(5)(B);

21 (5) the application, and such other information
22 as is available to the judge, including reports of the
23 Department of State and the United Nations Com-
24 mittee Against Torture and information concerning
25 the specific characteristics and circumstances of the

1 individual, establish a substantial likelihood that the
2 country to which the individual is to be rendered will
3 not subject the individual to torture or to cruel, in-
4 human, or degrading treatment, within the meaning
5 of the United Nations Convention Against Torture
6 and Other Cruel, Inhuman or Degrading Treatment
7 or Punishment, done at New York on December 10,
8 1984;

9 (6) the application, and such other information
10 as is available to the judge, establish reason to be-
11 lieve that the country to which the individual is to
12 be rendered will timely initiate legal proceedings
13 against that individual that comport with funda-
14 mental notions of due process; and

15 (7) the application establishes reason to believe
16 that rendition of the individual to be rendered is im-
17 portant to the national security of the United States.

18 (b) APPEAL.—The Government may appeal the de-
19 nial of an application for an order under subsection (a)
20 to the court of review established under section 103(b) of
21 the Foreign Intelligence Surveillance Act of 1978 (50
22 U.S.C. 1803(b)), and further proceedings with respect to
23 that application shall be conducted in a manner consistent
24 with that section 103(b).

1 **SEC. 105. AUTHORIZATIONS AND ORDERS FOR EMERGENCY**2 **DETENTION.**

3 (a) IN GENERAL.—Notwithstanding any other provi-
4 sion of this title, and subject to subsection (b), the Presi-
5 dent or the Director of National Intelligence may author-
6 ize the Armed Forces of the United States or an element
7 of the intelligence community, acting within the scope of
8 existing authority, to detain an international terrorist in
9 a foreign jurisdiction if the President or the Director of
10 National Intelligence reasonably determines that—

11 (1) failure to detain that individual will result
12 in a risk of imminent death or imminent serious
13 bodily injury to any individual or imminent damage
14 to or destruction of any United States facility; and
15 (2) the factual basis for issuance of an order of
16 rendition under paragraphs (3) and (7) of section
17 104(a) exists.

18 (b) NOTICE AND APPLICATION.—The President or
19 the Director of National Intelligence may authorize an in-
20 dividual be detained under subsection (a) if—

21 (1) the President or the Director of National
22 Intelligence, or the designee of the President or the
23 Director of National Intelligence, at the time of such
24 authorization, immediately notifies the Foreign In-
25 telligence Surveillance Court that the President or
26 the Director of National Intelligence has determined

1 to authorize that an individual be detained under
2 subsection (a); and

3 (2) an application in accordance with this title
4 is made to the Foreign Intelligence Surveillance
5 Court as soon as practicable, but not more than 72
6 hours after the President or the Director of National
7 Intelligence authorizes that individual to be de-
8 tained.

9 (c) EMERGENCY RENDITION PROHIBITED.—The
10 President or the Director of National Intelligence may not
11 authorize the rendition to a foreign jurisdiction of, and
12 the Armed Forces of the United States or an element of
13 the intelligence community may not render to a foreign
14 jurisdiction, an individual detained under this section, un-
15 less an order under section 104 authorizing the rendition
16 of that individual has been obtained.

17 (d) NONDELEGATION.—Except as provided in this
18 section, the authority and duties of the President or the
19 Director of National Intelligence under this section may
20 not be delegated.

21 **SEC. 106. UNIFORM STANDARDS FOR THE INTERROGATION**
22 **OF INDIVIDUALS DETAINED BY THE GOVERN-**
23 **MENT OF THE UNITED STATES.**

24 (a) IN GENERAL.—No individual in the custody or
25 under the effective control of an officer or agent of the

1 United States or detained in a facility operated by or on
2 behalf of the Department of Defense, the Central Intel-
3 ligence Agency, or any other agency of the Government
4 of the United States shall be subject to any treatment or
5 technique of interrogation not authorized by and listed in
6 United States Army Field Manual 2-22.3, entitled
7 "Human Intelligence Collector Operations".

8 (b) APPLICABILITY.—Subsection (a) shall not apply
9 with respect to any individual in the custody or under the
10 effective control of the Government of the United States
11 based on—

12 (1) an arrest or conviction for violating Federal
13 criminal law; or
14 (2) an alleged or adjudicated violation of the
15 immigration laws of the United States.

16 (c) CONSTRUCTION.—Nothing in this section may be
17 construed to diminish the rights under the Constitution
18 of the United States of any individual in the custody or
19 within the physical jurisdiction of the Government of the
20 United States.

21 **SEC. 107. PROTECTION OF UNITED STATES GOVERNMENT**
22 **PERSONNEL ENGAGED IN AN INTERROGA-**
23 **TION.**

24 (a) PROTECTION OF UNITED STATES GOVERNMENT
25 PERSONNEL.—In a civil action or criminal prosecution

1 against an officer or agent of the United States relating
2 to an interrogation, it shall be a defense that such officer
3 or agent of the United States complied with section 106.

4 (b) APPLICABILITY.—Subsection (a) shall not apply
5 with respect to any civil action or criminal prosecution re-
6 lating to the interrogation of an individual in the custody
7 or under the effective control of the Government of the
8 United States based on—

9 (1) an arrest or conviction for violating Federal
10 criminal law; or

11 (2) an alleged or adjudicated violation of the
12 immigration laws of the United States.

13 (c) PROVISION OF COUNSEL.—In any civil action or
14 criminal prosecution arising from the alleged use of an au-
15 thorized interrogation practice by an officer or agent of
16 the United States, the Government of the United States
17 may provide or employ counsel, and pay counsel fees, court
18 costs, bail, and other expenses incident to representation.

19 (d) CONSTRUCTION.—Nothing in this section may be
20 construed—

21 (1) to limit or extinguish any defense or protec-
22 tion from suit, civil or criminal liability, or damages
23 otherwise available to a person or entity; or

24 (2) to provide immunity from prosecution for
25 any criminal offense by the proper authorities.

1 **SEC. 108. MONITORING AND REPORTING REGARDING THE**
2 **TREATMENT, CONDITIONS OF CONFINEMENT,**
3 **AND STATUS OF LEGAL PROCEEDINGS OF IN-**
4 **DIVIDUALS RENDERED TO FOREIGN GOVERN-**
5 **MENTS.**

6 (a) **IN GENERAL.**—The Secretary of State shall—

7 (1) regularly monitor the treatment of, the con-
8 ditions of confinement of, and the progress of legal
9 proceedings against an individual rendered to a for-
10 eign legal jurisdiction under section 104; and

11 (2) not later than 6 months after the date of
12 enactment of this Act, and every 6 months there-
13 after, submit to the Select Committee on Intelligence
14 of the Senate and the Permanent Select Committee
15 on Intelligence of the House of Representatives a re-
16 port detailing the treatment of, the conditions of
17 confinement of, and the progress of legal pro-
18 ceedings against any individual rendered to a foreign
19 legal jurisdiction under section 104.

20 (b) **APPLICABILITY.**—The Secretary of State shall in-
21 clude in the reports required under subsection (a)(2) infor-
22 mation relating to the treatment of, the conditions of con-
23 finement of, and the progress of legal proceedings against
24 an individual rendered to a foreign legal jurisdiction under
25 section 104 during the period beginning on the date that
26 individual was rendered to a foreign legal jurisdiction

1 under section 104 and ending on the date that individual
2 is released from custody by that foreign legal jurisdiction.

3 **SEC. 109. REPORT TO CONGRESS.**

4 The Attorney General shall—

5 (1) submit to the Select Committee on Intel-
6 ligence of the Senate and the Permanent Select
7 Committee on Intelligence of the House of Rep-
8 resentatives an annual report that contains—

9 (A) the total number of applications made
10 for an order of rendition under section 104;

11 (B) the total number of such orders grant-
12 ed, modified, or denied;

13 (C) the total number of emergency author-
14 izations issued under section 105; and

15 (D) such other information as requested by
16 the Select Committee on Intelligence of the
17 Senate or the Permanent Select Committee on
18 Intelligence of the House of Representatives;
19 and

20 (2) make available to the Select Committee on
21 Intelligence of the Senate and the Permanent Select
22 Committee on Intelligence of the House of Rep-
23 resentatives a copy of each application made and
24 order issued under this title.

1 **SEC. 110. CIVIL LIABILITY.**

2 (a) IN GENERAL.—An aggrieved person shall have a
3 cause of action against the head of the department or
4 agency that subjected that aggrieved person to
5 extraterritorial detention or a rendition in violation of this
6 title and shall be entitled to recover—

7 (1) actual damages, but not less than liquidated
8 damages of \$1,000 for each day of the violation;
9 (2) punitive damages; and
10 (3) reasonable attorney's fees.

11 (b) JURISDICTION.—The United States District
12 Court for the District of Columbia shall have original ju-
13 risdiction over any claim under this section.

14 **SEC. 111. ADDITIONAL RESOURCES FOR FOREIGN INTEL-**15 **LIGENCE SURVEILLANCE COURT.**

16 (a) AUTHORITY FOR ADDITIONAL JUDGES.—Section
17 103(a) of the Foreign Intelligence Surveillance Act of
18 1978 (50 U.S.C. 1803(a)) is amended—

19 (1) by inserting “(1)” after “(a)”;
20 (2) in paragraph (1), as so designated, by in-
21 serting “at least” before “seven of the United States
22 judicial circuits”;
23 (3) by striking “If any judge so designated”
24 and inserting the following:
25 “(3) If any judge so designated”; and

(4) by inserting after paragraph (1), as so designated, the following:

3 “(2) In addition to the judges designated under para-
4 graph (1), the Chief Justice of the United States may des-
5 ignate as judges of the court established by paragraph (1)
6 such judges appointed under article III of the Constitution
7 of the United States as the Chief Justice determines ap-
8 propriate in order to provide for the prompt and timely
9 consideration of applications under sections 103 of the
10 National Security with Justice Act of 2007 for orders of
11 rendition under section 104 of that Act. Any judge des-
12 ignated under this paragraph shall be designated pub-
13 licly.”.

14 (b) ADDITIONAL LEGAL AND OTHER PERSONNEL
15 FOR FOREIGN INTELLIGENCE SURVEILLANCE COURT.—
16 There is authorized for the Foreign Intelligence Surveil-
17 lance Court such additional staff personnel as may be nec-
18 essary to facilitate the prompt processing and consider-
19 ation by that Court of applications under section 103 for
20 orders of rendition under section 104 approving rendition
21 of an international terrorist. The personnel authorized by
22 this section are in addition to any other personnel author-
23 ized by law.

1 **SEC. 112. RULE OF CONSTRUCTION.**

2 Nothing in this title may be construed as altering or
3 adding to existing authorities for the extraterritorial de-
4 tention or rendition of any individual.

5 **SEC. 113. AUTHORIZATION OF APPROPRIATIONS.**

6 There is authorized to be appropriated such sums as
7 may be necessary to carry out this title and the amend-
8 ments made by this title.

9 **TITLE II—ENEMY COMBATANTS**10 **SEC. 201. MODIFICATION OF DEFINITION OF “UNLAWFUL**
11 **ENEMY COMBATANT” FOR PURPOSES OF**
12 **MILITARY COMMISSIONS.**

13 Section 948a(1)(A) of title 10, United States Code,
14 is amended—

15 (1) in the matter preceding clause (i), by strik-
16 ing “means”; and

17 (2) by striking clauses (i) and (ii) and inserting
18 the following:

19 “(i) means a person who is not a lawful
20 enemy combatant and who—

21 “(I) has engaged in hostilities against
22 the United States; or

23 “(II) has purposefully and materially
24 supported hostilities against the United
25 States (other than hostilities engaged in as
26 a lawful enemy combatant); and

1 “(ii) does not include any person who is—
2 “(I) a citizen of the United States or
3 legally admitted to the United States; and
4 “(II) taken into custody in the United
5 States.”.

6 **TITLE III—HABEAS CORPUS**

7 **SEC. 301. EXTENDING STATUTORY HABEAS CORPUS TO DE-** 8 **TAINEES.**

9 (a) IN GENERAL.—Section 2241 of title 28, United
10 States Code, is amended by striking subsection (e) and
11 inserting the following:

12 “(e)(1) The United States District Court for the Dis-
13 trict of Columbia shall have jurisdiction to hear or con-
14 sider an application for a writ of habeas corpus filed by
15 or on behalf of any person detained by the United States
16 who has been—

17 “(A) determined by the United States to have
18 been properly detained as an enemy combatant; or
19 “(B) detained by the United States for more
20 than 90 days without such a determination.

21 “(2) The United States District Court for the Dis-
22 trict of Columbia shall have jurisdiction to hear or con-
23 sider an application for a writ of habeas corpus filed by
24 or on behalf of any person detained by the United States
25 who has been tried by military commission established

1 under chapter 47A of title 10, United States Code, and
2 has exhausted the appellate procedure under subchapter
3 VI of that chapter.”.

4 (b) TECHNICAL AND CONFORMING AMENDMENTS.—

5 (1) IN GENERAL.—Subchapter VI of chapter
6 47A of title 10, United States Code, is amended—

7 (A) by striking section 950g;

8 (B) in section 950h—

9 (i) in subsection (a), by adding at the
10 end the following: “Appointment of appellate
11 counsel under this subsection shall be
12 for purposes of this chapter only, and not
13 for any proceedings relating to an applica-
14 tion for a writ of habeas corpus relating to
15 any matter tried by a military commis-
16 sion.”; and

17 (ii) in subsection (c), by striking “,
18 the United States Court of Appeals for the
19 District of Columbia, and the Supreme
20 Court.”;

21 (C) in section 950j—

22 (i) by striking “(a) FINALITY.—”;
23 and

24 (ii) by striking subsection (b); and

(D) in the table of sections at the beginning of that subchapter, by striking the item relating to section 950g.

4 (2) DETAINEE TREATMENT ACTS.—

5 (A) IN GENERAL.—Section 1005(e) of the
6 Detainee Treatment Act of 2005 (Public Law
7 109–148; 119 Stat. 2742; 10 U.S.C. 801 note)
8 is amended—

9 (i) in subsection (e)—

10 (I) by striking paragraph (2);
11 and

12 (II) by redesignating paragraphs
13 (3) and (4) as paragraphs (2) and
14 (3), respectively; and

15 (ii) in subsection (h)(2)—

16 (I) by striking “Paragraphs (2)
17 and (3)” and inserting “Paragraph
18 (2)”; and

19 (II) by striking “one of such
20 paragraphs” and inserting “that para-
21 graph”.

22 (B) OTHER AMENDMENTS.—Section 1405
23 of the Detainee Treatment Act of 2005 (Public
24 Law 109–163; 119 Stat. 3475; 10 U.S.C. 801
25 note) is amended—

1 (i) in subsection (e)—
2 (I) by striking paragraph (2);
3 and
4 (II) by redesignating paragraphs
5 (3) and (4) as paragraphs (2) and
6 (3), respectively; and
7 (ii) in subsection (h)(2)—
8 (I) by striking “Paragraphs (2)
9 and (3)” and inserting “Paragraph
0 (2)”; and
1 (II) by striking “one of such
2 paragraphs” and inserting “that para-
3 graph”.

14 (c) RULE OF CONSTRUCTION.—Notwithstanding sub-
15 section (a), no court, justice, or judge shall have jurisdic-
16 tion to consider an action described in subparagraph (a)
17 brought by an alien who is in the custody of the United
18 States, in a zone of active hostility involving the United
19 States Armed Forces, and where the United States is im-
20 plementing United States Army Reg 190-8 (1997) or any
21 successor, as certified by the Secretary of Defense.