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 bellig-
8	erent) 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 sup-
13	ported 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.

"(3) RULE OF CONSTRUCTION.—The authority under this section shall not be construed to alter or limit the authority of the President under the Constitution of the United States to detain belligerents in the continuing armed conflict with the Taliban, al Qaeda, and associated forces, or in any other armed conflict.

"(c) Jurisdiction and Venue.—

"(1) IN GENERAL.—The United States District Court for the District of Columbia (in this section referred to as the 'District Court') shall have exclusive jurisdiction of, and shall be the exclusive venue for consideration of, all applications for habeas corpus by or on behalf of any covered individual that is pending on or filed on or after the date of enactment of the Terrorist Detention Review Reform Act.

"(2) Scope of Jurisdiction.—An application for habeas corpus filed under paragraph (1) by or on 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.—Al
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

by an application for habeas corpus by or on behalf

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

"(2) DEFERENCE TO THE EXECUTIVE.—In determining whether a particular organization is among the associated forces of the Taliban or al Qaeda, the District Court shall give utmost deference to the inclusion of the organization in a notice under this subsection.

"(e) Procedures.—

"(1) Status of covered individual.—

"(A) IN GENERAL.—In a proceeding instituted by an application for habeas corpus by or on behalf of a covered individual under subsection (c)(1), the burden shall be on the Government to submit a return in the form of a written declaration describing the factual basis upon which the Government is detaining the covered individual.

"(B) BURDEN OF PROOF.—The burden shall be on the Government to prove by a preponderance of the evidence that the covered individual 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

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-

ment's submission ex parte and in camera.

"(vii) Interlocutory appeal.—The Government may take an interlocutory appeal from a decision of the District Court relating to the disclosure of classified information subject to the same expedited procedures that would apply to such an ap-peal pursuant to section 7 of the Classified Information Procedures Act (18 U.S.C. App.).

"(3) Witness production.—

"(A) In General.—To the maximum extent possible, habeas corpus proceedings under this section shall be decided on the basis of a written return and a written declaration. The rules concerning the admissibility of evidence in civil or criminal trials shall not apply to the presentation and consideration of information at any evidentiary hearing under this section. The District Court may consider any probative evidence, including hearsay from military, intelligence, and law enforcement sources. The District Court may consider the reliability of hearsay evidence, as determined by the totality of the circumstances, for the purposes of deter-

mining its probative weight, but not its admissibility.

"(B) Basis for in-person testimony.—
The District Court may grant a motion for oral testimony relating to an evidentiary hearing pursuant to paragraph (1)(D) only if the District Court finds by clear and convincing evidence that military and intelligence operations would not be harmed by the production of the witness and oral testimony would be likely to provide a material benefit to the resolution by the District Court of the disputed matter.

"(4) Voluntariness.—

"(A) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR
DEGRADING TREATMENT.—No statement obtained by the use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of
2005 (42 U.S.C. 2000dd)), whether or not
under color of law, shall be admissible in a proceeding to consider an application for habeas
corpus by or on behalf of any covered individual
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

"(ii) may not divulge such information 1 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 detained 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. "(f) Exhaustion of Military Commission Proce-15 DURES AND STAY PENDING EXECUTIVE TRANSFER EF-16 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-

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.—

- "(A) IN GENERAL.—Subject to the restrictions under sections 950g and 950j of title 10, an application for a writ of habeas corpus by or on behalf of a covered individual in custody pursuant to a final judgment of a military commission shall not be granted unless the applicant has exhausted the remedies available under chapter 47A of title 10.
- "(B) Failure to exhaust.—An application for a writ of habeas corpus by or on behalf of a covered individual may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available under chapter 47A of title 10.
- "(C) Remedies not exhausted.—A covered individual shall not be determined to have exhausted the remedies available under chapter 47A of title 10, within the meaning of this section, if the covered individual has the right under chapter 47A of title 10 to raise, by any available procedure, the question presented in an application for a writ of habeas corpus.

"(D) LIMITATIONS.—An application for a writ of habeas corpus by or on behalf of a covered individual in custody pursuant to the judgment of a military commission under chapter 47A of title 10 shall not be granted with respect to any claim that was adjudicated on the merits in military commission proceedings under chapter 47A of title 10 or that could have been raised before the military commission, except where the commission was without jurisdiction to impose such a judgment.

"(E) Scope of Review.—Subject to the restrictions under subparagraph (D), in reviewing any other claim on an application for a writ of habeas corpus on behalf of a covered individual in custody pursuant to the sentence of a military commission under chapter 47A of title 10, the District Court shall apply the same deference applicable to a court reviewing an application on behalf of a person in custody pursuant to the sentence of a court martial.

"(3) STAY PENDING EXECUTIVE TRANSFER EF-FORTS.—Any application for habeas corpus that is pending on or after the date of enactment of the 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.

"(B) VISAS AND IMMIGRATION.—The Secretary of State shall not issue any visa and the Secretary of Homeland Security shall not admit or provide any type of immigration status to a covered individual described in subparagraph (A) that may permit the covered individual to enter, be admitted, or otherwise be at liberty in the United States.

"(2) Transfer.—

"(A) IN GENERAL.—If the District Court grants an application for a writ of habeas corpus and orders the release of a covered individual, the covered individual shall be released into the custody of the Secretary of Homeland Security for the purpose of transferring the individual to the country of citizenship of the individual or to another country.

"(B) Transfer.—An individual in the custody of the Secretary of Homeland Security pursuant to subparagraph (A) shall be housed separately from aliens detained as unprivileged enemy belligerents by the Department of Defense and in a manner consistent with safety and security of United States personnel and 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.