

110TH CONGRESS  
2D SESSION

# S. 3401

To provide for habeas corpus review for terror suspects held at Guantanamo Bay, Cuba, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JULY 31, 2008

Mr. GRAHAM (for himself and Mr. LIEBERMAN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To provide for habeas corpus review for terror suspects held at Guantanamo Bay, Cuba, 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 “Enemy Combatant De-  
5 tention Review Act of 2008”.

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

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 of November 6, 1978

1 (Public Law 95–598; 92 Stat. 2672), and inserting the  
2 following:

3 **“§ 2256. Habeas corpus review for certain enemy**  
4 **combatants**

5 “(a) DEFINITIONS.—In this section—

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

9 “(2) the term ‘covered individual’ means an in-  
10 dividual who—

11 “(A) has been determined by a Combatant  
12 Status Review Tribunal to be an enemy com-  
13 batant (pursuant to the definition employed by  
14 that tribunal) or is awaiting the determination  
15 of such a tribunal;

16 “(B) is in the custody of the United States  
17 at Guantanamo Bay, Cuba on or after the date  
18 of enactment of the Enemy Combatant Deten-  
19 tion Review Act of 2008; and

20 “(C) is not a citizen of the United States  
21 or an alien admitted for permanent residence in  
22 the United States; and

23 “(3) the term ‘enemy combatant’ means a per-  
24 son who has engaged in hostilities or who has pur-  
25 posefully and materially supported hostilities against

1 the United States or its cobelligerents on behalf of  
2 the Taliban, al Qaeda, or associated forces.

3 “(b) STATEMENT OF AUTHORITY.—

4 “(1) IN GENERAL.—Congress reaffirms that the  
5 United States is in an armed conflict with al Qaeda,  
6 the Taliban, and associated forces and that those en-  
7 tities continue to pose a threat to the United States  
8 and its citizens, both domestically and abroad.

9 “(2) AUTHORITY.—Congress reaffirms that the  
10 President is authorized to detain enemy combatants  
11 in connection with the continuing armed conflict  
12 with al Qaeda, the Taliban, and associated forces,  
13 regardless of the place of capture, until the termi-  
14 nation of hostilities.

15 “(3) RULE OF CONSTRUCTION.—The authority  
16 under this section shall not be construed to alter or  
17 limit the authority of the President under the Con-  
18 stitution of the United States to detain combatants  
19 in the continuing armed conflict with al Qaeda, the  
20 Taliban, and associated forces, or in any other  
21 armed conflict.

22 “(c) JURISDICTION AND VENUE.—

23 “(1) IN GENERAL.—The United States District  
24 Court for the District of Columbia (in this section  
25 referred to as the ‘District Court’) shall have exclu-

1 sive jurisdiction of, and shall be the exclusive venue  
2 for consideration of, all applications for habeas cor-  
3 pus by or on behalf of any covered individual that  
4 is pending on or filed on or after the date of enact-  
5 ment of the Enemy Combatant Detention Review  
6 Act of 2008.

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

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

12 “(B) may not include any other claim re-  
13 lating to the detention, transfer, treatment,  
14 trial, or conditions of confinement of the cov-  
15 ered individual or any other action against the  
16 United States or its agents.

17 “(3) CONSOLIDATED MOTIONS PRACTICE.—All  
18 applications for a writ of habeas corpus by or on be-  
19 half of a covered individual that are pending on or  
20 after the date of enactment of the Enemy Combat-  
21 ant Detention Review Act of 2008 shall be consoli-  
22 dated before the Chief Judge of the District Court  
23 or a designee of the Chief Judge for consolidated  
24 proceedings and determinations on common ques-

1 tions of fact or law, including questions concerning  
2 the procedures to be conducted on the applications.

3 “(4) TRANSFER.—Consistent with section  
4 1403(a) of this title, any court of the United States  
5 shall transfer a case within the exclusive jurisdiction  
6 of the District Court.

7 “(d) PROCEDURES.—

8 “(1) STATUS OF COVERED INDIVIDUAL.—

9 “(A) IN GENERAL.—In a proceeding insti-  
10 tuted by an application for habeas corpus by or  
11 on behalf of a covered individual under sub-  
12 section (c)(1), the burden shall be on the Gov-  
13 ernment to submit a return in the form of a  
14 written declaration describing the factual basis  
15 upon which the Government is detaining the  
16 covered individual. Any evidence relied upon by  
17 the Government in its declaration shall be sub-  
18 ject to a rebuttable presumption with respect to  
19 the competency and authenticity of such evi-  
20 dence.

21 “(B) PRESUMPTION.—Upon a determina-  
22 tion that the Government’s return shows cred-  
23 ible evidence that the covered individual is an  
24 enemy combatant, there shall be a rebuttable  
25 presumption that the covered individual is an

1 enemy combatant. The covered individual shall  
2 have the burden of rebutting the presumption  
3 that the covered individual is an enemy combat-  
4 ant by a showing of more persuasive evidence.  
5 The covered individual shall present such evi-  
6 dence in the form of a written declaration.

7 “(C) REBUTTAL OF PRESUMPTION.—If a  
8 covered individual presents evidence sufficient  
9 to rebut the presumption under subparagraph  
10 (B), the District Court may hold an evidentiary  
11 hearing on any disputed matter. In a hearing  
12 under this subparagraph, the court shall hear  
13 evidence and make findings of fact by a prepon-  
14 derance of the evidence.

15 “(2) DISCOVERY.—

16 “(A) SCOPE OF DISCOVERY.—Subject to  
17 subparagraph (B), a covered individual may re-  
18 quest from the Government as the discovery re-  
19 lating to a habeas corpus proceeding under this  
20 section, and if requested by a covered indi-  
21 vidual, the Government shall provide—

22 “(i) any documents or objects directly  
23 and specifically referenced in the return  
24 submitted by the Government;

1           “(ii) any evidence known to the attor-  
2           ney for the Government that tends materi-  
3           ally to undermine evidence presented in the  
4           return submitted by the Government;

5           “(iii) all statements, whether oral,  
6           written, or recorded, made or adopted by  
7           the covered individual that are known to  
8           the attorney for the Government and di-  
9           rectly related to the information in the re-  
10          turn submitted by the Government.

11          “(B) PROTECTION OF NATIONAL SECURITY  
12          INFORMATION.—

13           “(i) GENERALLY.—Classified informa-  
14           tion shall be protected and is privileged  
15           from disclosure in habeas corpus pro-  
16           ceedings relating to a covered individual.  
17           The rule under this subparagraph applies  
18           to all stages of any proceeding relating to  
19           an application for habeas corpus filed  
20           under subsection (c)(1).

21           “(ii) SUBSTITUTE.—If any informa-  
22           tion described in subparagraph (A) is clas-  
23           sified, the attorney for the Government  
24           shall either—

1           “(I) provide the covered indi-  
2           vidual with an adequate substitute, to  
3           the extent practicable and consistent  
4           with national security; or

5           “(II) make the classified infor-  
6           mation available to properly cleared  
7           counsel for the covered individual.

8           “(iii) NONDISCLOSURE OF CLASSIFIED  
9           INFORMATION.—Under no circumstances  
10          shall the Government be required to pro-  
11          vide a covered individual, or any other per-  
12          son detained as an enemy combatant, with  
13          access to classified information as part of  
14          a habeas corpus proceeding under this sec-  
15          tion.

16          “(iv) SOURCES AND METHODS.—The  
17          Government shall not be required to dis-  
18          close to anyone outside the Government  
19          the classified sources, methods, or activi-  
20          ties by which the Government acquired in-  
21          formation described in subparagraph (A).  
22          The District Court may require the Gov-  
23          ernment to present, to the extent prac-  
24          ticable and consistent with national secu-  
25          rity, an unclassified summary of the

1 sources, methods, or activities by which the  
2 Government acquired such information.

3 “(v) ORDER.—Upon motion of the  
4 Government, the District Court shall issue  
5 an order to protect against the disclosure  
6 of any classified information.

7 “(vi) EX PARTE AND IN CAMERA RE-  
8 VIEW.—If the Government seeks to protect  
9 classified information from disclosure pur-  
10 suant to the protections of this subpara-  
11 graph, the court may review the Govern-  
12 ment’s submission ex parte and in camera.

13 “(vii) INTERLOCUTORY APPEAL.—The  
14 Government may take an interlocutory ap-  
15 peal from a decision of the District Court  
16 relating to the disclosure of classified in-  
17 formation subject to the same expedited  
18 procedures that would apply to such an ap-  
19 peal pursuant to section 7 of the Classified  
20 Information Procedures Act (18 U.S.C.  
21 App.).

22 “(3) WITNESS PRODUCTION.—

23 “(A) IN GENERAL.—To the maximum ex-  
24 tent possible, habeas corpus proceedings shall  
25 be decided on the basis of a written return and

1 a written declaration. The rules concerning the  
2 admissibility of evidence in civil or criminal  
3 trials shall not apply to the presentation and  
4 consideration of information at any evidentiary  
5 hearing under this section. The District Court  
6 may consider any reliable and probative evi-  
7 dence, including hearsay from military, intel-  
8 ligence, and law enforcement sources.

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

10 The District Court may grant a motion for oral  
11 testimony relating to an evidentiary hearing  
12 pursuant to paragraph (1)(C) only if the court  
13 finds by clear and convincing evidence that mili-  
14 tary and intelligence operations would not be  
15 harmed by the production of the witness and  
16 oral testimony would be likely to provide a ma-  
17 terial benefit to the resolution by the court of  
18 the disputed matter.

19 “(4) ATTORNEYS.—

20 “(A) IN GENERAL.—The covered individual  
21 shall be represented by an attorney if the attor-  
22 ney—

23 “(i) is retained by the covered indi-  
24 vidual or appointed by the District Court;

1           “(ii) has been determined to be eligi-  
2           ble for access to classified information that  
3           is classified at the level Secret or higher,  
4           as required; and

5           “(iii) has signed a written agreement  
6           to comply with all applicable regulations or  
7           instructions for attorneys in habeas corpus  
8           proceedings before the District Court, in-  
9           cluding any rules of court for conduct dur-  
10          ing the proceedings.

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

13           “(i) shall protect any classified infor-  
14           mation received during the course of rep-  
15           resentation of the covered individual in ac-  
16           cordance with all applicable law governing  
17           the protection of classified information;  
18           and

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

21          “(5) VIDEO HEARINGS.—The District Court  
22          shall not require the presence of a covered individual  
23          detained at Guantanamo Bay, Cuba, or elsewhere,  
24          for the purpose of any proceeding under this section,  
25          including an evidentiary hearing pursuant to para-

1 graph (1)(C), although the District Court in its dis-  
2 cretion may permit a detainee to participate from  
3 Guantanamo Bay, Cuba, in certain proceedings  
4 through available technological means, if appropriate  
5 and consistent with the procedures for the protection  
6 of classified information and national security under  
7 this section.

8 “(e) EXHAUSTION OF MILITARY COMMISSION PRO-  
9 CEDURES.—

10 “(1) STAY OF APPLICATIONS PENDING OTHER  
11 PROCEEDINGS.—Any application for habeas corpus  
12 that is pending on or after the date of enactment of  
13 the Enemy Combatant Detention Review Act of  
14 2008 by or on behalf of a covered individual against  
15 whom charges have been sworn under chapter 47A  
16 of title 10 shall be stayed pending resolution of the  
17 proceedings under chapter 47A of title 10.

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

21 “(A) IN GENERAL.—Subject to the restric-  
22 tions under sections 950g and 950j of title 10,  
23 an application for a writ of habeas corpus on  
24 behalf of a covered individual in custody pursu-  
25 ant to a final judgment of a military commis-

1           sion shall not be granted unless the applicant  
2           has exhausted the remedies available under  
3           chapter 47A of title 10.

4           “(B) FAILURE TO EXHAUST.—An applica-  
5           tion for a writ of habeas corpus by a covered  
6           individual may be denied on the merits, not-  
7           withstanding the failure of the applicant to ex-  
8           haust the remedies available under chapter 47A  
9           of title 10.

10          “(C) REMEDIES NOT EXHAUSTED.—A cov-  
11          ered individual shall not be determined to have  
12          exhausted the remedies available under chapter  
13          47A of title 10, within the meaning of this sec-  
14          tion, if the covered individual has the right  
15          under chapter 47A of title 10 to raise, by any  
16          available procedure, the question presented in  
17          an application for a writ of habeas corpus.

18          “(D) LIMITATIONS.—An application for a  
19          writ of habeas corpus on behalf of a covered in-  
20          dividual in custody pursuant to the judgment of  
21          a military commission shall not be granted with  
22          respect to any claim that was adjudicated on  
23          the merits in military commission proceedings  
24          under chapter 47A of title 10 or that could  
25          have been raised before the military commis-

1           sion, except where the commission was without  
2           jurisdiction to impose such a judgement.

3           “(E) SCOPE OF REVIEW.—Subject to the  
4           restrictions under subparagraph (D), in review-  
5           ing any other claim on an application for a writ  
6           of habeas corpus on behalf of a covered indi-  
7           vidual in custody pursuant to the sentence of a  
8           military commission, the District Court shall  
9           apply the same deference applicable to a court  
10          reviewing an application on behalf of a person  
11          in custody pursuant to the sentence of a court  
12          martial.

13          “(f) LIMITS ON SECOND OR SUCCESSIVE APPLICA-  
14          TIONS.—

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

19               “(2) CLAIMS NOT INCLUDED IN PRIOR APPLICA-  
20               TION.—A claim presented in a second or successive  
21               application for habeas corpus under this section that  
22               was not presented in a prior application shall be dis-  
23               missed unless the—

1           “(A) factual predicate for the claim could  
2 not have been discovered previously through the  
3 exercise of due diligence; and

4           “(B) facts underlying the claim, if proven  
5 and viewed in light of the evidence as a whole,  
6 would be sufficient to establish by clear and  
7 convincing evidence that no reasonable  
8 factfinder would have found that the covered in-  
9 dividual was lawfully detained.

10           “(3) PROCEDURES FOR SECOND AND SUCCE-  
11 SIVE APPLICATIONS.—

12           “(A) IN GENERAL.—The District Court  
13 may only consider a second or successive appli-  
14 cation for habeas corpus under this section if  
15 the court determines that the covered individual  
16 makes a prima facie showing that the applica-  
17 tion satisfies the requirements under paragraph  
18 (2) for consideration of a second or successive  
19 application for habeas corpus.

20           “(B) APPEAL.—The Government may take  
21 an interlocutory appeal from a decision by the  
22 District Court to grant consideration of a sec-  
23 ond or successive habeas corpus application  
24 under this paragraph to the United States  
25 Court of Appeals for the District of Columbia

1           Circuit. The District Court shall stay pro-  
2           ceedings pending the decision on an interlocu-  
3           tory appeal.

4           “(g) RELEASE.—

5           “(1) COVERED INDIVIDUALS ORDERED RE-  
6           LEASED.—

7           “(A) IN GENERAL.—No court shall order  
8           the release of a covered individual into the  
9           United States.

10          “(B) VISAS AND IMMIGRATION.—The Sec-  
11          retary of State shall not issue any visa and the  
12          Secretary of Homeland Security shall not admit  
13          or provide any type of status to a covered indi-  
14          vidual described in subparagraph (A) that may  
15          permit the covered individual to enter or be ad-  
16          mitted to the United States.

17          “(C) WAIVER.—The President, in the sole  
18          discretion of the President, may waive the re-  
19          strictions under subparagraph (A) or (B), in  
20          whole or in part, upon a finding that the waiver  
21          of such restriction would be consistent with the  
22          national security of the United States.

23          “(2) TRANSFER.—

24          “(A) IN GENERAL.—If the District Court  
25          grants an application for a writ of habeas cor-

1           pus and orders the release of a covered indi-  
2           vidual, the covered individual shall be released  
3           into the custody of the Secretary of Homeland  
4           Security for the purpose of transferring the in-  
5           dividual to the country of citizenship of the in-  
6           dividual or to another country.

7           “(B) TRANSFER.—An individual in the  
8           custody of the Secretary of Homeland Security  
9           pursuant to subparagraph (A) shall be housed  
10          separately from aliens detained as enemy com-  
11          batants by the Department of Defense and in  
12          a manner consistent with safety and security of  
13          United States personnel. A transfer made pur-  
14          suant to subparagraph (A) shall be effected as  
15          expeditiously as possible and in a manner that  
16          is consistent with the policy set out in section  
17          2242 of the 1998 Foreign Relations Authoriza-  
18          tion Act, Fiscal Years 1998 and 1999 (subdivi-  
19          sion B of division G of Public Law 105–277; 8  
20          U.S.C. 1231 note), and with the national secu-  
21          rity interests of the United States.”.

22          (b) TECHNICAL AND CONFORMING AMENDMENTS.—

23               (1) IN GENERAL.—Section 2241 of title 28,  
24          United States Code, is amended by striking sub-  
25          section (e).

1           (2) TABLE OF SECTIONS.—The table of sections  
2           for chapter 153 of title 28, United States Code, is  
3           amended by striking the item relating to section  
4           2256, as added by section 250 of the Act of Novem-  
5           ber 6, 1978 (Public Law 95–598; 92 Stat. 2672),  
6           and inserting the following:

“2256. Habeas corpus review for certain enemy combatants.”.

7           (3) DETAINEE TREATMENT ACT OF 2005.—Sec-  
8           tion 1005(e) of the Detainee Treatment Act of 2005  
9           (10 U.S.C. 801 note) is amended by striking para-  
10          graph (2).

11 **SEC. 3. EFFECTIVE DATE.**

12          This Act shall take effect on the date of enactment  
13 of this Act, and shall apply to all cases, without exception,  
14 pending on or after the date of enactment of this Act.

○