

[DISCUSSION DRAFT]110TH CONGRESS
1ST SESSION**H. R.** _____

To provide for the effective prosecution of terrorists and guarantee due process rights.

IN THE HOUSE OF REPRESENTATIVES

Mr. NADLER introduced the following bill; which was referred to the Committee on _____

A BILL

To provide for the effective prosecution of terrorists and guarantee due process rights.

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 “Restoring the Con-
5 stitution Act of 2007”.

6 **SEC. 2. DEFINITION OF UNLAWFUL ENEMY COMBATANT.**

7 Paragraph (1) of section 948a of title 10, United
8 States Code, is amended to read as follows:

1 “(1) UNLAWFUL ENEMY COMBATANT.—The
2 term ‘unlawful enemy combatant’—

3 “(A) means an individual who is not a law-
4 ful enemy combatant and—

5 “(i) who directly participates in hos-
6 tilities in a zone of active combat against
7 the United States; or

8 “(ii) who—

9 “(I) planned, authorized, com-
10 mitted, or aided with specific intent
11 the terrorist acts on the United States
12 of September 11, 2001; or

13 “(II) harbored with specific in-
14 tent any individual described in clause
15 (i); and

16 “(B) may be used solely for the purpose of
17 designating an individual as triable by military
18 commission under this chapter.”.

19 **SEC. 3. CONSTRUCTION IN RELATION TO GENEVA CONVEN-**
20 **TIONS.**

21 Subsection (g) of section 948b of title 10, United
22 States Code, is amended to read as follows:

23 “(g) CONSTRUCTION IN RELATION TO GENEVA CON-
24 VENTIONS.—To the extent that any provision of this chap-
25 ter is determined to be inconsistent with the obligations

1 of the United States under the Geneva Conventions, the
2 Geneva Conventions shall prevail, and such provision shall
3 be deemed to have no further force or effect.”.

4 **SEC. 4. DETERMINATION OF UNLAWFUL ENEMY COMBAT-**
5 **ANT STATUS BY COMBATANT STATUS REVIEW**
6 **TRIBUNAL NOT DISPOSITIVE FOR PURPOSES**
7 **OF JURISDICTION OF MILITARY COMMIS-**
8 **SIONS.**

9 Section 948d of title 10, United States Code, is
10 amended—

11 (1) by striking subsection (c); and

12 (2) by redesignating subsection (d) as sub-
13 section (c).

14 **SEC. 5. TRIAL COUNSEL AND DEFENSE COUNSEL.**

15 (a) **REPEAL OF AUTHORITY FOR CIVILIAN TRIAL**
16 **COUNSEL.**—Subsection (b) of section 948k of title 10,
17 United States Code, is amended to read as follows:

18 “(b) **MILITARY TRIAL COUNSEL.**—Subject to sub-
19 section (e), trial counsel detailed for a military commission
20 under this chapter must be a judge advocate (as that term
21 is defined in section 801 of this title (article 1 of the Uni-
22 form Code of Military Justice)) who is—

23 “(1) a graduate of an accredited law school or
24 is a member of the bar of a Federal court or of the
25 highest court of a State; and

1 “(2) certified as competent to perform duties as
2 trial counsel before general courts-martial by the
3 Judge Advocate General of the armed force of which
4 he is a member.”.

5 (b) AUTHORITY FOR CIVILIAN DEFENSE COUN-
6 SEL.—Subsection (c) of such section is amended to read
7 as follows:

8 “(c) DEFENSE COUNSEL.—Subject to subsection (e),
9 trial counsel detailed for a military commission under this
10 chapter must be—

11 “(1) a judge advocate (as so defined) who is—

12 “(A) a graduate of an accredited law
13 school or is a member of the bar of a Federal
14 court or of the highest court of a State; and

15 “(B) certified as competent to perform du-
16 ties as trial counsel before general courts-mar-
17 tial by the Judge Advocate General of the
18 armed force of which he is a member; or

19 “(2) a civilian who is—

20 “(A) a member of the bar of a Federal
21 court or of the highest court of a State; and

22 “(B) otherwise qualified to practice before
23 the military commission pursuant to regulations
24 prescribed by the Secretary of Defense.”.

1 (c) CONFORMING AMENDMENTS.—Such section is
2 further amended—

3 (1) in subsection (d)(1), by striking “subsection
4 (b)(1)” and inserting “subsection (b)”;

5 (2) in subsection (a)—

6 (A) in paragraph (1), by striking “Trial
7 counsel and military defense counsel” and in-
8 serting “Military trial counsel and defense
9 counsel”;

10 (B) in paragraph (3), by striking “Military
11 defense” and inserting “Defense”; and

12 (C) in paragraph (4), by striking “trial
13 counsel and military defense counsel” and in-
14 serting “military trial counsel and defense
15 counsel”; and

16 (3) in subsection (e), by striking “trial counsel
17 or military defense counsel” and inserting “military
18 trial counsel or military defense counsel”.

19 **SEC. 6. EXCLUSION FROM TRIAL BY MILITARY COMMIS-**
20 **SION OF STATEMENTS OBTAINED BY COER-**
21 **SION.**

22 Section 948r of title 10, United States Code, is
23 amended by striking subsections (c) and (d) and inserting
24 the following new subsection (c):

1 “(c) EXCLUSION OF STATEMENTS OBTAINED BY CO-
2 ERCION.— A statement obtained by use of coercion shall
3 not be admissible in a military commission under this
4 chapter, except against a person accused of coercion as
5 evidence that the statement was made.”.

6 **SEC. 7. MODIFICATION OF AUTHORITIES ON RULES FOR**
7 **MILITARY COMMISSIONS.**

8 (a) RULES GENERALLY.—Subsection (a) of section
9 949a of title 10, United States Code, is amended to read
10 as follows:

11 “(a) PROCEDURES AND RULES OF EVIDENCE.— (1)
12 Pretrial, trial, and post-trial procedures, including ele-
13 ments and modes of proof, for cases triable by military
14 commission under this chapter may be prescribed by the
15 Secretary of Defense. Such procedures may not be con-
16 trary to or inconsistent with this chapter. Except as other-
17 wise provided in this chapter or chapter 47 of this title,
18 the procedures and rules of evidence applicable in trials
19 by general courts-martial shall apply in trials by military
20 commission under this chapter.

21 “(2) The Secretary of Defense may, in consultation
22 with the Attorney General, make such exceptions in the
23 applicability in trials by military commission under this
24 chapter from the procedures and rules of evidence other-
25 wise applicable in general courts-martial as may be re-

1 quired by the unique circumstances of the conduct of mili-
2 tary or intelligence operations during hostilities. Such ex-
3 ceptions may not be contrary to or inconsistent with this
4 chapter.”.

5 (b) EXCLUSION OF EVIDENCE SEIZED INSIDE THE
6 UNITED STATES WITHOUT WARRANT.—Subsection
7 (b)(2)(B) of such section is amended by inserting “seized
8 outside the United States” after “Evidence”.

9 (c) DISCRETION OF MILITARY JUDGE TO EXCLUDE
10 HEARSAY EVIDENCE DETERMINED TO BE UNRELIABLE
11 OR LACKING IN PROBATIVE VALUE.—Subsection
12 (b)(2)(E)(ii) of such section is amended by striking “if
13 the party opposing the admission of the evidence dem-
14 onstrates that the evidence is unreliable or lacking in pro-
15 bative value” and inserting “if the military judge deter-
16 mines, upon motion by counsel, that the evidence is unreli-
17 able or lacking in probative value”.

18 **SEC. 8. SELF-REPRESENTATION OF ACCUSED BEFORE MILI-**
19 **TARY COMMISSIONS.**

20 Section 949c of title 10, United States Code, is
21 amended by adding at the end the following new sub-
22 section:

23 “(c) SELF-REPRESENTATION BY ACCUSED.—(1)
24 Notwithstanding any provision of subsection (b), the ac-

1 cused may represent himself in his defense before a mili-
2 tary commission under this chapter.

3 “(2) The accused’s representation of himself in his
4 defense shall be governed by such rules as the Secretary
5 of Defense shall prescribe. Such rules, and any rights,
6 privileges, or limitations under such rules, shall be con-
7 sistent with rules applicable to self-representation by an
8 accused in a criminal trial under the laws of the United
9 States and international law.

10 “(3) If the accused represents himself under this sub-
11 section, the accused—

12 “(A) shall be assisted in his defense by military
13 defense counsel detailed in accordance with sub-
14 section (b)(2); or

15 “(B) may be assisted in his defense by civilian
16 defense counsel meeting the requirements of sub-
17 section (b)(3), together with military defense counsel
18 so detailed.

19 “(4) Any civilian counsel assisting in the de-
20 fense of an accused under this subsection shall com-
21 ply with the provisions of subsection (b)(4).

22 “(5) Subsection (b)(7) shall not apply with re-
23 spect to any defense counsel assisting in the defense
24 of an accused under this subsection, except to the

1 extent the accused is unable to carry out his de-
2 fense.”.

3 **SEC. 9. ENHANCEMENT OF AUTHORITIES ON DISCOVERY**
4 **OF WITNESSES AND OTHER EVIDENCE.**

5 (a) DISCOVERY OF SOURCES, METHODS, AND AC-
6 TIVITIES RELATING TO CERTAIN GOVERNMENT AC-
7 TIONS.—Subsection (c) of section 949j of title 10, United
8 States Code, is amended—

9 (1) in paragraph (2), by striking “The military
10 judge” and inserting “Except as provided in para-
11 graph (3), the military judge”; and

12 (2) by adding at the end the following new
13 paragraph:

14 “(3) Notwithstanding any other provision of this
15 chapter, the military judge may, upon motion of defense
16 counsel and at the discretion of the military judge, order
17 trial counsel to disclose to defense counsel the sources,
18 methods, or activities (including classified sources, meth-
19 ods, or activities) by which the United States obtained any
20 out of court statement the United States intends to intro-
21 duce at trial if the military judge determines, after ex
22 parte review, in camera review, or both, that evidence of
23 such sources, methods, or activities, as the case may be,
24 might reasonably tend to affect the weight given to the
25 out of court statement by the members of the military

1 commission. The military judge shall revoke such an order
2 in the event the United States elects not introduce the
3 out of court statement concerned at trial.”.

4 (b) DISCRETION OF MILITARY JUDGE TO TAKE CER-
5 TAIN ACTIONS IF SUBSTITUTE FOR CLASSIFIED EXCUL-
6 PATORY EVIDENCE IS INSUFFICIENT TO PROTECT RIGHT
7 OF DEFENDANT TO FAIR TRIAL.—Subsection (d)(1) of
8 such section is amended by adding at the end the fol-
9 lowing: “If the military judge determines that the sub-
10 stitute is not sufficient to protect the right of the defend-
11 ant to a fair trial, the military judge may—

12 “(A) dismiss the charges in their entirety;

13 “(B) dismiss the charges or specifications or
14 both to which the information relates; or

15 “(C) take such other actions as may be re-
16 quired in the interest of justice.”.

17 **SEC. 10. REVIEW OF MILITARY COMMISSION DECISIONS BY**
18 **UNITED STATES COURT OF APPEALS FOR**
19 **THE ARMED FORCES RATHER THAN COURT**
20 **OF MILITARY COMMISSION REVIEW.**

21 (a) REVIEW.—

22 (1) IN GENERAL.—Section 950f of title 10,
23 United States Code, is amended to read as follows:

1 **“SEC. 950f. REVIEW BY COURT OF APPEALS FOR THE**
2 **ARMED FORCES.**

3 “The United States Court of Appeals for the Armed
4 Forces, in accordance with procedures prescribed in regu-
5 lations by the Secretary of Defense, shall review the record
6 in each case that is referred to the Court by the convening
7 authority under section 950c of this title with respect to
8 any matter of law, including whether any rational fact
9 finder could have concluded that there was sufficient evi-
10 dence to establish guilt, raised by the accused.”.

11 (2) CLERICAL AMENDMENT.—The table of sec-
12 tions at the beginning of subchapter VI of chapter
13 47A of such title is amended by striking the item re-
14 lating to section 950f and inserting the following
15 new item:

“950f. Review by Court of Appeals for the Armed Forces.”.

16 (b) CONFORMING AMENDMENTS.—

17 (1) IN GENERAL.—Chapter 47A of title 10,
18 United States Code, is further amended as follows:

19 (A) In section 950c(a), by striking “the
20 Court of Military Commission Review” and in-
21 serting “the United States Court of Appeals for
22 the Armed Forces”.

23 (B) In section 950d, by striking “the
24 Court of Military Commission Review” each

1 place it appears and inserting “the United
2 States Court of Appeals for the Armed Forces”.

3 (C) In section 950g(a)(2), by striking “the
4 Court of Military Commission Review” each
5 place it appears and inserting “the United
6 States Court of Appeals for the Armed Forces”.

7 (D) In section 950h, by striking “the
8 Court of Military Commission Review” each
9 place it appears and inserting “the United
10 States Court of Appeals for the Armed Forces”.

11 (2) UNIFORM CODE OF MILITARY JUSTICE.—
12 Section 867a(a) of title 10, United States Code (ar-
13 ticle 67a(a) of the Uniform Code of Military Jus-
14 tice), is amended by striking “Decisions” and insert-
15 ing “Except as provided in sections 950d and 950g
16 of this title, decisions”.

17 **SEC. 11. SCOPE OF REVIEW OF DETENTION-RELATED DECI-**
18 **SIONS.**

19 (a) SCOPE OF REVIEW OF UNITED STATES COURT
20 OF APPEALS FOR THE DISTRICT OF COLUMBIA CIR-
21 CUIT.— Section 950g of title 10, United States Code, is
22 amended—

23 (1) by striking subsection (c); and

24 (2) by redesignating subsection (d) as sub-
25 section (c).

1 (b) SCOPE OF AUTHORITY FOR REVIEW OF MILITARY
2 COMMISSION PROCEDURES AND ACTIONS.—Subsection
3 (b) of section 950j of such title is amended to read as
4 follows:

5 “(b) LIMITED REVIEW OF MILITARY COMMISSION
6 PROCEDURES AND ACTIONS.—Except as otherwise pro-
7 vided in this chapter, section 2241 of title 28, and any
8 other habeas corpus provision, no court, justice, or judge
9 shall have jurisdiction to hear or consider any claim or
10 cause of action whatsoever, including any action pending
11 on or filed after October 17, 2006, relating to the prosecu-
12 tion, trial, or judgment of a military commission under
13 this chapter, including challenges to the lawfulness of pro-
14 cedures of military commissions under this chapter.”.

15 (c) Termination of Superseded Authority for Review
16 of CSRTS- Section 1005(e) of the Detainee Treatment
17 Act of 2005 (10 U.S.C. 801 note) is amended by striking
18 paragraphs (2) through (4).

19 **SEC. 12. REPEAL OF PROHIBITION ON TREATY OBLIGA-**
20 **TIONS AS ESTABLISHING GROUNDS FOR CER-**
21 **TAIN CLAIMS.**

22 The Military Commissions Act of 2006 (Public Law
23 109-366) is amended by striking section 5.

1 **SEC. 13. IMPLEMENTATION OF TREATY OBLIGATIONS.**

2 (a) IN GENERAL.—Section 6(a) of the Military Com-
3 missions Act of 2006 (Public Law 109-366; 120 Stat.
4 2632; 18 U.S.C. 2441 note) is amended—

5 (1) in paragraph (2)—

6 (A) in the first sentence, by inserting after
7 “international character” the following: “and
8 preserve the capacity of the United States to
9 prosecute nationals of enemy powers for engag-
10 ing in acts against members of the United
11 States Armed Forces and United States citizens
12 that have been prosecuted by the United States
13 as war crimes in the past”; and

14 (B) by striking the second sentence; and

15 (2) in paragraph (3)—

16 (A) in subparagraph (A)—

17 (i) by striking “the President has the
18 authority for the United States to interpret
19 the meaning and application of the Geneva
20 Conventions and to promulgate” and in-
21 sserting “the President has the authority,
22 subject to congressional oversight and judi-
23 cial review, to promulgate”; and

24 (ii) by striking “higher standards
25 and”;

1 (B) in subparagraph (B), by striking “in-
2 terpretations” and inserting “rules”; and

3 (C) by amending subparagraph (D) to read
4 as follows:

5 “(D) The President shall notify other par-
6 ties to the Geneva Conventions that the United
7 States expects members of the United States
8 Armed Forces and other United States citizens
9 detained in a conflict not of an international
10 character to be treated in a manner consistent
11 with the standards described in subparagraph
12 (A) and embodied in section 2441 of title 18,
13 United States Code, as amended by subsection
14 (b).”.

15 (b) MODIFICATION OF WAR CRIMES OFFENSES.—

16 (1) INCLUSION OF DENIAL OF TRIAL RIGHTS
17 AMONG OFFENSES.—Paragraph (1) of section
18 2441(d) of title 18, United States Code, is amended
19 by adding at the end the following new subpara-
20 graph:

21 “(J) DENIAL OF TRIAL RIGHTS.—The act
22 of a person who intentionally denies one or
23 more persons the right to be tried before a reg-
24 ularly constituted court affording all the judi-
25 cial guarantees which are recognized as indis-

1 pensable by civilized peoples as prescribed by
2 common Article 3.”.

3 (2) INCLUSION OF IMPOSITION OF CRUEL, IN-
4 HUMAN, OR DEGRADING TREATMENT OR PUNISH-
5 MENT AMONG OFFENSES.—Such section is further
6 amended—

7 (A) in paragraph (1), by adding at the end
8 the following new subparagraph:

9 “(K) CRUEL, INHUMAN, OR DEGRADING
10 TREATMENT OR PUNISHMENT.—The act of a
11 person who subjects, or conspires or attempts
12 to subject, an individual in the custody or under
13 the physical control of the United States Gov-
14 ernment, regardless of nationality or physical
15 location, to cruel, inhuman, or degrading treat-
16 ment or punishment.”; and

17 (B) in paragraph (2)—

18 (i) in subparagraph (D), by striking
19 “and” at the end;

20 (ii) in subparagraph (E), by striking
21 the period at the end and inserting “;
22 and”; and

23 (iii) by adding at the end the fol-
24 lowing new subparagraph:

1 “(F) the term ‘cruel, inhuman, or degrad-
2 ing treatment or punishment’ shall be applied
3 for purposes of paragraph (1)(K) in accordance
4 with the meaning given that term in section
5 6(e)(2) of the Military Commissions Act of
6 2006 (42 U.S.C. 2000dd-0).”.

7 (3) INCLUSION OF CERTAIN OTHER VIOLATIONS
8 OF COMMON ARTICLE 3 AMONG OFFENSES.—Para-
9 graph (1) of such section is further amended by add-
10 ing at the end the following new subparagraph:

11 “(L) CERTAIN OTHER VIOLATIONS OF
12 COMMON ARTICLE 3.—The act of a person not
13 subject to chapter 47 of title 10 (the Uniform
14 Code of Military Justice) who commits, or con-
15 spires or attempts to commit, an act not other-
16 wise enumerated under this paragraph that
17 constitutes a violation of common Article 3 and
18 is an act which, if committed by a person sub-
19 ject to chapter 47 of title 10, would be punish-
20 able under that chapter by the penalty of death
21 or confinement for one year or more.”.

22 (4) ADDITIONAL DEFINITIONAL MATTERS.—
23 Paragraph (2) of such section is further amended—

24 (A) in subparagraph (D)—

1 (i) by striking clause (ii) and inserting
2 the following new clause (ii):
3 “(ii) serious physical pain;”; and
4 (ii) in clause (iii), by striking “(other
5 than cuts, abrasions, or bruises)”; and
6 (B) in subparagraph (E)(ii), by striking
7 “and non-transitory”.

8 **SEC. 14. RESTORATION OF HABEAS CORPUS FOR INDIVID-**
9 **UALS DETAINED BY THE UNITED STATES.**

10 (a) RESTORATION.—Subsection (e) of section 2241
11 of title 28, United States Code, is repealed.

12 (b) CONFORMING AMENDMENT.— Subsection (b) of
13 section 7 of the Military Commissions Act of 2006 (Public
14 Law 109-366; 120 Stat. 2636; 28 U.S.C. 2441 note) is
15 repealed.

16 **SEC. 15. EXPEDITED JUDICIAL REVIEW OF MILITARY COM-**
17 **MISSIONS ACT OF 2006.**

18 Notwithstanding any other provision of law, the fol-
19 lowing rules shall apply to any civil action, including an
20 action for declaratory judgment, that challenges any provi-
21 sion of the Military Commissions Act of 2006 (Public Law
22 109-366), or any amendment made by that Act, on the
23 ground that such provision or amendment violates the
24 Constitution or the laws of the United States:

1 (1) The action shall be filed in the United
2 States District Court for the District of Columbia
3 and shall be heard in that Court by a court of three
4 judges convened pursuant to section 2284 of title
5 28, United States Code.

6 (2) An interlocutory or final judgment, decree,
7 or order of the United States District Court for the
8 District of Columbia in an action under paragraph
9 (1) shall be reviewable as a matter of right by direct
10 appeal to the Supreme Court of the United States.
11 Any such appeal shall be taken by a notice of appeal
12 filed within 10 days after the date on which such
13 judgment, decree, or order is entered. The jurisdic-
14 tional statement with respect to any such appeal
15 shall be filed within 30 days after the date on which
16 such judgment, decree, or order is entered.

17 (3) It shall be the duty of the United States
18 District Court for the District of Columbia and the
19 Supreme Court of the United States to advance on
20 the docket and to expedite to the greatest possible
21 extent the disposition of any action or appeal, re-
22 spectively, brought under this section.

23 **SEC. 16. EFFECTIVE DATE.**

24 (a) IN GENERAL.—Except as provided in subsection
25 (b), the amendments made by this Act shall take effect

1 on October 17, 2006, the date of the enactment of the
2 Military Commissions Act of 2006 (Public Law 109-366),
3 immediately after the enactment of that Act and shall
4 apply to all cases, without exception, that are pending on
5 or after such date.

6 (b) REVISIONS TO WAR CRIMES OFFENSES.—The
7 amendments made by section 13(b) shall take effect on
8 the date of the enactment of this Act.