#### 111TH CONGRESS 1ST SESSION

# H. R. 630

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

### IN THE HOUSE OF REPRESENTATIVES

January 22, 2009

Mr. Smith of Texas (for himself, Mr. Boehner, Mr. Sensenbrenner, Mr. Franks of Arizona, Mr. Daniel E. Lungren of California, Mr. Gallegly, Mr. Jordan of Ohio, Mr. Poe of Texas, Mr. Harper, Mr. Coble, and Mr. Rooney) introduced the following bill; which was referred to the Committee on the Judiciary

## 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 2009".
- 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

1	added by section 250 of the Act of November 6, 1978
2	(Public Law 95–598; 92 Stat. 2672), and inserting the
3	following:
4	"§ 2256. Habeas corpus review for certain enemy
5	combatants
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 'covered individual' means an in-
11	dividual who—
12	"(A) has been determined by a Combatant
13	Status Review Tribunal to be an enemy com-
14	batant (pursuant to the definition employed by
15	that tribunal) or is awaiting the determination
16	of such a tribunal;
17	"(B) is in the custody of the United States
18	at Guantanamo Bay, Cuba on or after the date
19	of enactment of the Enemy Combatant Deten-
20	tion Review Act of 2009; and
21	"(C) is not a citizen of the United States
22	or an alien admitted for permanent residence in
23	the United States; and
24	"(3) the term 'enemy combatant' means a per-
25	son who has engaged in hostilities or who has pur-

- posefully and materially supported hostilities against the United States or its cobelligerents on behalf of the Taliban, al Qaeda, or associated forces.
  - "(b) Statement of Authority.—

- "(1) IN GENERAL.—Congress reaffirms that the United States is in an armed conflict with al Qaeda, the Taliban, and associated forces and that those entities continue to pose a threat to the United States and its citizens, both domestically and abroad.
  - "(2) AUTHORITY.—Congress reaffirms that the President is authorized to detain enemy combatants in connection with the continuing armed conflict with al Qaeda, the Taliban, and associated forces, regardless of the place of capture, until the 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 to detain combatants in the continuing armed conflict with al Qaeda, the Taliban, and associated forces, in any other armed conflict, or as otherwise authorized under the Constitution of the United States.
- 23 "(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 yenue sive 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 Enemy Combatant Detention Review Act of 2009.

- "(2) Scope of Jurisdiction.—An application for habeas corpus filed under paragraph (1) by or on behalf of a covered individual—
  - "(A) may challenge the legality of the continued detention of the covered individual; and
  - "(B) may not include any other claim relating to the detention, transfer, treatment, trial, or conditions of confinement of the covered individual or any other action against the United States or its agents.
- "(3) Consolidated motions practice.—All applications for a writ of habeas corpus by or on behalf of a covered individual that are pending on or after the date of enactment of the Enemy Combatant Detention Review Act of 2009 shall be consolidated before the Chief Judge of the District Court or a designee of the Chief Judge for consolidated proceedings and determinations on common ques-

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

"(4) Transfer.—Consistent with section 1403(a) of this title, any court of the United States shall transfer a case within the exclusive jurisdiction of the District Court.

#### "(d) 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. Any evidence relied upon by the Government in its declaration shall be subject to a rebuttable presumption with respect to the competency and authenticity of such evidence.

"(B) Presumption.—Upon a determination that the Government's return shows credible evidence that the covered individual is an enemy combatant, there shall be a rebuttable presumption that the covered individual is an

enemy combatant. The covered individual shall 1 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. The covered individual shall present such evi-6 dence in the form of a written declaration. "(C) REBUTTAL OF PRESUMPTION.—If a 7 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.

#### "(2) Discovery.—

"(A) SCOPE OF DISCOVERY.—Subject to subparagraph (B), a covered individual may request from the Government as the discovery relating to a habeas corpus proceeding under this section, and if requested by a covered individual, the Government shall provide—

"(i) any documents or objects directly and specifically referenced in the return submitted by the Government;

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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; and
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 $(e)(1)$ .
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

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 reliable and probative evidence, including hearsay from military, intelligence, and law enforcement sources.

"(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)(C) only if the 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 court of the disputed matter.

#### "(4) Attorneys.—

"(A) IN GENERAL.—The covered individual shall be represented by an attorney if the attorney—

"(i) is retained by the covered individual 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. "(e) Exhaustion of Military Commission Pro-8 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 2009 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-

ant to a final judgment of a military commis-

sion 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 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 on behalf of a covered individual in custody pursuant to the judgment of a military commission 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 commis-

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

"(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, 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.

- 13 "(f) Limits on Second or Successive Applica-14 tions.—
- "(1) IN GENERAL.—A claim presented in a second or successive application for habeas corpus under this section that was presented in a prior application shall be dismissed.
  - "(2) CLAIMS NOT INCLUDED IN PRIOR APPLICA-TION.—A claim presented in a second or successive application for habeas corpus under this section that was not presented in a prior application shall be dismissed unless the—

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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 succes-
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 is
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

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-

pus 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 in-

dividual 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 enemy combatants by the Department of Defense and in a manner consistent with safety and security of United States personnel. A transfer made pursuant to subparagraph (A) shall be effected as expeditiously as possible and in a manner that is consistent with the policy set out in section 2242 of the 1998 Foreign Relations Authorization Act, Fiscal Years 1998 and 1999 (subdivision B of division G of Public Law 105–277; 8 U.S.C. 1231 note), and with the national security interests of the United States."

(b) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking subsection (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.

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