

110TH CONGRESS  
1ST SESSION

# S. 576

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

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 13, 2007

Mr. DODD (for himself, Mr. LEAHY, Mr. FEINGOLD, and Mr. MENENDEZ) introduced the following bill; which was read twice and referred to the Committee on Armed Services

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## 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’ means an indi-  
3           vidual who is not a lawful enemy combatant and—

4                   “(A) who directly participates in hostilities  
5           in a zone of active combat against the United  
6           States; or

7                   “(B) who—

8                           “(i) planned, authorized, committed,  
9                           or intentionally aided the terrorist acts on  
10                          the United States of September 11, 2001;

11                          or

12                           “(ii) intentionally harbored any indi-  
13                          vidual described in clause (i).

14           The term is used solely to designate individuals tri-  
15           able by military commission under this chapter.”.

16 **SEC. 3. CONSTRUCTION WITH GENEVA CONVENTIONS.**

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

19                   “(g) CONSTRUCTION WITH GENEVA CONVEN-  
20           TIONS.—To the extent that any provision of this chapter  
21           is determined to be inconsistent with the obligations of  
22           the United States under the Geneva Conventions, the Ge-  
23           neva Conventions shall prevail, and such provision shall  
24           be deemed to have no further force or effect.”.

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

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

8 (1) by striking subsection (e); and

9 (2) by redesignating subsection (d) as sub-  
 10 section (e).

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

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

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

20 “(1) a graduate of an accredited law school or  
 21 is a member of the bar of a Federal court or of the  
 22 highest court of a State; and

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

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

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

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

8 “(A) a graduate of an accredited law  
9 school or is a member of the bar of a Federal  
10 court or of the highest court of a State; and

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

15 “(2) a civilian who is—

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

18 “(B) otherwise qualified to practice before  
19 the military commission pursuant to regulations  
20 prescribed by the Secretary of Defense.”.

21 (c) CONFORMING AMENDMENT.—Subsection (d)(1)  
22 of such section is amended by striking “subsection (b)(1)”  
23 and inserting “subsection (b)”.

1 **SEC. 6. EXCLUSION FROM TRIAL BY MILITARY COMMIS-**  
2 **SION OF STATEMENTS OBTAINED BY COER-**  
3 **SION.**

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

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

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

14 (a) RULES GENERALLY.—Subsection (a) of section  
15 949a of title 10, United States Code, is amended to read  
16 as follows:

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

1       “(2) The Secretary of Defense may, in consultation  
2 with the Attorney General, make such exceptions in the  
3 applicability in trials by military commission under this  
4 chapter from the procedures and rules of evidence other-  
5 wise applicable in general courts-martial as may be re-  
6 quired by the unique circumstances of the conduct of mili-  
7 tary or intelligence operations during hostilities. Such ex-  
8 ceptions may not be contrary to or inconsistent with this  
9 chapter.”.

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

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

1 **SEC. 8. SELF-REPRESENTATION OF ACCUSED BEFORE MILI-**  
2 **TARY COMMISSIONS.**

3 Section 949c of title 10, United States Code, is  
4 amended by adding at the end the following new sub-  
5 section:

6 “(c) SELF-REPRESENTATION BY ACCUSED.—(1)  
7 Notwithstanding any provision of subsection (b), the ac-  
8 cused may represent himself in his defense before a mili-  
9 tary commission under this chapter.

10 “(2) The accused’s representation of himself in his  
11 defense shall be governed by such rules as the Secretary  
12 of Defense shall prescribe. Such rules, and any rights,  
13 privileges, or limitations under such rules, shall be con-  
14 sistent with rules applicable to self-representation by an  
15 accused in a criminal trial under the laws of the United  
16 States and international law.

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

19 “(A) shall be assisted in his defense by military  
20 defense counsel detailed in accordance with sub-  
21 section (b)(2); or

22 “(B) may be assisted in his defense by civilian  
23 defense counsel meeting the requirements of sub-  
24 section (b)(3), together with military defense counsel  
25 so detailed.

1 “(4) Any civilian counsel assisting in the defense of  
 2 an accused under this subsection shall comply with the  
 3 provisions of subsection (b)(4).

4 “(5) Subsection (b)(7) shall not apply with respect  
 5 to any defense counsel assisting in the defense of an ac-  
 6 cused under this subsection, except to the extent the ac-  
 7 cused is unable to carry out his defense.”.

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

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

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

17 (2) by adding at the end the following new  
 18 paragraph:

19 “(3) Notwithstanding any other provision of this  
 20 chapter, the military judge may, upon motion of defense  
 21 counsel and at the discretion of the military judge, order  
 22 trial counsel to disclose to defense counsel the sources,  
 23 methods, or activities (including classified sources, meth-  
 24 ods, or activities) by which the United States obtained any  
 25 out of court statement the United States intends to intro-

1 duce at trial if the military judge determines, after ex  
2 parte review, in camera review, or both, that evidence of  
3 such sources, methods, or activities, as the case may be,  
4 might reasonably tend to affect the weight given to the  
5 out of court statement by the members of the military  
6 commission. The military judge shall revoke such an order  
7 in the event the United States elects not introduce the  
8 out of court statement concerned at trial.”.

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

17 (A) dismiss the charges in their entirety;

18 (B) dismiss the charges or specifications or  
19 both to which the information relates; or

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

1 **SEC. 10. REVIEW OF MILITARY COMMISSION DECISIONS BY**  
2 **UNITED STATES COURT OF APPEALS FOR**  
3 **THE ARMED FORCES RATHER THAN COURT**  
4 **OF MILITARY COMMISSION REVIEW.**

5 (a) REVIEW.—

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

8 **“§ 950f. Review by Court of Appeals for the Armed**  
9 **Forces**

10 “The United States Court of Appeals for the Armed  
11 Forces, in accordance with procedures prescribed under  
12 regulations of the Secretary, shall review the record in  
13 each case that is referred to the Court by the convening  
14 authority under section 950e of this title with respect to  
15 any matter of law raised by the accused.”.

16 (2) CLERICAL AMENDMENT.—The table of sec-  
17 tions at the beginning of subchapter VI of chapter  
18 47A of such title is amended by striking the item re-  
19 lating to section 950f and inserting the following  
20 new item:

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

21 (b) CONFORMING AMENDMENTS.—

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

24 (A) In section 950e(a), by striking “the  
25 Court of Military Commission Review” and in-

1           serting “the United States Court of Appeals for  
2           the Armed Forces”.

3           (B) In section 950d, 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           (C) In section 950g(a)(2), 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          (D) In section 950h, by striking “the  
12          Court of Military Commission Review” each  
13          place it appears and inserting “the United  
14          States Court of Appeals for the Armed Forces”.

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

21 **SEC. 11. SCOPE OF REVIEW OF DETENTION-RELATED DECI-**  
22 **SIONS.**

23          (a) SCOPE OF REVIEW OF UNITED STATES COURT  
24 OF APPEALS FOR THE DISTRICT OF COLUMBIA CIR-

1 CUIT.—Section 950g of title 10, United States Code, is  
2 amended—

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

4 (2) by redesignating subsection (d) as sub-  
5 section (c).

6 (b) SCOPE OF AUTHORITY FOR REVIEW OF MILITARY  
7 COMMISSION PROCEDURES AND ACTIONS.—Subsection  
8 (b) of section 950j of such title is amended to read as  
9 follows:

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

20 (c) TERMINATION OF SUPERSEDED AUTHORITY FOR  
21 REVIEW OF CSRTS.—Section 1005(e) of the Detainee  
22 Treatment Act of 2005 (10 U.S.C. 801 note) is amended  
23 by striking paragraphs (2) through (4).

1 **SEC. 12. REPEAL OF PROHIBITION ON TREATY OBLIGA-**  
2 **TIONS AS ESTABLISHING GROUNDS FOR CER-**  
3 **TAIN CLAIMS.**

4 Section 5 of the Military Commissions Act of 2006  
5 (Public Law 109–366; 120 Stat. 2631; 28 U.S.C. 2241  
6 note) is repealed.

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

8 (a) **IN GENERAL.**—Section 6(a) of the Military Com-  
9 missions Act of 2006 (Public Law 109–366; 120 Stat.  
10 2632; 18 U.S.C. 2441 note) is amended—

11 (1) in paragraph (2)—

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

20 (B) by striking the second sentence; and

21 (2) in paragraph (3)—

22 (A) in subparagraph (A)—

23 (i) by striking “the President has the  
24 authority for the United States to interpret  
25 the meaning and application of the Geneva  
26 Conventions and to promulgate” and in-

1           serting “the President has the authority,  
2           subject to congressional oversight and judi-  
3           cial review, to promulgate”; and

4                   (ii) by striking “higher standards  
5           and”;

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

8           (C) by amending subparagraph (D) to read  
9           as follows:

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

20           (b) MODIFICATION OF WAR CRIMES OFFENSES.—

21                   (1) INCLUSION OF DENIAL OF TRIAL RIGHTS  
22           AMONG OFFENSES.—Paragraph (1) of section  
23           2441(d) of title 18, United States Code, is amended  
24           by adding at the end the following new subpara-  
25           graph:

1           “(J) DENIAL OF TRIAL RIGHTS.—The act  
2 of a person who intentionally denies one or  
3 more persons the right to be tried before a reg-  
4 ularly constituted court affording all the judi-  
5 cial guarantees which are recognized as indis-  
6 pensable by civilized peoples as prescribed by  
7 common Article 3.”.

8           (2) INCLUSION OF IMPOSITION OF CRUEL, IN-  
9 HUMAN, OR DEGRADING TREATMENT OR PUNISH-  
10 MENT AMONG OFFENSES.—Such section is further  
11 amended—

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

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

22           (B) in paragraph (2)—

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

1 (ii) in subparagraph (E), by striking  
2 the period at the end and inserting “;  
3 and”; and

4 (iii) by adding at the end the fol-  
5 lowing new subparagraph:

6 “(F) the term ‘cruel, inhuman, or degrad-  
7 ing treatment or punishment’ shall be applied  
8 for purposes of paragraph (1)(K) in accordance  
9 with the meaning given that term in section  
10 6(e)(2) of the Military Commissions Act of  
11 2006 (42 U.S.C. 2000dd-0).”.

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

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

1           able under that chapter by the penalty of death  
2           or confinement for one year or more.”.

3           (4) **ADDITIONAL DEFINITIONAL MATTERS.**—

4           Paragraph (2) of such section is further amended—

5                   (A) in subparagraph (D)—

6                           (i) by striking clause (ii) and inserting  
7                           the following new clause (ii):

8                                   “(ii) serious physical pain;”; and

9                                   (ii) in clause (iii), by striking “(other  
10                                   than cuts, abrasions, or bruises)”; and

11                           (B) in subparagraph (E)(ii), by striking  
12                           “and non-transitory”.

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

15           (a) **RESTORATION.**—Subsection (e) of section 2241  
16 of title 28, United States Code, is repealed.

17           (b) **CONFORMING AMENDMENT.**—Subsection (b) of  
18 section 7 of the Military Commissions Act of 2006 (Public  
19 Law 109–366; 120 Stat. 2636; 28 U.S.C. 2441 note) is  
20 repealed.

21 **SEC. 15. EXPEDITED JUDICIAL REVIEW OF MILITARY COM-**  
22 **MISSIONS ACT OF 2006.**

23           Notwithstanding any other provision of law, the fol-  
24 lowing rules shall apply to any civil action, including an  
25 action for declaratory judgment, that challenges any provi-

1 sion of the Military Commissions Act of 2006 (Public Law  
2 109–366), or any amendment made by that Act, on the  
3 ground that such provision or amendment violates the  
4 Constitution or the laws of the United States:

5           (1) The action shall be filed in the United  
6 States District Court for the District of Columbia  
7 and shall be heard in that Court by a court of three  
8 judges convened pursuant to section 2284 of title  
9 28, United States Code.

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

21           (3) It shall be the duty of the United States  
22 District Court for the District of Columbia and the  
23 Supreme Court of the United States to advance on  
24 the docket and to expedite to the greatest possible

1 extent the disposition of any action or appeal, re-  
2 spectively, brought under this section.

3 **SEC. 16. EFFECTIVE DATE.**

4 (a) IN GENERAL.—Except as provided in subsection  
5 (b), the amendments made by this Act shall take effect  
6 on October 17, 2006, the date of the enactment of the  
7 Military Commissions Act of 2006 (Public Law 109–366),  
8 immediately after the enactment of that Act and shall  
9 apply to all cases, without exception, that are pending on  
10 or after such date.

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

○