

109TH CONGRESS
1ST SESSION

H. R. 3038

To affirm the authority of the executive branch to detain foreign nationals as unlawful combatants, to enable a person detained as an unlawful combatant to challenge the basis for that detention and to receive a disposition within 2 years, to provide for the President to establish military tribunals to try such persons, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 22, 2005

Mr. SCHIFF (for himself, Mr. UDALL of Colorado, and Mr. OWENS) introduced the following bill; which was referred to the Committee on Armed Services, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To affirm the authority of the executive branch to detain foreign nationals as unlawful combatants, to enable a person detained as an unlawful combatant to challenge the basis for that detention and to receive a disposition within 2 years, to provide for the President to establish military tribunals to try such persons, 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,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Guantanamo Detainees
3 Procedures Act of 2005”.

4 **SEC. 2. AUTHORITY OF EXECUTIVE BRANCH TO DETAIN**
5 **PERSONS COVERED BY THIS ACT AS UNLAW-**
6 **FUL COMBATANTS.**

7 (a) FINDING.—Congress finds that the executive
8 branch has authority to detain persons covered by this Act
9 as unlawful combatants.

10 (b) PERSONS COVERED BY THIS ACT.—In this Act,
11 the term “person covered by this Act” means an individual
12 who—

13 (1) is accused of knowingly—

14 (A) planning, authorizing, committing, aid-
15 ing, or abetting one or more terrorist acts
16 against the United States; or

17 (B) being part of or supporting forces en-
18 gaged in armed conflict against the United
19 States;

20 (2) is not a United States person or lawful per-
21 manent resident; and

22 (3) is not a prisoner of war within the meaning
23 of the Geneva Convention Relative to the Treatment
24 of Prisoners of War, done on August 12, 1949.

1 **SEC. 3. RIGHT OF PERSON DETAINED AS UNLAWFUL COM-**
2 **BATANT OR ON SIMILAR BASIS TO CHAL-**
3 **LENCE THAT BASIS.**

4 (a) **IN GENERAL.**—Whenever the United States de-
5 tains a person covered by this Act on the basis of a deter-
6 mination that the person can be detained as an unlawful
7 combatant or can be detained on any similar basis, the
8 person is entitled to a hearing under this section as expedi-
9 tiously as practicable but not later than 6 months after
10 the date on which the United States first made the deter-
11 mination.

12 (b) **REQUIREMENTS FOR HEARING.**—A hearing re-
13 quired by subsection (a) must meet the following require-
14 ments:

15 (1) The hearing officer is an active member of
16 one of the Courts of Criminal Appeals of the Armed
17 Forces.

18 (2) The hearing officer has authority to decide
19 de novo whether the basis of a determination under
20 subsection (a) is valid and to grant appropriate re-
21 lief if the hearing officer decides that the basis is in-
22 valid.

23 (3) The hearing officer is impartial in fact, and
24 is in a position independent from—

25 (A) the individuals who first determined
26 that the person can be detained; and

1 (B) the individuals on whose orders the
2 person is being detained.

3 (4) The person is provided with access to the
4 evidence that tends to support the determination
5 that the person can be detained.

6 (5) The person is provided with an opportunity
7 to address the hearing officer, and is provided with
8 an interpreter for that purpose.

9 (c) ADMINISTRATIVE REVIEW.—The Secretary of De-
10 fense shall conduct administrative review of the activities
11 of a hearing officer under this section.

12 **SEC. 4. RIGHT OF PERSON DETAINED TO DISPOSITION**
13 **WITHIN 2 YEARS.**

14 (a) IN GENERAL.—Whenever the United States de-
15 tains a person covered by this Act on the basis of a deter-
16 mination that the person can be detained as an unlawful
17 combatant or can be detained on any similar basis, the
18 person is entitled to a disposition under this section not
19 later than 2 years after the date on which the United
20 States first made the determination.

21 (b) REQUIREMENTS FOR DISPOSITION.—A disposi-
22 tion under this section is any one of the following:

23 (1) Repatriation to the governing authority in
24 the area in which the person was first detained or
25 the person's country of origin, except where there

1 are substantial grounds to believe that the person
2 would be in danger of being subjected to torture.

3 (2) The commencement, by formal charges, of
4 prosecution in an appropriate court, which may in-
5 clude an extraordinary tribunal under section 5 of
6 this Act, an international criminal tribunal, or a dis-
7 trict court of the United States.

8 (c) EXTENSION.—

9 (1) CERTIFICATION.—The period required by
10 subsection (a) for the repatriation of the person or
11 the commencement of formal charges may be ex-
12 tended if the Secretary of Defense certifies, in writ-
13 ing, with respect to the person that the Secretary of
14 Defense has determined that the person is a con-
15 tinuing threat to the national security of the United
16 States due to a likelihood that the person will under-
17 take terrorist or belligerent acts against the United
18 States based on the person's past conduct, level of
19 authority within the group or organization, state-
20 ment and actions during confinement, age and
21 health, psychological profile, and other pertinent fac-
22 tors, and the repatriation of the person or the com-
23 mencement of formal charges will compromise the
24 national security of the United States by curtailing
25 intelligence gathering from the person, jeopardize in-

1 telligence sources necessary to prosecute the person,
2 or other extraordinary circumstances justify the ex-
3 tension.

4 (2) DETAILED BASIS.—A certification under
5 this subsection must include a detailed account of
6 the factual basis for that determination.

7 (3) ACCESS TO CERTIFICATION.—A person cov-
8 ered by a certification under this subsection is enti-
9 tled to an unclassified copy of the certification.

10 (4) DURATION OF CERTIFICATION.—A certifi-
11 cation under this subsection is effective for not more
12 than 1 year. The Secretary may make successive
13 certifications with respect to a person so long as
14 each additional certification is made while an immi-
15 nent threat to national security continues to be
16 posed by the group or organization in which the per-
17 son is a member or by other persons associated with,
18 or acting on behalf of, the group, organization, or
19 person.

20 (5) JUDICIAL REVIEW.—The United States
21 Court of Appeals for the Armed Forces shall provide
22 judicial review with respect to any issue under this
23 subsection, including whether the determination of
24 the Secretary under paragraph (1) is justified by the
25 factual basis under paragraph (2).

1 **SEC. 5. EXTRAORDINARY TRIBUNALS.**

2 (a) **AUTHORITY.**—The President is hereby authorized
3 to establish tribunals for the trial of persons covered by
4 this Act.

5 (b) **JURISDICTION.**—Tribunals established under
6 subsection (a) may adjudicate violations of the law of war,
7 international laws of armed conflict, and crimes against
8 humanity targeted against United States persons or resi-
9 dents.

10 (c) **AUTHORITY TO ESTABLISH PROCEDURAL**
11 **RULES.**—The Secretary of Defense, in consultation with
12 the Secretary of State and the Attorney General, shall pre-
13 scribe and publish in the Federal Register, and report to
14 the Committees on the Judiciary of the Senate and the
15 House of Representatives, the rules of evidence and proce-
16 dure that are to apply to tribunals established under sub-
17 section (a).

18 **SEC. 6. PROCEDURAL REQUIREMENTS.**

19 (a) **IN GENERAL.**—The rules prescribed for a tri-
20 bunal under section 5(c) shall be designed to ensure a full
21 and fair hearing of the charges against the accused. The
22 rules shall require the following:

23 (1) That the tribunal be independent and im-
24 partial.

25 (2) That the accused be notified of the particu-
26 lars of the offense charged or alleged without delay.

1 (3) That the proceedings be made simulta-
2 neously intelligible for participants not conversant in
3 the English language by translation or interpreta-
4 tion.

5 (4) That the evidence supporting each alleged
6 offense be given to the accused, except as provided
7 in subsection (d).

8 (5) That the accused have the opportunity to be
9 present at trial.

10 (6) That the accused have a right to be rep-
11 resented by counsel.

12 (7) That the accused have the opportunity—

13 (A) to respond to the evidence supporting
14 each alleged offense;

15 (B) to obtain exculpatory evidence from
16 the prosecution; and

17 (C) to present exculpatory evidence.

18 (8) That the accused have the opportunity to
19 confront and cross-examine adverse witnesses and to
20 offer witnesses.

21 (9) That the proceeding and disposition be ex-
22 peditious.

23 (10) That the tribunal apply reasonable rules of
24 evidence designed to ensure admission only of reli-
25 able information or material with probative value.

1 (11) That the accused be afforded all necessary
2 means of defense before and after the trial.

3 (12) That conviction of an alleged offense not
4 be based upon an act, offense, or omission that was
5 not an offense under law when it was committed.

6 (13) That the penalty for an offense not be
7 greater than it was when the offense was committed.

8 (14) That the accused—

9 (A) be presumed innocent until proven
10 guilty, and

11 (B) not be found guilty except upon proof
12 beyond a reasonable doubt.

13 (15) That the accused not be compelled to con-
14 fess guilt or testify against himself.

15 (16) That, subject to subsections (c) and (d),
16 the trial be open and public and include public avail-
17 ability of the transcripts of the trial and the pro-
18 nouncement of judgment.

19 (17) That a convicted person be informed of
20 remedies and appeals and the time limits for the ex-
21 ercise of the person's rights to the remedies and ap-
22 peals under the rules.

23 (18) That a preliminary proceeding be held
24 within 30 days of detention to determine whether
25 there is jurisdiction under section 4 over the person

1 and the offenses charged. The preliminary pro-
2 ceeding may be continued for an additional 30 days
3 for good cause shown.

4 (19) That the privilege of the writ of habeas
5 corpus under title 28, United States Code, or under
6 any other provision of law not be infringed.

7 (20) That the tribunal be comprised of a mili-
8 tary judge and not less than five members.

9 (b) IMPOSITION OF THE DEATH PENALTY.—The re-
10 quirements of the Uniform Code of Military Justice for
11 the imposition of the death penalty shall apply in any case
12 in which a tribunal established under section 5 is re-
13 quested to adjudge the death penalty.

14 (c) PUBLIC PROCEEDINGS.—Any proceedings con-
15 ducted by a tribunal established under section 5, and the
16 proceedings on any appeal of an action of the tribunal,
17 shall be accessible to the public consistent with any de-
18 monstrable necessity to secure the safety of observers, wit-
19 nesses, tribunal judges, counsel, or other persons.

20 (d) CONFIDENTIALITY OF EVIDENCE.—Evidence
21 available from an agency of the Federal Government that
22 is offered in a trial by a tribunal established under section
23 5 may be kept secret from the public only when the head
24 of the agency personally certifies in writing that disclosure
25 will cause—

1 (1) identifiable harm to the prosecution of mili-
2 tary objectives;

3 (2) significant, identifiable harm to intelligence
4 sources or methods; or

5 (3) substantial risk that such evidence could be
6 used for planning future terrorist attacks.

7 (e) REVIEW.—

8 (1) PROCEDURES REQUIRED.—The Secretary of
9 Defense shall provide for prompt review of convic-
10 tions by tribunals established under section 5 to en-
11 sure that the procedural requirements of a full and
12 fair hearing have been met and that the evidence
13 reasonably supports the convictions.

14 (2) UNITED STATES COURT OF APPEALS FOR
15 THE ARMED FORCES.—The procedures established
16 under paragraph (1) shall, at a minimum, allow for
17 review of the proceedings of the tribunals, and the
18 convictions and sentences of such tribunals, by the
19 United States Court of Appeals for the Armed
20 Forces established under the Uniform Code of Mili-
21 tary Justice.

22 (3) SUPREME COURT.—The decisions of the
23 United States Court of Appeals for the Armed
24 Forces regarding proceedings of tribunals estab-

1 lished under section 5 shall be subject to review by
2 the Supreme Court by writ of certiorari.

3 **SEC. 7. ANNUAL REPORT ON PERSONS COVERED BY THIS**
4 **ACT WHO ARE DETAINED AS UNLAWFUL COM-**
5 **BATANTS BY THE UNITED STATES.**

6 (a) **REPORT REQUIRED.**—The Secretary of Defense
7 shall submit to Congress an annual report on persons cov-
8 ered by this Act who are detained as unlawful combatants
9 by the United States.

10 (b) **CURRENT DETAINEES.**—The report shall include,
11 for each person currently so detained, the following:

12 (1) The name and nationality of the person.

13 (2) The period during which the person has
14 been so detained.

15 (3) A description of the specific process af-
16 farded to the person under sections 3 and 4 of this
17 Act and the outcome of those processes.

18 (c) **FORMER DETAINEES.**—The report shall include,
19 for each person formerly so detained, the following:

20 (1) The name and nationality of the person.

21 (2) The terms of the conditional release agree-
22 ment with respect to the person.

23 (3) A statement of the basis for the determina-
24 tion of the United States Government that release
25 was warranted.

1 (4) The period during which the person was so
2 detained, including the release date of the person.

3 (d) CLASSIFICATION.—The report required by this
4 section shall be submitted in unclassified form, but may
5 include a classified annex.

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