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## Fact Sheet

The White House  
 Washington, DC  
 September 6, 2006

## Myth/Fact: The Administration's Legislation to Create Military Commissions

### **MYTH: The Administration's Bill Would Permit Trials By Military Commission That Deprive The Accused Of Due Process.**

- **FACT: Military Commissions Established Under The Administration's Plan Would Provide Fair Trials Affording Unlawful Enemy Combatants Substantial Due Process, Including:**
  - The right to be tried before an impartial military judge and impartial commission;
  - The right to be presumed innocent until proven guilty beyond a reasonable doubt;
  - The right to counsel, including a JAG defense counsel and retained civilian counsel;
  - The right to obtain witnesses and evidence, to cross-examine witnesses, and to appropriate discovery;
  - The right against self-incrimination and the right against double jeopardy; and
  - The right to at least two appeals from any conviction, including to a Federal Article III appellate court.

### **MYTH: The Administration Supports "Secret Trials" In Absentia.**

- **FACT: The Administration Is Not Proposing That Detainees Be Tried In Absentia.** Particularly during an ongoing conflict, sharing sensitive intelligence sources and methods and other classified information with terrorist detainees could be highly dangerous to U.S. national security. We are working with Congress to provide for fair trials while protecting such information.
- **FACT: The Administration Believes The Commissions Must Provide For The Possibility Of Using Classified Evidence Outside The Presence Of The Accused In Extraordinary Circumstances.**
- **Sharing Sensitive Intelligence With Captured Terrorists Could Pose A Serious Risk To U.S. National Security.** In extraordinary circumstances, where the judge finds it is warranted and fair, military commissions will permit introduction of classified evidence outside the presence of the accused subject to strict conditions.
- **No "Secret Trials" Will Be Held.** Rather, the new bill provides that before any classified evidence is introduced outside the accused's presence, the head of the executive department that has classified the evidence must certify that sharing the evidence would harm national security and that the evidence has been declassified to the maximum extent possible. The military judge would also have to make specific findings that the exclusion is warranted to protect classified information; that the admission of an unclassified summary

or redacted version would not be an adequate substitute; that the exclusion is no broader than necessary; and that it would not violate the accused's right to a full and fair trial.

- **The Accused's Defense Counsel Will Remain Present And Able To Represent The Accused In All Proceedings, And Whenever Possible, The Accused Will Be Provided With Unclassified Summaries And A Redacted Transcript Of The Proceedings.**

**MYTH: The Administration Supports The Use Of Evidence Obtained Through Torture Or Coercion.**

- **FACT: Evidence Determined To Have Been Obtained Through Torture Is Simply Inadmissible For Military Commissions.** The United States follows this policy throughout the world. It is consistent with our treaty obligations and is reflected in the military commissions rules adopted in 2005.
- **FACT: Last Year, Congress Adopted The McCain Amendment, Which Prohibits "Cruel, Inhuman, Or Degrading Treatment Or Punishment."** This is defined by reference to our Constitutional standards, for all detainees held by the United States, regardless of nationality or geographic location. Congress passed the McCain Amendment as part of the Detainee Treatment Act (DTA) after a significant public debate on the standard that should govern the treatment of captured al Qaeda terrorists.
- **FACT: President Bush Is Committed To Enforcing The McCain Amendment.** THE PRESIDENT: "No American will be allowed to torture another human being anywhere in the world. And I signed the appropriations bill with the McCain Amendment attached on because that's the way it is. ... [M]ake no mistake about it, the McCain Amendment is an amendment we strongly support and will make sure it's fully effective." (President Bush, Press Conference, Washington, DC, 1/26/06)
- **FACT: Allegedly Coerced Testimony Will Be Subject to Review By The Military Judge.** The military judge must evaluate allegedly coerced testimony to determine whether it is reliable and probative before deciding to admit it.
- **FACT: This Proposed Rule Parallels The Rule Congress Adopted On Coercion In The Detainee Treatment Act (DTA), Which Embraces The Reliable And Probative Standard For Combatant Status Review Tribunals.** The DTA mandates that the procedures submitted to Congress for Combatant Status Review Tribunals (CSRTs) shall, to the extent practicable, assess: (A) whether any statement derived from or relating to a detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement. It is not an exclusionary rule.

**MYTH: The Administration's Support For The Use Of Hearsay Evidence Will Deny The Accused A Fair Trial.**

- **FACT: The Commissions Permit The Introduction Of All Probative And Reliable Evidence, Including Hearsay Evidence.** Military commissions must try crimes based on evidence collected anywhere from the battlefields in the War on Terror to foreign terrorist safe houses. It is imperative that reliable hearsay evidence be admissible because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses – for both the prosecution and the defense – may be unavailable because of military necessity, incarceration, injury, or death. Like any evidence, hearsay will not be admitted if its probative value is substantially outweighed by the danger of unfair prejudice.
- **FACT: Critics Are Ignoring The Reality That International War Crimes Tribunals Permit The Introduction Of Hearsay Statements.** For example, recognizing the difficulties in gathering evidence pertaining to events that occurred in war zones throughout the world, the International War Crimes Tribunal for the Former Yugoslavia allows witnesses to testify to statements made by other witnesses.

**MYTH: Americans Will Be Tried By The Military Commissions.**

- **FACT: Americans Cannot Be Tried By The Military Commissions The Administration Has Proposed.** Americans accused of war

crimes and terrorism-related offenses will continue to be tried through our Article III courts or courts-martial.

### **MYTH: Civilians At The Pentagon Ignored Military Lawyers.**

- **FACT: The Administration's Proposal Is The Product Of Extensive Interagency Deliberations And Numerous Consultations With Members Of Congress And Military Lawyers In All Branches Of The Armed Services.** Like a number of lawyers in the Defense Department and other concerned agencies, the JAGs have provided multiple rounds of comments on all aspects of the proposed legislative language, and they have been active participants in the Administration's deliberations and discussions. Many of their comments and recommendations are reflected in provisions of the Bill.
- **Military JAG Lawyers Note They Have Been "Consulted Fairly Extensively."** SEN. GRAHAM: "To the judge advocates, have you been consulted fairly extensively about military commissions and Common Article 3 by the administration?" GEN.: "Yes, sir, we have." GEN.: "Particularly of late, sir." GEN.: "Yes, sir." (Committee On The Judiciary, U.S. Senate, Hearing, 8/2/06)

### **MYTH: We Know Common Article 3 Is Clear Because The Military Trains To Common Article 3.**

- **FACT: The Military Trains To The Geneva Convention Standards For Lawful Prisoners Of War, But The Military Does Not Separately Train To Common Article 3.**
- **Military JAG Lawyers Concur That U.S. Troops Are Trained "To Follow The Geneva Convention Standards On Prisoner Of War Treatment."** SEN. GRAHAM TO THE JAGs: "Now, you're training our troops to follow the Geneva Convention standards on prisoner of war treatment for every enemy combatant that we may come in contact with. Is that correct? An affirmative response. And this is important, Mr. Chairman. From the boots on the ground, we don't worry about the differences. We train as if they were members of a uniformed service representing a sovereign nation. And don't ever change that, because we don't want to confuse the troops." (Committee On The Armed Services, U.S. Senate, Hearing, 7/13/06)

### **MYTH: The Administration Is Seeking To Narrow The War Crimes Act To Protect Abusers.**

- **FACT: The Administration Is Seeking To Provide United States Personnel With Clarity and Certainty As To What Constitutes A Criminal Offense Under The War Crimes Act.** The War Crimes Act provides that any violation of Common Article 3 is a felony, but it does not specify what conduct constitutes a violation. Although Common Article 3 prohibits some actions that are universally condemned, such as "murder" and "torture," it also prohibits "outrages upon personal dignity" and "humiliating and degrading treatment," phrases that are vague and do not provide adequate guidance to our personnel.
- **The Bill Defines The Clear Offenses That Violate Common Article 3.** The bill enumerates nine offenses that constitute clear violations of Common Article 3, including murder, torture, and cruel or inhuman treatment. These prohibitions include clear and serious outrages upon human dignity, such as rape, sexual assault, and conducting Nazi-like human experiments.
- **FACT: Prior To The Supreme Court's Decision In *Hamdan*, The United States Had Never Applied Common Article 3 To A Conflict With International Terrorists.** Now that the Supreme Court has ruled, the Administration believes that we owe it to those called upon to handle detainees in the War on Terror to ensure that the terms of the War Crimes Act are clear and certain.
- **FACT: The Administration's Bill Would Turn The War Crimes Act Into A Usable Prosecutorial Tool By Providing Individuals With Clear Notice As To The Prohibitions Under The Bill.** The United States has never prosecuted anyone for violation of the War Crimes Act. If violations of the War Crimes Act are to be prosecuted, fairness requires that there be clarity and certainty as to what constitutes a criminal offense under the Act.

- **FACT: The United States Will Prohibit Conduct That Could Constitute A Violation Of Common Article 3 As Defined By The U.S. Constitution And Laws.** The Bill defines our obligations under Common Article 3 by reference to the U.S. Constitutional standard already adopted by Congress in the McCain Amendment, which prohibits any United



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