



THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH



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Fact Sheet: The Administration's Legislation to Create Military Commissions

-  [President Discusses Creation of Military Commissions to Try Suspected Terrorists](#)
-  [In Focus: National Security](#)
-  [en Español](#)

Today, The Administration Submitted Draft Legislation To Create A Strong And Effective Military Commission Structure. This structure will help meet the President's objective of winning the War on Terror and ensuring terrorists can be prosecuted for their crimes in full and fair trials. Detaining, questioning, and, where appropriate, prosecuting enemy combatants for war crimes and other terrorism-related offenses is critical to protecting our Nation and winning the War on Terror.

- **Following The Supreme Court's Decision In *Hamdan v. Rumsfeld*, The Administration Is Working With Congress To Create A Process For Prosecuting Enemy Combatants That:**
 - Ensures terrorists can be brought to justice;
 - Recognizes the nature of the enemy and the battlefield;
 - Protects our national security interests;
 - Affirms our national values; and
 - Provides the accused a full and fair trial.
- **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.** Judge Advocates General (JAGs) and other lawyers in the Defense Department and other concerned agencies have provided multiple rounds of comments on the proposed legislation and have actively participated in the Administration's deliberations. Many of their comments and recommendations are reflected in provisions of the Bill.

Creating A New Code Of Military Commissions

The Bill's New Code Of Military Commissions (CMC) Adapts Relevant Provisions Of The Uniform Code Of Military Justice (UCMJ) To The Military Commission Context. The Administration has carefully reviewed the procedures of the UCMJ and adopted or adapted certain UCMJ articles that would be appropriate for these military commissions. The Bill would provide for the trial by military commission of unlawful enemy combatants, including members of al Qaeda, the Taliban, and other international terrorists. The Bill codifies the CMC as chapter 47A to Title 10 of the United States Code following the UCMJ, which is now at chapter 47.

The Bill Uses Existing Court-Martial Procedures Where They Make Sense For Terrorists, But Separates The Military Commission Process From The Court-Martial Process Used To Try Our Own Service Members. The proposed procedures for military commissions would be separate from the UCMJ provisions for courts-martial of U.S. service members, with separate implementing rules.

The CMC Tracks The UCMJ Structure In Many Respects. The Bill establishes a system of military commissions, presided over by a military judge, with commission members drawn from the Armed Forces, and prosecutors and defense counsel from the JAG Corps. The accused may also retain civilian defense counsel if he or she so chooses. Trial procedures, sentencing, and intermediate appellate review generally parallel the processes currently provided under the UCMJ. The bill also provides for appellate review by the United States Court of Appeals for the District of Columbia Circuit, as provided for under the Detainee Treatment Act of 2005 (DTA).

- **The Bill Establishes That The Military Judge, As In The Court-Martial Process, Has The Traditional Authority Of A Judge To Rule On Questions Of Law And Evidence.** The military judge is not a voting member of the commission.
- **The Bill Increases The Minimum Number Of Commission Members From Three To Five And Requires Twelve Commission Members For Any Case In Which The Death Penalty Is Sought.** A conviction would require a vote of two-thirds of the commission members in non-death penalty cases. As with the UCMJ, the death penalty would require the unanimous vote of all 12 commission members.
- **The Bill Proposes A Formal Military Appellate Process That Parallels The Appellate Process Under The UCMJ.** Congress would establish a Court of Military Commission Review within the Department of Defense to hear appeals on questions of law. All convicted detainees would also be entitled to an appeal to the U.S. Court of Appeals for the D.C. Circuit, regardless of the length of their sentence. The Supreme Court could review decisions of the D.C. Circuit.

The CMC Provides The Accused With Substantial Due Process Rights, Including:

- The accused has a right to a full and fair trial.
- The accused has a right to know the charges against him as soon as practicable.
- The accused is presumed innocent until proven guilty beyond a reasonable doubt by legal and competent evidence, with the burden of proof on the prosecution.
- The accused has a right to counsel, including military defense counsel and retained civilian defense counsel.
- The accused must have a reasonable opportunity to obtain witnesses and other evidence, including evidence in the possession of the government.
- The prosecution must disclose to the defense any exculpatory evidence known to it.
- The accused has the right to cross-examine witnesses who testify for the prosecution.
- The accused has a right not to testify against himself at a commission proceeding.
- Evidence may be admitted only if the judge finds it would have probative value to a reasonable person, and it must be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice.

- Statements obtained by use of torture are not admissible against the accused.
- Statements allegedly obtained through use of coercion are not admissible if the judge finds that the circumstances under which they were obtained render them unreliable or lacking in probative value.
- No person may attempt to coerce or by any unauthorized means influence the action of a commission or any commission member in reaching a finding or sentence.
- The commission proceedings must be open except in special circumstances where the judge makes specific findings.
- The accused has the right to at least two appeals from any conviction, including appeal to the D.C. Circuit.
- The accused may not be tried a second time for the same offense.

The Bill Departs From The UCMJ In Some Respects, Where The UCMJ's Provisions Would Be Inappropriate Or Impractical In The Trial Of Terrorists.

- **The CMC Eliminates The UCMJ Miranda-Type Requirements.** The Bill recognizes the accused's privilege against self-incrimination during an actual commission proceeding. However, the Miranda-type rights provided in the UCMJ are broader than the civilian rule and could impede or limit the collection of intelligence during the interrogation of terrorist detainees. The Administration does not think Miranda warnings should be required before interrogating terrorist combatants.

The CMC Eliminates The UCMJ's Article 32 Investigation, Which Is A Pre-Charging Proceeding Similar To A Civilian Grand Jury But Considerably More Protective Of The Accused. Such a proceeding is unnecessary and inappropriate for the trial of captured terrorists, who are already subject to detention under the laws of war.

- **The CMC Provides For The Introduction Of All Probative Evidence, Including Hearsay Evidence Where It Is Reliable.** 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 military commissions have the ability to consider reliable hearsay statements because many witnesses are likely to be foreign nationals who might be difficult to compel to appear in court, and many witnesses may be unavailable due to military necessity, incarceration, injury, or death. International tribunals have similarly recognized the need to allow witnesses to testify to the hearsay statements made by others who are unavailable.
- **The Bill Contains Strict Requirements Limiting The Introduction Of Classified Evidence Outside The Presence Of The Accused.** 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, particularly where the terrorists may be released before hostilities are over. Where the judge finds it is warranted and fair, military commissions can consider such evidence in extraordinary circumstances and subject to strict conditions:
 - The CMC provides that before any classified evidence may be 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 be required to make specific findings that excluding the accused 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 would have to be provided with a redacted transcript of any portion of the proceedings from which he is excluded and an unclassified summary of any evidence introduced, to the extent possible.
- **No "Secret Trials" Will Be Held – The Introduction Of Classified Evidence Is An Extraordinary Procedure That We Expect Would Be Used Only In Exceptional Circumstances And Only Where The Judge Finds It Is Appropriate And Fair.**

Adding Definition To Common Article 3 Of The Geneva Conventions

The Bill Contains Several Provisions Addressing The Supreme Court's Ruling That Common Article 3 Of The Geneva Conventions Applies To Our Armed Conflict With Al Qaeda. If left undefined by statute, the application of Common Article 3 would subject those who fight to defend America from terrorist attack to an uncertain legal standard that may be influenced by foreign tribunals. United States senior civilian and military leaders accordingly have requested that Congress provide clear statutory definition of United States obligations under Common Article 3.

Some Of The Terms In Common Article 3 Are Inherently Vague. Many of the provisions of Common Article 3 prohibit actions that are universally condemned, such as "violence to life," "murder," "mutilation," "torture," and the "taking of hostages." However, Common Article 3 also prohibits "[o]utrages upon personal dignity, in particular, humiliating and degrading treatment." This phrase is susceptible to uncertain and unpredictable application.

Without The Clarification Provided By The Proposed Legislation, The Meaning Of Common Article 3 – The Standard That Now Applies To The Conduct Of Our U.S. Personnel In The War On Terror – Would Change Based On The Evolving Interpretations Of Tribunals And Governments Outside The United States. The Supreme Court has said that in interpreting a treaty provision such as Common Article 3, the meaning given to the treaty language by international tribunals must be accorded "respectful consideration," and the interpretations adopted by other state parties to the treaty should be given "considerable weight."

The Standards Governing The Treatment Of Detainees By The United States In The War On Terror Should Be Clearly Defined By U.S. Law, Consistent With Our International Obligations.

The Bill defines our obligations under Common Article 3 by reference to the U.S. Constitutional standard already adopted by Congress in the Detainee Treatment Act of 2005 (DTA).

- **Last Year, After A Significant Public Debate On The Standard That Should Govern The**

Treatment Of Captured Al Qaeda Terrorists, Congress Adopted The Detainee Treatment Act Of 2005 (DTA). The DTA prohibits "cruel, inhuman, or degrading treatment or punishment," as defined by reference to the Fifth, Eighth, and Fourteenth Amendments of the U. S. Constitution, for all detainees held by the United States, regardless of nationality or geographic location.

The DTA Settled Questions About The Standard Governing The Treatment Of Detainees By The United States In The War On Terror. The DTA's baseline standard fully satisfies our international obligations under Common Article 3, and the Bill makes this clear for all purposes under Federal law.

The Meaning And Application Of The Vague Terms In Common Article 3 Also Raise Questions About Possible Criminal Liability – The War Crimes Act, 18 U.S.C. § 2441, Makes Any Violation Of Common Article 3 A Felony Offense For U.S. Personnel.

- **The Administration Believes That We Owe It To Those Called Upon To Handle Detainees In The War On Terror To Bring Clarity And Certainty To The War Crimes Act.** The surest way to achieve that clarity and certainty is to define a list of specific offenses that constitute war crimes punishable as violations of Common Article 3.

Addressing Judicial Review Of Detainee Claims

The Bill Addresses *Hamdan's* Holding That The DTA's Judicial Review Provisions Do Not Apply To The Hundreds Of Habeas Petitions Now Pending In Federal Courts. The Bill makes clear that the DTA does govern all challenges by detainees to their detention or trial before a military commission, allowing review only of final Combatant Status Review Tribunal (CSRT) determinations and military commission judgments. The Administration believes this was Congress's intent under the DTA, that it makes sense to restrict the accused's ability to pursue appellate remedies until after the CSRT or military commission trial has been completed, and that our courts should not be misused to hear all manner of other challenges by terrorists lawfully held as enemy combatants in wartime.

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Return to this article at:

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