



For Immediate Release  
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## Press Briefing by Teleconference with National Security Advisor Steve Hadley

5:50 P.M. EDT

MR. HADLEY: This is Steve Hadley. I'll try and describe what we accomplished today. The work involved both the issue of Common Article III, which needed to be resolved so that the CIA program of questioning terrorists could go forward. That was addressed. We also needed to address some issues involved in the military commissions so that we would have that instrument for bringing terrorists to justice.

We addressed both of those issues. We reached an agreement that will do really two things. First, the President said that his sole standard with respect to Common Article III, so-called Common Article III, was going to be whether the CIA would be able to go forward with a program for questioning terrorists. This is a program that has been probably one of the most useful tools we've had in the war on terror, and has gotten information that has saved lives, both here at home, and saved lives on the battlefield. And it was critical for the President. As he said, the sole test will be whether this legislation will allow that program to go forward. And the good news is that the program will go forward.

I think it is clear from the legislation that there is now -- the program will go forward and that the men and women who are asked to carry out that program will have clarity as to the legal standard, will have clear congressional support, and will have legal protections as we ask them to do this difficult work.

And I think you heard in the comments that were made when various senators came out to speak after we concluded our work for the day, you have both Senator Graham and Senator McCain talking about that this legislation would allow the CIA program to go forward. Senator Graham characterized this as an aggressive questioning program that would go forward in order to save American lives. So what you saw today was all Republicans coming together to enable this program to go forward in order to enhance the security of the country.

In terms of military commissions, we were able to address outstanding issues that allows the military commissions to go forward and to be available as a device for bringing -- as a proceeding for bringing terrorists to justice. If you take these things together, what we now have is a legislative framework that allows us to capture, detain, question, and prosecute and bring to justice terrorists. It's a good news day.

Let me mention a couple things about the substance of what was done. In terms of clarity to the legal standard in connection with Common Article 3 -- there's been a lot of discussion about that -- it's really achieved in three ways in the proposed legislation. One will be to enumerate those actions that will

constitute violations of Common Article 3, that are grave breaches of Common Article 3, and those are defined in statute. So it will be clear from the statute of the kinds of activities which, if engaged in by men and women who are involved in interrogation of -- in questioning of detainees, what kinds of activities would subject them to criminal penalties as grave breaches.

The second is that the Detainee Treatment Act, or the so-called McCain Amendment, which was adopted in December of last year, is reaffirmed in the statute, and the statute also provides that the President shall take action to ensure compliance with this section. As you know, the section prohibits cruel, inhuman, or degrading treatment or punishment within the meaning of cruel, unusual and inhumane treatment or punishment as prohibited in the 5th, 8th and 14th amendments -- so-called McCain amendment standard. And finally, there is a provision that makes clear that the President has authority as provided by the Constitution and by this legislation, given to him by the Congress, he has the authority for the United States to interpret the meaning and application of the Geneva Conventions, including Common Article III, and to establish standards and administrative regulations for violations that are less than grave breaches of Geneva Conventions.

So the standard comes from three places -- a list of actions which would expose people to criminal liability; a reaffirmation of the standard in the Detainee Treatment Act and the charge to the President to adopt measures for enforcing those provisions; and then finally, the option for the President to provide greater clarity through an executive order process. And we think that will both give the clarity to the legal standard, and also make clear congressional support for this program.

In terms of the military commissions issues, I'll just give you a quick summary. A provision dealing with classified evidence makes sure that no sensitive intelligence will have to be shared with terrorists or their lawyers. The bar is very high. There will not be -- the terrorists will not have access to classified information.

In addition, if classified information is required for the prosecution of a terrorist, there are a variety of ways in which the substance of the information can be provided and used at trial without transferring classified information. And of course, finally, under all circumstances, information about sources and methods, which is the most important, is protected.

So that was the disposition of classified evidence. In terms of coerced statements, so-called coerced statements, or statements that are taken under circumstances when counsel for the defendant may allege coercion, the test is whether it is reliable, the statements are reliable and probative, and if they are, then they will come in. In addition to that standard, after the date of enactment of the Detainee Treatment Act, there is additional test to ensure that the methods by which any information was obtained are consistent with the standards of the Detainee Treatment Act.

So that was the resolution of that issue. And finally, on the issue of hearsay evidence, prosecutors will have wide latitude to use hearsay evidence, and the burden will be on the accused to show that the statement is unreliable or lacking in probative value.

Let me just say that, as you heard from the meeting we had after our discussions, there are still some differences of view on classified evidence between Chairman Hunter in the House, and Senator

Graham on the Senate side. There's been the start of a very good discussion of them between them on that issue, and I think -- the point is I am very confident that they will come up with a resolution that will protect classified information from falling into the hands of terrorists, and still allow our prosecutors be able to go forward and bring terrorists to justice.

So that was done. And again, I think what you saw today was everybody involved in these discussions coming together behind the proposition that this country needs a CIA program to question terrorists; it now has the legal framework to have such a program. And that, in addition, we need a military commission instrument for bringing terrorists to justice, and we now have a statutory framework that will allow prosecutors to go forward with those proceedings. So, bottom line, good progress.

More to do. As the President said, he is hopeful that all the work can be done so a bill can be on his desk next week. And that's what everybody is shooting for.

Thank you very much. And I'd be glad to take some questions.

Q Can you tell us a little bit more about the executive order? Will he outline acceptable interrogation techniques for the CIA in that, or is it more what kind of techniques can be banned? Can you fill that out a little bit more?

MR. HADLEY: Yes. I think what he will do is give some standards and regulations. As you know, specific techniques are classified. The reason is if there's public discussions of techniques, then the terrorists are able to train against them. So you will not see specific discussion of techniques. But what you will find is additional guidance as to standards and regulations for what Common Article 3 requires short of the issue of grave breaches. It's part of this effort through these three devices I described to give clarity to those who carry forward the program.

And again, this whole effort is to get a legal framework supported by the Congress. The President, of course, had authority to do this under his powers of Commander-in-Chief, but what we wanted to do was to have an additional legal framework supported by the Congress as part of this effort to give clear guidance and to make clear that the Congress supports what we've asked of these men and women at the CIA.

Q About the regulations that are going to be drawn up, as I understand it, and I want to make sure I understand it correctly, these are regulations to govern offenses that are, in essence, lesser offenses, not covered by the 5th, the 8th, and the 14th Amendments under the DTA?

MR. HADLEY: They are lesser than the grave breaches, the criminal provisions that are set out. These would be additional standards that would apply. Of course, you're right, there is the Detainees Treatment Act; that continues to be a standard, and the President will adopt some regulations to enforce that.

Q But what I'm getting at is, the Detainee Treatment Act speaks specifically of the American constitutional bar to cruel and unusual punishment --

MR. HADLEY: Correct.

Q -- in case law. And is that the standard beyond which anything else is a lesser offense, like two men sharing a cell and using the same latrine? Or does American case law govern what is a serious offense, and the President writes regulations for everything else?

MR. HADLEY: Clearly, in terms of U.S. law, we're going to look to the criminal provisions and also the Detainee Treatment Act. There, of course, is the fact that the treaty provides, and the Geneva Convention involves obligations of the United States not under domestic law, but also under international law. And this provision recognizes that it is the President that interprets treaties. And what it allows him to do is to provide guidance to our men and women as to what is required of them in order to comply with the international law obligations of the United States.

Q But the problem I'm having is nobody gets prosecuted under the Geneva Conventions. They get prosecuted under the War Crimes Act, and the War Crimes Act speaks of grave offenses.

MR. HADLEY: Correct.

Q And are those grave offenses the same as what is defined under the Detainee Treatment Act as unconstitutional behavior in violation of the 8th Amendment?

MR. HADLEY: No, the grave breaches are violations of criminal law. The Detainee Treatment Act is not a provision of criminal law, as adopted in December of last year, and as re-codified in this statute. It is a statutory provision that puts prohibitions on people, makes clear what activity and what conduct is expected and not expected of the men and women in this program. It does not create criminal liability.

Q Does not create criminal liability for what?

MR. HADLEY: Correct.

Q For what?

MR. HADLEY: For violations of its terms. If you want to know what you're going to be held to criminal liability for, you look at the provisions that deal with grave breaches. They're violations of Title 18. If you want to look at the guidance and the standards that we're going to hold our people to, and that give them clear guidance about what is required and not required beyond the issue of grave breaches, you look at the Detainee Treatment Act. And finally, again, those define obligations under U.S. law.

And if you want to know what additional obligations there may be under international law, that is what the President will provide guidance to in his constitutional authority, and backed up now by the congressional delegation, to define U.S. obligations under treaties.

Q Got it.

Q In enumerating actions that constitute violations, or actually that constitute grave breaches of Common Article 3, could you give us an example of what two or three of those grave breaches would be?

MR. HADLEY: I'll give you a couple in terms of prohibited conduct -- torture, cruel or inhuman treatment, performing biological experiments, obviously murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking hostages. These are the kinds of things we're talking about.

Q I see. So water boarding would fall short of that then, right?

MR. HADLEY: As I said, we are not going to get into discussions of particular techniques. This is to give clear guidance to our men and women in uniform in terms of what are the things that put them at risk for criminal prosecution; what is the standard that otherwise governs their conduct, which is the Detainee Treatment Act. And again, for purposes of complying with our international obligations under international law, that's something that the President will clarify by executive order.

So if you take those three things together, we think we've met the President's requirement that our men and women who run this program have a clear guidance and clarity on the legal standard that applies to their activity. And you do that by defining the legal standard, but we would not be getting into specific legislating techniques. That would be a bad course, and no one in this process has argued for that.

Q Got you. Thank you very much.

MR. HADLEY: Yes.

Q I'm with the editorial page, so we're not double-teaming you. Mr. Hadley, are you confident that -- both in the President's statement, he said his test is whether the program could go forward. And you said you're satisfied with that. Does that mean that every single technique used in interrogation up until now is, as you see it, permissible under this agreement?

MR. HADLEY: Again, I don't want to go in specific --

Q I'm not asking for --

MR. HADLEY: I know -- I know --

Q -- specific procedures.

MR. HADLEY: Let me -- I'm going to answer your question. This isn't a dodge. If you look at the President's speech of two weeks ago Wednesday, he said very clearly, we're going to first get clarity as to what the legal standard is so people know what they can do and not do -- what is the legal standard under which they're going to be judged. And then in light of that, Mike Hayden was going to

go up and consult with appropriate members of the House and the Senate about the kind of program he would propose to run under that legal standard. And that, in turn, is the program that he would ultimately recommend to the President of the United States for approval.

That's the process we're in. We've now got step one. We've got clarity on the legal standard. Mike will now have his consultations about the kind of programs he thinks he wants to run under that legal standard. And having consulted with the members of the Congress, he will then make his recommendation to the President.

Q Just to follow up, is it conceivable that a technique that was used in the past would not be permissible henceforth after this process is finished?

MR. HADLEY: Obviously, what we want to do is come up with, and what he wants to do, is come up with a program that is supported by the executive branch, supported by the Congress, and is one that his people will feel comfortable running and will be -- have clear legal protections in the operation of it. And the bottom line, of course, of all of this effort is to get an effective means of getting information from terrorists who have information that we need to get in order to disrupt plots and protect Americans. And so the bottom line is we've got now a legal framework. He will now consult about the kind of program he wants to run under that legal framework with the Congress, make recommendation to the President. And what he will be recommending to the President is what he judges to be an effective program to help defend the country.

Q Okay, thanks.

Q Could I get clarification on the classified evidence? You have said that the detainees and their attorneys will not have access to sensitive evidence. And there are a variety of ways you said in which the evidence can be used a trial without transferring the classified data. They will not have any -- about sources and methods. The argument from Warner, McCain and Graham was that they don't want to see anybody convicted who doesn't have access to all of the information. So how was that reconciled?

MR. HADLEY: There are really two different things here. One is the ability in a discovery process for a defendant and his attorney to get classified information. And we have a very high bar that is going to present that -- is going to prevent that. So in terms of the ability of the defendant and his counsel to, as of right, get classified information, they do not have it. And the legislation is very clear on that.

And to the extent there is exculpatory evidence that is involved, that will be provided to them, but in an unclassified form. So the first key piece of this is there is a very high bar to protect classified information from getting in the hands of terrorists. So that's on the defense piece. There's a shield to protect classified information from terrorists.

On the flip side, on the so-called sword piece of it, the question is, will prosecutors be able to use classified information in their proceedings. And the answer there is that the statute provides for a variety of means by which the substance of statements they want to get in could be used with respect to the jury, and provided to the defendant and his or her lawyer, but not in classified form. So that they would be deleted of information -- classified information would be deleted from the document, or a

summary of the information in the classified documents would be prepared -- basically a way to get the substance before the defendant and into the trial, but without sharing classified information either with the defendant or his attorney.

Q But if the defendant or the attorney do not have access to redacted information in the classified data which may be pertinent to the conviction, how does that pass muster?

MR. HADLEY: That is the business of the person who runs the tribunal -- will make those kinds of judgments. And they will have access to the redacted -- they will have access to the redacted version, and it is going to be for the trial judge, if you will, to -- basically, the military judge on motion of the trial counsel shall authorize these procedures. So it's under the supervision of the military judge.

The issue that was joined between Senator Graham and Chairman Hunter was the following narrow issue, which is one we think effectively is unlikely ever to come up, which is, in the end of the day, if a prosecutor wants to use classified information and feels that those various devices or means of getting the information available to the prosecutor, but taking out or eliminating the classified piece -- if at the end of the day, those don't work for the prosecutor and the prosecutor wants to actually use classified evidence at trial, does he have to give it to the defendant, or not?

Senator Graham says, absolutely not. If the prosecutor wants to use the classified information at trial, it's got to be given to the defendant and, of course, the defendant's lawyer. Chairman Hunter takes a different view. Chairman Hunter says that in the extreme case, he would like to keep the door open to the possibility that classified evidence and classified statements could be used with the jury without being shown to the defendant.

Our own view and our approach is that we think the likelihood of that situation occurring is remote, to say the least. And so, in our approach we've tended to side with Senator Graham. But it is an issue that is -- that they have not resolved. It is an issue between the Senate and the House. They are engaged in that issue now. But the rest of what I've described is agreed. So we're really talking about what we in the executive branch think is a fairly remote case. That's the issue between the two of them. And I'm pretty confident, in the end, they'll come up with a mechanism that both protects classified information and, at the same time, allows prosecutors to go forward in a way that's fair to the defendant.

Q Just to make this clear, so are there cases in which a defendant and his or her attorney would have access to the classified data if the prosecutor wanted to present it in court?

MR. HADLEY: In the approach that Senator Graham has urged, if a prosecutor wants to use classified information in court, he would have to give it to the defendant and the defendant's counsel.

Q And did you agree to that?

MR. HADLEY: We think, at this point in terms of what we've agreed with the Senate, our view is to -- we think that's a good approach because we think the likelihood of that situation actually occurring is very remote. Chairman Hunter said he's got a different view; he wanted an opportunity to look at what

we came up with the Senate, to be able to make a case that there might be circumstances under which classified information should be used at trial and shared with the counsel, but not with the defendant. And we all basically said, okay, we will all keep an open mind to hearing Chairman Hunter on that issue. And that's what Senator Graham agreed to do, and that's what we in the administration agreed to do.

Q Just to put a coda on this, so when you say this will keep classified information out of the hands of terrorists and their attorneys, that's not a hundred percent accurate?

MR. HADLEY: It depends on how this last five percent issue gets resolved. But I would say this: that if a prosecutor -- the big point I would want to make is that if that situation occurs and classified information is provided, it will only be because the prosecutor has chosen to do so. There will be no situation where, as of right, a defendant can, through discovery, get access to classified information. Everybody agrees that needs to be precluded.

Q Got you. Thanks for clearing that up.

Q Thank you, Mr. Hadley. Mr. Hadley, you said, on coerced testimony, it could come in if it was reliable and probative, but then it would be examined to see if the methods by which it was obtained were consistent with the Detainee Treatment Act. At what point would that examination occur, and who would make the judgment?

MR. HADLEY: That second standard applies, of course, only for statements that had been obtained after enactment of the Detainee Treatment Act, and it is the military judge, of course, that would make that determination.

Q Based on evidence presented by the defendant and his or her attorney?

MR. HADLEY: And additional information in front of the judge that allows the judge to meet the standard. And obviously, the judge could ask for showings from the prosecutor, and obviously, the defendant would have an opportunity to express their view.

Q Thank you, sir. And if the judge determined that it was coerced beyond the terms of the DTA, then it would not be allowed, and vice versa?

MR. HADLEY: The judge can rule it out. Exactly right.

Q What did the administration give up in this negotiation? Because it seems like you got everything that you asked for.

MR. HADLEY: This was a situation where both the Congress and the administration shared a common objective. And what we did in a fairly creative way was come up with ways that we could all support to achieve that objective. And that's really what I think is the most important thing. And it really came out of the commentary subsequent to the President's speech of two weeks ago, that everybody came

together on the proposition that we need this very important program to go forward. It's one of the best tools we have in the war on terror. We need to do it in a way that gives clear guidance to our men and women in -- our men and women who run this program, clear congressional support, and legal protections. And everybody agreed we ought to try and do it in a way that did not involve modifying or amending our international obligations.

That was the objective that we all came to here in the last week. And the goal was whether we could find language mutually agreed between the Senate and the White House that would achieve those objectives. And the good news is, we could and did.

Q Was there anything that you didn't get that you would have wanted to see on this?

MR. HADLEY: I've said all I said -- I can say on that issue. I just want to thank everybody for their time, and thanks very much for your time and attention.

Q Thank you.

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