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CONFERENCE REPORT ON H.R. 4775, 2002 SUPPLEMENTAL APPROPRIATIONS ACT FOR FURTHER RECOVERY FROM AND RESPONSE TO TERRORIST ATTACKS ON THE UNITED STATES

*Excerpts*

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Mr. YOUNG of Florida . Mr. Speaker, I am pleased that we were joined by the gentleman from Illinois (Mr. Hyde), chairman of the Committee on International Relations, which is the committee of the House with legislative jurisdiction over the American Servicemembers' Protection Act. This legislation appears as title II of this conference report. I would like to ask the gentleman to explain the background of this legislation and describe how some of its provisions are intended to work.

Mr. HYDE. I thank the gentleman. The gentleman from Texas (Mr. DeLay) and I first introduced the American Servicemembers' Protection Act as *H.R. 4654* on June 14, 2000, and reintroduced it in the 107th Congress as *H.R. 1794*. On May 10, 2001, the House of Representatives adopted the text of our legislation as a floor amendment to another bill, *H.R. 1646*. The gentleman from Texas (Mr. Delay) and I thereafter entered into negotiations with representatives of the Bush administration in an effort to agree on a version of the American Servicemembers' Protection Act that the Bush administration could support. We were joined in these negotiations by Senator Helms, the lead sponsor of the Senate companion bill.

After many months of detailed discussions, we reached an agreement on language last September, and Senator Helms, the gentleman from Texas (Mr. DeLay) and I each received from the administration letters dated September 25, 2001, promising the administration's full support for enactment of this agreed language. I am pleased that the conference report includes the language we agreed on last September with only one nonsubstantive addition that I will describe in a few minutes.

Mr. YOUNG of Florida . Mr. Speaker, I note that one provision of this agreed language, which appears as section 2011 of the conference report, is particularly complicated. And I would hope that the gentleman could draw on his background as the former chairman of our Committee on the Judiciary, as well as his current

position as chairman of our Committee on International Relations, to explain to our colleagues the purpose of section 2011.

Mr. HYDE. I thank the chairman. I would be pleased to explain the purpose of section 2011.

Mr. YOUNG of Florida . Mr. Speaker, does the gentleman know if all other Members of Congress agree with the interpretation that he has provided of the language negotiated with the administration?

Mr. HYDE . Mr. Speaker, obviously I cannot read the minds of all of our colleagues, but I do know that the gentleman from Texas (Mr. DeLay), Senator Helms and I were the only three members actively involved in negotiating the language of sections 2004, 2006 and 2011 with the administration. I have accurately described our understanding of how these sections would work together, what our intention was, and what we understood the administration's understanding and intention to be. I suppose that someone else could try to project onto these sections a different intention, but they would be doing precisely that, projecting onto them a new meaning that was never intended by those of us who were involved in drafting and refining them.

Mr. YOUNG of Florida . Mr. Speaker, I want to thank the gentleman from Illinois (Mr. Hyde) for providing clarity to this rather complicated and important title of this conference report.

Mr. HYDE . Mr. Speaker, my statement on the American Servicemembers' Protection Act is as follows:

When Congressman DeLay, Senator Helms, and I sat down with representatives of the Bush Administration to discuss the American Servicemembers' Protection Act, it quickly emerged that the Administration's principal concern with the legislation was the belief that a few of its restrictions on United States interaction with the International Criminal Court could, in certain improbable circumstances, interfere with the exercise of authorities vested in the President by the Constitution. The constitutional authorities that they saw as possibly conflicting with the legislation were the president's authority as Commander in Chief of the Armed Forces of the United States under article II, section 2 of the Constitution, and the President's constitutional authority with respect to the conduct of foreign policy, in particular his authority to exchange information with foreign governments and international organizations. Because there is no specific enumeration in the Constitution of the President's authority to conduct foreign policy, this authority is encompassed textually within the executive power vested in the President by article II, section 1 of the Constitution.

There are two sections of our legislation that restrict United States interaction with the International Criminal Court and which therefore, in the view of the Administration, could possibly come into conflict with the exercise of the President's constitutional authority as Commander in Chief and his authority to conduct foreign policy as chief executive. These sections appear as sections 2004 and 2006 of the conference report.

To ensure that sections 2004 and 2006 will never operate to prohibit the President from taking an action that he is empowered under the Constitution to take and that

Congress is without power to prohibit, we developed the "exercise of constitutional authorities" exception set forth in section 2011 of the conference report.

The Committee on International Relations has approved a lot of legislation over the years containing presidential waiver provisions. The "exercise of constitutional authorities" exception contained in section 2011 is very different from these other waiver provisions.

The other waiver provisions give the President, or some other official of the Executive branch, the authority to "waive" an otherwise applicable prohibition or restriction. Typically, the President or other official must first determine that a particular standard set forth in the waiver provision is satisfied. Common examples are requirements that he find that exercising the waiver is "in the national interest," "important to the national interest," or "vital to the national interest." Whatever the waiver standard, the idea is that the President or other official is invited to sue his judgment, and if he judges that the facts permit him to determine that the waiver standard is satisfied, he can then exercise the waiver, which has the effect of rendering the prohibition or restriction inapplicable with respect to the action that he wishes to take or direct.

The "exercise of constitutional authorities" exception contained in section 2011 is very different. Section 2011 does not turn on factual judgments made by the President. Rather, it turns on the parameters of the President's authority under the Constitution. What it says, in effect, is that Congress has not prohibited anything under sections 2004 and 2006 that Congress is without constitutional authority to prohibit.

The intent of Congress in sections 2004 and 2006 could not be clearer. Congress wishes to prohibit any form of assistance to, or cooperation with, the International Criminal Court. We wish to impose such a prohibition to the fullest extent of our ability under the Constitution to do so. To the extent that certain forms of interaction with the International Criminal Court are subject to the shared responsibility of Congress and the President under the Constitution, Congress has the constitutional authority to forbid those forms of interaction, and in sections 2004 and 2006 we exercise that authority to forbid such interaction. However, we recognize that there may be forms of interaction that are the exclusive authority of the President under the Constitution, which Congress constitutionally is without authority to prohibit.

**[\*H5221]**

Accordingly, with respect to those forms of interaction, section 2011 provides a mechanism for ensuring that sections 2004 and 2006 do not constrain the President in ways that, as a matter of constitutional law, he may not be constrained by Congress.

To put the matter differently, it is the intention of Congress that the "exercise of constitutional authorities" exception in this legislation shall only be available in those instances where the President's lawyers could in good faith write a legal opinion concluding that application of the prohibitions of sections 2004 or 2006 to a proposed action by the President would be unconstitutional. It is not good enough that the prohibitions of sections 2004 or 2006 conflict with what the President judges to be in the national interest, or that they interfere with the foreign policy that he would like to conduct. The prohibitions must actually be unconstitutional if applied to the proposed action. This is the meaning of the term "action . . . taken or directed by the President .

. . . in the exercise of the President's authority as Commander in Chief of the Armed Forces . . . or in the exercise of the executive power . . ." The action by the President, in contravention of the prohibitions set forth in sections 2004 or 2006, must actually be an exercise by him of constitutional authority to take an action that Congress is without authority to prohibit.

We understand that many, if not most, actions by the President involve, to some degree or another, an exercise of some constitutional authority. But that is not the kind of constitutional authority to which section 2011 refers. Section 2011 refers to an exercise of the kind of constitutional authority necessary to overcome a statutory prohibition on the taking of a particular action. That kind of constitutional authority exists only with respect to statutory prohibitions that Congress is without constitutional authority to impose in the first place.

This means, as a practical matter, that most of the prohibitions in section 2004 are beyond the reach of the exception set forth in section 2011. This is because most of them do not restrict the exercise of any authority vested exclusively in the President by the Constitution.

A clear example is section 2004(d), which prohibits the extradition of any person from the United States to the International Criminal Court. The Supreme Court ruled in the case of *Valentine v. United States* in 1936 that the President has no inherent constitutional authority to extradite persons to foreign jurisdictions. To the contrary, the Supreme Court ruled that it is unconstitutional for the President to extradite persons in the absence of an extradition treaty or a statute authorizing extradition to the foreign jurisdiction in question. Because there is no treaty or statute authorizing the extradition of persons to the International Criminal Court, the President could not rely on section 2011 to extradite a person to the International Criminal Court in contravention of section 2004(d). This point is underscored by section 2011(c), which makes clear that section 2011 grants no statutory authority to the President to take any action.

Another category of prohibitions that cannot be overcome under section 2011 is those relating to the provision by the U.S. Government of funds, property, or services to the International Criminal Court. Congress has plenary authority under the Constitution with respect to the use of appropriated funds and the disposition of U.S. Government property. Subsections (e) and (f) of section 2004 represent an exercise of this plenary authority. The intention of Congress is to prohibit any direct or indirect provision by the U.S. Government to the International Criminal Court of appropriated funds, U.S. Government property, or services provided utilizing appropriated funds. There may be very limited circumstances in which the President may rely on section 2011 to direct the provision of services to the International Criminal Court notwithstanding the prohibitions of subsections (e) and (f) of section 2004, for example, services provided by the United States Armed Forces pursuant to an exercise of the President's authority as Commander in Chief. But in the absence of an exercise of a constitutional authority vested exclusively in the President, such as the Commander in Chief authority, the prohibitions of these subsections prohibit the provision of the kinds of support to which they apply, and the exception set forth in section 2011 is not available to permit an action by the President in contravention of these sections.

A third category of prohibitions that cannot be overcome under section 2011 is those relating to the exercise of functions not vested in the Executive branch of the United States Government. The President has no inherent constitutional authority to direct or control the operations of state and local governments. Nor does he have any inherent constitutional authority to direct or control the operations of the judicial branch of the federal government, much less the judicial functions of state and local governments. Accordingly, the President may not rely on section 2011 to direct state and local governments. Accordingly, the President may not rely on section 2011 to direct state and local governments to take actions prohibited under subsections (b), (d) and (e) of section 2004, or to authorize such governments to take such actions notwithstanding the prohibitions of these subsections. Similarly, the President may not rely on section 2011 to direct federal, state, or local courts to take actions prohibited under subsections (b), (d), (e) and (f) of section 2004, or to authorize such courts to take such actions notwithstanding the prohibitions of these subsections. The explanation is very simply. Because the exercise of functions by state and local governments and by federal, state, and local courts is by design beyond the inherent constitutional authority of the President, there is no constitutional authority that the President can exercise under section 2011 to overcome prohibitions that this legislation applies to such governments and courts.

This does not mean that section 2011 is of no practical use to the President. In our negotiations with the Administration we discussed a number of circumstances where the President would be able to rely on section 2011 to direct actions plainly prohibited in the first instance by the language of sections 2004 or 2006.

I have already mentioned one such circumstance, and that is actions by the United States Armed Forces directed by the President in the exercise of his constitutional authority as Commander in Chief. An example we discussed in our negotiations was a decision by the President to facilitate the transfer to the International Criminal Court of a foreign national wanted by that Court. Section 2004(e) prohibits the United States Government from facilitating the transfer of persons to the International Criminal Court, including by the United States Armed Forces. But we recognize that at a certain level this prohibition may come into conflict with the President's authority to command our Armed Forces, and in such a case, section 2011 would ensure that the President is not unconstitutionally constrained.

Another circumstance where the President may be able to rely on section 2011 concerns the provision of information controlled by the President to foreign governments and to international organizations, including the International Criminal Court. To the degree the President has inherent constitutional authority to provide such information to foreign governments and international organizations, conflicts could arise between this authority and the prohibitions of section 2004(e) and section 2006. In the case of such a conflict, the President could rely on section 2011 to provide information in the exercise of his constitutional authority without violating the letter of the statute.

I am not aware of other circumstances where the President could rely on section 2011 to take or direct actions otherwise prohibited under section 2004 and 2006, and we pressed the Administration very hard on this point in our negotiations. These were only examples they gave us of situations where the prohibitions of sections 2004 and 2006 could come into conflict with the President's constitutional prerogatives. In order to address this concern, we developed the mechanism contained in section 2011.

Section 2011 is narrowly tailored to be available only in cases where there is such a conflict exists. In other cases where the prohibitions of the legislation are merely inconvenient, or in conflict with the President's preferred foreign policy, section 2011 is not available to permit the President to take or direct actions prohibited by section 2004 or 2006.

Another feature of section 2011 is that, by its terms, it can be invoked by the President only on a "case-by-case basis". In using this term, we were mindful of the way that the existing United Nations war crimes tribunals for Yugoslavia and Rwanda have gone about their work. Those tribunals have developed separate cases against suspected war criminals. Usually these cases involve a single defendant, though sometimes a case will have multiple defendants who were involved in the same specific incident. We intend the term "case" in section 2011 to have the same meaning that it has in current usage at the Yugoslavia and Rwanda tribunals. Yugoslavia and Rwanda are not "cases" before those tribunals. Rather, the prosecutions of individual named persons are the "cases" pending before these tribunals. This can be verified by simply looking at the web sites of these two tribunals.

Before closing, I wish to comment on the effect of the addition by the Senate to this legislation of the language appearing as section 2015. That section was not part of language we negotiated with the Administration. But it does not in any way vitiate the restrictions on cooperation with the International Criminal Court set forth in sections 2004 and 2006. Section 2015 simply reiterates that this legislation does not apply to international efforts besides the International Criminal Court to bring to justice foreign national accused of genocide, war crimes, or crimes against humanity. Regarding application of this section to the **[\*H5222]** International Criminal Court, however, ordinary canons of statutory construction apply. The specific controls the general unless otherwise provided, and in the case of this legislation it is quite obvious that the legislation is very specific about what is to be allowed and what is to be forbidden when it comes to assisting the International Criminal Court. Had the Senate wanted to vitiate the restrictions of sections 2004 and 2006, it would have had to amend them, strike them, or expressly notwithstanding them.

The Senate debate during which the language of section 2015 was agreed to makes clear that this language was understood at the time to make no substantive change to the other provisions of the American Servicemembers' Protection Act. The full text of sections 2004, 2006 and 2011, along with other provisions of the American Servicemembers' Protection Act, was adopted by the Senate as an amendment to another bill on December 7, 2001, by a vote of 78-21. When Senator Warner offered these same provisions as an amendment to this supplemental appropriations bill, the Senate had essentially the same debate it had on December 7th of last year. Neither the supporters nor the opponents of the language that became section 2015 suggested that this language made any change to the legislation that had previously passed the Senate, and the final vote in favor of the amendment, 75-19, was essentially the same as the vote last year. For these reasons, Mr. DeLay and I agreed with the House conferees that there was no reason not to accept the Senate language.

Mr. OBEY . Mr. Speaker, I yield myself 1 minute.

Mr. Speaker, I did not want to insert myself in the colloquy that has just preceded, but I would simply say that while there may have been negotiations going on outside of the room with the administration, the negotiations that count were the negotiations

between the four parties that produced this language. And I think that the understandings discussed here are not necessarily those that were reached between the gentleman from Florida (Mr. Young), myself, Mr. Byrd and Mr. Stevens.

I think the language speaks for itself without being maneuvered one way or another by any after-the-fact colloquies that may or may not relate to the language involved.