

COLLOQUY OF SENATOR LEAHY AND SENATOR BYRD AMERICAN SERVICEMEMBERS' PROTECTION ACT

Mr. Leahy: Mr. President, I read with interest the statement that Representative Hyde made on July 23, 2002 about the American Servicemembers' Protection Act (ASPA) during House consideration of the conference report on H.R. 4775, the fiscal year 2002 Supplemental Appropriations bill for Further Recovery From and Response to Terrorist Attacks on the United States.

Although neither Mr. Hyde nor his staff were present during the negotiations on ASPA, he suggests that the House readily accepted section 2015, also known as the "Dodd-Warner amendment", which was unanimously included in the Senate-passed version of ASPA. I do not think it is necessary to engage in an exhaustive discussion of the legislative history of the Dodd-Warner amendment because it is clear on its face. And, the first rule of legislative interpretation is that one looks to the history only if a provision is ambiguous.

To the extent that the legislative history is relevant, I believe that I can comment on this issue, as I was involved with the drafting of the amendment and was an original co-sponsor. Moreover, I was involved in negotiations over section 2015 during the conference on the Supplemental, and my staff was actively engaged in discussions on this issue throughout.

Contrary to Mr. Hyde's suggestion that the House receded on section 2015 because it is ineffectual, the House understood that the effect of the Dodd-Warner amendment is to qualify provisions of ASPA, including sections 2004, 2006, and 2011, in cases involving foreign nationals. It was for that reason that the House conferees repeatedly and vigorously sought to remove all or part of it from the conference report.

Those present at the negotiations know that the House agreed to accept the Dodd-Warner amendment only when the Senate agreed to drop its provision related to the United Nations Population Fund (UNFPA), which House supporters of ASPA strongly opposed.

Mr. Hyde also asserts that section 2015 "simply reiterates that this legislation does not apply to international efforts besides the International Criminal Court to bring to justice foreign nationals accused of genocide, war crimes, or crimes against humanity." As a former prosecutor and Chairman of the Senate Judiciary Committee, I appreciate the creativity of Mr. Hyde's argument. But he is trying to put a square peg into a round hole, and one would have to rewrite the provision to support his interpretation.

The flaws in this interpretation are self-evident, if one simply reads the text of section 2015:

"Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin

Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.”

The language of this section is clear, and it is noteworthy that any iteration of the phrase “besides the International Criminal Court” does not appear anywhere in the text.

In fact, when Senator Dodd and I were drafting this amendment, I specifically added the phrase “and other foreign nationals accused of genocide, war crimes or crimes against humanity” to ensure that this section would apply to the International Criminal Court (ICC). The ICC currently has jurisdiction over these three crimes.

As I mentioned earlier, the importance of this phrase was not lost on the House, and opponents of the Dodd-Warner amendment tried repeatedly to nullify or remove it. It was even reported to me that, at the eleventh hour, House staff members sought, unsuccessfully, to insert the word “other” before the phrase “international efforts to bring to justice...”, in an attempt to prevent the Dodd-Warner amendment from applying to the ICC and heavily qualifying portions of ASPA.

Another important phrase in section 2015 is: “Nothing in this title shall prohibit...”, which makes unequivocally clear that no provision in ASPA prevents the U.S. from cooperating with the ICC in cases involving foreign nations.

No one disputes the fact that Congress has serious concerns about Americans coming before the ICC, which is the reason that ASPA was passed. During consideration of ASPA, Senator Warner made that point clear:

“This amendment would protect U.S. military personnel and other elected and appointed officials of the U.S. government against potential criminal prosecution by an international tribunal court to which the United States is not a party.”

However, through the Dodd-Warner amendment, Congress sets a different standard with respect to non-Americans. Congress wanted to be clear that the U.S. can cooperate with international efforts, including those by the ICC, to bring foreign nationals to justice for genocide, war crimes, and crimes against humanity, as Senator Dodd pointed out during the Senate debate:

“My amendment merely says that despite whatever else we have said, when it comes to prosecuting these people, we would participate and help, even though we are not a signatory or participant in the International Criminal Court.”

This is precisely why the Senate unanimously accepted the Dodd amendment and why the lead sponsor of ASPA, Senator Warner, joined as co-sponsor of the amendment.

Mr. President, I see that Chairman Byrd is here on the floor and I would ask if he agrees with my recollection of events that transpired during the conference negotiations on the Supplemental and my interpretation of the Dodd-Warner amendment.

Mr. Byrd: I agree with what Senator Leahy has said about section 2015 of the Supplemental Appropriations bill. The House strongly resisted efforts to incorporate the Dodd-Warner amendment in the bill, and receded only in exchange for the Senate agreeing to drop a provision on UNFPA.

Mr. Leahy: Thank you, Mr. Chairman. I want to take this opportunity say a few words about the importance of section 2015. A primary reason for the creation of the ICC is to remove the uncertainty and protracted negotiations surrounding the establishment of ad hoc tribunals to try those accused of genocide, war crimes, and crimes against humanity. In the future, the ICC may be the only venue for bringing to justice those accused of these heinous crimes.

The Dodd-Warner amendment simply ensures that the United States can assist the ICC, or other international efforts, to try foreign nationals accused of war crimes, genocide, and crimes against humanity. It is not difficult to think of a number of instances when it would be in the interest of the United States to support such efforts. For example:

--What if 50 Americans, traveling overseas, are brutally killed by a suicide bomber and the ICC attempts to bring to justice the perpetrators of this horrendous act?

--What if a group of terrorists commits war crimes against U.S. military personnel who are posted abroad and the ICC is involved with efforts to bring them to justice?

--What if the ICC prosecutes some future Saddam Hussein, Slobodan Milosovic, or Osama bin Laden who is responsible for the deaths of thousands of people?

Would we want the President of the United States to be hamstrung by ASPA in these, or a number of other cases, and prevented from actively supporting efforts by the ICC to bring these types of notorious criminals to justice? Of course not. Finally, Mr. President, I want to point out that Mr. Hyde also goes to great lengths to provide an interpretation of sections 2004, 2006, and 2011. Although I was not involved with the negotiations on ASPA with the Administration, I must say that the State Department's efforts with the House on this issue were miserable, and I know this is not typical of the way the Department represents U.S. interests abroad.

The explanation that the State Department offers for supporting ASPA is that it did so in exchange for releasing the U.N. dues. This does not withstand the most basic scrutiny.

In the wake of the September 11 attacks, there was overwhelming support in Congress to assist with efforts to prevent and respond to international terrorism. After September 11, without any quid-pro-quo, the Senate voted to confirm Ambassador John Negroponte to the position of U.S. representative to the United Nations. I am confident that the State Department, with a little ingenuity, could have persuaded the Republican majority in the House to meet our obligations to the United Nations - something that is clearly in our national security interests - without having to agree to support ASPA.

In any event, I take issue with Mr. Hyde's interpretation of sections 2004, 2006, and 2011, even though they are heavily qualified by the Dodd-Warner amendment. Again, one should look to legislative history only if the text of the provision is unclear, and in this case the text of ASPA is clear and does not support his reading. For example, there is nothing in the waiver language concerning the President's executive authority or authority as Commander-in-Chief that limits the waiver to a subset of this authority. Moreover, ASPA clearly states that the waiver applies to "any action or actions..." not to "some" actions.

For Mr. Hyde's interpretation to be correct it would be necessary to add language to the provision such as: "if it would be unconstitutional for Congress to restrict the exercise of this authority." Moreover, ASPA states that it applies to "any action" taken by the President as Commander-in-Chief or exercising "the executive power" of the Presidency. If the President has the constitutional authority to take an action, this provision permits him to do so, notwithstanding any other language in the bill. It is not relevant whether Congress could have prohibited such actions.

Further, no matter what was said between those who negotiated ASPA, Mr. Hyde's interpretation of the provision was not necessarily in the minds of the majority of Members voting on ASPA because it simply was not mentioned during the House or Senate debates. These waiver provisions complement section 2015 which is highly relevant in interpreting them, as Senator Warner alluded to during the Senate debate. Congress decided that it did not want to tie the President's hands if he determined that it makes sense for the United States to cooperate with any international body, including the ICC, in prosecuting foreign nationals accused of genocide, war crimes, and crimes against humanity.

Mr. President, I want to thank Senators Dodd and Warner for their efforts to ensure that ASPA does not include overly-burdensome restrictions on the President that prevent the U.S. from cooperating with the ICC. I also want to thank Senator Dodd's staff for providing valuable advice on this issue.