[redacted]@judiciary-rep.senate.gov

From: [redacted]@judiciary-rep.senate.gov
Sent: Thursday, February 9, 2006 7:29 PM
To: Gorsuch, Neil M; [redacted]@bakerbotts.com
Subject: February 9 Kyl statement
Attachments: February floor statement.wpd; Graham-Kyl Am 11.8.05.pdf

Senator Kyl "made" the following statement on the floor of the U.S. Senate today. It will eventually appear in the printed record for today, February 9. The final printed version will not be available online for several days, however. I will send that to you when it is available.

SENATOR KYL
ENEMY COMBATANTS

Mr. KYL: Mr. President, I rise today to introduce into the Record a letter that Senator Graham and I recently sent to the Attorney General, and to respond to misrepresentations that have been made in the press and by others regarding the circumstances of the enactment of the Graham amendment to last year's Defense Authorization bill. The letter responds to similar misleading attacks that were made against the Justice Department at the beginning of this year. My office has received several inquiries about this letter, which was sent to the Attorney General on January 18. So that anyone interested in this matter might review the letter, I introduce it into the Record.

I ordinarily would not comment on the meaning of legislation that already has been enacted into law. In this case, however, there has been a considerable amount of post-enactment commentary by others on the meaning of the Graham amendment. Much of this commentary insinuates that the Administration and the backers of the amendment are violating an agreement with members of the minority by characterizing the amendment as governing pending litigation. Since the enactment of the Graham amendment last December, some critics have begun to paint a revisionist history of this legislation. In this new account, the Graham amendment supposedly was intentionally modified by the Senate so as not to affect pending litigation. Also in this version of events, Senators relied on representations that the amendment was modified to carve out pending litigation when they voted in favor of its final passage. This conspiracy theory is without foundation.

For those unfamiliar with the Graham amendment, the disputed provision in the legislation changes the federal habeas code by adding a subsection providing as follows: "Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." The amendment also provides that "[t]his section shall take effect on the date of the enactment of this Act." In addition, the amendment establishes substantive standards for limited judicial review of CSRT determinations and military-commission decisions, and provides that the paragraphs creating those review standards "shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act."

Some critics now assert that nothing in the amendment prevents pre-enactment habeas actions from going forward in their previous form. For reasons explained in the letter to the Attorney General, I believe that such an interpretation is untenable. In addition to the points made in the letter, I would also add the following: the amendment states that the changes that it makes to the habeas code "shall take effect on the date of the enactment of this Act." If the current pack habeas cases are allowed to go forward in their current form, the law's provision that "no court, justice, or judge shall have jurisdiction" to hear those cases in that form will not be effective on the date of the law's enactment. Rather, the courts still would have jurisdiction over these cases after the date of enactment, and the law's all-encompassing jurisdictional bar would become effective only when the current litigation would exhaust itself – a date that likely would

come only years in the future. Such a result would not be consistent with the requirement that the law's total jurisdictional prohibition "take effect of the date of the enactment of this Act."

Of those critics who argue that the amendment carves out pre-enactment habeas cases, I would simply ask, what part of "no court, justice or judge" do you not understand? How could this language possibly be more comprehensive? And how could any Senator possibly have been misled as to its effect?

Some of the recent criticism of the amendment in the press has taken a new tack. A few critics have begun to suggest that even if the legislative text of the Graham amendment does wipe out the pending habeas cases, Senators were affirmatively misled about this aspect of the final amendment. The allegation is that Senators were led to understand that the amendment that they were voting on would not affect pending cases. I have reviewed the legislative record from the days leading up to the vote on final passage of the Graham amendment, and find this suggestion wanting. Allow me to describe what was actually said about the original version of the amendment – the Graham/Kyl amendment – as well as the final version, the Graham/Levin/Kyl amendment, prior to their passage.

On November 10, Senator Levin stated with regard to the original Graham/Kyl amendment, "I read the language as to how broad it is. It eliminates explicitly any appeal: No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus, and that is the way an appeal goes to a court from one of these people. It is eliminated." (151 Cong. Rec. S12665.) Similarly, later that day, Senator Bingaman characterized the original Graham amendment as follows: "It essentially denies all courts anywhere the right to consider any petition from any prisoner being held at Guantanamo Bay." (151 Cong. Rec. S12667.) And later, on November 15, Senator Durbin said the following about the original Graham/Kyl amendment: "the amendment would eliminate habeas for detainees at Guantanamo Bay. * * * * It would strip Federal courts, including the U.S. Supreme Court, of the right to hear any challenge to any practice at Guantanamo Bay, other than a one-time appeal to the D.C. Circuit * * *. It applies retroactively, and therefore also likely would prevent the Supreme Court from ruling on the merits of the Hamdan case, a pending challenge to the legality of the administration's military commissions." (151 Cong. Rec. S12799.)

Thus from the beginning, Senators recognized and emphasized to their colleagues that the original Graham amendment's language was comprehensive. They also recognized and emphasized that the amendment barred pending cases from going forward, including the Hamdan case in the Supreme Court. These aspects of the original amendment not only were generally acknowledged, but were a point of controversy during the Senate debate.

Had the subsequent Graham/Levin/Kyl amendment departed from the original amendment by carving out pending cases, this would have been a momentous change. Aside from the fact that such a change would have gutted the amendment, it also would addressed one of the issues about which opposing Senators had expressed sharp concern. Surely, had such a change been made or even intended to be made, the fact would have been noted. Instead, it is the dog that did not bark.

First, neither Senator Graham nor I ever said anything in the days leading up to the final vote on the amendment that could possibly suggest to anyone that the modified amendment exempted pending cases. Senator Graham is the lead sponsor and I am an original cosponsor of the amendment that passed the Senate on November 10. We controlled the amendment. No one was in a better position than we were to describe what the amendment does and does not do. Had such a major change to the amendment been made, it is inconceivable that one of us would not at least have commented on it. No such comment or even the suggestion of such a change was made by either one of us.

Indeed, the few statements that Senator Graham did make prior to passage of Graham/Levin/Kyl that describe the amendment's reach tend to confirm that the amendment does not treat detainees differently based on when they filed their claims. For example, on the evening of November 14, when the final amendment was introduced, Senator Graham noted that "[i]nstead of having unlimited habeas corpus opportunities under the Constitution, we give every enemy combatant, all 500, a chance to go to Federal court, the Circuit Court of Appeals for the District of Columbia." (151 Cong. Rec. S12754.) "What we have done, working with Senators Levin, Kyl, and others, we have created that same type of appeals process for all military commission decisions." *Ibid.*

During that same evening, Senator Levin also commented on the new amendment. Although he said that the amendment did not "strip jurisdiction" from the courts, he made clear that he meant that jurisdiction remained in place because the pending cases – including challenges to military-commission decisions – could go forward as claims invoking the substantive review standards of the new amendment. Senator Levin stated: "What we have done in this amendment, we have said that the standards in the amendment will be applied in pending cases, but the amendment will not trip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in Hamdan is not affected." (151 Cong. Rec. S12755.) Again, later: "what our amendment does, as soon as it is enacted and the enactment is effective, it provides that the standards we set forth in our amendment will be the substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date of this amendment." *Ibid.* And again: "because it would not strip courts of jurisdiction over these matters where they have taken jurisdiction, it does, again, apply the substantive law and assume that the courts would apply the substantive law if this amendment is agreed to." *Ibid.*

Whether the amendment, by barring one type of claim and authorizing another type to take its place, strips the courts of jurisdiction, is, to some extent, a matter of perspective. It is a question of whether the glass is half empty or half full. On the operative issue, however, Senator Levin's remarks on November 14 are consistent not only with my own and Senator Graham's characterization of the amendment (*see, e.g.* 151 Cong. Rec. S14263), but also with the interpretation now advanced by the Justice Department: that the current claims can go forward, but only as claims for review under the substantive standards created by the new the act.

It bears mention that the revised amendment's authorization of judicial review of

military-commission decisions, though narrow and venue-restricted, was a substantial departure from the original amendment. As Senator Levin had emphasized on November 10, the original amendment "eliminates court review of the sentences of enemy combatants before these commissions." (151 Cong. Rec. S12664.) He stated that the amendment even "eliminates the appeal of a conviction that led to a capital offense." (151 Cong. Rec. S12665.) Under the original Graham amendment, no appeal of any kind would have been permitted from the military-commission verdict in the Hamdan case.

The revised amendment does allow limited appeals of final military-commission decisions. In fact, this change was described to Senators as the principal difference between the original and revised Graham amendments. Senator Levin noted on the morning of November 15, before the vote on Graham/Levin/Kyl:

> "The amendment which was approved last Thursday, which is the one now awaiting this amendment, would have provided for review only for status determinations and not of convictions by military commissions. * * * * One of the reasons I voted against the amendment last Thursday is that it did not provide for that direct judicial review of convictions by military commissions. That is the major change in the amendment before the Senate, the so-called Graham-Levin-Kyl amendment which is before the Senate. There are a number of other changes as well, but of all the changes, what this amendment does is add * * * a direct appeal for convictions by military commissions." (151 Cong. Rec. S12754.)

Other Senators speaking about the amendment prior to the final vote did not even view the detainee's glass as half full. On the morning of November 15, Senator Specter exhorted his colleagues to oppose the amendment, stating: "On the face of the Graham amendment, it * * * even takes away jurisdiction from the Supreme Court of the United States." (151 Cong. Rec. S12799.) He later stated that the amendment would "strip Federal courts of the authority to consider a habeas petition from detainees being held in U.S. custody as enemy combatants," (151 Cong. Rec. 12801), and reiterated that the Graham/Levin/Kyl amendment was an amendment "which on the face takes away jurisdiction of the Supreme Court of the United States." *Ibid.* Senator Specter's remarks should at least have placed any Senator on inquiry notice that the final amendment might affect pending cases.

Finally, Senator Durbin also spoke about the final Graham amendment prior to the vote. As I mentioned earlier, on the morning of November 15, Senator Durbin expressed concern that the original Graham/Kyl amendment's jurisdictional bar would apply "retroactively," and that it "likely would prevent the Supreme Court from ruling on the merits of the Hamdan case." (151 Cong. Rec. S12799.) Almost immediately after these words, Senator Durbin also commented on the revised Graham amendment. He stated:

> "The Graham-Levin substitute amendment would somewhat improve the underlying amendment by expanding the scope of review in the D.C. Circuit Court to include whether CSRT's are legal, but not whether a particular detainee's detention is legal. It would also allow for post-conviction review of military

commission convictions. However, the amendment would still eliminate habeas review and overrule Rasul."

(151 Cong. Rec. S12799.) Again, no suggestion was made that the new amendment might carve out pending cases, despite the Senator's expressed concern about retroactivity. The Senator gave no hint that he expected the new amendment to treat pending cases any differently than did the old amendment. Senator Durbin does not appear to have been misled about the effect of the final Graham amendment, not did he mislead anyone else.

To be sure, two statements that do appear in the record prior to the final vote on the Graham amendment both assert that the amendment would not "strip jurisdiction" – and both of these statements are unleavened by Senator Levin's accompanying clarification that pending cases would proceed under the substantive review standards of the new law. Both of these statements, however, appear to have been introduced into the record following the final vote – both refer to that vote in the past tense. Neither Senator thus could have misled other members about the effect of the amendment prior to the vote. Senator Kerry made clear in his statement that his remarks were made only after the November 15 vote: "Today, I voted in favor of Senator Bingaman's amendment No. 2523, because it would have preserved judicial review. * * * When the Bingaman amendment failed, I voted for a second-degree amendment." (151 Cong. Rec. S12799.) Similarly, Senator Reid also emphasized that his statement did not precede the actual vote: "the Senate has voted to deny the availability of habeas corpus to individuals held by the United States at Guantanamo Bay, Cuba. I rise to explain * * * my votes in favor of the Bingaman amendment and the Graham-Levin amendment earlier today." (151 Cong. Rec. S12802.) Neither of these statements was part of the information that was presented to Senators prior to the final vote on the Graham amendment.

To summarize, the legislative record is utterly devoid of any evidence that Senators were led to believe that the Graham/Levin/Kyl amendment would carve out pending cases. Prior to the vote, several Senators spoke of the original amendment's breadth and the fact that it would terminate pending cases. Senator Graham, drawing no distinction between pre- and post-enactment filers, stated that the revised amendment would apply a uniform standard to all 500 Guantanamo detainees. Senator Levin made clear that "the standards we set forth in our amendment will be the substantive standards which we would expect would be applied in all cases, including cases which are pending as of the effective date of this amendment." Senator Specter pointedly warned that the final amendment would "strip Federal courts of the authority to consider a habeas petition from detainees" and "even take[] away jurisdiction from the Supreme Court of the United States." Other members who condemned the original amendment for terminating pending cases gave no hint that they viewed the new amendment any differently. Quite simply, there is no evidence that anyone misled anyone else about the fact that the Graham amendment would only allow pending cases to go forward under the limited review standards of the new law.

On November 15, the Graham/Levin/Kyl amendment passed the Senate by a vote of 84-14. That same day, the entire Defense Authorization bill passed the Senate by unanimous consent and the Senate appointed conferees. One month later, on December 16, the House and

Senate conferees agreed to file a conference report. In the days that followed, a new slew of statements were made in the Senate and even in the House commenting on the meaning of the Graham amendment. Many of these statements are simply the usual effort by the losers of legislative battles to rewrite legislative history. The majority of the Senators, for example, who announced in these statements that the Graham amendment was not intended to affect pending cases also were among the 14 Senators who voted against the final Graham/Levin/Kyl amendment. No one can seriously suggest that these members relied on any representations made by the backers of the amendment. And more importantly, given the marked disagreement between the statements that were made at this late stage about the effect of the amendment on pending cases, no one could justifiably have relied upon one view rather than another to learn what the amendment does. Rather, it is up to members to examine the actual language of the amendment.

I hope that this review of the circumstances of the enactment of the Graham amendment will put to rest any accusation that members of Congress were misled about the amendment's impact on pending cases. Whether the amendment does in fact govern pending cases is another matter. For the reasons expressed here and in the January 18 letter to the Attorney General, I believe that it does so, but that, of course, is a matter for the courts to decide. In the event that the courts concur with my and Senator Graham's interpretation of the amendment, however, no member should be heard to complain that they were led to believe that the amendment would operate differently.

I ask unanimous consent that the following letter be printed in the RECORD.