

107TH CONGRESS
1ST SESSION

H. R. 1794

To protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not party.

IN THE HOUSE OF REPRESENTATIVES

MAY 10, 2001

Mr. DELAY (for himself, Mr. MURTHA, Mr. HYDE, Mr. GILMAN, and Mr. SMITH of New Jersey) introduced the following bill; which was referred to the Committee on International Relations

A BILL

To protect United States military personnel and other elected and appointed officials of the United States Government against criminal prosecution by an international criminal court to which the United States is not party.

1 *Be it enacted by the Senate and House of Representa-
2 tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “American
5 Servicemembers’ Protection Act of 2001”.

6 SEC. 2. FINDINGS.

7 Congress makes the following findings:

1 (1) On July 17, 1998, the United Nations Dip-
2 lomatic Conference of Plenipotentiaries on the Es-
3 tablishment of an International Criminal Court,
4 meeting in Rome, Italy, adopted the “Rome Statute
5 of the International Criminal Court.” The vote on
6 whether to proceed with the Statute was 120 in
7 favor to 7 against, with 21 countries abstaining. The
8 United States voted against final adoption of the
9 Rome Statute.

23 (4) During testimony before the Congress following the adoption of the Rome Statute, the lead
24
25 United States negotiator, Ambassador David

1 Scheffer stated that the United States could not
2 sign the Rome Statute because certain critical nego-
3 tiating objectives of the United States had not been
4 achieved. As a result, he stated: “We are left with
5 consequences that do not serve the cause of inter-
6 national justice.”

7 (5) Ambassador Scheffer went on to tell the
8 Congress that: “Multinational peacekeeping forces
9 operating in a country that has joined the treaty can
10 be exposed to the Court’s jurisdiction even if the
11 country of the individual peacekeeper has not joined
12 the treaty. Thus, the treaty purports to establish an
13 arrangement whereby United States armed forces
14 operating overseas could be conceivably prosecuted
15 by the international court even if the United States
16 has not agreed to be bound by the treaty. Not only
17 is this contrary to the most fundamental principles
18 of treaty law, it could inhibit the ability of the
19 United States to use its military to meet alliance ob-
20 ligations and participate in multinational operations,
21 including humanitarian interventions to save civilian
22 lives. Other contributors to peacekeeping operations
23 will be similarly exposed.”.

24 (6) Notwithstanding these concerns, President
25 Clinton directed that the United States sign the

1 Rome Statute on December 31, 2000. In a state-
2 ment issued that day, he stated that in view of the
3 unremedied deficiencies of the Rome Statute, “I will
4 not, and do not recommend that my successor sub-
5 mit the Treaty to the Senate for advice and consent
6 until our fundamental concerns are satisfied”.

7 (7) Any American prosecuted by the Inter-
8 national Criminal Court will, under the Rome Stat-
9 ute, be denied procedural protections to which all
10 Americans are entitled under the Bill of Rights to
11 the United States Constitution, such as the right to
12 trial by jury.

13 (8) Members of the Armed Forces of the
14 United States deserve the full protection of the
15 United States Constitution wherever they are sta-
16 tioned or deployed around the world to protect the
17 vital national interests of the United States. The
18 United States Government has an obligation to pro-
19 tect the members of its Armed Forces, to the max-
20 imum extent possible, against criminal prosecutions
21 carried out by United Nations officials under proce-
22 dures that deny them their constitutional rights.

23 (9) In addition to exposing members of the
24 Armed Forces of the United States to the risk of
25 international criminal prosecution, the Rome Statute

1 creates a risk that the President and other senior
2 elected and appointed officials of the United States
3 Government may be prosecuted by the International
4 Criminal Court. Particularly if the Preparatory
5 Commission agrees on a definition of the Crime of
6 Aggression over United States objections, senior
7 United States officials may be at risk of criminal
8 prosecution for national security decisions involving
9 such matters as responding to acts of terrorism, pre-
10 venting the proliferation of weapons of mass destruc-
11 tion, and deterring aggression. No less than mem-
12 bers of the Armed Forces of the United States, sen-
13 ior officials of the United States Government deserve
14 the full protection of the United States Constitution
15 with respect to official actions taken by them to pro-
16 tect the national interests of the United States.

17 **SEC. 3. WAIVER AND TERMINATION OF PROHIBITIONS OF**
18 **THIS ACT.**

19 (a) AUTHORITY TO INITIALLY WAIVE SECTIONS 5
20 AND 7.—The President is authorized to waive the prohibi-
21 tions and requirements of sections 5 and 7 for a single
22 period of one year. Such a waiver may be issued only if
23 the President at least 15 days in advance of exercising
24 such authority—

12 (i) covered United States persons;
13 (ii) covered allied persons; and
14 (iii) individuals who were covered
15 United States persons or covered allied
16 persons; and

17 (B) ensures that no person described in
18 subparagraph (A) will be arrested, detained,
19 prosecuted, or imprisoned by or on behalf of the
20 International Criminal Court.

21 (b) AUTHORITY TO EXTEND WAIVER OF SECTIONS
22 5 AND 7.—The President is authorized to waive the prohibi-
23 bitions and requirements of sections 5 and 7 for successive
24 periods of one year each upon the expiration of a previous
25 waiver pursuant to subsection (a) or this subsection. Such

1 a waiver may be issued only if the President at least fifteen
2 teen days in advance of exercising such authority—

3 (1) notifies the appropriate congressional committees of the intention to exercise such authority;
4 and

5 (2) determines and reports to the appropriate congressional committees that the International Criminal Court—

6 (A) remains party to, and has continued to abide by, a binding agreement that—

7 (i) prohibits the International Criminal Court from seeking to exercise jurisdiction over the following persons with respect to actions undertaken by them in an official capacity:

8 (I) covered United States persons;

9 (II) covered allied persons; and

10 (III) individuals who were covered United States persons or covered allied persons; and

11 (ii) ensures that no person described in clause (i) will be arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court; and

(B) has taken no steps to arrest, detain, prosecute, or imprison any person described in clause (i) of subparagraph (A).

4 (c) AUTHORITY TO WAIVE SECTIONS 4 AND 6 WITH
5 RESPECT TO AN INVESTIGATION OR PROSECUTION OF A
6 NAMED INDIVIDUAL.—The President is authorized to
7 waive the prohibitions and requirements of sections 4 and
8 6 to the degree they would prevent United States coopera-
9 tion with an investigation or prosecution of a named indi-
10 vidual by the International Criminal Court. Such a waiver
11 may be issued only if the President at least 15 days in
12 advance of exercising such authority—

18 (A) a waiver pursuant to subsection (a) or
19 (b) of the prohibitions and requirements of sec-
20 tions 5 and 7 is in effect:

21 (B) there is reason to believe that the
22 named individual committed the crime or
23 crimes that are the subject of the International
24 Criminal Court's investigation or prosecution;

1 (C) it is in the national interest of the
2 United States for the International Criminal
3 Court's investigation or prosecution of the
4 named individual to proceed; and

5 (D) in investigating events related to ac-
6 tions by the named individual, none of the fol-
7 lowing persons will be investigated, arrested,
8 detained, prosecuted, or imprisoned by or on
9 behalf of the International Criminal Court with
10 respect to actions undertaken by them in an of-
11 ficial capacity:

12 (i) Covered United States persons.
13 (ii) Covered allied persons.
14 (iii) Individuals who were covered
15 United States persons or covered allied
16 persons.

17 (d) TERMINATION OF WAIVER PURSUANT TO SUB-
18 SECTION (c).—Any waiver or waivers exercised pursuant
19 to subsection (c) of the prohibitions and requirements of
20 sections 4 and 6 shall terminate at any time that a waiver
21 pursuant to subsection (a) or (b) of the prohibitions and
22 requirements of sections 5 and 7 expires and is not ex-
23 tended pursuant to subsection (b).

24 (e) TERMINATION OF PROHIBITIONS OF THIS ACT.—

25 The prohibitions and requirements of sections 4, 5, 6, and

1 7 shall cease to apply, and the authority of section 8 shall
2 terminate, if the United States becomes a party to the
3 International Criminal Court pursuant to a treaty made
4 under article II, section 2, clause 2 of the Constitution
5 of the United States.

6 **SEC. 4. PROHIBITION ON COOPERATION WITH THE INTER-**

7 **NATIONAL CRIMINAL COURT.**

8 (a) **CONSTRUCTION.**—The provisions of this
9 section—

10 (1) apply only to cooperation with the Inter-
11 national Criminal Court and shall not be construed
12 to apply to cooperation with an ad hoc international
13 criminal tribunal established by the United Nations
14 Security Council before or after the date of the en-
15 actment of this Act to investigate and prosecute war
16 crimes committed in a specific country or during a
17 specific conflict; and

18 (2) shall not be construed to prohibit—

19 (A) any action permitted under section 8;
20 (B) any other action taken by members of
21 the Armed Forces of the United States outside
22 the territory of the United States while engaged
23 in military operations involving the threat or
24 use of force when necessary to protect such per-

1 sonnel from harm or to ensure the success of
2 such operations; or

3 (C) communication by the United States to
4 the International Criminal Court of its policy
5 with respect to a particular matter.

6 (b) PROHIBITION ON RESPONDING TO REQUESTS
7 FOR COOPERATION.—No agency or entity of the United
8 States Government or of any State or local government,
9 including any court, may cooperate with the International
10 Criminal Court in response to a request for cooperation
11 submitted by the International Criminal Court pursuant
12 to Part 9 of the Rome Statute.

13 (c) PROHIBITION ON SPECIFIC FORMS OF COOPERA-
14 TION AND ASSISTANCE.—No agency or entity of the
15 United States Government or of any State or local govern-
16 ment, including any court, may provide financial support
17 or other cooperation, support, or assistance to the Inter-
18 national Criminal Court, including by undertaking any ac-
19 tion described in the following articles of the Rome Statute
20 with the purpose or intent of cooperating with, or other-
21 wise providing support or assistance to, the International
22 Criminal Court:

23 (1) Article 89 (relating to arrest, extradition,
24 and transit of suspects).

7 (d) RESTRICTION ON ASSISTANCE PURSUANT TO
8 MUTUAL LEGAL ASSISTANCE TREATIES.—The United
9 States shall exercise its rights to limit the use of assist-
10 ance provided under all treaties and executive agreements
11 for mutual legal assistance in criminal matters, multilat-
12 eral conventions with legal assistance provisions, and ex-
13 tradition treaties, to which the United States is a party,
14 and in connection with the execution or issuance of any
15 letter rogatory, to prevent the transfer to, or other use
16 by, the International Criminal Court of any assistance
17 provided by the United States under such treaties and let-
18 ters rogatory.

19 (e) PROHIBITION ON INVESTIGATIVE ACTIVITIES OF
20 AGENTS.—No agent of the International Criminal Court
21 may conduct, in the United States or any territory subject
22 to the jurisdiction of the United States, any investigative
23 activity relating to a preliminary inquiry, investigation,
24 prosecution, or other proceeding at the International
25 Criminal Court.

1 **SEC. 5. RESTRICTION ON UNITED STATES PARTICIPATION**2 **IN CERTAIN UNITED NATIONS PEACE-**
3 **KEEPING OPERATIONS.**

4 (a) **POLICY.**—Effective beginning on the date on
5 which the Rome Statute enters into force pursuant to Ar-
6 ticle 126 of the Rome Statute, the President should use
7 the voice and vote of the United States in the United Na-
8 tions Security Council to ensure that each resolution of
9 the Security Council authorizing any peacekeeping oper-
10 ation under chapter VI of the charter of the United Na-
11 tions or peace enforcement operation under chapter VII
12 of the charter of the United Nations permanently exempts,
13 at a minimum, members of the Armed Forces of the
14 United States participating in such operation from crimi-
15 nal prosecution by the International Criminal Court for
16 actions undertaken by such personnel in connection with
17 the operation.

18 (b) **RESTRICTION.**—Members of the Armed Forces of
19 the United States may not participate in any peacekeeping
20 operation under chapter VI of the charter of the United
21 Nations or peace enforcement operation under chapter VII
22 of the charter of the United Nations, the creation of which
23 is authorized by the United Nations Security Council on
24 or after the date that the Rome Statute enters into effect
25 pursuant to Article 126 of the Rome Statute, unless the
26 President has submitted to the appropriate congressional

1 committees a certification described in subsection (c) with
2 respect to such operation.

3 (c) CERTIFICATION.—The certification referred to in
4 subsection (b) is a certification by the President that
5 members of the Armed Forces of the United States are
6 able to participate in the peacekeeping or peace enforce-
7 ment operation without risk of criminal prosecution by the
8 International Criminal Court because—

9 (1) in authorizing the operation, the United
10 Nations Security Council permanently exempted, at
11 a minimum, members of the Armed Forces of the
12 United States participating in the operation from
13 criminal prosecution by the International Criminal
14 Court for actions undertaken by them in connection
15 with the operation;

16 (2) each country in which members of the
17 Armed Forces of the United States participating in
18 the operation will be present is either not a party to
19 the International Criminal Court and has not in-
20 voked the jurisdiction of the International Criminal
21 Court pursuant to Article 12 of the Rome Statute,
22 or has entered into an agreement in accordance with
23 Article 98 of the Rome Statute preventing the Inter-
24 national Criminal Court from proceeding against

1 members of the Armed Forces of the United States
2 present in that country; or

3 (3) the United States has taken other appro-
4 priate steps to guarantee that members of the
5 Armed Forces of the United States participating in
6 the operation will not be prosecuted by the Inter-
7 national Criminal Court for actions undertaken by
8 such personnel in connection with the operation.

9 **SEC. 6. PROHIBITION ON DIRECT OR INDIRECT TRANSFER**

10 **OF CERTAIN CLASSIFIED NATIONAL SECU-**
11 **RITY INFORMATION TO THE INTERNATIONAL**
12 **CRIMINAL COURT.**

13 (a) DIRECT TRANSFER.—Not later than the date on
14 which the Rome Statute enters into force, the President
15 shall ensure that appropriate procedures are in place to
16 prevent the transfer of classified national security infor-
17 mation to the International Criminal Court.

18 (b) INDIRECT TRANSFER.—Not later than the date
19 on which the Rome Statute enters into force, the President
20 shall ensure that appropriate procedures are in place to
21 prevent the transfer of classified national security infor-
22 mation relevant to matters under consideration by the
23 International Criminal Court to the United Nations and
24 to the government of any country that is a party to the
25 International Criminal Court unless the United Nations

1 or that government, as the case may be, has provided writ-
2 ten assurances that such information will not be made
3 available to the International Criminal Court.

4 (c) CONSTRUCTION.—The provisions of this section
5 shall not be construed to prohibit any action permitted
6 under section 8.

7 **SEC. 7. PROHIBITION OF UNITED STATES MILITARY ASSIST-
8 ANCE TO PARTIES TO THE INTERNATIONAL
9 CRIMINAL COURT.**

10 (a) PROHIBITION OF MILITARY ASSISTANCE.—Sub-
11 jeet to subsections (b) and (c), no United States military
12 assistance may be provided to the government of a country
13 that is a party to the International Criminal Court.

14 (b) WAIVER.—The President may waive the prohibi-
15 tion of subsection (a) with respect to a particular
16 country—

17 (1) for one or more periods not exceeding one
18 year each, if the President determines and reports to
19 the appropriate congressional committees that it is
20 vital to the national interest of the United States to
21 waive such prohibition; and

22 (2) permanently, if the President determines
23 and reports to the appropriate congressional com-
24 mittees that such country has entered into an agree-
25 ment with the United States pursuant to Article 98

1 of the Rome Statute preventing the International
2 Criminal Court from proceeding against United
3 States personnel present in such country.

4 (c) EXEMPTION.—The prohibition of subsection (a)
5 shall not apply to the government of—

6 (1) a NATO member country;

10 (3) Taiwan.

11 SEC. 8. AUTHORITY TO FREE MEMBERS OF THE ARMED
12 FORCES OF THE UNITED STATES AND CER-
13 TAIN OTHER PERSONS HELD CAPTIVE BY OR
14 ON BEHALF OF THE INTERNATIONAL CRIMI-
15 NAL COURT.

16 (a) AUTHORITY.—The President is authorized to use
17 all means necessary and appropriate to bring about the
18 release from captivity of any person described in sub-
19 section (b) who is being detained or imprisoned against
20 that person's will by or on behalf of the International
21 Criminal Court.

22 (b) PERSONS AUTHORIZED TO BE FREED.—The au-
23 thority of subsection (a) shall extend to the following per-
24 sons:

25 (1) Covered United States persons.

1 (2) Covered allied persons.

7 (c) AUTHORIZATION OF LEGAL ASSISTANCE.—When
8 any person described in subsection (b) is arrested, de-
9 tained, prosecuted, or imprisoned by or on behalf of the
10 International Criminal Court, the authority under sub-
11 section (a) may be used—

12 (1) for the provision of legal representation and
13 other legal assistance to that person (including, in
14 the case of a person entitled to assistance under sec-
15 tion 1037 of title 10, United States Code, represen-
16 tation and other assistance in the manner provided
17 in that section); and

18 (2) for the provision of exculpatory evidence on
19 behalf of that person.

20 (d) BRIBES AND OTHER INDUCEMENTS NOT AU-
21 THORIZED.—Subsection (a) does not authorize the pay-
22 ment of bribes or the provision of other incentives to in-
23 duce the release from captivity of a person described in
24 subsection (b).

1 **SEC. 9. ALLIANCE COMMAND ARRANGEMENTS.**

2 (a) REPORT ON ALLIANCE COMMAND ARRANGE-
3 MENTS.—Not later than 6 months after the date of the
4 enactment of this Act, the President shall transmit to the
5 appropriate congressional committees a report with re-
6 spect to each military alliance to which the United States
7 is party—

8 (1) describing the degree to which members of
9 the Armed Forces of the United States may, in the
10 context of military operations undertaken by or pur-
11 suant to that alliance, be placed under the command
12 or operational control of foreign military officers
13 subject to the jurisdiction of the International Crimi-
14 nal Court because they are nationals of a party to
15 the International Criminal Court; and

16 (2) evaluating the degree to which members of
17 the Armed Forces of the United States engaged in
18 military operations undertaken by or pursuant to
19 that alliance may be exposed to greater risks as a
20 result of being placed under the command or oper-
21 ational control of foreign military officers subject to
22 the jurisdiction of the International Criminal Court.

23 (b) DESCRIPTION OF MEASURES TO ACHIEVE EN-
24 HANCED PROTECTION FOR MEMBERS OF THE ARMED
25 FORCES OF THE UNITED STATES.—Not later than one
26 year after the date of the enactment of this Act, the Presi-

1 dent shall transmit to the appropriate congressional com-
2 mittees a description of modifications to command and
3 operational control arrangements within military alliances
4 to which the United States is a party that could be made
5 in order to reduce any risks to members of the Armed
6 Forces of the United States identified pursuant to sub-
7 section (a)(2).

8 (c) SUBMISSION IN CLASSIFIED FORM.—The report
9 under subsection (a), and the description of measures
10 under subsection (b), or appropriate parts thereof, may
11 be submitted in classified form.

12 **SEC. 10. WITHHOLDINGS.**

13 Funds withheld from the United States share of as-
14 sessments to the United Nations or any other inter-
15 national organization during any fiscal year pursuant to
16 section 705 of the Admiral James W. Nance and Meg
17 Donovan Foreign Relations Authorization Act, Fiscal
18 Years 2000 and 2001 (as enacted by section 1000(a)(7)
19 of Public Law 106-113; 113 Stat. 1501A-460), are au-
20 thorized to be transferred to the Embassy Security, Con-
21 struction and Maintenance Account of the Department of
22 State.

23 **SEC. 11. NONDELEGATION.**

24 The authorities vested in the President by sections
25 3, 5(c), and 7(b) may not be delegated by the President

1 pursuant to section 301 of title 3, United States Code,
2 or any other provision of law.

3 **SEC. 12. DEFINITIONS.**

4 As used in this Act and in sections 705 and 706 of
5 the Admiral James W. Nance and Meg Donovan Foreign
6 Relations Authorization Act, Fiscal Years 2000 and 2001:

7 (1) APPROPRIATE CONGRESSIONAL COMMIT-
8 TEES.—The term “appropriate congressional com-
9 mittees” means the Committee on International Re-
10 lations of the House of Representatives and the
11 Committee on Foreign Relations of the Senate.

12 (2) CLASSIFIED NATIONAL SECURITY INFORMA-
13 TION.—The term “classified national security infor-
14 mation” means information that is classified or clas-
15 sifiable under Executive Order 12958 or a successor
16 Executive order.

17 (3) COVERED ALLIED PERSONS.—The term
18 “covered allied persons” means military personnel,
19 elected or appointed officials, and other persons em-
20 ployed by or working on behalf of the government of
21 a NATO member country, a major non-NATO ally
22 (including, *inter alia*, Australia, Egypt, Israel,
23 Japan, the Republic of Korea, and New Zealand), or
24 Taiwan, for so long as that government is not a
25 party to the International Criminal Court and wish-

1 es its officials and other persons working on its be-
2 half to be exempted from the jurisdiction of the
3 International Criminal Court.

4 (4) COVERED UNITED STATES PERSONS.—The
5 term “covered United States persons” means mem-
6 bers of the Armed Forces of the United States,
7 elected or appointed officials of the United States
8 Government, and other persons employed by or
9 working on behalf of the United States Government,
10 for so long as the United States is not a party to
11 the International Criminal Court.

12 (5) EXTRADITION.—The terms “extradition”
13 and “extradite” include both “extradition” and “sur-
14 render” as those terms are defined in article 102 of
15 the Rome Statute.

16 (6) INTERNATIONAL CRIMINAL COURT.—The
17 term “International Criminal Court” means the
18 court established by the Rome Statute.

19 (7) MAJOR NON-NATO ALLY.—The term “major
20 non-NATO ally” means a country that has been so
21 designated in accordance with section 517 of the
22 Foreign Assistance Act of 1961.

23 (8) PARTY TO THE INTERNATIONAL CRIMINAL
24 COURT.—The term “party to the International
25 Criminal Court” means a government that has de-

1 posited an instrument of ratification, acceptance, ap-
2 proval, or accession to the Rome Statute, and has
3 not withdrawn from the Rome Statute pursuant to
4 Article 127 thereof.

5 (9) PEACEKEEPING OPERATION UNDER CHAP-
6 TER VI OF THE CHARTER OF THE UNITED NATIONS
7 OR PEACE ENFORCEMENT OPERATION UNDER CHAP-
8 TER VII OF THE CHARTER OF THE UNITED NA-
9 TIONS.—The term “peacekeeping operation under
10 chapter VI of the charter of the United Nations or
11 peace enforcement operation under chapter VII of
12 the charter of the United Nations” means any mili-
13 tary operation to maintain or restore international
14 peace and security that—

15 (A) is authorized by the United Nations
16 Security Council under chapter VI or VII of the
17 charter of the United Nations; and

18 (B) is paid for from assessed contributions
19 of United Nations members that are made
20 available for peacekeeping or peace enforcement
21 activities.

22 (10) ROME STATUTE.—The term “Rome Stat-
23 ute” means the Rome Statute of the International
24 Criminal Court, adopted by the United Nations Dip-
25 lomatic Conference of Plenipotentiaries on the Es-

1 establishment of an International Criminal Court on
2 July 17, 1998.

3 (11) SUPPORT.—The term “support” means as-
4 sistance of any kind, including financial support,
5 material support, services, intelligence sharing, law
6 enforcement cooperation, the training or detail of
7 personnel, and the arrest or detention of individuals.

8 (12) UNITED STATES MILITARY ASSISTANCE.—
9 The term “United States military assistance”
10 means—

11 (A) assistance provided under chapters 2
12 through 6 of part II of the Foreign Assistance
13 Act of 1961 (22 U.S.C. 2311 et seq.);

14 (B) defense articles or defense services fur-
15 nished with the financial assistance of the
16 United States Government, including through
17 loans and guarantees; or

18 (C) military training or education activities
19 provided by any agency or entity of the United
20 States Government.

21 Such term does not include activities reportable
22 under title V of the National Security Act of 1947
23 (50 U.S.C. 413 et seq.).

○