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S. 1296

To provide for the protection of the due process rights of United States citizens (including United States servicemembers) before foreign tribunals, including the International Criminal Court, for the prosecution of war criminals, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 1, 2001

Mr. DODD introduced the following bill; which was read twice and referred to the Committee on Foreign Relations

A BILL

To provide for the protection of the due process rights of United States citizens (including United States servicemembers) before foreign tribunals, including the International Criminal Court, for the prosecution of war criminals, and for other purposes.

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 Citizens’
5 Protection and War Criminal Prosecution Act of 2001”.

6 **SEC. 2. FINDINGS.**

7 Congress makes the following findings:

1 (1) Since the Nuremberg and Tokyo Tribunals
2 were convened following World War II, the United
3 States has been the world's leading proponent of
4 international justice. Today, the United States is
5 pursuing justice for the architects of genocide and
6 other gross crimes in Cambodia, East Timor, Rwan-
7 da, Sierra Leone, and the former Yugoslavia.

8 (2) Bringing the perpetrators of genocide, war
9 crimes, and crimes against humanity to justice is
10 consistent with United States national interests and
11 fundamental values.

12 (3) Such crimes cause massive humanitarian
13 tragedies, and refugee emergencies, that often sig-
14 nificantly affect United States national interests.

15 (4) The International Criminal Court will be a
16 permanent court designed to investigate and bring to
17 justice individuals who commit war crimes, crimes
18 against humanity, and genocide. The International
19 Criminal Court will be established under the Rome
20 Statute, a treaty adopted in Rome on July 17, 1998,
21 at a United Nations diplomatic conference.

22 (5) On December 31, 2000, the United States
23 signed the Rome Statute. As of June 28, 2001, 139
24 countries have signed the treaty and 36 countries
25 have ratified it. Every member of the European

1 Union and 18 of 19 members of the North Atlantic
2 Treaty Organization have signed the Rome Statute.

3 (6) United States servicemembers and United
4 States officials involved in national security affairs
5 deserve the full protection of the United States Gov-
6 ernment and should not be the subject of frivolous
7 or politically motivated prosecutions by the Inter-
8 national Criminal Court or any other foreign tri-
9 bunal.

10 (7) United States negotiators succeeded in en-
11 suring that the Rome Statute contains numerous
12 safeguards designed to protect United States citi-
13 zens, including due process rights that former State
14 Department Legal Adviser Monroe Leigh has called
15 “more detailed and comprehensive” than those con-
16 tained in the United States Bill of Rights. The De-
17 partment of Justice has never objected to the Rome
18 Statute on constitutional grounds.

19 (8) Under the Rome Statute, the International
20 Criminal Court must defer to United States jurisdic-
21 tion in cases involving United States citizens or serv-
22 ice personnel. The International Criminal Court may
23 proceed in such cases only if it determines that the
24 United States has decided not to prosecute the per-
25 son concerned and that the decision resulted from

1 the unwillingness or inability of the United States
2 genuinely to prosecute the matter.

3 (9) Upon signing the Rome Statute, President
4 Clinton stated he did not intend to submit the Rome
5 Statute in its present form to the Senate for advice
6 and consent to ratification. The Bush Administra-
7 tion has also stated that it will not seek the Senate's
8 advice and consent to ratification of the Rome Stat-
9 ute.

10 (10) Many issues important to United States
11 interests are still being negotiated by signatories to
12 the Rome Statute. Continued United States engage-
13 ment with the International Criminal Court can help
14 protect United States interests.

15 **SEC. 3. DEFINITIONS.**

16 In this Act:

17 (1) APPROPRIATE CONGRESSIONAL COMMIT-
18 TEES.—The term “appropriate congressional com-
19 mittees” means the Committee on Foreign Relations
20 of the Senate and the Committee on International
21 Relations of the House of Representatives.

22 (2) CLASSIFIED NATIONAL SECURITY INFORMA-
23 TION.—The term “classified national security infor-
24 mation” means information that is classified or clas-

1 sifiable under Executive Order 12958 or a successor
2 executive order.

3 (3) INTERNATIONAL CRIMINAL COURT.—The
4 term “International Criminal Court” means the
5 court established by the Rome Statute.

6 (4) PARTY TO THE INTERNATIONAL CRIMINAL
7 COURT.—The term “party to the International
8 Criminal Court” means a government that has de-
9 posited an instrument of ratification, acceptance, ap-
10 proval, or accession to the Rome Statute, and has
11 not withdrawn from the Rome Statute pursuant to
12 Article 127 thereof.

13 (5) ROME STATUTE.—The term “Rome Stat-
14 ute” means the Rome Statute of the International
15 Criminal Court, adopted by the United Nations Dip-
16 lomatic Conference of Plenipotentiaries on the Es-
17 tablishment of an International Criminal Court on
18 July 17, 1998.

19 (6) UNITED STATES SERVICEMEMBER.—The
20 term “United States servicemember” means any per-
21 son that is subject to the provisions of chapter 47
22 of title 10, United States Code (relating to the Uni-
23 form Code of Military Justice).

1 **SEC. 4. STATEMENT OF POLICY.**

2 It is the sense of Congress that the United States
3 should—

4 (1) maintain a policy of fully supporting the
5 due process rights of all United States citizens be-
6 fore foreign tribunals, including before the Inter-
7 national Criminal Court;

8 (2) continue to participate in negotiations of
9 the Preparatory Commission of the International
10 Criminal Court and as an observer in the Assembly
11 of States Parties in order to—

12 (A) ensure that the rules of procedure and
13 evidence and elements of crimes adopted by the
14 International Criminal Court conform to United
15 States standards of due process, are formally
16 adopted by the Assembly, and fairly applied by
17 the International Criminal Court's judges and
18 prosecutors;

19 (B) seek a definition of the crime of ag-
20 gression under the Rome Statute that is con-
21 sistent with international law and fully respects
22 the right of self-defense of the United States
23 and its allies; and

24 (C) ensure that United States interests are
25 protected in the negotiations over the remaining

1 elements of the International Criminal Court
2 regime;

3 (3) provide appropriate diplomatic and legal as-
4 sistance to United States citizens, especially United
5 States servicemembers and their dependents, who
6 face prosecution without full due process in any
7 forum, including, if applicable, before the Inter-
8 national Criminal Court; and

9 (4) undertake, in all diplomatic negotiations re-
10 lated to international legal matters, to ensure that
11 no United States citizen, especially United States
12 servicemembers and their dependents, will face frivo-
13 lous prosecutions or prosecutions without full due
14 process of law.

15 **SEC. 5. POLICY OF JUDICIAL ASSISTANCE AND PROTEC-**
16 **TION FOR UNITED STATES CITIZENS AND**
17 **SERVICEMEMBERS; STUDY AND REPORT.**

18 (a) PROHIBITION.—The United States shall not take
19 any action to extradite or otherwise make available any
20 United States citizen or United States servicemember to
21 the International Criminal Court—

22 (1) if the United States is exercising its right
23 under the Rome Statute to investigate or prosecute
24 the crime under title 18, United States Code, or

1 chapter 47 of title 10, United States Code (relating
2 to the Uniform Code of Military Justice); or

3 (2)(A) if, after any such investigation, no rea-
4 sonable basis has been found to proceed with a pros-
5 ecution of such person; or

6 (B) if, after prosecution for such crime, such
7 person has been acquitted.

8 (b) RIGHT TO INVESTIGATE AND PROSECUTE
9 UNDER UNITED STATES LAW.—If a United States citizen
10 or United States servicemember is accused of a crime
11 under the Rome Statute, the United States shall in all
12 cases fully exercise its right under the Rome Statute to
13 investigate and, if appropriate, to prosecute the crime
14 under title 18, United States Code, or chapter 47 of title
15 10, United States Code (relating to the Uniform Code of
16 Military Justice), unless the President determines that it
17 is not in the national interest to do so.

18 (c) STUDY AND REPORT.—

19 (1) STUDY.—The Attorney General, the Sec-
20 retary of Defense, and the Secretary of State shall
21 jointly conduct a study consisting of a review of the
22 crimes defined under the Rome Statute and consid-
23 eration of what amendments to title 18, United
24 States Code, and chapter 47 of title 10, United
25 States Code (relating to the Uniform Code of Mili-

1 tary Justice) may be necessary to ensure that the
2 United States can fully exercise its rights under
3 Part 2 of the Rome Statute.

4 (2) REPORT.—Not later than 180 days after
5 the date of enactment of this Act, the Attorney Gen-
6 eral, the Secretary of Defense, and the Secretary of
7 State shall jointly submit to the appropriate congres-
8 sional committees a report setting forth the findings
9 of the study conducted under paragraph (1), includ-
10 ing any recommendations for the enactment of legis-
11 lation making the amendments described in that
12 paragraph.

13 (d) PROTECTIONS FOR UNITED STATES DEFEND-
14 ANTS BEFORE THE INTERNATIONAL CRIMINAL COURT.—
15 If a case involving a United States citizen or United States
16 servicemember is found admissible by the International
17 Criminal Court (within the meaning of Article 17 of the
18 Rome Statute), then the President shall—

19 (1) use all appropriate diplomatic and legal re-
20 sources to ensure that such person receives due
21 process (including, in the case of a person entitled
22 to assistance under section 1037 of title 10, rep-
23 resentation and other assistance in the manner pro-
24 vided in that section); and

1 (2) provide for the defendant whatever excul-
2 patory evidence may be available.

3 **SEC. 6. REPORTING REQUIREMENT.**

4 (a) REQUIREMENT.—Not later than one year after
5 the date of enactment of this Act, the President shall sub-
6 mit a report to the appropriate congressional
7 committees—

8 (1) comparing the due process protections af-
9 forded under the Rome Statute to those due process
10 protections afforded United States servicemembers
11 and their dependents under Status of Forces Agree-
12 ments, temporary Status of Forces Agreements,
13 temporary Status of Mission Agreements and Let-
14 ters of Assist in effect between the United States
15 and foreign nations or international organizations as
16 of the date of the report; and

17 (2) comparing the due process protections af-
18 forded under the Rome Statute to those due process
19 protections afforded United States citizens under bi-
20 lateral extradition treaties to which the United
21 States is a party, or multilateral treaties to which
22 the United States is a party and which contain a
23 provision authorizing extradition.

24 (b) ELEMENTS OF THE REPORT.—The report re-
25 quired by subsection (a) shall describe, in particular, the

1 extent to which United States citizens or United States
2 servicemembers accused of crimes overseas currently are
3 provided—

- 4 (1) the right to a jury trial;
- 5 (2) the presumption of innocence;
- 6 (3) the privilege against compelled self-incrimi-
7 nation;
- 8 (4) the right to confront witnesses;
- 9 (5) the protection against double jeopardy;
- 10 (6) the freedom from unreasonable searches
11 and seizures;
- 12 (7) the right to be present at trial;
- 13 (8) the right to effective assistance of counsel;
- 14 and
- 15 (9) the exclusion of unlawfully obtained evi-
16 dence.

17 **SEC. 7. POLICY OF ASSISTANCE FOR THE PROSECUTION OF**
18 **WAR CRIMINALS.**

19 (a) SUPPORT AND ASSISTANCE AUTHORIZED.—Not-
20 withstanding any other law, while the United States is not
21 a party to the Rome Statute, the United States may pro-
22 vide support and assistance, as appropriate, on a case-by-
23 case basis to the International Criminal Court for the
24 prosecution of accused war criminals, particularly those
25 accused of crimes against United States servicemembers,

1 United States citizens, or citizens of countries friendly to,
2 or allied with, the United States when the President deter-
3 mines that doing so would serve important United States
4 interests.

5 (b) SUPPORT AND ASSISTANCE DEFINED.—In this
6 section, the term “support and assistance” includes finan-
7 cial support, compliance with extradition requests, provi-
8 sion of appropriate intelligence information, legal assist-
9 ance, and such other assistance that is ordinarily provided
10 under treaties and executive agreements for mutual legal
11 assistance.

12 **SEC. 8. PROHIBITION ON DIRECT OR INDIRECT TRANSFER**
13 **OF CERTAIN CLASSIFIED NATIONAL SECU-**
14 **RITY INFORMATION TO THE INTERNATIONAL**
15 **CRIMINAL COURT.**

16 (a) DIRECT TRANSFER.—Except as provided in sec-
17 tion 7, and not later than the date of entry into force of
18 the Rome Statute, the President shall ensure that appro-
19 priate procedures are in place to prevent the transfer of
20 classified national security information to the Inter-
21 national Criminal Court.

22 (b) INDIRECT TRANSFER.—Except as provided in
23 section 7, and not later than the date of entry into force
24 of the Rome Statute, the President shall ensure that ap-
25 propriate procedures are in place to prevent the transfer

1 of classified national security information relevant to mat-
2 ters under consideration by the International Criminal
3 Court to the United Nations and to the government of
4 any country that is a party to the International Criminal
5 Court unless the United Nations or that government, as
6 the case may be, has provided written assurances that
7 such information will not be made available to the Inter-
8 national Criminal Court.

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

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

16 (1) describing the degree to which members of
17 the Armed Forces of the United States may, in the
18 context of military operations undertaken by or pur-
19 suant to that alliance, be placed under the command
20 or operational control of foreign military officers
21 subject to the jurisdiction of the International Crimi-
22 nal Court because they are nationals of a party to
23 the International Criminal Court; and

24 (2) evaluating the degree to which members of
25 the Armed Forces of the United States engaged in

1 military operations undertaken by or pursuant to
 2 that alliance may be exposed to greater risks as a
 3 result of being placed under the command or oper-
 4 ational control of foreign military officers subject to
 5 the jurisdiction of the International Criminal Court.

6 (b) DESCRIPTION OF MEASURES TO ACHIEVE EN-
 7 HANCED PROTECTION FOR MEMBERS OF THE ARMED
 8 FORCES OF THE UNITED STATES.—Not later than one
 9 year after the date of the enactment of this Act, the Presi-
 10 dent shall transmit to the appropriate congressional com-
 11 mittees a description of modifications to command and
 12 operational control arrangements within military alliances
 13 to which the United States is a party that could be made
 14 in order to reduce any risks to members of the Armed
 15 Forces of the United States identified pursuant to sub-
 16 section (a)(2).

17 (c) SUBMISSION IN CLASSIFIED FORM.—The report
 18 under subsection (a), and the description of measures
 19 under subsection (b), or appropriate parts thereof, may
 20 be submitted in classified form.

21 **SEC. 10. CERTIFICATION PRIOR TO SUBMISSION OF ROME**
 22 **STATUTE TO THE SENATE AS A TREATY.**

23 Prior to submission of the Rome Statute to the Sen-
 24 ate for its advice and consent to ratification, the President
 25 should certify that the International Criminal Court has

- 1 established a demonstrated record of fair and impartial
- 2 prosecution of genocide, war crimes, and crimes against
- 3 humanity.

