

106TH CONGRESS  
2D SESSION

# S. 2726

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 a party.

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## IN THE SENATE OF THE UNITED STATES

JUNE 14, 2000

Mr. HELMS (for himself, Mr. LOTT, Mr. WARNER, Mr. HATCH, Mr. GRAMS, and Mr. SHELBY) introduced the following bill; which was read twice and referred to the Committee on Foreign Relations

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## 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 a 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 2000”.

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           adoption of the Statute was 120 in favor to 7  
7           against, with 21 countries abstaining. The United  
8           States voted against final adoption of the Rome  
9           Statute.

10           (2) As of May 30, 2000, 96 countries had  
11           signed the Rome Statute and 10 had ratified it. Pur-  
12           suant to article 126 of the Rome Statute, the Stat-  
13           ute will enter into force on the first day of the  
14           month after the 60th day following the date that the  
15           60th country deposits an instrument ratifying the  
16           Statute.

17           (3) Since adoption of the Rome Statute, a Pre-  
18           paratory Commission for the International Criminal  
19           Court has continued to meet regularly to draft docu-  
20           ments to implement the Rome Statute, including  
21           Rules of Procedure and Evidence, definitions of Ele-  
22           ments of Crimes, and a definition of the Crime of  
23           Aggression.

24           (4) During testimony before the Congress, the  
25           lead 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) Any Americans prosecuted by the Inter-  
25 national Criminal Court will, under the Rome Stat-

1       ute, be denied many of the procedural protections to  
2       which all Americans are entitled under the Bill of  
3       Rights to the United States Constitution, including,  
4       among others, the right to trial by jury, the right  
5       not to be compelled to provide self-incriminating tes-  
6       timony, and the right to confront and cross-examine  
7       all witnesses for the prosecution.

8               (7) American servicemen and women deserve  
9       the full protection of the United States Constitution  
10      when they are deployed around the world to protect  
11      the vital national interests of the United States. The  
12      United States Government has an obligation to pro-  
13      tect American servicemen and women, to the max-  
14      imum extent possible, against criminal prosecutions  
15      carried out by United Nations officials under proce-  
16      dures that deny them their constitutional rights.

17              (8) In addition to exposing American service-  
18      men and women to the risk of international criminal  
19      prosecution, the Rome Statute creates a risk that  
20      the President and other senior elected and appointed  
21      officials of the United States Government may be  
22      prosecuted by the International Criminal Court. Par-  
23      ticularly if the Preparatory Commission agrees on a  
24      definition of the Crime of Aggression, senior United  
25      States officials may be at risk of criminal prosecu-

1       tion for national security decisions involving such  
2       matters as responding to acts of terrorism, pre-  
3       venting the proliferation of weapons of mass destruc-  
4       tion, and deterring aggression. No less than Amer-  
5       ican servicemen and women, senior officials of the  
6       United States Government deserve the full protec-  
7       tion of the United States Constitution with respect  
8       to official actions taken by them to protect the na-  
9       tional interests of the United States.

10 **SEC. 3. TERMINATION OF PROHIBITIONS OF THIS ACT.**

11       The prohibitions and requirements of sections 4, 5,  
12 6, and 7 shall cease to apply, and the authority of section  
13 8 shall terminate, if the United States becomes a party  
14 to the International Criminal Court pursuant to a treaty  
15 made under article II, section 2, clause 2 of the Constitu-  
16 tion of the United States.

17 **SEC. 4. PROHIBITION ON COOPERATION WITH THE INTER-**  
18 **NATIONAL CRIMINAL COURT.**

19       (a) CONSTRUCTION.—The provisions of this section  
20 apply only to cooperation with the International Criminal  
21 Court and shall not be construed to apply to cooperation  
22 with an ad hoc international criminal tribunal established  
23 by the United Nations Security Council before or after the  
24 date of the enactment of this Act to investigate and pros-

1 ecute war crimes committed in a specific country or during  
2 a specific conflict.

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

10 (c) PROHIBITION ON SPECIFIC FORMS OF COOPERA-  
11 TION.—No agency or entity of the United States Govern-  
12 ment or of any State or local government, including any  
13 court, may undertake any action described in the following  
14 articles of the Rome Statute with the purpose or intent  
15 of cooperating with, or otherwise providing support or as-  
16 sistance to, the International Criminal Court:

17 (1) Article 89 (relating to arrest, extradition,  
18 and transit of suspects).

19 (2) Article 92 (relating to provisional arrest of  
20 suspects).

21 (3) Article 93 (relating to seizure of property,  
22 asset forfeiture, execution of searches and seizures,  
23 service of warrants and other judicial process, taking  
24 of evidence, and similar matters).

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

13 (e) PROHIBITION ON INVESTIGATIVE ACTIVITIES OF  
14 AGENTS.—No agent of the International Criminal Court  
15 may conduct, in the United States or any territory subject  
16 to the jurisdiction of the United States, any investigative  
17 activity relating to a preliminary inquiry, investigation,  
18 prosecution, or other proceeding at the International  
19 Criminal Court.

20 **SEC. 5. RESTRICTION ON UNITED STATES PARTICIPATION**  
21 **IN CERTAIN UNITED NATIONS PEACE-**  
22 **KEEPING OPERATIONS.**

23 (a) POLICY.—Effective beginning on the date that  
24 the Rome Statute enters into force pursuant to article 126  
25 of the Rome Statute, the President should use the voice

1 and vote of the United States in the United Nations Secu-  
2 rity Council to ensure that each resolution of the Security  
3 Council authorizing a peacekeeping operation pursuant to  
4 chapter VI or VII of the charter of the United Nations  
5 permanently exempts United States military personnel  
6 participating in such peacekeeping operation from crimi-  
7 nal prosecution by the International Criminal Court for  
8 actions undertaken by such personnel in connection with  
9 the operation.

10 (b) RESTRICTION.—United States military personnel  
11 may not participate in a peacekeeping operation author-  
12 ized by the United Nations Security Council pursuant to  
13 chapter VI or VII of the charter of the United Nations  
14 on or after the date that the Rome Statute enters into  
15 effect pursuant to article 126 of the Rome Statute, unless  
16 the President has submitted to the appropriate congres-  
17 sional committees a certification described in subsection  
18 (c) with respect to such peacekeeping operation.

19 (c) CERTIFICATION.—The certification referred to in  
20 subsection (b) is a certification by the President that  
21 United States military personnel are able to participate  
22 in a peacekeeping operation without risk of criminal pros-  
23 ecution by the International Criminal Court because—

24 (1) in authorizing the peacekeeping operation,  
25 the United Nations Security Council permanently

1       exempted United States military personnel partici-  
2       pating in the operation from criminal prosecution by  
3       the International Criminal Court for actions under-  
4       taken by them in connection with the operation;

5               (2) each country in which United States mili-  
6       tary personnel participating in the peacekeeping op-  
7       eration will be present is either not a party to the  
8       International Criminal Court or has entered into an  
9       agreement in accordance with Article 98 of the  
10      Rome Statute preventing the International Criminal  
11      Court from proceeding against United States per-  
12      sonnel present in that country; or

13              (3) the President has taken other appropriate  
14      steps to guarantee that United States military per-  
15      sonnel participating in the peacekeeping operation  
16      will not be prosecuted by the International Criminal  
17      Court for actions undertaken by such personnel in  
18      connection with the operation.

19 **SEC. 6. PROHIBITION ON DIRECT OR INDIRECT TRANSFER**  
20                           **OF CERTAIN CLASSIFIED NATIONAL SECU-**  
21                           **RITY INFORMATION TO THE INTERNATIONAL**  
22                           **CRIMINAL COURT.**

23              (a) **DIRECT TRANSFER.**—Not later than the date on  
24      which the Rome Statute enters into force, the President  
25      shall ensure that appropriate procedures are in place to

1 prevent the transfer of classified national security infor-  
2 mation to the International Criminal Court.

3 (b) INDIRECT TRANSFER.—Not later than the date  
4 on which the Rome Statute enters into force, the President  
5 shall ensure that appropriate procedures are in place to  
6 prevent the transfer of classified national security infor-  
7 mation relevant to matters under consideration by the  
8 International Criminal Court to the United Nations and  
9 to the government of any country that is a party to the  
10 International Criminal Court unless the United Nations  
11 or that government, as the case may be, has provided writ-  
12 ten assurances that such information will not be made  
13 available to the International Criminal Court.

14 **SEC. 7. PROHIBITION OF UNITED STATES MILITARY ASSIST-**  
15 **ANCE TO PARTIES TO THE INTERNATIONAL**  
16 **CRIMINAL COURT.**

17 (a) PROHIBITION OF MILITARY ASSISTANCE.—Sub-  
18 ject to subsections (b), (c), and (d), no United States mili-  
19 tary assistance may be provided to the government of a  
20 country that is a party to the International Criminal  
21 Court.

22 (b) WAIVER.—The President may waive the prohibi-  
23 tion of subsection (a) with respect to a particular country  
24 if the President determines and reports to the appropriate  
25 congressional committees that such country has entered

1 into an agreement with the United States pursuant to Ar-  
2 ticle 98 of the Rome Statute preventing the International  
3 Criminal Court from proceeding against United States  
4 personnel present in such country.

5 (c) SPECIAL AUTHORITIES.—The prohibition of sub-  
6 section (a) shall be subject to the special authorities of  
7 section 614 of the Foreign Assistance Act of 1961 and  
8 the applicable conditions and limitations under such sec-  
9 tion.

10 (d) EXEMPTION.—The prohibition of subsection (a)  
11 shall not apply to the government of any country that is—

12 (1) a NATO member country, or

13 (2) a major non-NATO ally (including, inter  
14 alia, Australia, Egypt, Israel, Japan, the Republic of  
15 Korea, and New Zealand).

16 **SEC. 8. AUTHORITY TO FREE UNITED STATES MILITARY**  
17 **PERSONNEL AND CERTAIN OTHER PERSONS**  
18 **HELD CAPTIVE BY OR ON BEHALF OF THE**  
19 **INTERNATIONAL CRIMINAL COURT.**

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

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

4 (1) United States military personnel, elected or  
5 appointed officials of the United States Government,  
6 and other persons employed by or working on behalf  
7 of the United States Government.

8 (2) Military personnel, elected or appointed offi-  
9 cials, and other persons employed by or working on  
10 behalf of the government of a NATO member coun-  
11 try or major non-NATO ally (including, inter alia,  
12 Australia, Egypt, Israel, Japan, the Republic of  
13 Korea, and New Zealand) that is not a party to the  
14 International Criminal Court, upon the request of  
15 such government.

16 (3) Individuals detained or imprisoned for offi-  
17 cial actions taken while the individual was a person  
18 described in paragraph (1) or (2), and in the case  
19 of such individuals described in paragraph (2), upon  
20 the request of such government.

21 (c) CONSTRUCTION.—Subsection (a) shall not be con-  
22 strued to authorize the payment of bribes or the provision  
23 of other incentives to induce the release from captivity of  
24 a person described in subsection (b).

1 **SEC. 9. STATUS OF FORCES AGREEMENTS.**

2 (a) REPORT ON STATUS OF FORCES AGREEMENTS.—  
3 Not later than 6 months after the date of the enactment  
4 of this Act, the President shall transmit to the appropriate  
5 congressional committees a report evaluating the degree  
6 to which each existing status of forces agreement with a  
7 foreign government, or other similar international agree-  
8 ment, protects United States military and other personnel  
9 from extradition to the International Criminal Court  
10 under Article 98 of the Rome Statute.

11 (b) PLAN FOR ACHIEVING ENHANCED PROTECTION  
12 OF UNITED STATES MILITARY PERSONNEL.—Not later  
13 than 1 year after the date of the enactment of this Act,  
14 the President shall transmit to the appropriate congres-  
15 sional committees a plan for amending existing status of  
16 forces agreements, or negotiating new international agree-  
17 ments, in order to achieve the maximum protection avail-  
18 able under Article 98 of the Rome Statute for United  
19 States military and other personnel in those countries  
20 where maximum protection under Article 98 has not al-  
21 ready been achieved.

22 (c) SUBMISSION IN CLASSIFIED FORM.—The report  
23 under subsection (a), and the plan under subsection (b),  
24 or appropriate parts thereof, may be submitted in classi-  
25 fied form.

1 **SEC. 10. 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 United  
9 States military personnel may, in the context of mili-  
10 tary operations undertaken by or pursuant to that  
11 alliance, be placed under the command or oper-  
12 ational control of foreign military officers subject to  
13 the jurisdiction of the international criminal court  
14 because they are nationals of a party to the inter-  
15 national criminal court, and

16 (2) evaluating the degree to which United  
17 States military personnel engaged in military oper-  
18 ations undertaken by or pursuant to that alliance  
19 may be exposed to greater risks as a result of being  
20 placed under the command or operational control of  
21 foreign military officers subject to the jurisdiction of  
22 the international criminal court.

23 (b) PLAN FOR ACHIEVING ENHANCED PROTECTION  
24 OF UNITED STATES MILITARY PERSONNEL.—Not later  
25 than one year after the date of the enactment of this Act,  
26 the President shall transmit to the appropriate congres-

1 sional committees a plan for modifying command and  
2 operational control arrangements within military alliances  
3 to which the United States is a party to reduce any risks  
4 to United States military personnel identified pursuant to  
5 subsection (a)(2).

6 (c) SUBMISSION IN CLASSIFIED FORM.—The report  
7 under subsection (a), and the plan under subsection (b),  
8 or appropriate parts thereof, may be submitted in classi-  
9 fied form.

10 **SEC. 11. WITHHOLDINGS.**

11 Funds withheld from the United States share of as-  
12 sessments to the United Nations or any other inter-  
13 national organization pursuant to section 705 of the Ad-  
14 miral James W. Nance and Meg Donovan Foreign Rela-  
15 tions Authorization Act, Fiscal Years 2000 and 2001 (as  
16 enacted by section 1000(a)(7) of Public Law 106–113;  
17 113 Stat. 1501A–460), are authorized to be transferred  
18 to the Embassy Security, Construction and Maintenance  
19 Account of the Department of State.

20 **SEC. 12. DEFINITIONS.**

21 As used in this Act and in sections 705 and 706 of  
22 the Admiral James W. Nance and Meg Donovan Foreign  
23 Relations Authorization Act, Fiscal Years 2000 and 2001,  
24 the following terms have the following meanings:

1           (1) APPROPRIATE CONGRESSIONAL COMMIT-  
2           TEES.—The term “appropriate congressional com-  
3           mittees” means the Committee on International Re-  
4           lations of the House of Representatives and the  
5           Committee on Foreign Relations of the Senate.

6           (2) CLASSIFIED NATIONAL SECURITY INFORMA-  
7           TION.—The term “classified national security infor-  
8           mation” means information that is classified or clas-  
9           sifiable under Executive Order 12958 or a successor  
10          executive order.

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

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

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

22          (6) PARTY TO THE INTERNATIONAL CRIMINAL  
23          COURT.—The term “party to the International  
24          Criminal Court” means a government that has de-  
25          posited an instrument of ratification, acceptance, ap-

1 proval, or accession to the Rome Statute, and has  
2 not withdrawn from the Rome Statute pursuant to  
3 Article 127 thereof.

4 (7) PEACEKEEPING OPERATION AUTHORIZED  
5 BY THE UNITED NATIONS SECURITY COUNCIL PUR-  
6 SUANT TO CHAPTER VI OF VII OF THE CHARTER OF  
7 THE UNITED NATIONS.—The term “peacekeeping  
8 operation authorized by the United Nations Security  
9 Council pursuant to chapter VI of VII of the charter  
10 of the United Nations” means any military oper-  
11 ation to maintain or restore international peace and  
12 security that—

13 (A) is authorized by the United Nations  
14 Security Council pursuant to chapter VI or VII  
15 of the charter of the United Nations, and

16 (B) is paid for from assessed contributions  
17 of United Nations members that are made  
18 available for peacekeeping activities.

19 (8) ROME STATUTE.—The term “Rome Stat-  
20 ute” means the Rome Statute of the International  
21 Criminal Court, adopted by the United Nations Dip-  
22 lomatic Conference of Plenipotentiaries on the Es-  
23 tablishment of an International Criminal Court on  
24 July 17, 1998.

1           (9) SUPPORT.—The term “support” means as-  
2           sistance of any kind, including material support,  
3           services, intelligence sharing, law enforcement co-  
4           operation, the training or detail of personnel, and  
5           the arrest or detention of individuals.

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

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

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

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

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

○