

Congressional Update

In the US Congress, while there are a few very vocal members adamantly opposed to the ICC and international obligations in general, most negative votes have arisen because members lack information, have been swayed by disinformation, or see the Court as low priority. Those who oppose the Court have many of the same concerns as the Administration, but are also guided by their belief in American exceptionalism and their perception that the ICC violates US sovereignty. Among some people there is a strong feeling that it just isn't right for the US to use extra-constitutional means to participate in creating a foreign Court, even if there is no legal bar to its doing so.

ANTI-ICC LEGISLATION

Action taken thus far against the ICC in Congress includes a standing provision that prevent US funding in support of the ICC and extradition to the Court from the US. Two anti-ICC amendments that passed the Congress during the 107th session prevent the use of funds to provide support or other assistance to the ICC or any criminal investigation by the Court. They are, however, in force only for the 2002 fiscal year. Also, the President's signing statements for both amendments said that he would interpret them consistently with his foreign affairs powers. This does not mean, however, that these provisions will have no impact. For instance, these laws may have helped bolster the anti-ICC opposition to put pressure on the Administration not to participate in the final ICC negotiations.

THE AMERICAN SERVICEMEMBER'S PROTECTION ACT (ASPA)

The American Servicemembers Protection Act (ASPA) is now law. ASPA provisions include, subject to full waivers at the discretion of the President:

- Prohibition on cooperation with the International Criminal Court;
- Restrictions on US participation in UN peacekeeping operations;
- Prohibition on direct or indirect transfer of classified national security information, including law enforcement information, to the International Criminal Court, even if no American is accused of a crime;
- Prohibition of US military assistance to parties to the International Criminal Court; and
- Preauthorized authority to free members of the armed forces of the US and certain other persons detained or imprisoned by or on behalf of the international criminal court (the Hague Invasion Clause).

The Act is an odd and tortured piece of legislation whose impact is hard to assess. Although the Act contains authority for the president to waive most of its requirements, its adoption is nevertheless a strong psychological and symbolic statement against the Court and is already alienating our friends and allies whom we are asking to help us with our anti-terrorist coalition.

It is the outcome of several contradictory forces: a determination shared with the Administration by House and Senate leadership to make a strong statement of ideological hostility to the ICC,

the Administration's resolve to preserve in full the President's constitutional powers in international relations, and some congressional resistance to the Act-especially in the Senate.

ASPA can best be understood as three stacked layers:

- The first is the original text that gave the President a few very limited waivers, mostly for sanctions on friendly countries.
- The second layer, dropped right on the first, consists of waivers at the will of the president on all of the operative provisions of the bill. The Administration insisted on these to protect the president's constitutional privileges.
- The last layer on the top of the stack was language added by Senator Dodd that essentially reverses the effect of ASPA by authorizing the US government to participate in a wide-range of international justice efforts:

"Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity."