

January 6, 2025

Re: Vote “No” on H.R. 23, the Illegitimate Court Counteraction Act

Dear Representative:

The American Civil Liberties Union strongly urges you to oppose H.R. 23, the Illegitimate Court Counteraction Act. This bill would impose sanctions with respect to the International Criminal Court (ICC) for any efforts to investigate, arrest, detain, or prosecute any protected person of the United States and its allies.¹ **We urge you to vote no on this legislation and will score the vote.**



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As a U.S.-focused civil liberties and human rights organization, the ACLU does not take a position on the war in Gaza or the ICC prosecutor’s investigation and application for arrest warrants related to the conflict between Israel and Palestine. We do, however, urge you to oppose the bill as it would harm free speech protections and the rule of law. This legislation raises serious First Amendment concerns, as it would chill U.S. persons from engaging in constitutionally protected speech under the threat of civil and criminal penalties under the International Emergency Economic Powers Act (IEEPA). Further, this bill would undermine the rule of law and the independence of the ICC.

If this legislation were to become law, U.S. persons anywhere in the world, including those who may work with ICC sanctioned personnel, could not transact with sanctioned parties or entities because of IEEPA criminal and civil penalties.² The prohibitions in the statute would sweep incredibly broadly. In effect, U.S. persons would not be able to continue working in their ICC positions and any work that non-ICC U.S. persons are doing with the sanctioned ICC personnel could also be subject to criminal and civil penalty.³

Indeed, this prohibition would apply to any “foreign person” who acts or “purports to have acted”—even indirectly—on behalf of another “person” who “engages in any effort by the International Criminal Court to investigate, arrest, detain, or prosecute a protected person.” The legislation is entirely unclear about what it means to act “indirectly” on behalf of someone engaged in an effort to investigate a protected person, but the executive branch could interpret this

¹ The legislation defines a protected person as any US person or any foreign person that is a citizen or lawful resident of an ally of the United States that has not consented to International Criminal Court jurisdiction or is not a state party to the Rome Statute of the International Criminal Court.

² The penalties for violating IEEPA sanctions can be severe. The civil fine for violating IEEPA sanctions can be as high as \$368,136 (or twice the value of the offending transaction, whichever is greater). Civil violations do not have to be intentional or significant to be penalized. The criminal penalties for violating IEEPA sanctions can include fines up to \$1 million and 20 years in prison. Criminal violations must be “willful.”

³ While the legislation contains only a specific “property blocking” provision, in other contexts the Office of Foreign Assets Control has interpreted property blocking under IEEPA to encompass prohibitions on provisions of services.

language expansively. All these factors would create a severe chilling effect on constitutionally protected speech by U.S. persons who engage with the ICC.⁴

Moreover, the Illegitimate Court Counteraction Act could easily affect not just the application for arrest warrants related to the conflict in Palestine and Israel, but multiple other cases before the prosecutor's office regarding genocide, war crimes, and crimes against humanity involving many of the same officials and staff who would face sanctions under this legislation. The very broad conduct definition in Section 2(a) would include court officials, prosecutors, or anyone else who has provided broadly defined support to ICC investigations, arrests, detentions, or prosecutions. This would likely apply even to services having nothing to do with the ICC's efforts to investigate, arrest, detain, or prosecute a protected person. In practice, these sanctions would largely prohibit U.S. persons from working with the ICC. This would have major implications for other unrelated ICC prosecutions, including the arrest warrants related to the conflict between Ukraine and Russia, which has strong bipartisan support across Congress.⁵

We also have concerns regarding the bill's immediate U.S. visa revocation and any immigration benefit for sanctioned persons and their "immediate family members," meaning spouses and children. Such an approach would amount to collective punishment targeting immediate family members for conduct in which they were not involved in any way.

In June 2020, the Trump Administration issued an executive order authorizing sanctions against people who assist the ICC in investigating or prosecuting war crimes and other gross human rights violations. While the ACLU challenged this executive order on First Amendment and other grounds,⁶ the lawsuit was ultimately withdrawn following the Biden Administration's rescission of the

⁴ For instance, the external Experts Panel who provided legal advice to the ICC chief prosecutor in the Gaza investigation could be sanctioned based on this text. The panel of experts includes an Israeli American lawyer, NYU professor, and former ICC judge Theodor Meron who also served as legal advisor to Israeli foreign ministry. See Report of the Panel in Experts in International Law, (May, 20 2024), <https://www.icc-cpi.int/about/otp/special-advisers-to-the-prosecutor/panel-of-experts-in-international-law/report-of-the-panel-of-experts-in-international-law>.

⁵ See e.g. Press Release, Congressman Crow Leads Bipartisan Coalition in Urging Biden Administration to Send Russian War Crimes Intelligence to the International Criminal Court (June 5, 2024), <https://crow.house.gov/media/press-releases/congressman-crow-leads-bipartisan-coalition-in-urging-biden-administration-to-send-russian-war-crimes-intelligence-to-the-international-criminal-court>. Press Release, Durbin, Graham, Bipartisan Group of Senators Urge President Biden to Support the ICC's Investigation into Atrocities in Ukraine (March 3, 2023), <https://www.judiciary.senate.gov/press/dem/releases/durbin-graham-bipartisan-group-of-senators-urge-president-biden-to-support-the-iccs-investigation-into-atrocities-in-ukraine>. Press Release, House Resolution Supports ICC Arrest Warrant For Putin & Lvova-Belova (April 18, 2023), <https://quigley.house.gov/media-center/press-releases/house-resolution-supports-icc-arrest-warrant-putin-lvova-belova>.

⁶ *Sadat v. Trump*, <https://www.aclu.org/cases/sadat-v-trump-challenge-trumps-international-criminal-courts-sanctions-regime>.

sanctions regime. However, in a separate case, a federal court issued a preliminary injunction on First Amendment grounds.⁷

It is also the case that there has been a complete lack of adequate process with this legislation. There was not a single hearing in the House of Representatives or the Senate on this bill last Congress, nor was it marked up in either the House Foreign Affairs Committee or the House Judiciary Committee. The complete lack of legislative process on this bill means that there has been no opportunity for a robust debate regarding its shortcomings and whether alternative approaches could avoid the clear First Amendment concerns that currently exist.

Finally, we strongly urge you to oppose this bill and any other attempt to attack the independence of the ICC, its judges, lawyers, or staff, including the use of sanctions or other measures that would impede, intimidate, improperly influence, or retaliate against them for performing their duties. Moreover, this legislation could have serious implications on U.S. relations with close allies who ratified the Rome Statute which created the ICC and are obligated to cooperate and assist with its investigations, including the majority of NATO allies like Germany and France.

If this bill were to become law, the government could use the threat of civil and criminal penalties to chill Americans from engaging in protected speech with the ICC, including speech that aids the court in pursuing justice for the gravest international crimes. The ACLU urges you to vote no on this legislation and will score the vote. If you have questions, please contact Senior Policy Counsel Kia Hamadanchy at khamadanchy@aclu.org or (734)-649-2929.

Sincerely,



Christopher Anders
Director, Democracy & Technology



Kia Hamadanchy
Senior Policy Counsel

⁷ *Open Society Justice Initiative et al. v. Donald J. Trump et al.*, No. 1:20-cv-08121-KPF (S.D.N.Y. January 4, 2021) (granting preliminary injunction).