

CRS Report for Congress

Arms Transfers To Saudi Arabia: Presidential Authority To Waive Legislative Restrictions

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August 20, 1990



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PRESIDENTIAL AUTHORITY TO WAIVE
LEGISLATIVE RESTRICTIONS**

SUMMARY

This report reviews key authorities set out in U.S. law for the President to waive legislative restrictions on arms transfers to Saudi Arabia. It focuses in particular on a limitation contained in the FY 1989 Defense Department Authorization Act (the Metzenbaum Amendment) concerning sales of F-15 aircraft to Saudi Arabia, on arms sales waiver authorities of the Arms Export Control Act, and on the special waiver authorities of section 614(a) of the Foreign Assistance Act of 1961, as amended. Issues related to leases of defense articles are treated in a separate CRS report on that subject.

TABLE OF CONTENTS

METZENBAUM AMENDMENT	1
ARMS EXPORT CONTROL ACT	2
FOREIGN ASSISTANCE ACT OF 1961	3

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The Iraqi invasion of Kuwait and the decision of the President to deploy American military forces to Saudi Arabia to deter further Iraqi aggression has raised the prospect that additional arms sales or transfers to Saudi Arabia might be made. In the current circumstances, the President might determine that significant arms transfers should be made quickly to meet immediate Saudi needs. Consequently, he may choose to waive existing legislative restrictions on arms transfers to achieve this end. What follows is a review of the legislative provisions and Presidential waiver authorities that are most likely to be utilized.

METZENBAUM AMENDMENT

Section 1306 of Public Law 100-456, referred to as the Metzenbaum amendment, after its author, Senator Howard Metzenbaum (D-Ohio), entered into force on September 29, 1988. It placed conditions on the sale or transfer of F-15 aircraft to Saudi Arabia. The amendment reads as follows:

(a) Notwithstanding any other provision of law, any sale or other transfer to Saudi Arabia by the United States of F-15 aircraft shall be subject to the following conditions:

(1) Any such F-15 aircraft sold or otherwise transferred to Saudi Arabia shall be limited to models A, B, C, and D.

(2) The United States shall not sell or otherwise transfer to Saudi Arabia the F-15-E with a ground attack capability and shall not upgrade existing Saudi aircraft to that capability.

(3) Saudi Arabia shall not possess more than 60 F-15 aircraft at any time, except that additional replacement F-15 aircraft may be held in the United States, at the expense of Saudi Arabia, for shipment to Saudi Arabia only after the President notifies Congress that the existing inventory of F-15 aircraft held by Saudi Arabia is less than 60 and, then, only on a one-for-one replacement basis as each F-15 aircraft is totally removed from the inventory of Saudi Arabia.

(b) The President may waive subsection (a) if the President certifies to Congress that such action is in the national interest.

On August 8, 1990, Secretary of Defense Richard Cheney stated at a press conference that the President had waived the Metzenbaum amendment. Subsequently on August 9, 1990, President Bush issued to the Congress formal certification necessary to waive the restrictions contained in the Metzenbaum amendment. By waiving the Metzenbaum amendment, the President is now authorized to transfer to Saudi Arabia any number of F-15s. He is also free to sell or transfer any additional F-15s the Saudis may seek to obtain, as well as to upgrade the ground attack capability of any existing Saudi F-15s or any others they may seek in the future, without being subject to constraints previously imposed by the Metzenbaum amendment.

ARMS EXPORT CONTROL ACT

Under section 36(b)(1) of the Arms Export Control Act, Congress must be formally notified 30 calendar days before the Administration can take the final steps to conclude a government-to-government foreign military sale of major defense equipment valued at \$14 million or more, defense articles or services valued at \$50 million or more, or design and construction services for \$200 million or more. (In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar days before the Administration can proceed with the sale.) Under the provisions of section 36(c)(1) of the Arms Export Control Act, commercially licensed arms sales also must be formally notified to Congress 30 calendar days before the export license is issued if they involve the sale of major defense equipment valued at \$14 million or more, or defense articles and services valued at \$50 million or more.

However, if the President states in the formal notification to Congress under sections 36(b)(1) or 36(c)(1) of the Arms Export Control Act that "an emergency exists" which requires the sale (or export license approval) to be made immediately "in the national security interest of the United States," he is free to proceed with the sale without further delay. He must provide Congress at the time of this notification a "detailed justification for his determination, including a description of the emergency circumstances" which necessitated his action and a "discussion of the national security interests involved."

By using the waiver authorities in either section 36(b) or 36(c) of the Arms Export Control Act, the President would be able to sell weapons to Saudi Arabia at any time of his choosing, without regard for the statutory requirement to submit to Congress for a formal 30 calendar day review of all arms sales breaking the AECA's reporting thresholds. Since Saudi Arabia has traditionally been a cash purchaser of weapons, the need for Congress to provide credits or grants, at some point, to facilitate such arms purchases would not likely arise.

FOREIGN ASSISTANCE ACT OF 1961

Section 614(a) of the Foreign Assistance Act of 1961, as amended, (the FAA) (22 U.S.C. 2364) provides the President with special authorities to waive various provisions of law, including those of the Arms Export Control Act under specific circumstances. The pertinent part--section 614(a)(2) of the FAA--reads as follows:

The President may make sales, extend credit, and issue guarantees without regard to any provision of this Act [the FAA], the Arms Export Control Act, any law relating to receipts and credits accruing to the United States, and any Act authorizing or appropriating funds for use under the Arms Export Control Act, in furtherance of any of the purposes of such Act, when the President determines, and so notifies in writing the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate, that to do so is vital to the national security interests of the United States.

The President may use the 614(a) waiver provisions to make up to \$750 million in cash arms sales and up to \$250 million in arms sales credits available during each fiscal year. Not more than \$50 million in credits may be made available to any single country in a fiscal year unless it is a "victim of active Communist or Communist-supported aggression."

Before exercising the authority granted in section 614(a), the President must "consult with" and "provide a written policy justification to" the House Foreign Affairs, the Senate Foreign Relations Committee, and to the House and Senate Appropriations Committees.

This waiver provision, while very broad in scope, may not prove to be especially helpful for the President to use in the case of a perceived need to sell or transfer large quantities of expensive arms to Saudi Arabia quickly. Saudi Arabia has not participated in the Foreign Military Sales credit program since FY1971, choosing instead to make its arms purchases on a cash basis. Thus, it does not seem likely that the section 614(a) authority would be used to obtain credits for its use.

Furthermore, Presidential use of the section 614(a) waiver would only permit \$50 million dollars in FMS credits to be made available for any one country in a fiscal year (unless it is a victim of Communist aggression). And, its use would only authorize \$750 million in cash arms sales in any fiscal year.

These significant limitations in section 614(a) mitigate against its use for large arms transfers to a single country. At the same time it seems evident that the use of the waiver authorities in sections 36(b) or 36(c) of the Arms Export Control Act, would give the President an almost unlimited degree of

flexibility should he wish to make large and costly cash arms sales to Saudi Arabia while avoiding the statutory congressional review periods for them.