Congressional Research Service

Memorandum

July 28, 2008

TO: Hon. Frank Wolf
Attention: Elyse Anderson

FROM:
Legislative Attorney
American Law Division

SUBJECT: Potential application of the Foreign Missions Act to the Islamic Saudi Academy

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This memorandum is in response to your question as to whether the Islamic Saudi Academy (ISA) located in Virginia constitutes a "foreign mission" for purposes of the Foreign Missions Act of 1982 (FMA),[1] as amended, and whether the State Department may act pursuant to the FMA to require the ISA to divest itself or forgo the use of real property. The letter you forwarded to CRS describes the ISA as being closely associated with the Government of Saudi Arabia. The letter states that one of the ISA's leases with Fairfax Country describes one of the school's properties as being leased by "the Royal Embassy of Saudi Arabia d/b/a (doing business as) the Islamic Saudi Academy," while the school's other property is owned by the embassy itself. The Saudi ambassador to the U.S. chairs the school's board, and the school uses the Saudi embassy's IRS employer tax number.[2] Based on these factors, it would appear that the ISA could be deemed a "foreign mission" by the State Department for FMA purposes, as it is an "entity...substantially owned or effectively controlled by...a foreign government."[3] Accordingly, it could be ordered to divest itself of real property if certain statutory requirements are met, including in an instance when the Secretary of State determines that such divestiture is "necessary to protect the interests of the United States."[4]

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[1] 22 U.S.C. § 4301, *et seq.*

[2] Letter to Secretary of State Rice from Rep. Frank R. Wolf, Jul. 14, 2008.

[3] 22 U.S.C. § 4302(a)(3).

[4] 22 U.S.C. § 4305(b). This memorandum does not address potential constitutional arguments that might be made by a designated foreign mission in response to action taken by the State Department to limit its activities. *Cf.* Palestine Information Office v. Shultz, 853 F.2d 932, 936 (D.C. Cir. 1988) (rejecting arguments that the FMA was unconstitutionally vague, and that the State Department's order closing the Palestine Information Office of the Palestinian Liberation Organization violated the Office's First Amendment and due process rights).

In passing the FMA, Congress vested broad authority in the Secretary of State to regulate the benefits and privileges of foreign missions in the United States.[5] Although the FMA may have primarily been intended to provide the State Department with the ability to respond to a foreign government's disparate treatment of U.S. diplomatic and consular missions abroad,[6] the FMA defines foreign missions falling under its purview to include entities that are not necessarily engaged in diplomatic or consular functions. Specifically, the FMA defines a "foreign mission" as including:

> any mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of, or which is substantially owned or effectively controlled by—
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> (A) a foreign government, or
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> (B) an organization (other than an international organization, as defined in section 4309(b) of this title) representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under the laws of the United States or which engages in some aspect of the conduct of the international affairs of such territory or political entity, including any real property of such a mission and including the personnel of such a mission[.][7]

Further, the FMA provides that determinations as to the meaning and applicability of the term "foreign mission" are committed to the discretion of the Secretary of State.[8]

Although there has been little jurisprudence interpreting the breadth of entities potentially falling under the purview of the FMA's definition, it appears well understood that the FMA's scope is quite broad, covering commercial and noncommercial entities, including those not involved in diplomatic or consular activities.[9] Courts have also expressed

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[5] While the FMA provides a statutory mechanism that assists the Secretary of State in regulating the privileges and immunities owed to foreign missions, it does not directly accord any immunities to those entities. Accordingly, the fact that an entity constitutes a "foreign mission" for FMA purposes does not necessarily mean that it is entitled to the privileges and immunities afforded to diplomatic or consular missions. The specific privileges and immunities generally owed by the U.S. to foreign diplomatic, consular, and international organization missions and personnel are provided under separate statutes and treaties. *See, e.g.,* Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; Agreement Regarding the Headquarters of the United Nations, November 21, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11; Convention on the Privileges and Immunities of the United Nations, February 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15; International Organizations Immunities Act, 22 U.S.C. § 288, *et seq.*

[6] For background on the development of the FMA, see generally Andrew L. Odell, *Enforcing Reciprocity in U.S. Diplomatic Relations: the Foreign Missions Act of 1982*, 17 N.Y.U. J. INT'L L. & POL. 817 (1985)

[7] 22 U.S.C. § 4302(a)(3).

[8] 22 U.S.C. § 4302(b).

[9] Palestine Information Office v. Shultz, 674 F.Supp. 910, 917 (D.D.C. 1987) (interpreting the FMA use of the term "entity" as an all-inclusive term, covering entities engaged in both commercial and

(continued...)

significant deference to the State Department's determination as to whether an entity constitutes a "foreign mission" for FMA purposes. In *Palestine Information Office v. Shultz*,[10] the D.C. Circuit rejected the appellant's request that it construe the FMA's description of an "entity" constituting a foreign mission narrowly. The court explained that:

> The meaning of the word "entity" in general usage is quite broad... For this court to add [conditions to the application of the word] would be to abjure the basic principle of statutory construction that words are ordinarily to be given their "plain meaning." Our general reluctance to read into the word "entity" the condition appellants propose is further compounded by two additional considerations. First, the Foreign Missions Act explicitly vests "[d]eterminations with respect to the meaning and applicability of the terms used in subsection (a) ... [in] the discretion of the Secretary." Appellants' appeal to legislative history provides little basis for interposing our views in light of the statutory language and the Act's explicit injunction that the Secretary should make determinations with respect to meaning under the Act. In addition, we are mindful of the extra degree of latitude accorded to the executive branch in questions of diplomacy. Taken together, we find that these considerations compel us to reject appellants' request that we second-guess the Secretary's interpretation of the statute.[11]

If an entity is deemed a foreign mission, the FMA accords the Secretary of State with authority to regulate its acquisition or maintenance of property. Among other things, the FMA authorizes (but does not compel[12]) the Secretary to require an identified "foreign mission" to divest itself or forgo the use of any real property deemed by the Secretary:

> (1) not to have been acquired in accordance with [FMA];
> (2) to exceed limitations placed on real property available to a United States mission in the sending State; or
> (3) where otherwise necessary to protect the interests of the United States.[13]

Given the facts presented in your letter, it would appear possible for the Secretary of State to characterize the ISA as a "foreign mission" for purposes of the FMA. The ISA lease with Fairfax County indicates that it is the business identity of the Saudi embassy,[14] and the Saudi embassy owns one of the properties which the ISA occupies. Further, the ISA and the Saudi embassy share the same IRS employer tax number. These characteristics appear to provide the Secretary of State with a strong basis for concluding, if she should choose to do so, that the ISA is an "entity in the United States...which is substantially owned or effectively controlled by...a foreign government." Accordingly, it would appear that the Secretary is authorized to designate the ISA as a "foreign mission" for FMA purposes. If the Secretary

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[9] (...continued)
non-commercial activities).

[10] Palestine Information Office v. Shultz, 853 F.2d 932 (D.C. Cir. 1988).

[11] *Id.* at 937-938 (internal citations omitted).

[12] Foreign missions are generally required to notify the Secretary of State prior to any proposed acquisition or sale of property. 22 U.S.C. § 4305(a)(1). However, the Secretary retains discretion to determine whether foreign governments are to be sanctioned for noncompliance. *See* Republic of Benin v. Mezei, 483 F.Supp.2d 312 (S.D.N.Y. 2007).

[13] 22 U.S.C. § 4305(b).

[14] Regency Financial Corp. v. Meziere, 1990 WL 103247 (N.D. Ill. 1990) (unreported) ("[t]he acronym 'd/b/a' indicates...an assumed business name").

deems the ISA to be a "foreign mission," the FMA authorizes her to order the ISA to divest itself or forgo the use of any real property in certain instances, including when the Secretary deems such divestiture as "necessary to protect the interests of the United States."[15]

It should also be noted as well that the Saudi embassy unquestionably constitutes a "foreign mission" for FMA purposes. Accordingly, the State Department has authority under the FMA to require it to divest itself of real property if certain criteria are met. It would therefore appear that the State Department could require the embassy to divest itself of any real property which it owns that is used by the ISA if such action were deemed necessary to protect U.S. interests.

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[15] 22 U.S.C. § 4305(b). The level of discretion the State Department possesses in determining whether the divestiture of foreign mission property is "necessary to protect the interests of the United States" has not been addressed by the courts. In Palestine Information Office v. Shultz, the D.C. Circuit upheld a State Department order requiring the closing of the PIO, when that order was premised "U.S. concern over terrorism committed and supported by individuals and organizations affiliated with the PLO, and as an expression of our overall policy condemning terrorism." 853 F.2d at 936. The Circuit Court further opined that "When exercising its supervisory function over foreign missions, the State Department acts at the apex of its power. Because it has been accorded express authority from Congress to act in this area, it wields the combined power of both the executive and legislative branches." *Id.* at 937.