Arms Sales: Congressional Review Process

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Summary

This report reviews the process and procedures that currently apply to congressional consideration of foreign arms sales proposed by the President. This includes consideration of proposals to sell major defense equipment, defense articles and services, or the re-transfer to third party states of such military items. Under Section 36(b) of the Arms Export Control Act (AECA), 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 valued at $200 million or more. In the case of such sales to NATO member states, NATO, Japan, Australia, South Korea, Israel, or New Zealand, Congress must be formally notified *15* calendar days before the Administration can proceed with the sale. However, the prior notice threshold values are higher for sales to NATO members, Japan, Australia, South Korea, Israel, or New Zealand. 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 or services valued at $50 million or more (Section 36(c) AECA). In the case of such sales to NATO member states, NATO, Japan, Australia, South Korea, Israel, or New Zealand, Congress must be formally notified *15* calendar days before the Administration is authorized to proceed with a given sale. As with government-to-government sales, the prior notice threshold values are higher for sales to NATO members, Japan, Australia, South Korea, Israel, or New Zealand.

Furthermore, commercially licensed arms sales cases involving defense articles that are firearms-controlled under category I of the United States Munitions List and valued at $1 million or more must also be formally notified to Congress for review *30* days prior to the license for export being approved. In the case of proposed licences for such sales to NATO members, Japan, Australia, South Korea, Israel, or New Zealand, *15* days prior notification is required.

In general, the executive branch, after complying with the terms of applicable U.S. law, principally contained in the AECA, is free to proceed with an arms sales proposal unless Congress passes legislation prohibiting or modifying the proposed sale. Under current law Congress must overcome two fundamental obstacles to block or modify a Presidential sale of military equipment: it must pass legislation expressing its will on the sale, and it must be capable of overriding a presumptive Presidential veto of such legislation. Congress, however, is free to pass legislation to block or modify an arms sale *at any time* up to the point of delivery of the items involved. This report will be updated, if notable changes in these review procedures or applicable law occur.

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Congressional Notification Requirements

This report reviews the process and procedures that currently apply to congressional consideration of foreign arms sales proposed by the President. This includes consideration of proposals to sell major defense equipment, defense articles and services, or the re-transfer to other states of such military items. In general, the executive branch, after complying with the terms of applicable U.S. law, principally contained in the Arms Export Control Act (AECA), is free to proceed with an arms sales proposal unless Congress passes legislation prohibiting or modifying the proposed sale. The traditional sequence of events for the congressional review of an arms sale proposal has been the submission by the Defense Department (on behalf of the President) of a preliminary or "informal" classified notification of a prospective major arms sale *20* calendar days before the executive branch takes further formal action. This "informal" notification is provided to the committees of primary jurisdiction for arms sales issues. In the Senate, this is the Senate Foreign Relations Committee; in the House, it is the Foreign Affairs Committee. This notification practice stems from a February 18, 1976, letter of the Defense Department making a *nonstatutory* commitment to give Congress these preliminary classified notifications. This letter also noted that this preliminary "informal" notification procedure might be deviated from should "extraordinary circumstances" require this to occur. In that event, the Defense Department committed itself to "make every effort to explain the circumstances to the committees.... "[1]

It has been the practice for such "informal" notifications to be made for arms sales cases that would have to be formally notified to Congress under the provisions of Section 36(b) of the Arms Export Control Act (AECA).[2] These "informal" notifications always precede the submission of the required statutory notifications, but the time period between the submission of the "informal" notification and the statutory notification is not fixed. It is determined by the President, who has the obligation under the law to submit the arms sale proposal to Congress, but only after he has determined that he is prepared to proceed with any such notifiable arms sales transaction.

Under Section 36(b) 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 valued at $200 million or more. In the case of such sales to NATO member states, NATO, Japan, Australia, South Korea, Israel, or New Zealand, Congress must be formally notified *15* calendar days before the Administration can proceed with the sale. However, the prior notice threshold values are higher for NATO members, Japan, Australia, South Korea, Israel, or New Zealand. These higher thresholds are: $25,000,000 for the sale, enhancement or upgrading of major defense equipment; $100,000,000 for the sale, enhancement or upgrading of defense articles and defense services; and $300,000,000 for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of states. Section 36(i) requires the President to notify both the Senate Foreign Relations Committee and House Foreign Affairs Committee at least 30 days in advance of a pending shipment of defense articles subject to the 36(b)requirements if the chairman and ranking member of either committee request such notification.

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

[1] Letter of February 18, 1976 from Lt. General H.M. Fish, USAF, Director, Defense Security Assistance Agency to Senator Hubert H. Humphrey, Senate Committee on Foreign Relations.

[2] 22 U.S.C. 2776(b).

$14 million or more, or defense articles or services valued at $50 million or more (Section 36(c) AECA).[3] In the case of such sales to NATO member states, NATO, Japan, Australia, South Korea, Israel, or New Zealand, Congress must be formally notified *15* calendar days before the Administration can proceed with such a sale. However, the prior notice threshold values are higher for sales to NATO members, Japan, Australia, South Korea, Israel, or New Zealand specifically: $25,000,000 for the sale, enhancement or upgrading of major defense equipment; $100,000,000 for the sale, enhancement or upgrading of defense articles and defense services, and $300,000,000 for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of states. Furthermore, commercially licensed arms sales cases involving defense articles that are firearms controlled under category I of the United States Munitions List and valued at $1 million or more must also be formally notified to Congress for review 30 days prior to the license for export being approved (15 days prior notice is required for proposed licences for sales to NATO members, Japan, Australia, South Korea, Israel, or New Zealand). It has not been the general practice for the Administration to provide a 20-day "informal" notification to Congress of arms sales proposals that would be made through the granting of commercial licenses.[4]

A congressional recess or adjournment does not stop the 30 calendar-day statutory review period. It should be emphasized that after Congress receives a statutory notification required under Sections 36(b) or 36(c) of the Arms Export Control Act, for example, and 30 calendar days elapse without Congress having blocked the sale, the executive branch is free to proceed with the sales process. This fact does not mean necessarily that the executive branch and the prospective arms purchaser will sign a sales contract and that the ite[ms] will be transferred on the 31[st] day after the statutory notification of the proposal has been made. It would, however, be legal to do so at that time.

Congressional Disapproval by Joint Resolution

Although Congress has more than one legislative option it can use to block or modify an arms sale, one option explicitly set out in law for blocking a proposed arms sale is the use of a joint resolution of disapproval as provided for in Section 36(b) of the Arms Export Control Act. Under the AECA, the formal notification is legally required to be submitted to the chairman of the Senate Foreign Relations Committee and the Speaker of the House. The Speaker has routinely referred these notifications to the House Foreign Affairs Committee as the committee of jurisdiction. As a courtesy, the Defense Department has submitted a copy of the statutory notification to the House Foreign Affairs Committee when that notification is submitted to the Speaker of the House. Under this option, after receiving a statutory Section 36(b) notification from the executive branch, opponents of the arms sale would introduce joint resolutions in the House and Senate drafted so as to forbid by law the sale of the items specified in the formal sale notification(s) submitted to the Congress. If no member introduces such a measure, the AECA's provisions expediting congressional action, discussed below, do not take effect.

[3] 22 U.S.C. 2776(c)

[4] These notification requirements and reporting thresholds also apply to prospective re-transfers of United States-origin major defense equipment, defense articles or defense services as stipulated in Section 3(d) of the Arms Export Control Act (AECA); and leases or loans of defense articles from U.S. Defense Department stocks (see Sections 62 and 63 AECA). Section 36(d) contains similar notification requirements, though not reporting thresholds, for commercial technical assistance or manufacturing licensing agreements. As with arms sales, Congress can block any of these reportable transactions by enacting a joint resolution of disapproval as stipulated in the Arms Export Control Act (AECA) (see 22 U.S.C. 2753, 2776, 2796).

The next step would be committee hearings in both Houses on the arms sale proposal. If a majority of either the House or the Senate committee supported the joint resolution of disapproval, they would report it to their respective chamber in accordance with its rules. Following this, efforts would be made to seek floor consideration of the resolution.

Senate Procedures

At this point, it is important to take note of procedures crafted to expedite the consideration of arms sales resolutions of disapproval. Since 1976, Section 36(b)(2) of the Arms Export Control Act has stipulated that consideration of any resolution of disapproval in the Senate under Section 36(b)(1) of the AECA shall be "in accordance with the provisions of Section 601(b) of the International Security Assistance and Arms Export Control Act of 1976" (P.L. 94-329, 90 Stat. 729). Since 1980, this stipulation has also applied to resolutions of disapproval in the Senate relating to commercially licensed arms sales under Section 36(c)(1) of the Arms Export Control Act. The purpose of Section 601(b) was to establish rules to facilitate timely consideration of any resolution of disapproval in the Senate. The rules set forth in Section 601(b) supersede the standing rules of the Senate and among other things do the following:

- Give the committee with jurisdiction [the Senate Foreign Relations Committee] 10 calendar days from the date a resolution of disapproval is referred to it to report back to the Senate its recommendation on any such resolution (certain adjournment periods are excluded from computation of the 10 days);
- Make it in order for a Senator favoring a disapproval resolution to move to discharge the committee from further consideration of the matter if the committee fails to report back to the Senate by the end of the 10 calendar days it is entitled to review the resolution (the AECA expressly permits a discharge motion after 5 calendar days for sales to NATO, NATO countries, Japan, Australia, South Korea, Israel and New Zealand);
- Make the discharge motion privileged, limit floor debate on the motion to one hour, and preclude efforts to amend or to reconsider the vote on such a motion;
- Make the motion to proceed to consider a resolution of disapproval privileged and preclude efforts to amend or to reconsider the vote on such motion;
- Limit the overall time for debate on the resolution of disapproval to 10 hours and preclude efforts to amend or recommit the resolution of disapproval;
- Limit the time (one hour) to be used in connection with any debatable motion or appeal; provide that a motion to further limit debate on a resolution of disapproval, debatable motion or appeal is not debatable.

The Senate is constitutionally empowered to amend its rules or to effect a rule change at any time. The fact that an existing rule is in Section 601 of the International Security Assistance and Arms Export Control Act of 1976 is not an obstacle to changing it by Senate action alone should the Senate wish to do so.

House Floor Procedures

The House of Representatives is directed by Sections 36(b)(3) and 36(c)(3)(B) of the Arms Export Control Act to consider a motion to proceed to the consideration of a joint resolution disapproving an arms sale reported to it by the appropriate House committee as "highly privileged." Generally, this means that the resolution will be given precedence over most other legislative business of the House, and may be called up on the floor without a special rule

reported by the Rules Committee. Unlike for the Senate, however, the AECA contains no provision for discharge of the House committee if it does not report on the joint resolution. If reported and called up, the measure will be considered in the Committee of the Whole, meaning that amendments can be offered under the "five-minute rule." Nevertheless, amendments to joint resolutions disapproving arms sales have apparently never been offered in the House.

The Rules Committee usually sets the framework for floor consideration of major legislation in the House of Representatives, however, and could do so for a joint resolution of disapproval. Upon receiving a request for a rule to govern consideration of such a resolution, the House Rules Committee could set a time limit for debate, exclude any amendments to, and waive any points of order against the resolution. If the House adopted the rule reported by the Committee, it would govern the manner in which the legislation would be considered, superseding the statutory provision.

Final Congressional Action

After a joint resolution is passed by both the House and the Senate, the measure would next be sent to the President. Once this legislation reaches the President, presumably he would veto it in a timely manner. Congress would then have to muster a two-thirds majority in both Houses to override the veto and impose its position on the President.

Congressional Use of Other Legislation

Congress can also block or modify a proposed sale of major defense equipment, or defense articles and services, if it uses the regular legislative process to pass legislation prohibiting or modifying the sale or prohibiting delivery of the equipment to the recipient country. While it is generally presumed that Congress will await formal notification under Section 36(b) or 36(c) of the Arms Export Control Act before acting in opposition to a prospective arms sale, it is clear that a properly drafted law could block or modify an arms sale transaction at any time—including before a formal AECA notification was submitted or after the 30-day AECA statutory notification period had expired—so long as the items have not been delivered to the recipient country.

Congressional use of its lawmaking power regarding arms sales is not constrained by the reporting requirements of the Arms Export Control Act. In order to prevail, however, Congress must be capable of overriding a Presidential veto of this legislation, for the President would presumably veto a bill that blocked his wish to make the arms sale in question. This means, in practical terms, that to impose its view on the President, Congress must be capable of securing a two-thirds majority of those present and voting in both Houses.

There are important practical advantages, however, to prohibiting or modifying a sale, if Congress wishes to do so, prior to the date when the formal contract with the foreign government is signed—which could occur at any time after the statutory 30-day period. These advantages include (1) limiting political damage to bilateral relations that could result from signing a sales contract and later nullifying it with a new law; and (2) avoiding financial liabilities which the United States Government might face for breaking a valid sales contract. The legislative vehicle designed to prohibit or modify a specific arms sale can take a variety of forms, ranging from a rider to any appropriation or authorization bill to a freestanding bill or joint resolution. The only essential features that the vehicle must have are (1) that it is legislation passed by both Houses of Congress and presented to the President for his signature or veto and, (2) that it contains an express restriction on the sale and/or the delivery of military equipment (whether it applies to specific items or general categories) to a specific country or countries.

Presidential Waiver of Congressional Review

It is important to note that the President also has the legal authority to waive the 30-day statutory review period set out in the Arms Export Control Act. For example, 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 interests 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."

Section 614(a) of the Foreign Assistance Act of 1961 (FAA), as amended,[5] also allows the President, among other things, to waive provisions of the Arms Export Control Act, the Foreign Assistance Act of 1961 (FAA), and any Act authorizing or appropriating funds for use under either the AECA or FAA in order to make available, during each fiscal year, up to $750 million in cash arms sales and up to $250 million in funds. Not more than $50 million of the $250 million limitation on funds use may be made available to any single country in any fiscal year through this waiver authority unless the country is a "victim of active aggression." Not more than $500 million of cash sales (or cash sales and funds made available combined) may be provided under this waiver authority to any one country in any fiscal year. To waive the provisions of these Acts related to arms sales, the President must determine and notify Congress in writing that it is "vital" to the "national security interests" of the United States to do so. 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 and the Senate Foreign Relations Committees and House and Senate Appropriations Committees.

In summary, in the absence of a strong majority in both Houses of Congress supporting legislation to block or modify a prospective arms sale, the practical and procedural obstacles to passing such a law—whether a freestanding measure or one within the existing framework of the Arms Export Control Act—are great. Even if the Congress can pass the requisite legislation to work its will on an arms sale, the President need only veto it and secure the support of one-third plus one of the members of either the Senate or the House to have his veto sustained and permit him to make the sale.

It should be noted that Congress has never successfully blocked a proposed arms sale by use of a joint resolution of disapproval, although it has come close to doing so (see text-box note below for a detailed legislative history). Nevertheless, Congress has—by expressing strong opposition to prospective arms sales, during consultations with the executive branch—affected the timing and the composition of some arms sales, and may have dissuaded the President from formally proposing certain arms sales.

Examples of Congressional Opposition

For example, in the fall of 1990, during the Persian Gulf crisis, the George H.W. Bush Administration reportedly planned to make large arms sales of several advanced weapons systems to Saudi Arabia. Some reports placed the value of a potential Saudi arms package at over $20 billion. During executive branch consultations with Congress, it became clear that there was significant opposition to such a large and controversial arms sales package taking place so close to congressional adjournment when it would not be possible for Congress to make a careful

[5] 22 U.S.C. 2364(a).

review of it. In response, this Bush Administration submitted a smaller arms package of about $7 billion for Saudi Arabia for formal congressional review in September 1990. This package was composed of only those weapons systems deemed most urgently needed by the Saudis and ones for which the need for quick American procurement decisions was especially critical. Agreement was reached at the time between the Bush Administration and Congress that final decisions on other major weapons sales to Saudi Arabia would be deferred until Congress reconvened in January 1991 at the earliest.

SAUDI ARABIA MISSILES CASE (1986)

On April 8, 1986, President Ronald Reagan formally proposed the sale to Saudi Arabia of 1,700 Sidewinder missiles, 100 Harpoon missiles, 200 Stinger missile launchers and 600 Stinger missile re-loads. On May 6, 1986, the Senate passed legislation to block these sales (S.J.Res. 316) by a vote of 73-22. The House concurred with the Senate action on May 7, 1986, by passing H.J.Res. 589 by a vote of 356-62. The House then passed S.J.Res. 316 by a voice vote and (in lieu of H.J.Res. 589) sent it to the President. On May 21, 1986, President Reagan vetoed S.J.Res 316. But, in a May 21 letter to then Senate Majority Leader Robert Dole, President Reagan said he would not include the controversial Stinger missiles and launchers in the sales proposal, in the hope that the Congress would then agree not to block the other missile sales. On June 5, 1986, the Senate by a 66-34 vote, sustained the President's veto of S.J.Res. 316, and the sale of the Sidewinder and Harpoon missiles to Saudi Arabia proceeded.

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