

Waiver of Congressional Notification Period in the Arms Export Control Act

May 29, 2019

The Trump Administration's [notification](#) to Congress on May 24, 2019 regarding the sales of arms to Saudi Arabia, the United Arab Emirates, and Jordan as an emergency measure, avoiding the statutorily required 30-day congressional notification requirement, has stirred a [debate](#) concerning the propriety of the waiver. Specifically, some argue that the waiver authority under the [relevant section of the Arms Export Control Act \(AECA\) \(as amended\)](#) is effective only with respect to export licenses to NATO and certain other allied countries and certain exports of satellite communications equipment, both of which ordinarily require a 15-day notification period. Others read the relevant statute as permitting a waiver also with respect to arms sales to countries that ordinarily require a 30-day waiting period. As a result of an [amendment](#) Congress enacted in 2000, [§ 36\(c\) of the AECA](#) seems ambiguous on this point. (Secretary of State Michael Pompeo also asserted authority under paragraphs 36(b)(1) and 36(d)(2), covering Foreign Military Sales offers and commercial technical assistance or manufacturing licensing agreement, both of which appear to be covered by waiver authorization.)

Section 36(c) of the AECA covers commercially licensed arms sales and sales of defense services, for which Congress must be formally notified 30 calendar days (in the case of non-allies) before the export license is issued if the sale is of major defense equipment valued at \$14 million or more, or defense articles or services valued at \$50 million or more. However, § 36(c)(2) gives the President authority to issue such an export license without the waiting period for congressional notification if he states that immediate issue is necessary "in the national security interests of the United States," and provides a justification. (For more information on the congressional notification procedure under the AECA, see [CRS report Arms Sales: Congressional Review Process](#).)

Prior to enactment of [§ 102\(c\) of the Security Assistance Act of 2000](#), § 36(c)(2) of the AECA provided:

(2) Unless the President states in his certification that an emergency exists which requires the proposed export in the national security interests of the United States, a license for export described in paragraph (1)-

(A) in the case of a license for an export to the North Atlantic Treaty Organization, any member country of that Organization or Australia, Japan, the Republic of Korea, Israel, or New Zealand, shall not be issued until at least 15 calendar days after the Congress receives such certification,

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and shall not be issued then if the Congress, within that 15-day period, enacts a joint resolution prohibiting the proposed export;

(B) in the case of any other license, shall not be issued until at least 30 calendar days after the Congress receives such certification, and shall not be issued then if the Congress, within that 30-day period, enacts a joint resolution prohibiting the proposed export.

If the President states in his certification that an emergency exists which requires the proposed export in the national security interests of the United States, thus waiving the requirements of subparagraphs (A) and (B) of this paragraph, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the export license and a discussion of the national security interests involved.

In the [2000 amendment](#), Congress redesignated subparagraph (B) as subparagraph (C) and inserted a new subparagraph (B) providing for a 15-day waiting period prior to the sale of commercial satellite equipment to certain countries. Critically, Congress did not amend the second portion of paragraph (c)(2) to include the newly redesignated subparagraph (C) among the provisions that would be waived by the certification of an emergency necessitating a bypass of the congressional notification period.

Did Congress intend to exempt countries not covered by subparagraphs (A) or (B) from the emergency waiver provision or merely from the reporting requirements associated with it? It is possible that Congress did not intend either result, but rather that the omission of subparagraph (C) from the waiver language was merely an oversight. The [legislative history](#) does not suggest an intent to enact far-reaching changes to the waiver provision. However, courts will not ordinarily interpret a statute by presuming a drafting error in order to read the new language to comport with earlier versions. Rather, a court would likely start with the [text of the statute](#) as currently written and employ one or more [principles or canons of statutory interpretation](#) to give meaning to [all of its words](#).

As it now stands, the relevant statutory language in § 36(c)(2) reads:

(2) Unless the President states in his certification that an emergency exists which requires the proposed export in the national security interests of the United States, a license for export described in paragraph (1)-

(A) in the case of a license for an export to the North Atlantic Treaty Organization, any member country of that Organization or Australia, Japan, the Republic of Korea, Israel, or New Zealand, shall not be issued until at least 15 calendar days after the Congress receives such certification, and shall not be issued then if the Congress, within that 15-day period, enacts a joint resolution prohibiting the proposed export;

(B) in the case of a license for an export of a commercial communications satellite for launch from, and by nationals of, the Russian Federation, Ukraine, or Kazakhstan, shall not be issued until at least 15 calendar days after the Congress receives such certification, and shall not be issued then if the Congress, within that 15-day period, enacts a joint resolution prohibiting the proposed export; and

(C) in the case of any other license, shall not be issued until at least 30 calendar days after the Congress receives such certification, and shall not be issued then if the Congress, within that 30-day period, enacts a joint resolution prohibiting the proposed export.

If the President states in his certification that an emergency exists which requires the proposed export in the national security interests of the United States, **thus waiving the requirements of subparagraphs (A) and (B) of this paragraph**, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate issuance of the export license and a discussion of the national security interests involved. (emphasis added).

To read the statute as having been amended to add the satellite provision but do nothing more, an interpreter would essentially have to read the bolded words above out of the statute. In what is sometimes described as the [rule against surplusage](#), courts do not generally favor such an interpretation. Consequently, it appears that the omission of subparagraph (C) from the bolded phrase above is significant.

One means of interpreting the statute would divide the paragraph into two parts, one authorizing an emergency waiver of three separate requirements and the other specifying congressional reporting requirements in the event the waiver authority is invoked. Under such a reading, the provision could plausibly be read to mean that the President may waive subparagraphs (A) through (C), but if the President waives the requirements of subparagraphs (A) or (B), he is required to set forth a detailed justification for his determination. But if the President issues an emergency certification waiving the requirements of subparagraph (C), he need not provide any justification to Congress.

Aside from the seeming unlikelihood that Congress would have intended to apply more stringent requirements with respect to allies than to non-allies, this reading conceivably suffers from two interpretive weaknesses. First, Congress could have used a more natural phrasing to achieve that result, for example, by eliminating the word “thus” and using the word “or” instead of “and” in the bolded phrase above. Accordingly, a more natural phrasing for that interpretation might state “and waives the requirements of subparagraphs (A) or (B).”

Second, the phrase “thus waiving the requirements of” is used [elsewhere](#) in the AECA apparently to indicate which requirements are waived in the event of an emergency certification. For example, subsection 36(d) states, in pertinent part:

(2) A certification under this subsection shall be submitted-

(A) at least 15 days before approval is given in the case of an agreement for or in a country which is a member of the North Atlantic Treaty Organization or Australia, Japan, the Republic of Korea, Israel, or New Zealand; and

(B) at least 30 days before approval is given in the case of an agreement for or in any other country;

unless the President states in his certification that an emergency exists which requires the immediate approval of the agreement in the national security interests of the United States.

(3) If the President states in his certification that an emergency exists which requires the immediate approval of the agreement in the national security interests of the United States, **thus waiving the requirements of paragraph (4)**, he shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate the immediate approval of the agreement and a discussion of the national security interests involved. (emphasis added).

(4) Approval for an agreement subject to paragraph (1) may not be given under section 2778 of this title if the Congress, within the 15-day or 30-day period specified in paragraph (2)(A) or (B), as the case may be, enacts a joint resolution prohibiting such approval

Courts often look to [statutory context](#) to review how Congress has employed the same phrase in the same statute. When Congress uses the same terminology in multiple places within a statute, a court may attempt to [give the same construction](#) to each use of the phrase. Here, it appears that the phrase “thus waiving the requirements” in subsection (d) indicates which requirements are waived by the emergency certification and excludes any other requirements in the subsection. Subsection (b) also uses the phrase, apparently to explain which requirements are subject to waiver (e.g., “thus waiving the congressional review requirements of this subsection”).

A second plausible reading of paragraph (c)(2) would read the phrase “thus waiving the requirements” as indicating which requirements are subject to waiver. Under this view, subparagraph (C) would not be subject to a waiver at all. Setting aside the seeming unlikelihood that Congress would have taken away that authority in 2000 without debate, this reading is subject to a structural weakness. Namely, the outset of the subsection makes clear that (A), (B), and (C) apply “[u]nless the President states in his certification that an emergency exists....” A reading that then immediately removes the waiver authority for the requirement in subparagraph (C) stands in tension with the first part of the subsection. But under the canon known as *expressio unius*, the omission of an item from a series is presumed to be intentional. Also, the language “thus waiving the requirements ...” could be seen as providing an exception to an earlier established rule. Such a reading would not render subparagraph (C) superfluous as it would continue in force the 30-day waiting period for relevant arms sales, with or without an emergency certification.

On the other hand, a court might in some cases interpret statutory language against its [practical consequences](#), determine those results to be too absurd to express Congress’s will, and chalk it up as a [scrivener’s error](#). If a court determines legislation is ambiguous, it might look to [legislative history](#) to discern Congress’s intent. Whether any of these methods of interpretation would result in an interpretation of the AECA that reflects Congress’s will is open to question. Accordingly, Congress might consider enacting a conforming amendment if necessary to clarify its intent for congressional oversight of arms sales under § 36, AECA.

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