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THE CENTER FOR ARMS CONTROL AND NON-PROLIFERATION

More Harmful than Helpful:
The Iran Nuclear Agreement Review Act of 2015

Analysis by Center for Arms Control and Non-Proliferation Advisory Board Member Edward Levine

On February 27, Senator Bob Corker (R-TN), chairman of the Senate Foreign Relations Committee (SFRC), introduced the Iran Nuclear Agreement Review Act of 2015, S. 615, for himself and 11 co-sponsors, headed by SFRC ranking minority member Bob Menendez (D-NJ). Senator Corker has said that he intends to move the bill out of the SFRC during the second week of March, and he will likely seek Senate and House floor action before the P5+1 and Iran can sign a comprehensive nuclear settlement agreement.

The Bottom Line: Senators should consider the Corker bill, S. 615, very carefully. Do they really want to send a message to Tehran that the President may be unable to fulfill his commitments? Do they really want to move the goalposts by adding support for terrorism to the list of reasons for reinstating sanctions? The Corker bill will endanger both the negotiations and the sanctions regime; it does not merit support.

1. **It could help Iran's own hard-liners to scuttle the negotiations.**
2. **The process established for congressional review is rushed and impractical.**
3. **It will delay U.S. compliance with any agreement by up to 65 days.**
4. **It moves the goalposts by adding Iranian support for terrorism into the negotiations.**
5. **In the wake of failed negotiations, it could cause our P5+1 negotiating partners to abandon the international sanctions on which we have relied to encourage Iranian flexibility.**

Senator Corker has attracted five initial Democratic cosponsors: Menendez; Tim Kaine (VA); Joe Donnelly (IN); Heidi Heitkamp (ND); and Bill Nelson (FL); and one independent, Angus King (ME). His bill also has garnered a veto threat from President Obama. Why the split? A more careful analysis of the bill is required.

The Challenge for Congress: It's Hard to Do Anything Useful. There are good reasons why the executive branch, rather than Congress, conducts international negotiations. The President represents the whole country, rather than particular states or constituencies; the executive branch has the resources and personnel to engage in long and detailed negotiations; and executive branch departments and agencies can provide negotiators with timely intelligence and diplomatic information that Congress too often lacks.

Congress can provide valuable policy guidance for negotiations, and has done so in the past. Usually, however, its role is to react to what the President proposes. If a negotiation leads to a treaty, then the Senate may pass or refrain from passing a resolution of advice and consent to U.S. ratification of the treaty. If the negotiation leads to an executive agreement or to an international organization decision such as a resolution of the United Nations Security Council or the International Atomic Energy Agency Board of Governors, Congress may pass or reject legislation to implement the agreement or decision, or authorize or reject needed funding. It is a real challenge for Congress to craft a larger role for itself without hamstringing the President.

The U.S. separation of powers, in contrast to a parliamentary system, has always made negotiations more difficult. U.S. negotiating partners have never had complete certainty that the United States would make good on its commitments. A second major challenge for Congress, then, if it wants to influence negotiations before they are concluded, is to push the negotiations in the desired direction without undercutting U.S. negotiators by leaving them unable to assure other countries that an agreement with us will, in fact, be implemented. The challenge is all the greater in this case, as Iran has distrusted the United States for many years (mainly because we once overthrew its government and later supported Iraq when Saddam Hussein used chemical weapons against Iran), and the ability of the United States to influence Iran is dependent in large measure on our ability to maintain broad international support for the U.S. position and for the international economic sanctions regime.

Failing the First Test: A Flawed Process of Congressional Review. Senator Corker's basic intent is to mandate a process whereby Congress will have 60 days in which to enact a motion of disapproval of any comprehensive nuclear agreement with Iran. During those 60 days, the President may not lift or suspend any statutory Iran sanctions. Setting aside, for a moment, the diplomatic risks that this legislation would impose, even if there were no such risks, does Senator Corker's bill propose a useful congressional review process? The answer is "no."

The failings of the Iran Nuclear Agreement Review Act begin with subsection (a)(1) of the new Section 135 that the bill would add to the Atomic Energy Act. The requirement to submit an agreement to Congress "not later than 5 calendar days after reaching an agreement with Iran" is an invitation to congressional error. An Iran nuclear agreement will not be a treaty, but even if it were, treaties are not normally submitted to Congress until they have been thoroughly analyzed by the executive branch. Importantly, they are submitted with an authoritative section-by-section analysis prepared by the Office of the Legal Adviser in the Department of State. The process of analyzing an agreement and preparing the section-by-section analysis often takes a few months. That passage of time gives both Congress and the executive time to raise and consider any concerns that the agreement might occasion. It also affords a certain cooling off period before any congressional action is taken. The Corker bill, by contrast, would not give Congress the time needed for truly reasoned consideration of an agreement. Rather, it would encourage a vote in each house of Congress before any careful legal analysis of the agreement could be brought to bear.

Subsection (a)(1) goes on to require that a "verification assessment report" from the Secretary of State be submitted within 5 days, as well. Subsection (a)(2) specifies that the report must assume that Iran could "use all measures not expressly prohibited by the agreement to conceal activities that violate its obligations under the agreement" and "alter or deviate from standard practices in order to impede efforts to verify" its compliance. It also states that the report "shall include a classified annex prepared in consultation with the Director of National Intelligence."

Verification assessment reports simply are not completed in 5 days; you would be very lucky to get a cogent report in 5 weeks. The mandated assumptions are good ones, commonly required when the Senate considers an arms control treaty; and the State Department and the intelligence community have been considering these questions ever since the negotiations began. But it's not possible to answer them before the agreement's verification provisions are agreed to, and it's impossible to determine the verification provisions before you have agreement on what is to be verified. So the key input to a verification assessment is the last item that will be pinned down in any comprehensive settlement with Iran; and then the Corker bill says: "Go! You have 5 days." By requiring a premature report, the Corker bill would deprive Congress of truly useful analysis and encourage it instead to act on the basis of first impressions and ideological arguments.

Paragraph (a)(2)(A) only muddies the situation by requiring that the verification assessment report address how well we will be able "to ensure Iran's activities permitted [under the agreement] will not be used to further any nuclear-related military or nuclear explosive purpose." This could be read to imply that Iran should not be allowed to develop nuclear-powered warships, satellites, or sensing devices. Such military applications are not barred by international law and are not part of the current negotiations with Iran. It is unclear why this odd wording was used, instead of referring to "nuclear weapons or other nuclear explosive devices," the formulation used in the Nuclear Non-Proliferation Treaty. Perhaps Senator Corker's concern is the risk of an Iranian "dirty bomb;" in that case, he would have been more precise if he had referred to "nuclear or radiological weapons." Even an Iranian radiological weapons program would be outside the scope of the current negotiations, however, and also outside the scope of the NPT.

Subsection (c)(1) of the new Section 135 adds another confusing element. It states that statutory sanctions relief actions may be taken if a joint resolution favoring the agreement is enacted during the 60-day period, and that such actions may not be taken if a joint resolution opposing the agreement is enacted during the 60-day period. But, what if no joint resolution is enacted during the 60-day period? Then, pursuant to paragraph (c)(1)(C), statutory sanctions relief actions "may be taken…if, following the period for review…, there is not enacted any such joint resolution." That's interesting. Two types of joint resolutions have just been discussed in this subsection. Let's give the drafters the benefit of the doubt, and assume that paragraph (c)(1)(C) is meant to refer to a resolution of disapproval. What happens if such a resolution is enacted a week, a month, two years, or a decade after the end of the 60-day review period? Does it purport

to nullify any sanctions relief actions taken since the end of the 60-day review period? That would seem legally and practically feckless. So, let's assume that enacting a joint resolution of disapproval after the end of the 60-day review period would bar statutory sanctions relief actions after the enactment of the resolution. One thing we can be sure of is that, if the President opposed the joint resolution, all manner of statutory sanctions relief actions would be taken just before the joint resolution was enacted.

Failing the Second Test: The Irony and Diplomatic Risks of an Added Congressional Vote. Congress can pass a law undoing an international agreement whenever it has the votes. It may be unwise; it may undermine the world's respect for international law and for the United States. But Congress does not require Senator Corker's bill to stop implementation of an Iran nuclear agreement.

So, what would the 60-day review period achieve? It would delay full U.S. compliance with an agreement. But its major impact would be to remind the world that the United States might not fulfill its obligations under the agreement. And what good does that do?

Supporters of the bill believe that it could force Iran to be more forthcoming. In practice, however, it is more likely to encourage Iran's own hard-liners to scuttle the negotiations on the grounds that the United States is using improper pressure on Iran and, in any case, is simply not to be trusted. Enactment of the Corker bill may well move our P5+1 negotiating partners to a similar conclusion, moreover, and thereby undermine the international sanctions on which we have relied to encourage Iranian flexibility. As noted at the beginning, it isn't easy for Congress to be useful in negotiations; this element of the Corker bill is a good illustration of that general point.

Congress and Compliance: Another Flawed Process, and More Diplomatic Risk. Section (d)(1) requires that the President inform Congress "within 10 days of receiving credible and accurate information relating to a potentially significant breach or compliance incident by Iran." The problem with this requirement is that it often takes weeks or months to determine whether a piece of information is "credible and accurate." So, the President will have to choose between "disobeying the law" and feeding unconfirmed information to Congress. Then, pursuant to section (d)(2), he will have only another 10 days in which to determine and report to Congress whether the alleged activity "constitutes a material breach" of the agreement and, if so, what is being done about it. Again, the Corker bill demands speed rather than care.

Section (d)(3) requires a compliance report every 180 days. While much of the required report makes sense, a few provisions may not. Thus, paragraph (d)(3)(E)(ii) demands that the report highlight any Iranian centrifuge R&D that "may substantially enhance the enrichment capacity of Iran if deployed," even if such R&D is in compliance with the agreement. Since all of the more advanced centrifuges on which Iran is working would have at least double the enrichment capacity of the IR-1 model now in use at Natanz, it would follow that all of Iran's R&D efforts would have to be highlighted every 180 days. Paragraphs (H) and (I) go on to require reporting

on Iranian money laundering and support for terrorism. Those are important topics, but they would seem to have nothing to do with a comprehensive nuclear settlement agreement.

On top of the periodic 180-day compliance reports, section (d)(5) requires periodic 90-day compliance certifications. This provision requires the President to certify, inter alia, that "Iran has not taken any action...that could significantly advance its nuclear weapons program." Would that include the permitted centrifuge R&D noted earlier? The answer is unclear.

A clearer, and clearly problematic, required element of the 90-day certifications is that "Iran has not directly supported or carried out an act of terrorism against the United States or a United States person anywhere in the world." Iranian support for terrorism is a very significant problem, of course, but it is not an issue that will be addressed in the nuclear agreement now being negotiated. Senator Corker's bill, by inserting the terrorism issue into U.S. implementation of any nuclear agreement, is thus "moving the goalposts," and doing so in a manner that could well scuttle the negotiations. Moreover, Iran can run afoul of this provision without doing bodily harm to any individual. The definition of "United States person" used in this bill includes "an entity that is organized under the laws of the United States or any State." Thus, if Hezbollah (which receives Iranian financial and material support) were to plant a bomb next to the Beirut branch of a U.S. bank, that would arguably suffice to prevent the President from making the next 90-day certification. Once that happens, section (e) provides for expedited consideration of a bill to reinstate all the statutory sanctions that were waived, suspended or reduced pursuant to an Iran nuclear agreement, even if Iran is in complete compliance with its obligations under that agreement.

Senator Corker's summary of his bill is telling on the compliance question: "After the congressional review period, the president would be required to assess Iran's compliance with the agreement every 90 days. In the event the president cannot certify compliance, or if the president determines there has been a material breach of the agreement, Congress could vote, on an expedited basis, to restore sanctions that had been waived or suspended under the agreement." His summary makes no mention of the terrorism certification that he has added to the compliance certification requirement. Perhaps he hopes that his colleagues will not notice the moving goalposts.

Section (e)(3) gives Congress 60 days in which either leader in either House (or his or her designee) may introduce the legislation. Section (e)(4) refers such a resolution to the Foreign Relations or Foreign Affairs Committee, and section (e)(5) would discharge it from committee after 10 session days. Careful consideration in committee does not appear to be the intent. Indeed, if one of the committees opposes the bill, it must still report it within 10 session days or the bill will be discharged from committee. And if one House of Congress fails to take up the bill, then paragraph (e)(8)(B) provides that the other House's bill, if passed, will be entitled to expedited procedures in the first House. The deck is stacked in favor of passage.

Sections (e)(6) and (e)(7) are frankly puzzling. The expedited procedures used for peaceful nuclear cooperation agreements are specified in section 601 of the International Security Assistance and Arms Export Control Act of 1976, which does not specify expedited procedures to be followed in the House of Representatives. Traditionally, the House has not allowed its procedures to be dictated by statute. Has that view changed? Is the House really willing to limit debate to a mere 2 hours equally divided on an issue of this importance?

Senator Corker's proposed Senate procedures also differ from the normal expedited procedures. For example, when there is a motion to proceed to the resolution of disapproval, section 601 states: "An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to." Paragraph (e)(7)(A) of the Corker bill, by contrast, states that a motion to proceed shall be in order "even though a previous motion to the same effect has been disagreed to." Section 601 does not explicitly bar multiple motions to proceed, but it certainly seems to suggest that you only get one try. The Corker bill would allow opponents of an agreement to try again and again to bring the resolution of disapproval to the floor, with expedited procedures intact.

The waiving of points of order in the Corker bill also differs from section 601, as does the prohibition of motions to postpone debate or to proceed to the consideration of other business. Paragraph (e)(7)(E) of the Corker bill is especially curious; I do not recall a previous statute limiting Senate debate on a veto message. There is no need for all this pre-planned haste, and senators should think twice before agreeing to it.

Finally, it should be noted that the Corker bill's definition of "material breach" includes any breach that "substantially benefits Iran's nuclear program." Perhaps Senator Corker meant to say Iran's nuclear weapons program, but that isn't what he wrote. One pities the poor U.S. diplomat who has to shout "material breach" over a breach that only benefits Iran's peaceful nuclear activities.

Edward Levine serves on the Center for Arms Control and Non-Proliferation National Advisory Board. He spent more than 14 years as a senior professional staff member of the Senate Foreign Relations Committee and over 20 years with the Senate Select Committee on Intelligence.