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Iran Nuclear Agreement Review Act of 2015 and Legal Ramifications

The Iran Nuclear Agreement Act of 2005 ("INARA") raises interesting and novel constitutional issues.

The Act represents an amendment to the Atomic Energy Act of 1954, 42 U.S.C. § 2011, *et seq.* The legislation requires, within five (5) calendar days after reaching an agreement with Iran relating to the nuclear program of Iran, transmission by the President to the appropriate congressional committees of the text of the agreement "and all related materials and annexes." There must also be a certification that the agreement includes the appropriate terms, conditions and duration of the agreement's requirements with respect to Iran's nuclear activities, among other things. The certification must also contain the President's determination that the agreement meets the United States non-proliferation objectives and complies with other security considerations.

The Secretary of State is required to assess a number of items, including the ability to verify Iran's compliance with any agreement. Relevant classified information must be transmitted to Congress in a "classified annex" prepared in consultation with the Director of National Intelligence.

The Act contains language concerning the obligation of the President to relay to Congress any significant breach by Iran with respect to the agreement reached between the parties. A procedure is developed by INARA for Congress to investigate any breach of an Iran nuclear agreement.

Whether, from a constitutional perspective, the supervision over the President's actions by Congress will stand the test of time and the scrutiny of the courts, is a serious question. One of the issues which has been raised is whether secret signed deals with Iran which underlie the Iranian nuclear accord will be given to Congress and are subject to the scrutiny of INARA.

Reading the specific words of the legislation cannot be underestimated in terms of the value of appreciating just how dangerous Iran may prove to be. INARA requires the "appropriate" terms, conditions and duration of the agreement's requirements to be disclosed to Congress. The use of the word "appropriate" would make the Act difficult to enforce. The language which states that the President shall transmit "the text of the agreement and all related materials and annexes" is subject to interpretation. Are secret side deals which are integral to the agreement but not incorporated within it subject to the Act? As we have learned from long Supreme Court history, there is great deference given to the executive branch by the Supreme Court of the United States. The likelihood of any section of the Act being struck down as unconstitutional or requiring the President to transmit secret deals to Congress is slim.

Further, Presidents have conducted war so frequently and made *de facto* treaties on so many occasions, that the Constitution has been rendered virtually impotent in foreign policy. Thousands of Americans have died in undeclared wars, Vietnam being one of the most gruesome examples. Likewise, Presidents have made nefarious deals with foreign powers which Congress did not even know about, such as Iran-Contra under President Reagan, absent treaty approval required by the United States Constitution.

In reality, Congressional oversight by virtue of the treaty and war-making powers has been utilized less than perhaps any provision in the Constitution. There is a certain attractiveness to those who demand that we end the national hypocrisy and only enter into wars where the Constitution is followed and that important deals with foreign powers must be subject to the treaty power of Congress. It certainly appears as though any "deal" with Iran should be subject to the treaty power, but the Supreme Court has not been very impressive on that point.

What exactly is a treaty? I studied at Georgetown University Law Center with the great Adrian S. Fisher, who negotiated the nuclear test ban treaty for John Kennedy in 1963, and negotiated other important agreements for Presidents Johnson and Carter. In authoring a thesis concerning the enforceability of treaties as domestic law, I wrestled with the problem as to when an agreement with a foreign power should be considered a treaty.

Ultimately, the negotiations with Iran may result in a world decimated by nuclear war. Given the risks of the Iranian accord, one could certainly argue that the treaty power of the Constitution should be followed. However, the importance of agreements with foreign powers have not been foremost in the mind of the Supreme Court when it has granted Presidents significant jurisdiction over agreements with other nations.

The agreement with Iran, and the footnotes, make for important reading. Key are the following concerning following those agreements:

1. The protocols are "voluntary" by their own terms.

2. Uranium from foreign powers or stored with other nations will not be subject to the restrictions or limitations on uranium enrichment.

3. Fusion, plasma and thermonuclear technology which could lead to the development of a hydrogen bomb will be shared with Iran even though there are currently no peaceful uses for the technology.

4. Retirement of old, inefficient centrifuges with the technology to build better, faster, more effective uranium enrichment infrastructure will be encouraged.

The debate over the Iranian accord seems to be more about whether an individual supports President Obama than the contents of any of the agreements. The safety and future of

the United States should not depend upon either political correctness or political loyalties. It is possible to love President Obama and detest a weak, poorly negotiated agreement.

Congress has attempted to exercise its Congressional oversight over a bad deal with a dangerous country. Most Americans disapprove of the agreement of Iran, notwithstanding pressure from the Administration. Democrats should separate themselves from political loyalties and look at what is safe for the United States. Nuclear nonproliferation is a key to the survival of the world. An agreement which provides technology and the ability for Iran to become a nuclear or thermonuclear power simply cannot be justified against the backdrop of the dangers which will exist from an emboldened, wealthy fundamentalist Islamic power.

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