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Chairman Royce, Ranking Member Engel, and Members of the Committee, I am honored to appear before you again to discuss the status of the Joint Comprehensive Plan of Action (JCPOA). I was deeply involved in the Iran nuclear issue during my service as an Assistant Secretary of State during the Bush Administration, and I have continued to follow the issue as a member of various commissions and task forces, including currently the Iran Task Force of JINSA’s Gemunder Center for Defense and Strategy. I wish to stress, however, that the views I will express today are purely my own, and should not be ascribed to the Gemunder Center, the law firm for which I work, or my firm’s clients.

In three previous appearances before the Committee on this issue--all prior to entry into force of the JCPOA--I expressed strong reservations about the agreement. It will not surprise you to hear that my views have not changed and I continue to believe that the JCPOA was deeply flawed.

The principal concern I have expressed on past occasions relates to the agreement’s so-called sunset clauses, which provide for expiration of almost all the agreed restrictions on Iran’s nuclear program after 10-15 years. I summarized my concern as follows in my testimony of July 9, 2015:

If it is dangerous today for Iran to be able to produce a single nuclear weapon in just two or three months, why won’t it be even more dangerous for them to be able to produce a much larger number of nuclear weapons in a much shorter period of time beginning just ten years from now?

I stressed that it was not just my opinion that this risk was baked into the JCPOA; even President Obama acknowledged it. In an interview with NPR on April 7, 2015, President Obama conceded that beginning by about the 13th year of the agreement, Iran’s nuclear weapons breakout time will have “shrunk down almost to zero.”¹

President Trump has characterized the sunset clauses as one of three principal “flaws” of the JCPOA which he insists must be “fixed.” The other two features he has identified as flaws

¹ <https://www.npr.org/2015/04/07/397933577/transcript-president-obamas-full-npr-interview-on-iran-nuclear-deal>.

are inadequacies in the agreement's inspections provisions and inadequacies in its treatment of the ballistic missile threat from Iran. He has threatened not to renew the presidential waivers of mandatory U.S. sanctions on Iran if these three flaws are not addressed, and he has called upon Congress and the governments of the United Kingdom, France and Germany (the "EU-3") to join him in adopting appropriate fixes.

Naturally I welcome President Trump's attention to the sunset clauses. For far too long, supporters of the JCPOA have blithely asserted that the agreement "cuts off all of Iran's pathways to a bomb," without including the essential qualification that this is only true for the first 10-15 years of the agreement.

But the recognition that the JCPOA has embedded within it very serious flaws does not lead to the conclusion that we should abandon the agreement today. Doing that would threaten to turn the long-term problem of the sunset clauses--a problem which will mature in January 2026, ten years after the agreement entered into force--into an immediate problem. The reality is that structure of the JCPOA frontloaded many of the benefits to Iran, while backloading most of the benefits to us. Consequently, if we abandon the agreement today, we will be unable to reclaim the benefits Iran has already received, while positioning Iran to withhold many of the future benefits it committed to provide us. I will leave it to supporters of the JCPOA to elaborate on other risks associated with this path, such as the stress it would put on our alliance relationships, the opportunities it would afford Iran to play the victim and seek to isolate the United States, and the risk of non-compliance with our secondary and financial sanctions.

It is my strong hope, therefore, that a way can be found to "fix" the JCPOA as President Trump has called for, thereby averting an immediate U.S. exit from the agreement. I believe the Trump Administration has proposed some creative ways for doing this, and I hope those proposals are seized by the EU-3 and by Congress. I will elaborate on those proposals in a moment, but first, to put the Trump Administration's approach in perspective, I want to review the options available to us for dealing with the problem of the sunset clauses.

I. Options for Dealing with the Sunset Clauses

I can imagine five possible ways of dealing with the fact that under the terms of the JCPOA, beginning in January 2026, the time required for Iran to produce nuclear weapons will begin to radically decrease, and over the following three years or so, in President Obama's words, will reduce "almost to zero."

Our options are to:

- 1) plan to abide by the terms of the JCPOA and simply accept this fact;
- 2) plan to abide by the terms of the JCPOA but not accept this fact, telling the Iranians that if they take certain steps permitted under the JCPOA we will attack them;

- 3) plan to abide by the terms of the JCPOA but not accept this fact, telling the Iranians that if they take certain steps permitted under the JCPOA we will re-impose sanctions on them;
- 4) negotiate a new agreement with Iran that eliminates the sunset clauses; or
- 5) abandon the JCPOA.

A careful review of these options leads, in my view, to the conclusion that our least bad option is the third, which in fact appears to be the Trump Administration's preferred course.

Option One: Abide by the JCPOA and Accept that Iran's Nuclear Breakout Time will Reduce "Almost to Zero"

The first option would require us to simply accept as our fate the deal that was promised to Iran in the JCPOA. In other words, taking President Obama's comments on the subject as authoritative, beginning about 13 years into the agreement (or about 10 1/2 years from today), Iran will be able to produce nuclear weapons within days, or at most a few weeks, of a decision to do so. And not just one nuclear weapon, but multiple weapons, with the number of weapons they could quickly produce growing over time. This breakout time will be shorter than can be detected by routine international inspections, meaning that we could simply wake up one day to learn that Iran now possesses a nuclear weapons arsenal.

Adopting this option might make sense if we expected Iran's government to be transformed over the course of the JCPOA into something less threatening to us and its neighbors than it has been in the past. But as of today, two years and four months into the agreement (or almost a quarter of the way to the point at which the sunset clauses begin to kick in), there is little evidence of such a transformation. Absent that, this option probably poses the greatest long-term risk of the five I've identified.

Option Two: Abide by the JCPOA, But Threaten to Attack Iran if it Takes Certain Steps Permitted Under the JCPOA

The second option proceeds from the recognition that the first option is unacceptable. But rather than do anything about that today, it would have us simply declare that notwithstanding what was promised to Iran under the JCPOA, we do not intend to let them come close to producing nuclear weapons, and if they do, we will use armed force to destroy their capacity to do so. To me this sounds like the most fanciful of the options, but it is the option that had the most intellectual and political firepower behind it when Congress was debating the JCPOA in 2015.

This option was recommended in the “Public Statement on U.S. Policy toward the Iran Nuclear Negotiations” issued on June 24, 2015, by the “Bipartisan Group of American Diplomats, Legislators, and Experts” convened by the Washington Institute for Near East Policy. This group included many prominent former officials of the Clinton, Bush and Obama Administrations. After expressing concern about the sunset clauses, their statement asserted:

Most importantly, it is vital for the United States to affirm that it is U.S. policy to prevent Iran from producing sufficient fissile material for a nuclear weapon—or otherwise acquiring or building one—both during the agreement and after it expires. Precisely because Iran will be left as a nuclear threshold state (and has clearly preserved the option of becoming a nuclear weapon state), *the United States must go on record now that it is committed to using all means necessary, including military force, to prevent this. The President should declare this to be U.S. policy and Congress should formally endorse it.* (emphasis added)²

One of the many things the United States agreed to in the JCPOA was that there would be no restrictions on Iran’s ability to produce fissile material (specifically highly enriched, weapons-grade uranium) after 15 years, and in particular no agreed limitation on the amount of such material that Iran may produce or possess. Therefore this recommendation called on the United States to effectively amend the terms of the JCPOA, not through new negotiations with Iran, but rather through the threat of unilateral military action if Iran took certain steps permitted under the JCPOA.

Personally I doubt that Iran will find this threat very credible. If America was unwilling in the days before the JCPOA to use military force against Iran when it was enriching uranium in violation of six legally binding UN Security Council resolutions, why would they believe we might in the future use military force against them for enriching uranium in a manner permissible under the JCPOA?

Option Three: Abide by the JCPOA, But Threaten to Sanction Iran if it Takes Certain Steps Permitted Under the JCPOA

The third option is very similar to the second, except that the threat wielded against Iran if it takes steps permitted under the JCPOA to produce excessive amounts of enriched uranium isn’t a potential U.S. military strike, but rather the potential application of economic sanctions. One could argue that because the second option is capable of stopping Iran’s nuclear program in its tracks, we can wait longer before applying it, thereby preserving the JCPOA for a longer time before launching military strikes that presumably would mark the end of the JCPOA. The economic sanctions of the third option, by contrast, would probably need to be applied sooner in order to have any effect. On the other hand, the third option does not have the credibility

² <http://www.washingtoninstitute.org/policy-analysis/view/public-statement-on-u.s.-policy-toward-the-iran-nuclear-negotiations>.

problem associated with the second option. The United States has a long history of applying economic sanctions against Iran, while the history of seeking to avoid military confrontation with Iran is at least as long.

Because the Trump Administration is pursuing a variation of the third option, I will elaborate on how this option might work in practice later in my testimony.

Option Four: Negotiate a New Agreement that Eliminates the Sunset Clauses

The fourth option is superficially very attractive. Instead of confrontation with Iran, it promises renewed cooperation. President Macron of France advocated this idea when he visited Washington two weeks ago. And as the debate over President Trump's proposals has unfolded during the past year, it has emerged that this is the preferred option of many other supporters of the JCPOA. Indeed, it has emerged that this was, if not the secret plan, then at least the unstated plan, of many of those who were involved in negotiating the JCPOA. There was no discussion of this idea when Congress was debating the JCPOA, however. Presumably this is because acknowledging the need for a follow-on agreement then would have raised questions whether it was really true that the JCPOA "cuts off all of Iran's pathways to a bomb."

I believe this is an option that we must take seriously, and we must also recognize that it is an option that may strongly appeal to President Trump. If he is willing to negotiate with Kim Jong Un, certainly he must be open to negotiating with Iran as well. If we are going to consider this option, however, it is important to think through where this path will likely lead.

Any negotiation proceeds from a baseline--a status quo that the negotiation seeks to alter. The baseline for negotiating the JCPOA was six binding resolutions of the UN Security Council that made Iran's ongoing uranium enrichment program illegal as a matter of international law, and a highly effective global economic embargo of Iran that was largely driven by America's secondary sanctions on Iran.³ According to the negotiators of the JCPOA, the best deal they could cut with Iran negotiating from this baseline was the deal they got, which included restrictions on Iran's nuclear activities that sunset after 10-15 years.

Presumably the baseline for any new negotiation with Iran to eliminate the sunset clauses will be the JCPOA, which permits Iran to produce unlimited amounts of enriched uranium once the sunset clauses take effect. No one believes Iran will surrender its ability to do this as a gesture of goodwill. If Iran is going to surrender this ability, it will demand hefty compensation.

³ By "secondary sanctions," I mean the threat--mandated by the Iran Sanctions Act of 1996, and a series of other laws approved by this Committee over the ensuing two decades--that the United States would impose economic sanctions on foreign persons from third countries who engaged in certain activities with Iran or with Iranian persons. Secondary sanctions are to be distinguished from "primary sanctions," which are restrictions that the United States imposes on American persons with respect to their dealings with Iran or Iranian persons.

What sort of compensation are we in a position to offer? The most obvious candidate is relief from the primary U.S. sanctions on Iran, which are still in effect.

America's primary sanctions on Iran--the ones that prohibit Americans and American companies from dealing with Iran--were not lifted under the JCPOA because, unlike America's secondary sanctions, they were not imposed on Iran on account of its nuclear weapons program. The primary sanctions were initially imposed beginning in the 1980s on account of Iran's support for international terrorism, and they have been strengthened over time on account of Iran's continued support for terrorism, as well as other malign activities such as human rights violations against its own people, obstruction of the Middle East peace process deriving from its stated goal of wiping Israel off the map, and ballistic missile proliferation. The position of the U.S. government going back to the Reagan Administration has been that we will only consider lifting our primary sanctions when Iran is prepared to stop supporting terrorism and doing the other things that led us to impose the primary sanctions.

It follows from this that those who want us to engage in a follow-on negotiation with Iran to supplement the nuclear-related restrictions of the JCPOA are, in reality, proposing that we consider trading our primary sanctions on Iran for additional concessions by Iran on its nuclear program. This would be a fine idea if our only concern with Iran was its nuclear program. But what will be left of our policy of seeking to persuade Iran to end its support for international terrorism, and its other malign activities, if we end our primary sanctions? Are we prepared to fully rehabilitate Iran--to tell Americans and the rest of the world that they are now free to trade with Iran and otherwise treat it as a normal country--while Iran continues to act as the world's leading state sponsor of terrorism, and remains committed to the destruction of Israel? We need to think through whether we are prepared to entertain such a deal, because this is where the path of negotiating a follow-on agreement to the JCPOA is likely to lead.

Because this is such an unsavory prospect, it may lead some to ask--and I'm thinking here in particular of President Trump--why we can't change the baseline before engaging in a new round of negotiations with Iran? The way to change the baseline, of course, is to terminate the JCPOA and try to establish some new baseline closer to the one we had before the JCPOA was adopted. I am deeply skeptical that this can be done, because establishing a new baseline like that will require considerable international cooperation, and I doubt much cooperation will be forthcoming if the United States has unilaterally abandoned the JCPOA.

But my real point is this: President Macron and others who are advocating new negotiations with Iran because they think that's a way of preserving the JCPOA need to be mindful that, to President Trump's ears, their arguments may come across as reasons for immediately abandoning the JCPOA.

Option Five: Abandon the JCPOA

The fifth option, abandoning the JCPOA, is appealing to many who originally opposed the JCPOA. And clearly it is President Trump's fallback option if the third option above proves unachievable. I have already explained why I believe this is a bad option that, if exercised unilaterally by the United States, is likely to benefit Iran more than us.

II. Position of the Trump Administration

As I have already indicated, President Trump's current approach to the problem of the sunset clauses is a combination of options three and five above. He has called for the establishment of a mechanism that will re-impose economic sanctions on Iran if it steps up its uranium enrichment activities in a way that will shorten its nuclear weapons breakout time, and he has threatened to abandon the agreement if such a mechanism cannot be established.

To understand the Administration's position, it is useful to recall how it evolved. In October of 2017, President Trump created a great deal of suspense over whether he would make a certification provided for under the Iran Nuclear Agreement Review Act. In announcing his decision on October-, he flagged his three key concerns about the JCPOA--the sunset clauses, inspections, and missile proliferation--and called upon Congress to join him in addressing these problems, stating:

Key House and Senate leaders are drafting legislation that would amend the Iran Nuclear Agreement Review Act to strengthen enforcement, prevent Iran from developing an inter- — this is so totally important — an intercontinental ballistic missile, and make all restrictions on Iran's nuclear activity permanent under U.S. law. So important. I support these initiatives. However, in the event we are not able to reach a solution working with Congress and our allies, then the agreement will be terminated.⁴

In January of this year, there was another round of suspense as we waited to see if President Trump would renew presidential waivers of various U.S. sanctions laws with respect to Iran. In the end he announced:

Today, I am waiving the application of certain nuclear sanctions, but only in order to secure our European allies' agreement to fix the terrible flaws of the Iran nuclear deal. This is a last chance. In the absence of such an agreement, the United States will not again waive sanctions in order to stay in the Iran nuclear deal.⁵

Why is it that in October he placed the onus on Congress to "fix" the JCPOA, and in January he placed it instead on the EU-3? The answer appears to be that between October and January it became clear that the legislation he had endorsed--a Senate bill drafted by Senators Corker and Cotton--could not achieve the 60 votes necessary to pass the Senate. According to

⁴ <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-iran-strategy/>

⁵ <https://www.whitehouse.gov/briefings-statements/statement-president-iran-nuclear-deal/>

press reports, one of the reasons the legislation stalled was because of lobbying by European diplomats in opposition to the bill.⁶ President Trump therefore must have thought it was fair play to shift the onus to the EU-3.

My take-away from this history, however, is that President Trump would be satisfied either by the enactment of legislation along the lines of the Corker-Cotton bill, or by an agreement with the EU-3. In either case, the substantive elements of the “fix” would be roughly the same. They would provide for re-imposition of economic sanctions on Iran if it (1) violates its obligations to comply with inspections under the JCPOA, (2) crosses certain red lines with respect to its missile program, or (3) takes steps with respect to the production of fissile material that would shorten its nuclear weapons breakout time, including by exercising flexibilities it was afforded to enrich uranium upon expiration of the JCPOA’s sunset clauses.

The first two of these features are relatively non-controversial. Few would argue that Iran should be free to violate the inspections obligations it undertook in the JCPOA. And the missile proliferation issue was not directly addressed in the JCPOA, so there is no argument that threatening sanctions over that would violate commitments that were made to Iran in that agreement. The controversial feature is the third one, and in particular the idea of threatening to sanction Iran if it takes steps permitted under the JCPOA following expiration of the sunset clauses.

Reportedly at least some of the EU-3 have objected that the mere declaration of such a policy would breach our obligations under the JCPOA. I believe this view is legally incorrect. By way of analogy, I would note that Iranian officials from President Rohani on down have repeatedly insisted that they will never allow international inspectors access to Iranian military sites, notwithstanding that they are required under the JCPOA to afford such access if the International Atomic Energy Agency (IAEA) requests it.⁷ Do these policy declarations mean that Iran is today in violation of the JCPOA? I believe not, because even though Iran has declared a policy that, if acted upon, would violate the JCPOA, it has never been requested by the IAEA to permit such inspections, and therefore we don’t know whether Iran would actually follow through on its declared policy. In my view, Iran will not have breached its obligations under the JCPOA until (1) the IAEA has requested access to a military site in Iran, and (2) that request has been denied by Iran.

Applying the same logic to the sunset clauses, what the Trump Administration is asking for is agreement on a policy about what will happen if, after January 2026, Iran begins to take advantage of the flexibility it will gain at that point under the terms of the JCPOA to increase its

⁶ <https://www.usnews.com/news/world/articles/2017-12-14/european-diplomacy-helps-sway-congress-to-keep-the-iran-nuclear-deal>

⁷ <https://www.rferl.org/a/iran-dismisses-us-call-un-access-military-sites-dream-rohani-haley-iaea/28704445.html>

uranium enrichment capacity. Just as with the question of international inspections of military sites in Iran, there are two levels of uncertainty here. First, it is not clear that Iran will use the flexibility the JCPOA affords it to increase its uranium enrichment capacity after January 2026. The JCPOA *permits* Iran to increase its enrichment capacity at that point, it does not *require* it to do so. Second, no matter what policy has been established (either by agreement with the EU-3 or under U.S. law), there is no certainty that sanctions will be applied if Iran takes advantage of the flexibilities afforded it by the JCPOA.

We have no idea what kind of government will be in power in the United States or any of the EU-3 after January 2026. In the case of all four countries, it is possible that the governments in power at that point will feel no more obligated to follow an agreement reached by their predecessors than President Trump feels obligated to follow the JCPOA, which was negotiated by his predecessor. And in the case of any legislation enacted into law by Congress, it presumably will include some sort of mechanism by which Congress can either approve or disapprove of the imposition of sanctions, so it is impossible to predict today what may happen under such legislation in 2026 or thereafter.

The more serious concern, therefore, is not that the establishment of such a policy today would place us in breach of the JCPOA, but rather that it might prompt Iran to withdraw from the JCPOA. Here we can only speculate about what Iran's tolerance will be for such policy declarations by us and the EU-3. But obviously it's in their interest to try to bluff us into believing that their tolerance is lower than it actually is.

Personally I believe that the JCPOA has been and will remain a very good deal for Iran, and they will not be eager to return to the pre-JCPOA days of confrontation and sanctions. So I predict they will see the establishment of such a policy as our opening move in what will inevitably be a negotiation over the shape of Iran's post-January 2026 nuclear program. As I have already indicated, it is very much in Iran's interest that such a negotiation have as its baseline the JCPOA rather than a baseline of sanctions, so I don't expect them to withdraw from the agreement over declarations today about what we intend to do after January 2026.

The final thought I want to leave you with is that, for a man who has declared the JCPOA to be the "worst deal ever," President Trump has in fact come up with relatively modest demands for keeping the United States in the deal. His tactics for persuading others to agree with his demands have not been modest, of course, but we should not allow that to obscure that, as a substantive matter, his demands appear more calculated to preserve the deal than to blow it up.

I therefore will close by reiterating what I said at the outset: it is my strong hope that agreement can be reached on some variation of what President Trump has proposed. That could take the form of either an agreement between the Trump Administration and the EU-3 (which Congress should then write into U.S. law), or agreement within Congress on a version of the Corker-Cotton bill. Either of these would be far preferable to U.S. withdrawal from the JCPOA

over the objection of our allies, which appears to be where President Trump is headed if no agreement is reached.

I thank you for your attention and look forward to your questions.