

JCPOA Under the Gun (Part 1): Trump's Five Decisions

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Brief Analysis

Any U.S. pushback against the nuclear deal with Iran will carry consequences, along with potential side benefits, but some courses of action could be more self-defeating than others.

Read Part 2 of this PolicyWatch (<http://www.washingtoninstitute.org/policy-analysis/view/jcpoa-under-the-gun-part-2-a-middle-course>), which discusses the various points of leverage Washington will wield as the certification debate proceeds.

President Donald Trump garnered much attention, first, with comments about no longer wanting to certify a set of questions related to Iran and the 2015 nuclear agreement, known as the Joint Comprehensive Plan of Action (JCPOA), a certification required every ninety days by Congress in accordance with the Iran Nuclear Agreement Review Act of 2015 (INARA, aka the "Corker-Cardin Act"). He did so a second time by saying he had already made up his mind on whether the United States would continue adhering to the deal but would not reveal his course of action. Indeed, news reports on October 5 indicated Trump would announce plans to decertify the deal in an address scheduled for October 12.

Moreover, what is clear from the president's comments to date, and those of Secretary of State Rex Tillerson and ambassador to the United Nations Nikki Haley -- who provided a detailed critique of the JCPOA at the American Enterprise Institute (AEI) in September -- is that the administration, whatever it decides, will embed the decision, as the INARA stipulates, in broader U.S. policy toward Iran.

This piece reviews not specific policy recommendations but rather the various "decision tree" steps the United States would work through in dealing with the certification issue and the future of the JCPOA. It draws on technical

analysis in the Congressional Research Service (CRS) report *Options to Cease Implementing the Iran Nuclear Agreement* (<https://fas.org/sgp/crs/nuke/R44942.pdf>), which was released in September.

Decision 1: Whether to Certify or Not

1. *To certify.* The first option is by October 15 to confirm, under the terms of the INARA, affirmative answers to four questions: (1) whether Iran is implementing the agreement; (2) has not committed a material breach, uncorrected, of it; (3) is not acting to advance significantly its nuclear weapons program; and (4) whether suspension of U.S. sanctions pursuant to the agreement is (a) appropriate and proportional to the measures Iran is taking to end its nuclear weapons program and (b) in the vital interests of the United States. If the president agreed on these conclusions, he would be certifying not only Iran's compliance with the agreement -- e.g., see 1 and 2, above -- but also that Iran is not advancing a nuclear weapons program, including outside the JCPOA strictures (see 3) and that suspension of U.S. sanctions makes sense from the broader perspectives of a quid pro quo for Iranian measures to end its illicit weapons program and the vital national interests of the United States (see 4). In such a case the United States would thus have to deal with Iran's regional actions on a second track.

The logic to this position is that the primary -- but not total -- focus of the INARA's certification requirement is Iran's JCPOA compliance. In her talk at AEI, Ambassador Haley provided no new specific evidence of ongoing violations of the act proper; Secretary Tillerson, on September 17, stated that Iran was technically in compliance, a position the International Atomic Energy Agency has taken more strongly and repeatedly. Iran arguably is violating provisions of UN Security Council Resolution 2231 under legally binding Chapter VII, on missile programs and arms transfers. To this end, the United States joined the European JCPOA participants in July in formally condemning Iran on missile tests ("inconsistent with UNSCR 2231"). But the UN Security Council has not formally acted on these violations. Thus, certifying the four INARA queries would be a defensible course of action.

Selecting this option would "stop" the decision tree. The administration could also certify but press for follow-on negotiations to improve or extend the JCPOA, but that would be a long-term effort absent international consensus on Iranian noncompliance.

1.2: *To decertify.* The alternative course would be for the president not to certify the deal. The logic for this is that Iran is rampaging throughout the region, while simultaneously enjoying a commercial and diplomatic renaissance with much of the world, especially Europe, with U.S. acquiescence as seen in repeated "compliance" determinations. But given the absence of significant Iranian violations of the JCPOA, the most likely basis for this determination is under the act's requirement (see 4, b, above) that continuing sanctions reflects a vital U.S. national interest. Here, considerations outside compliance with the JCPOA, including Iran's behavior throughout the Middle East, carry weight, as Haley emphasized. Tillerson also argued that Iran was not acting in accordance with the expectations in the preface to the JCPOA: "They [i.e., parties to the agreement] anticipate that full implementation of this JCPOA will positively contribute to regional and international peace and security." That clearly has not occurred.

The INARA thus is sufficiently broad for the president to make the case not to decertify. (A possible third presidential course of action, making no determination, is treated in the act as tantamount to noncertification). Aside from considerations of "next steps," however, the administration would have to explain what has changed with Iran's behavior in the region since the last presidential certification ninety days ago in accordance with the same criteria established in the act. This is especially critical considering that the nature of Iran's destabilizing or missile activities has not changed in any dramatic way since mid-July. Were the president to take this decision -- either by not certifying or not making any determination -- the administration would have to decide to either continue de facto full compliance with, or act against, the JCPOA.

Decision 2: Further Actions if President Does Not Certify

2. 1: *No follow-up.* The first option is to take no further action at the time of a determination against the JCPOA. The logic of this seemingly illogical position resides in the difficulty of bringing on board the international community, which is necessary for "fixing" the JCPOA absent hard noncompliance evidence, and the difficulties of negotiating a new JCPOA or even imposing a new international sanctions regime. Rather, the noncompliance determination could be seen as a shot across Iran's bow, as a moral condemnation of both the flaws in the agreement and Iran's behavior in the region, and as pressure on the global business community against engaging with Iran. The difficulty with such a decision involves its earlier-noted illogic: if the president declares that continuing sanctions is not in U.S. vital interests, then should the United States not then follow up on such a weighty decision?

In any case, if the administration were to choose this "no follow-up action" option, the decision tree would stop here, for the moment.

2.2. *Follow-up.* Alternatively, the president could follow up on the determination with steps specifically affecting U.S. commitments under the JCPOA. Given a decision not to certify, this would be the more logical option. However, taking any one of these courses of action would require the administration to consider three further questions:

1. What is the goal: to fix the deal without renegotiation, a new international negotiation with Iran, or to simply walk away from the agreement?
2. Which branch of government should take the lead?
3. Which mechanisms in accordance with the agreement can be used?

Decision 3: Purpose -- Pressure Iran or a New Deal?

3. 1. *Pressure Iran.* The first possible goal of taking action against the JCPOA would be to pressure Iran, focused on the country's regional behavior. The logic behind such a move is the general belief in the West that the JCPOA would empower moderates in Tehran and encourage Iran to deal less adversarially with the rest of the world. Acting against the JCPOA, even if only in a token manner, could rob the Islamic Republic of its status, thanks to the JCPOA, as a UN member state in good standing, a status Iran appears to desire, and pressure states and particularly businesses to move cautiously on trade, investment, diplomatic, or other initiatives with Iran. Given the power of the dollar-denominated international banking system, as seen in the highly effective oil sanctions against Iran under the 2012 National Defense Authorization Act (NDAA), this could be a potent tool. Acting against the JCPOA could signal also to the international community that it, not just the United States alone, must deal with Iran's international actions, some of which -- destroying Syria, enabling refugee flows to Europe, and indirectly furthering Sunni Islamic radicalism -- have a greater impact on others than on the United States.

The downside of this option is that Iran has already declared that it would respond to any U.S. noncompliance with the agreement with its own violations -- specifically allowed in Article 36 of the JCPOA -- such as speeding up uranium enrichment. Furthermore, vague language in Articles 29 and 33 of the JCPOA commits the United States to support the Iranian economy, a provision America arguably is already violating. Washington thus could be confronted with a "bad trade" -- largely "symbolic" theoretical pressure on Iran's economy through limited U.S. noncompliance, in return for a concrete loosening of Iran's obligations under the agreement and dismay among U.S. allies. Continuing this policy indefinitely would be difficult, with the United States pressured to either return to the deal or propose a new nuclear regime. (Alternatively, Iran could simply continue compliance to drive a wedge between the other P5+1 states -- Britain, China, France, Russia, and Germany -- and the United States.)

3.2. *A new deal.* The alternative goal, negotiating an entirely new nuclear regime with Iran, poses major difficulties. The JCPOA was enabled by the imposition of crushing economic sanctions, mainly on Iran's oil trade, by the

European Union and, globally, by the U.S. 2012 NDAA, which eventually cut exports by roughly 50 percent. Such a major international sanctions regime, however, required states to accept "extraterritorial" U.S. threats to their banking sectors, a hard sell potentially putting at risk the dominance of the dollar in world markets. But those threats were tolerated by the international community because of Iran's repeated violations of its nuclear account, amassing of sufficient enriched uranium to manufacture a nuclear device within weeks, the bellicose rhetoric of then Iranian president Mahmoud Ahmadinejad, and fears that either the United States or Israel would use military force against Iran.

None of these factors persists today; Iran remains, with the JCPOA, a year away from a nuclear device; Iran's destabilizing behavior, while acknowledged by most of the world, is seen as a problem to be dealt with by the United States and its regional partners. While most states have more important Middle East interests than the JCPOA, the agreement is much admired in "international order" circles. Furthermore, Russia and China overall are more hostile to the United States today than when serious nuclear negotiations began. Given all this, it is difficult to see how Washington could again mobilize the international community.

Decision 4: The Agent -- Congress or the Executive Branch?

4. 1. *Congress.* The INARA permits expedited congressional action within sixty days upon presidential noncertification. The president does not need any new legislation; he has various sanctions on the books that he is currently waiving but could reactivate at any time. Enrolling Congress, however, could signal to a skeptical world that the United States as a whole, not simply President Trump, wants a new approach to Iran.

4.2. *Executive branch.* Various factors, however, argue for an executive lead, even if coordinated with Congress and amid contemplation of new congressional action. A presidential challenge of the JCPOA would be an "A-league" foreign policy issue, of the sort any administration wants to closely manage. Handing off the lead to Congress, despite Corker-Cardin Act language allowing such a course, could undercut administration control. If Congress had the lead, the administration could face either a failure to decide by a divided Congress or a Congress united on a path of action against the JCPOA that undercut administration policy.

Decision 5: Which Mechanism?

5. 1. *Joint Commission.* The JCPOA has measures beginning with a Joint Commission for dispute resolution, laid out in paragraphs 36 and 37 of the agreement. The administration could "keep the pot boiling" by raising various issues in the Joint Commission and alternative forums (namely, a foreign ministers gathering and an outside-experts advisory board), but without clear-cut evidence of Iranian JCPOA malfeasance, this course of action risks increasing irritation with the United States more than pressuring Iran. To seriously pressure Iran, or advance toward a new agreement, the administration would have to reimpose sanctions.

The path to such an outcome can be found in paragraph 36, which allows any party to the agreement, if that party considers the aforementioned dispute-resolution process unsatisfactory, to cease compliance "totally or in part." In essence, it allows "tit for tat" responses to noncompliance by another party, rather than "breaking the bank" with snap-back, as discussed shortly. The risk in using this route, however, is that Iran would retaliate. One Iranian option would be to pull out of the agreement, taking at least part of the blame for ending compliance. But given the advantages of the agreement to Iran, assuming the United States cannot reimpose the truly biting oil sanctions, the Islamic Republic could continue to enjoy trade and diplomatic relations with most of the rest of the world by simply violating some of its commitments "in retaliation" without leaving altogether, as Article 36 allows. All the while, Tehran could help isolate Washington.

Such a development could lead to a less-constrained Iranian nuclear program, potentially cutting the time to a theoretical nuclear device from the current twelve months to six or less, thus creating a "now" rather than a "post-

2026" problem, in return for relatively limited U.S. bilateral sanctions. On this count, most Iranian activities with the United States are already sanctioned for nonnuclear reasons, among them terrorism, money laundering, and the missile program, none of these being small change for Tehran. The assumption here is that the United States could not be successful reimposing the extraterritorial NDA global oil sanctions, given that many states, from Europe to Japan, India, South Korea, and China, would likely balk absent the earlier-noted conditions that prevailed during the 2010-15 period.

5.2. *Snap-back.* An alternative option would entail U.S. imposition of the JCPOA's so-called snap-back provisions (paragraph 37). Snap-back requires the same conflict-resolution and debate process laid out in paragraph 36, but in this case the concerned party could -- at the close of such a process -- generate an automatic Security Council vote on a resolution draft on keeping operable UNSC Resolution 2231, which replaced all the previous UNSC resolutions condemning Iran's nuclear program and imposing UN Iran-nuclear-related sanctions. The state invoking the snap-back -- if, like the United States, a permanent Security Council member -- could then use its veto to kill the "keep UNSC 2231 operative" resolution, thus reviving all the superseded UN resolutions and sanctions. This is tantamount to blowing up the entire agreement, and the other P5+1 members, absent evidence Iran is violating the agreement, could well see this as the United States "gaming" the international legal system, and likely would be unwilling to then sign on to a U.S.-led negotiation for a tougher regime, a negotiation Iran also would almost certainly reject.

5.3. *U.S. withdrawal without deal "destruction."* An alternative to snap-back would be U.S. withdrawal from the agreement, particularly if the United States wanted to cease its own compliance without necessarily ending the deal. The JCPOA formally is an unsigned understanding of mutual actions by a set of states, for which a UN Security Council resolution (2231) "[e]ndorses...and urges...full implementation," but not under force of international law -- i.e., not under Chapter VII of the UN charter. By comparison, the UN Security Council's own actions in accordance with the agreement -- essentially voiding its earlier Iran resolution -- do have force of law under Article 41 of Chapter VII. With a single JCPOA participant (apart from Iran) withdrawing, the agreement's commitments and understandings could certainly continue.

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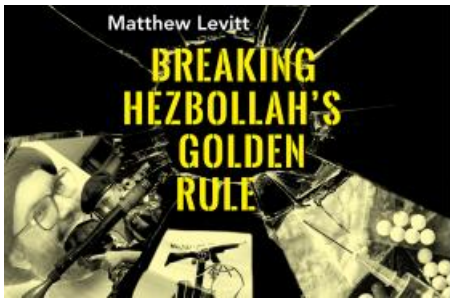
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