Can the States Stop Implementation of Iran Nuclear Deal?

President Obama American University Speaking on the Iran Nuclear Deal

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Source: *Reuters*

On the Sunday, September 20, 2015 Lisa Benson Show we interviewed, David B. Rivkin, Jr. a noted Constitutional litigator, a partner in the Washington, DC office of the Baker Hostetler law firm. The topic was "Can the Senate Sue the President over his handling of the Iran Nuclear Deal?" Rivkin is also a Senior Fellow of the Foundation for Defense of Democracies (FDD). He served in a variety of legal and policy positions in the Reagan and George H. W. Bush Administrations, including stints at the White House Counsel's office, Office of the Vice President and the Departments of Justice and Energy. While in the government, he handled a variety of national security and domestic issues, including environmental and energy policy, tax, trade and constitutional issues He is a much sought after media commentator on matters of constitutional and international law, as well as foreign and defense policy.

Rivkin recently won a landmark decision in the DC Federal District Court in the matter of House v. Burwell over the supremacy of Congressional appropriations authorities with regard to implementation of the Affordable Care Act that affirmed Congressional standing to bring such an action. He co-authored a September 6, 2015 *Washington Post* opinion article with Rep. Mike Pompeo (R-KS) suggesting a possible

suit by the Senate against the President for non –compliance with the language of the Iran Nuclear Agreement Review Act requiring delivery of all requisite documents including the privileged IAEA side agreements. A September 10, 2015 WSJ op ed by Rivkin and Elizabeth Price Foley discussed how the successful House v. Burwell suit gave standing to Congress to bring possible litigation against the President. Moreover, the suit in the ACA matter had survived a motion to dismiss by the Administration. We have published similar proposals by Sklaroff and Bender for Senate litigation over the JCPOA unanimously endorsed by the UN Security Council on July 22, 2015.

The Sklaroff Bender proposal required the Senate to change Rule 22 to achieve cloture to cut off filibusters by Minority Democrats, before Majority leader Mitch McConnell (R-KY) might offer up a resolution to treating the Iran nuclear agreement as a treaty under Article II, Section 2 of the Constitution requiring a two thirds vote under the advise and consent of the Senate. However, to initiate that would have required McConnell to make changes in Rule 22 at the start of the 114th Congress in January 2015. Currently, to cut off debate requires 60 votes. Congressional Research Service reports on this issue indicated previous proposals reducing the threshold down in steps to a simple majority vote. A number of prominent conservative activists and organizations advocated such a change at the start of the new Congress but McConnell pushed back, arguing that Democrats would use the new rules once they returned to the Majority to quash Republican concerns in the future.

The Senate Republican majority failed in a last move to upend the Iran Nuclear deal. As reported by the *AP,* a Senate vote on a resolution requiring Iran to recognize Israel as a quid pro quo to lifting sanctions failed once again to reach the 60 vote's threshold. The vote was 53 to 45 before the deadline of September 17th under the Corker-Cardin Iran Nuclear

Agreement Review Act. Senate Majority Leader Mitch McConnell (R-KY) said, in an *AP report* on the Administration's start to implement the JCPOA, the deal "likely will be revisited by the next commander-in-chief." The AP reported House Speaker John Boehner suggesting that possible litigation might be an option. Other Senators and Members of Congress have suggested renewal of the Iran Sanctions Act of 2006 before it sunsets in 2016.

Watch this mid-April 2015 *Wall Street Journal* interview with David B. Rivkin, Esq. He had presciently predicted the problems confronting Congress under the Corker-Cardin Iran Nuclear Agreement Review Act to pass resolutions rejecting the JCPOA.

During the Lisa Benson Show interview, Rivkin suggested that the President had violated Coker-Cardin by not delivering all of the requisite information, including the IAEA side agreements with Iran. As a result of this violation, the Congressional review period has never started and, consistent with the statutory language of Corker Cardin, the President's authority to lift any sanctions against Iran or unblock any frozen Iranian funds has been vitiated. Rivkin expressed the view that, if the President were to indicate that he intends to lift sanctions, or unblock frozen assets, this decision can be challenged in court, either by the House or the Senate, or the States. Listen to the Rivkin interview on the Lisa Benson Show sound cloud, here.

Rivkin and colleague Lee Casey wrote about that possibility in a July 26, 2015, *Wall Street Journal* opinion article, "The Lawless Underpinnings in the Iran Nuclear Deal". They argued:

> The Obama end-run around the Constitution could yet be blocked if states exercise their own sanctions regimes …The administration faces another serious problem because the deal requires the removal of state and local Iran-related sanctions. That would have been all right if Mr.

> Obama had pursued a treaty with Iran, which would have bound the states, but his executive-agreement approach cannot pre-empt the authority of the states.

That leaves the states free to impose their own Iran-related sanctions, as they have done in the past against South Africa and Burma. The Constitution's Commerce Clause prevents states from imposing sanctions as broadly as Congress can. Yet states can establish sanctions regimes—like banning state-controlled pension funds from investing in companies doing business with Iran—powerful enough to set off a legal clash over American domestic law and the country's international obligations. The fallout could prompt the deal to unravel.

An explanation of the JCPOA State Sanctions impasse was outlined in a Steptoe International Compliance blog on August 15, 2015, "The JCPOA and State Sanctions" by Bibek Pandy:

> The Iran nuclear deal (JCPOA) does not say much about Iran sanctions imposed by US state governments. Almost two dozen states (including New York, California and Florida) have passed laws that in some form (i) ban the awarding of government contracts to companies tied to Iran, and/or (ii) prohibit public funds from investing in companies doing certain types of business in Iran. These state restrictions can be more extensive in scope than US federal sanctions. For example, some state restrictions (e.g. in Florida) attach automatically to the parent entity of the company who engages in certain Iran activities. Laws in many states provide for the lifting of Iran sanctions when the President removes Iran from the list of countries that support terrorism; but the JCPOA does not do that, and, as a result, Iran sanction laws in most states will remain intact.

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> Companies considering engaging in activity authorized under

the JCPOA need to be still mindful of non-federal Iran sanctions. In particular, state government contractors with Iran links should review state procurement laws before engaging in activities permitted by the JCPOA. Furthermore, contractors can face civil penalties in many states for providing false certifications related to their Iran activities. The bar for Iran-related disqualification in some states is relatively low, and the JCPOA does not change that.

David B. Rivkin, Jr., Esq.

Following the Lisa Benson Show, David Rivkin and this writer held a conversation to explore the possibilities of a state level initiative. Florida Attorney General (AG) Pam Bondi led a filing made in the US District Court for the Northern District in Pensacola on behalf of Florida and more than two dozen other State AGs endeavoring to overturn the Affordable Care Act. Senior Federal Judge Roger Vinson heard oral arguments and ruled on the matter sending it ultimately to the 11th Circuit in Atlanta. Rivkin thinks that a similar action could be mounted by Florida and a few other states in the same legal venue, the US District Court for the Northern District of Florida. The filing might be based on existing Florida sanction law passed under the federal 2010 Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA) supplemented by an Executive Order. The State cause of action, according to Rivkin, could be filed in a matter of weeks, potentially forestalling the release of sanctions before the implementation date under JCPOA, December 15, 2015. As indicated in a September 11, 2015 FDD memo by Dubowitz, Fixler, et.al. the subsequent release of upwards of $120 billion of sequestered funds in several Asian banks would take an additional six months. Thus the Rivkin state litigation proposal, if implemented promptly, might possibly stop the release of Iran nuclear sanctions.