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S. 495, A BETTER ALTERNATIVE TO THE CWC

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Senator Jon Kyl (R-AZ) and seven other Senators have introduced the Chemical and Biological Weapons Threat Reduction Act of 1997 (S. 495). If enacted, S. 495 would do far more to protect Americans from biological and chemical weapons than the Chemical Weapons Convention (CWC), which is before the Senate for ratification. S. 495 is expected to reach the Senate floor for a vote before the CWC does, giving Senators a logical and preferable alternative.

The CWC attempts to ban chemical arsenals worldwide. S. 495 takes a better approach by adopting the positive aspects of the CWC as U.S. policy while avoiding pitfalls in the CWC that actually exacerbate the chemical weapons problem. For example, both S. 495 and the CWC would require the U.S. government to outlaw the possession of chemical weapons by U.S. citizens. S. 495, however, does not contain the CWC requirement that the United States and its allies lower trade restrictions governing the transfer of chemicals, purportedly for peaceful purposes, to such threatening regimes as Iran. Rather, S. 495 would ensure that the regime of trade restrictions adopted by the United States and its allies would be no less rigorous than today.

THE PROVISIONS OF S. 495

S. 495 contains eight provisions that would strengthen the ability of the United States to protect its people, military forces, and allies against chemical attacks. These are consistent with the requirements of the CWC. Other provisions are likely to result in a better chemical defense posture than that provided by the CWC.

Provision #1: This imposes criminal and civil penalties for the development, production, stockpiling, and transfer of biological and chemical weapons. S. 495 would impose the severest penalties possible for the illegal possession of chemical weapons. Even the death penalty may be imposed on individuals who use chemical weapons to cause the death of another. Lesser violations of this provision could bring civil

penalties of up to \$100,000 per violation. In addition, the export privileges of those illegally possessing chemical weapons can be revoked.

Provision #2: This imposes mandatory sanctions against foreign countries that use biological and chemical weapons. Title II of bill imposes a wide variety of sanctions against foreign countries that use biological or chemical weapons either in war or against their own citizens. The sanctions would last three years and include no fewer than five of the following measures: (1) termination of foreign assistance; (2) suspension of arms sales; (3) suspension of financing arrangements for arms sales; (4) denial of U.S. government credits and financial assistance; (5) imposition of strict export controls; (6) imposition of restrictions on imports; (7) termination of financial assistance from multilateral banks such as the World Bank; (8) a prohibition on private bank loans; (9) termination of aviation rights; (10) downgrading of diplomatic relations; and (11) imposition of a “freeze” on the violating country’s assets in the United States, which may be used to compensate the victims of a biological or chemical attack.

Provision #3: This preserves the system of multilateral export controls on biological and chemical materials and technologies. Section 202 of S. 495 would maintain—and where possible, strengthen—the existing multilateral system for controlling the exports of biological and chemical materials and technologies for medical and industrial purposes, commonly referred to as the Australia Group.

Provision #4: This requires Russian cooperation in the area of biological and chemical disarmament in return for continued U.S. assistance for dismantling chemical and biological weapons. This provision would require Russia to: (1) implement the 1990 agreement with the United States to reduce chemical arsenals to 5,000 tons each—referred to as the Bilateral Destruction Agreement, or BDA—which Russia currently refuses to implement; (2) resolve Russian compliance problems with the BDA and an earlier agreement on chemical disarmament called the Wyoming Memorandum of Understanding, which requires the exchange of data between the United States and Russia on each side’s chemical arsenal; (3) declare openly the content of its chemical weapons arsenal and facilities; and (4) enter into compliance with the 1972 Biological Weapons Convention, which Russia is now likely violating. If the President cannot certify to Congress that Russia has taken these steps, the covered assistance programs would be stopped.

Provision #5: This requires calling an international conference to strengthen the 1925 Geneva Protocol, which prohibits the use of biological and chemical weapons. The Geneva Protocol has been violated on numerous occasions with little or no response from the states observing its prohibitions. Section 205 of S. 495 would call for the creation of an international conference whose purpose would be to ensure that the participating states will penalize any state found to be violating the Geneva Protocol. One of the advantages of such a conference over the CWC is that many of the rogue states that have refused to sign the CWC—Iraq, Libya, and North Korea, for example—are parties to the Geneva Protocol and therefore already subject to its limitations.

Provision #6: This strengthens U.S. biological and chemical defense programs. The bill recommends three steps to improve the readiness of U.S. military forces in the area of biological and chemical defense. First, it would require the Secretary of Defense to ensure that U.S. military forces are prepared to conduct operations in a contaminated environment, particularly in the areas of operating ports and air fields, sustaining air

combat missions, and undertaking large-unit maneuvers of ground forces. Second, it would seek improved allied support for biological and chemical defense to sustain operations in a contaminated environment. Third, it would require that the United States Army Chemical School remain under the oversight of a general officer. By contrast, the CWC will lessen the military's preparedness for chemical attacks because the treaty will leave policymakers with the false impression that the chemical weapons threat has been "solved" through arms control.

Provision #7: This requires a review of the policy of "negative security assurances."

Section 208 of the bill would require the President to review the existing policy of negative security assurances, which in most circumstances bars the option of responding to a biological or chemical attack on U.S. and allied forces with nuclear weapons. The purpose of the review would be to widen the options for the United States to respond with nuclear weapons against a biological or chemical attack.

Provision #8: This preserves the ability of the military to make use of such riot control agents as tear gas. Section 209 of S. 495 would ensure that the U.S. military can use riot control agents for such purposes as rescuing downed pilots and dispersing hostile civilians surrounding U.S. forces. Specifically, this provision would preserve the policy established by President Ford in 1975 regarding the use of such agents.

AVOIDING THE PITFALLS OF THE CWC

The positive steps contained in S. 495 for addressing the chemical weapons threat, however, are only half the story. S. 495 also contains none of the dangerous and costly provisions of the CWC. These range from an ineffective verification regime to potential threats to liberties guaranteed by the Constitution. Thus:

- **S. 495 would not require the sharing of chemical defense capabilities with dangerous regimes like Iran.** Article X of the CWC requires that a participating state "undertakes to facilitate...the fullest possible exchange of equipment, material and scientific and technological information concerning means of protection against chemical weapons." Iran, which has signed the CWC, would have a right to receive defensive assistance from the United States and all other countries that are parties to the Convention. This provision could be extremely dangerous. It could help Iran, which is surreptitiously building chemical weapons, to develop better defenses at the same time. In fact, such assistance could allow Iran to gain a better understanding of the defensive measures the U.S. military uses to protect its troops against chemical attack.
- **S. 495 would not require an expansion of trade in the sorts of chemicals that can be used later to fashion chemical weapons.** Article XI of the CWC states that parties will "not maintain among themselves any restrictions...which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." The line between using chemicals for peaceful or military purposes, of course, can be extremely thin. Iran, for example, will be able to take advantage of the expanded access to chemicals provided through Article XI and later use the materials and knowledge to fashion more effective chemical weapons through clandestine production. A

similar program for nuclear technology established in the 1950s, called Atoms for Peace, allowed Iraq to undertake the clandestine nuclear weapons program that was discovered only after Iraq's defeat in the Persian Gulf War. Under Article XI, history is likely to be repeated in the chemical weapons field. S. 495, by contrast, would ensure that a robust system of multilateral export controls that limit the scope of trade in chemicals will remain in place.

- **The success of the program for countering the chemical weapons threat established by S. 495 would not depend on an ineffective verification regime.** The CWC establishes an elaborate verification regime. But even proponents of the CWC acknowledge that it will not work. The Clinton Administration's former Director of Central Intelligence, James Woolsey, warned the Senate Foreign Relations Committee on June 23, 1994, that the "chemical weapons problem is so difficult from an intelligence perspective that I cannot state that we have high confidence in our ability to detect noncompliance, especially on a small scale."
- **S. 495 would not impose a costly inspection program on U.S. businesses.** The CWC's verification regime relies on an intrusive and costly program of inspections of even private facilities. The direct cost to business of this inspection program could run as high as \$200 million annually. If the inspection program is used to steal sensitive proprietary information from these same businesses, the costs could exceed a \$1 billion annually.
- **S. 495 would ensure that U.S. policy governing the use of riot control agents such as tear gas will remain clear.** The CWC, by contrast, contains ambiguous language that could result in an absurd policy of forcing U.S. soldiers to use lethal force when non-lethal force would have been sufficient. This ambiguous language is found in Article I. It states, "Each State Party undertakes not to use riot control agents as a method of warfare." What constitutes a "method of warfare" is undefined. S. 495 would preserve the existing policy regarding the use of riot control agents by U.S. troops, which dates back to the Ford Administration.
- **S. 495, by not relying on the intrusive inspection program established by the CWC, would not be unconstitutional.** Legal scholars believe that the CWC inspection program raises serious constitutional questions. First, the inspection program may be inconsistent with the Fourth Amendment right against unreasonable searches and seizures. Under the CWC, international inspectors will be given open access to any facility they wish to inspect, whether or not the constitutional standard of "probable cause" has been met before they enter a facility. Moreover, the theft of proprietary data or sensitive business information by an international inspection could constitute the sort of uncompensated taking of private property that is prohibited by the Fifth Amendment. S. 495 has none of these problems because its investigations would follow standard legal procedures.
- **S. 495 is not based on false expectations about the chemical weapons threat.** The CWC's proponents claim it will banish chemical weapons from the face of the earth. This is not likely. Rogue states will refuse to participate in the CWC and continue to possess or acquire chemical weapons. Among the countries that have not signed the CWC are Iraq, Libya, and North Korea. Other countries may sign and ratify the CWC and then simply cheat. Iran, which has signed but not

ratified the CWC, may be among this group. S. 495 would adopt as national policy a posture of vigilance against the chemical weapons threat.

CONCLUSION

S. 495 is a significant improvement over the CWC. It would establish substantive and workable national policies for confronting the chemical weapons threat, while avoiding all of the shortcomings associated with the CWC. The CWC asks the United States to sign an agreement that purports to end the chemical weapons threat by fiat and then to pretend that the threat is gone. The CWC, of course, will not end the chemical weapons threat. Its make-believe world will come to an unfortunate end when U.S. citizens, troops, or allies are confronted with a chemical weapons attack for which they are thoroughly unprepared. The time for pretending then will be over. The American people, with justification, will ask their leaders why they started pretending in the first place. If the CWC is ratified, it is a question to which they never will receive a satisfactory answer. With its attention to the real-world threat posed by chemical weapons, S. 495 seeks to ensure that Americans never will need to ask such a question.

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