

## COMMENT

### Certification as Sabotage: Lessons from Guantánamo Bay

#### INTRODUCTION

One of President Obama's most public failures was his inability to close the prison at Guantánamo Bay. He had campaigned against the facility throughout the 2008 election,<sup>1</sup> and on his second day in office signed an executive order ordering the base closed within a year.<sup>2</sup> But eight years later the prison remained defiantly open.

A major reason for this failure was congressional opposition.<sup>3</sup> While this opposition took different forms, one critical tool has received little attention: the certification requirements that governed the transfers of detainees from Guantánamo to foreign countries. Beginning in late 2010, Congress demanded that, prior to a detainee transfer, the Secretary of Defense certify that the receiving country had taken the steps "necessary to ensure that the individual cannot engage or re-engage in any terrorist activity."<sup>4</sup> While the precise language of this certification changed over time, its effect was the same: Congress's requirements

---

1. See, e.g., Elizabeth White, *Obama Says Gitmo Facility Should Close*, WASH. POST (June 24, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401046.html> [<http://perma.cc/6X5X-SU29>].

2. Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 27, 2009).

3. See, e.g., Jeremy Herb, *Obama Slams Congress for Blocking Efforts To Close Gitmo*, POLITICO (Jan. 19, 2017), <http://www.politico.com/story/2017/01/obama-congress-guantanamo-bay-233859> [<http://perma.cc/6MSS-4XLT>] (describing President Obama criticizing Congress "for playing politics in repeatedly blocking his effort to close the terrorist prison"); see also *infra* notes 42-51 and accompanying text.

4. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033(b)(5), 124 Stat. 4137, 4352 (2011).

made the Secretary of Defense “personally responsible for preventing recidivism,”<sup>5</sup> accountable for any mistakes.

Certification requirements have long been thought of as a weak check on the Executive. “When push comes to shove, a certification requirement will not prevent the executive branch from acting, if it believes that there are compelling reasons to do so,” wrote one commentator.<sup>6</sup> Yet at Guantánamo these requirements proved “devastating.”<sup>7</sup> “As Secretary, that provision required that I sign my life away,” said former Defense Secretary Leon Panetta.<sup>8</sup>

The success of certification requirements in stymieing Guantánamo’s closure makes clear that it is time to rethink the narrative of their inefficacy. This Comment argues that certifications have been underestimated because they have been undertheorized. Certifications require an individual to attest that a state of affairs exists before a particular action can be taken.<sup>9</sup> Fundamentally, then, certifications should be understood as tools to localize accountability for a judgment. In the context of high stakes or uncertain decisions, this localization of responsibility concentrates the risk of blame: a decision may jeopardize the certifier’s job security, personal welfare, and public image. While such concerns may not be the only guiding considerations of public officials, they are surely among them.<sup>10</sup> By heightening the risk of blame, certifications can change an individual’s decision-making calculus, thereby becoming a stronger influence on executive action than the scholarly consensus acknowledges.

Part I surveys the existing literature on certifications before contrasting the literature’s conclusions with the important role certifications played at Guantánamo Bay. The discrepancy shows that a new account is needed. Part II provides that new account, showing when certifications can be effective – that is, when

- 
5. Connie Bruck, *Why Obama Has Failed To Close Guantánamo*, NEW YORKER (Aug. 1, 2016), <http://www.newyorker.com/magazine/2016/08/01/why-obama-has-failed-to-close-guantanamo> [<http://perma.cc/X4TZ-BTB9>].
  6. Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation*, 31 N.Y.U. J. INT’L L. & POL. 217, 272 (1999).
  7. Bruck, *supra* note 5.
  8. *Id.*
  9. Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 827 (1984); *cf. Certification*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining a certification as “an official document stating that a specified standard has been satisfied”); Chinen, *supra* note 6, at 219 (defining certification requirements as “laws that require the President to certify as to particular conditions before acting”).
  10. See CHRISTOPHER HOOD, *THE BLAME GAME: SPIN, BUREAUCRACY, AND SELF-PRESERVATION IN GOVERNMENT* 7-8 (2010) (describing the motivations of public officials to avoid blame); *see also* Graham T. Allison, *Conceptual Models and the Cuban Missile Crisis*, 63 AM. POL. SCI. REV. 689, 710 (1969) (noting the role of “personal interests” in political decision-making).

they can influence the Executive to behave in ways it would have otherwise resisted. Part III leverages Part II's theoretical account to explore the 2015 American SAFE Act, a bill that would have imposed crippling certification requirements on the Iraqi and Syrian refugee programs. The American SAFE Act illustrates that the substantive and political power of certifications extends beyond Guantánamo Bay, while also revealing that legislators themselves have varying sophistication in their understanding of this power. The Comment concludes that, contrary to the prevailing scholarly view, certifications instituted under the right conditions can meaningfully shape executive policy making.

## I. CERTIFICATIONS' UNDERAPPRECIATION

### A. *The Existing Scholarship*

Congressional requirements that an executive officer personally attest to a policy decision are not new; they appeared early in both foreign and domestic policy.<sup>11</sup> However, certifications became much more common in foreign affairs beginning in the 1970s as Congress began to reassert itself against the President.<sup>12</sup> According to one 1999 tally, certification requirements appeared in “more than one hundred provisions relating to U.S. foreign policy,”<sup>13</sup> including in legislation concerning specific nation-states and multilateral organizations, as well as on particular foreign policy issues.<sup>14</sup> For instance, a number of certification requirements in the late 1970s and early 1980s conditioned foreign aid upon the Executive affirming that the receiving country had made human rights progress.<sup>15</sup> Such requirements are intended both to control the executive branch in foreign affairs and to influence the behavior of the foreign states themselves.<sup>16</sup>

---

11. Chinen, *supra* note 6, at 221. For examples of early certifications, see *id.* at 221 n.16.

12. *Id.* at 222.

13. *Id.* at 223. For a more recent high-profile example, see the Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201.

14. Chinen, *supra* note 6, at 286-306.

15. See, e.g., Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 26(a), 88 Stat. 1795, 1802 (tying twenty million dollars in military assistance for South Korea to the President's finding that South Korea is making “significant progress” in observing human rights); International Security Development Cooperation Act of 1981, Pub. L. No. 97-113, § 725, 95 Stat. 1519, 1553 (conditioning assistance upon the President certifying, *inter alia*, that the Argentinian government had made “significant progress” in complying with human rights principles); *id.* § 726, 95 Stat. 1519, 1554 (requiring the same for Chile).

16. Chinen, *supra* note 6, at 220.

Some of the United States's most important national security laws have certification requirements. For instance, Section 702 of the Foreign Intelligence Surveillance Act, the provision that authorizes the warrantless surveillance of non-U.S. persons reasonably believed to be outside the United States,<sup>17</sup> requires a special court to approve annual certifications by the Attorney General and the Director of National Intelligence. These certifications, among other things, require the officials to attest that a “significant purpose” of the surveillance is to obtain foreign intelligence information and that the surveillance complies with certain statutory restrictions.<sup>18</sup> The War Powers Resolution, too, employs a certification requirement: the President may trigger a thirty-day extension to the Act's sixty-day use-of-force window by certifying to Congress “that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.”<sup>19</sup>

Despite their historical provenance and contemporary popularity, certification requirements have been met with little scholarly discussion. While scholars have periodically examined executive certifications in the context of particular programs,<sup>20</sup> the literature on certifications themselves is limited. What exists has been particularly influenced by human rights certifications made during the Carter and Reagan Administrations; these certifications, required to continue foreign aid to specific countries, were controversial.<sup>21</sup> Perhaps as a result, the literature is largely dismissive of the possibility that certifications can meaningfully shape executive behavior.

- 
17. *FISA: 702 Collection*, LAWFARE, <http://www.lawfareblog.com/topic/fisa-702-collection> [<http://perma.cc/HM69-VU4Y>] (Jan. 18, 2018, 4:29 PM).
  18. 50 U.S.C. § 1881a (2012); *see also Section 702: What It Is & How It Works*, CTR. FOR DEMOCRACY & TECH. (Feb. 15, 2017), <http://cdt.org/insight/section-702-what-it-is-how-it-works> [<http://perma.cc/Y74Y-LKE2>].
  19. 50 U.S.C. § 1544(b) (2012).
  20. *See, e.g.*, H. Richard Friman, *Behind the Curtain: Naming and Shaming in International Drug Control*, in *THE POLITICS OF LEVERAGE IN INTERNATIONAL RELATIONS: NAME, SHAME, AND SANCTION* 143, 153-62 (H. Richard Friman ed., 2015) (discussing U.S. certifications related to international narcotics control).
  21. *See, e.g.*, John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 69 (1986) (discussing the Carter Administration's certification that Nicaragua was not giving assistance to international terrorism—a certification that was controversial based on the evidence but necessary to continue providing economic aid); Scott Horton & Randy Sellier, Commentary, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 WIS. L. REV. 825; Amy S. Griffin, Comment, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U. L. REV. 163, 210 (1983).

Mark Chinen's *Presidential Certifications in U.S. Foreign Policy Legislation* provides the most comprehensive theoretical treatment to date. Chinen argues that certification requirements attempt to control executive action in foreign affairs by "requiring the executive branch to take into account the concerns they [the certification requirements] represent—they ensure that the President has covered all the bases before making a foreign policy decision."<sup>22</sup> But, Chinen concludes, certification requirements "are ultimately ineffective in controlling executive behavior."<sup>23</sup> Chinen cites a number of factors that limit certifications' capacity to shape executive behavior, including Congress's limited ability to contest a certification when it disagrees with the Executive's assessment: to overturn a certification directly, Congress would need to pass a joint resolution, likely over a presidential veto. Courts are unlikely to provide relief because they will be reluctant to arbitrate interbranch disputes over whether the Executive's characterizations are accurate.<sup>24</sup> As an example of this judicial reluctance, Chinen points to *Crockett v. Reagan*,<sup>25</sup> where twenty-nine members of Congress sued President Reagan and other officials for providing military assistance to El Salvador's anti-communist government.<sup>26</sup> This military assistance had been conditioned upon the President making certifications as to El Salvador's human rights progress.<sup>27</sup> President Reagan made these certifications, but their accuracy was dubious—members of Congress characterized them as "akin to calling night day or a duck an eagle."<sup>28</sup> The congressional plaintiffs submitted "voluminous" documentation of human rights abuses and asked the court to independently examine the accuracy of the President's certifications. The court declined to do so, saying that "[w]hatever infirmities the President's certifications may or may not suffer," the plaintiffs' dispute was with their fellow legislators who have accepted the certifications.<sup>29</sup> Because certification requirements lack strong legislative or judicial enforcement mechanisms, Chinen argues that "the President need only give colorable arguments to justify a particular certification."<sup>30</sup> Peter Quint makes a similar point, citing the El Salvador certifications to show that while certification

---

22. Chinen, *supra* note 6, at 234.

23. *Id.* at 272.

24. *See id.* at 243-44.

25. 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam).

26. For his discussion of *Crockett*, see Chinen, *supra* note 6, at 253-55.

27. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728(d), 95 Stat. 1519, 1556.

28. *Crockett*, 558 F. Supp. at 902.

29. *Id.*

30. Chinen, *supra* note 6, at 272.

“appears to be a mandatory device, it is actually hortatory in nature because the Executive’s certification is ordinarily not subjected to effective review.”<sup>31</sup>

Other scholars also rely on the El Salvador certifications in arguing that the objective fact-finding demanded by a certification will yield to the Executive’s policy preferences. Scott Horton and Randy Sellier assert that though the Salvadoran government was not actually making the progress required by the certification requirements (and indeed was complicit in human rights abuses), President Reagan was committed to supporting the anti-communist government and so made the certifications anyway.<sup>32</sup> They conclude that the certifications were little more than parchment barriers: “[R]egardless of the factual situation in El Salvador, it is difficult to imagine the President abandoning his policy because of a congressionally created certification process. He will simply go through the formality of filing the required papers . . . .”<sup>33</sup> Amy S. Griffin also casts a critical eye on certification requirements based on the El Salvadoran experience, concluding that while the certifications were meant to be “purely factual determinations,” in reality they would be shaped by the President’s policy preferences. She suggests that if Congress were truly serious about cutting off aid to human rights abusers, it would remove “the factual determination from the broad realm of presidential discretion” by appointing an independent human rights commission charged with making the requisite factual determinations.<sup>34</sup> Jeffrey A. Meyer similarly proposes pairing defined, objective certification criteria with a “shadow” fact-finding commission; the combination, he argues, would constrain attempts by the Executive to play fast-and-loose with certifications.<sup>35</sup>

The consensus, then, is that certification requirements are weak tools for controlling executive behavior.<sup>36</sup> A 2014 Note in the *Harvard Law Review* sums up the conventional wisdom: “Scholars have shown that executive certification

---

31. Quint, *supra* note 9, at 827, 827 n.221.

32. Horton & Sellier, *supra* note 21, at 842-58.

33. *Id.* at 859.

34. Griffin, *supra* note 21, at 210.

35. Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 101 (1988).

36. In addition to the pieces already referenced, see also Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT’L L. 246, 278 (1982) (examining legislation conditioning security assistance on human rights practices and finding that if executive officials are hostile, “even a general rule written with a high degree of precision will probably have little impact on executive decisions”); and Friman, *supra* note 20, at 156-57 (describing congressional disappointment with lax or inconsistent executive certifications regarding which countries were “fully cooperating” with U.S. narcotics efforts).

and waiver requirements are easily manipulated and evaded by the Executive and do little to constrain executive branch policymaking.”<sup>37</sup>

Guantánamo Bay gives reason to believe that this account is wrong.

*B. The Certification Requirements at Guantánamo Bay*

The detention facility at Guantánamo Bay was established in January 2002 to hold and interrogate Al Qaeda and Taliban terror suspects.<sup>38</sup> The prison quickly became a target of fierce criticism by the human rights community, and Barack Obama campaigned for President on the promise to close it.<sup>39</sup> Central to his closure strategy was first shrinking the prison by transferring less dangerous detainees to third-party countries willing to accept them<sup>40</sup>: a smaller prison population would make it both politically and logistically easier to move the remaining detainees somewhere else.<sup>41</sup>

Congress had different ideas. Concerned that President Obama’s Guantánamo closure plan was not adequately developed, “overwhelming bipartisan majorities” rejected President Obama’s 2009 request for funding to close the prison.<sup>42</sup> Congress also imposed transfer restrictions via a supplementary appropriations act that required, among other things, that the Executive notify Congress in advance of any transfers abroad.<sup>43</sup>

In late 2010, Congress used the annual National Defense Authorization Act (NDAA) to further tie the hands of the Obama Administration. The bill flatly

---

37. Note, *Congressional Control of Foreign Assistance to Post-Coup States*, 127 HARV. L. REV. 2499, 2519 n.117 (2014).

38. John Bellinger, *Guantanamo Redux: Why It Was Opened and Why It Should Be Closed (and Not Enlarged)*, LAWFARE (Mar. 12, 2017, 5:01 PM), <http://www.lawfareblog.com/guantanamo-redux-why-it-was-opened-and-why-it-should-be-closed-and-not-enlarged> [<http://perma.cc/C44J-6WY3>].

39. See Alyssa Fetini, *A Brief History of Gitmo*, TIME (Nov. 12, 2008), <http://content.time.com/time/nation/article/0,8599,1858364,00.html> [<http://perma.cc/7EY4-HVVF>].

40. CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA’S POST-9/11 PRESIDENCY 127 (2015) (“[President Obama] laid out a framework for Guantánamo: Transfer lower-level detainees. Keep holding the more dangerous ones somewhere but prosecute as many as possible, strongly preferring civilian trials but retaining military commissions as an option.”).

41. *Id.* at 529.

42. *Id.* at 129.

43. See Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(c), 123 Stat. 1859, 1921; see also SAVAGE, *supra* note 40, at 129.

prohibited expenditures for the transfer of detainees to the United States.<sup>44</sup> Additionally, the bill restricted transfers to foreign countries via a certification regime. Previously, Congress had merely required the President to submit a report that included a risk assessment and mitigation plan before any foreign transfer.<sup>45</sup> The new NDAA, however, demanded the Secretary of Defense “personally certify to Congress, thirty days ahead of any transfer, that the receiving country had met an extensive list of security conditions.”<sup>46</sup> Among these was the requirement that the Secretary of Defense certify that the receiving country had taken the steps “necessary to ensure that the [transferee] cannot engage or reengage in any terrorist activity.”<sup>47</sup>

Subsequent NDAAs somewhat relaxed the certification requirements. In the 2012 and 2013 NDAAs, the Secretary could waive having to certify that “the individual [could not] engage or reengage in terrorism” if she instead determined in writing that the risk of recidivism was “substantially mitigate[d],” and that the transfer was in U.S. national security interests.<sup>48</sup> The Secretary was required to submit the written determination and a statement for its basis to Congress thirty days in advance of any transfer.<sup>49</sup> Beginning with the 2014 NDAA, the “substantially mitigated” standard became the language of the certification itself.<sup>50</sup> Even with the looser language, the requirements still effectively forced the Defense Secretary to personally vouch, in writing, for the safety of each transferred detainee.<sup>51</sup>

- 
44. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351.
  45. Supplemental Appropriations Act, § 14103(e).
  46. SAVAGE, *supra* note 40, at 327.
  47. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, § 1033(b)(5).
  48. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1028(d)(1), 126 Stat. 1632, 1915-16 (2012); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028(d)(1), 125 Stat. 1298, 1568 (2011).
  49. National Defense Authorization Act for Fiscal Year 2013, § 1028(d)(2); National Defense Authorization Act for Fiscal Year 2012 § 1028(d)(2).
  50. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035(b), 127 Stat. 672, 851-52 (2014) (including in § 1035(b)(1)-(2), for instance, key language about “mitigating risk” of terrorism and “national security interests” from the National Defense Authorization Act for Fiscal Year 2012 § 1028(d)(1)(C)-(D)); see also National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1034(a)-(b), 129 Stat. 726, 968; Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1032, 128 Stat. 3292, 3491 (2014) (leaving the provision unchanged from the NDAA for fiscal year 2014).
  51. Missy Ryan & Adam Goldman, *Time Is Running Out for Obama To Fulfill Promise To Close Guantanamo*, WASH. POST (Oct. 7, 2015), <http://www.washingtonpost.com/world/national>



Congress's certification requirements hamstrung the transfer process. Jeh Johnson, the General Counsel for the Department of Defense, publicly called the certifications "onerous and near impossible to satisfy"<sup>52</sup> and advised Secretary Robert Gates not to make any.<sup>53</sup> Secretary Gates heeded the advice: he testified that Congress had put him in an "uncomfortable position" and that the certification requirement "raise[d] the bar very high" for transfers.<sup>54</sup> He subsequently made none.<sup>55</sup> Nor did his successor Leon Panetta.<sup>56</sup> On the date President Obama signed the first NDAA containing a certification requirement—January 7, 2011—there were eighty-nine men waiting on the recommended-for-transfer list. For nearly three years, not one would be approved for transfer.<sup>57</sup> The Obama Administration blamed the certification requirements for the stalled effort.<sup>58</sup>

While subsequent Defense Secretaries Chuck Hagel and Ashton Carter eventually made a number of certifications, they were not without significant delay—and significant arm-twisting. The certifications created friction between a motivated President and his hesitant subordinates. "It got pretty bad, pretty brutal," said Secretary Hagel. "I'd get the hell beat out of me all the time on this at the White House."<sup>59</sup> "The President said, 'I want this done—I want it done now.' I said, 'I think you'd be disappointed in me, Mr. President, if I just arbitrarily sign

---

-security/time-is-running-out-for-obama-to-fulfill-promise-to-close-guantanamo/2015/10/07/od42dd20-6778-11e5-9223-70cb36460919\_story.html [http://perma.cc/JGQ9-XBSC] ("By U.S. law, the defense secretary must personally vouch for the safety of all detainee transfers.").

52. Jeh C. Johnson, *Speech to the Heritage Foundation*, HERITAGE FOUND. 7 (Oct. 18, 2011), [http://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2011/10/20111018\\_Jeh-Johnson-Heritage-Speech.pdf](http://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2011/10/20111018_Jeh-Johnson-Heritage-Speech.pdf) [http://perma.cc/CCC6-C598].
53. Bruck, *supra* note 5.
54. *Department of Defense Authorization for Appropriations for Fiscal Year 2012 and the Future Years Defense Program: Hearings on S. 1253 Before the S. Comm. on Armed Services*, 112th Cong. 49 (2011) (statement of Robert Gates, Secretary of Defense).
55. Bruck, *supra* note 5.
56. *Id.*
57. SAVAGE, *supra* note 40, at 329.
58. Jason Leopold, *Here's What the White House's "Secret" Plan To Close Guantanamo Looks Like*, FREEDOM OF THE PRESS FOUND. (Aug. 22, 2013), <http://freedom.press/news-advocacy/heres-what-the-white-houses-secret-plan-to-close-guantanamo-looks-like> [http://perma.cc/E6WR-ZBA6] (making available the White House Plan for Closing the Guantánamo Bay Detention Facility); see also Daniel Klaidman, *President Obama's Secret Gitmo Plan*, NEWSWEEK (July 31, 2013), <http://www.newsweek.com/2013/07/31/president-obamas-secret-gitmo-plan-237782.html> [http://perma.cc/FTU4-H5X7].
59. Dan De Luce, *Hagel: The White House Tried To "Destroy" Me*, FOREIGN POL'Y (Dec. 18, 2015), <http://foreignpolicy.com/2015/12/18/hagel-the-white-house-tried-to-destroy-me> [http://perma.cc/9GFN-K9DF].

off, based on a political promise. I have a legal obligation to certify certain things to Congress.”<sup>60</sup> Secretary Hagel eventually resigned under pressure; media accounts widely reported that frustration with the pace of the transfer process was a factor in his ouster,<sup>61</sup> although Obama Administration officials denied it.<sup>62</sup> When Carter replaced Hagel, he too initially stalled. Secretary Carter declined to make a decision on any newly proposed transfers for his first six months, prompting concern from the White House.<sup>63</sup> “Carter doesn’t feel comfortable putting his name on the line, to sign off on them,” one Senate aide reported.<sup>64</sup> In an attempt to prevent further delay, White House officials even ambushed Secretary Carter with an unsigned National Security Council memo that ordered him to make transfer decisions within thirty days of their reaching him; he reacted angrily,<sup>65</sup> without explicitly accepting the thirty-day transfer deadline.<sup>66</sup> President Obama needed to upbraid Secretary Carter personally before he picked up the pace of approvals.<sup>67</sup>

---

60. Bruck, *supra* note 5.

61. See, e.g., Helene Cooper, *Hagel Resigns Under Pressure as Global Crises Test Pentagon*, N.Y. TIMES (Nov. 24, 2014), <http://www.nytimes.com/2014/11/25/us/hagel-said-to-be-stepping-down-as-defense-chief-under-pressure.html> [<http://perma.cc/6SST-ERKE>] (citing Mr. Hagel’s delays in transferring detainees); De Luce, *supra* note 59 (“The arguments over Guantánamo detainees were cited by White House officials as the last straw that led to Hagel having to step down.”); Adam Goldman & Missy Ryan, *Issue of Where To Move Guantanamo Detainees Threatens Closure Plan*, WASH. POST (Aug. 10, 2015), [http://www.washingtonpost.com/world/national-security/guantanamo-closure-plan-suffers-setback-over-us-site-for-detainees/2015/08/10/1540c2e0-3f68-11e5-9561-4b3dc93e3b9a\\_story.html](http://www.washingtonpost.com/world/national-security/guantanamo-closure-plan-suffers-setback-over-us-site-for-detainees/2015/08/10/1540c2e0-3f68-11e5-9561-4b3dc93e3b9a_story.html) [<http://perma.cc/8DVF-8XEZ>] (“White House pressure to approve transfers more quickly created friction with then-Defense Secretary Chuck Hagel, which contributed to his early resignation last year.”); Charles Levinson & David Rohde, *Special Report: Pentagon Thwarts Obama’s Efforts To Close Guantanamo*, REUTERS (Dec. 29, 2015, 5:20 AM), <http://www.reuters.com/article/us-usa-gitmo-release-special-report-idUSKBN0UB1B020151229> [<http://perma.cc/L57H-822Q>] (“The Pentagon’s slow pace in approving transfers was a factor in President Obama’s decision to remove Hagel in February, former administration officials said.”).

62. SAVAGE, *supra* note 40, at 530.

63. Charlie Savage, *Obama’s Plan for Guantánamo Is Seen as Faltering*, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/22/us/politics/obamas-plan-for-guantanamo-is-seen-faltering.html> [<http://perma.cc/LC7K-HKEQ>].

64. Tim Mak & Nancy A. Youssef, *The Pentagon Is Keeping Half of Gitmo Locked Up – Against the White House’s Wishes*, DAILY BEAST (Aug. 9, 2015, 8:53 PM), <http://www.thedailybeast.com/the-pentagon-is-keeping-half-of-gitmo-locked-up-against-the-white-houses-wishes> [<http://perma.cc/ZD6Y-9W7P>].

65. Bruck, *supra* note 5.

66. SAVAGE, *supra* note 40, at 554.

67. Levinson & Rohde, *supra* note 61.

While President Obama ultimately transferred 196 detainees out of Guantánamo Bay,<sup>68</sup> he failed on his promise to close the base. Forty-one prisoners remained.<sup>69</sup> And while Congress's certification requirements were not the sole obstacle, they were plainly a serious one. President Obama's efforts to close the prison relied on first shrinking its population. Transfers, then, were at the heart of closure strategy<sup>70</sup> and time was of the essence: as Cliff Sloan, the State Department's Special Envoy for Guantánamo Closure, said, "every month counts" because "the path to closure demands substantial progress in moving people from Guantánamo."<sup>71</sup> Yet multiple Secretaries of Defense dragged their feet in the face of daunting certification requirements that would have made them "personally accountable if something [went] wrong."<sup>72</sup> While Secretary Carter ultimately made a number of transfers in the waning days of the Obama Administration, the prior delays helped run out the clock.<sup>73</sup>

The case of Guantánamo challenges the academic literature's conclusion that certification requirements cannot meaningfully impede executive priorities. Closing the prison had been one of President Obama's earliest and most public promises. But in the face of Congress's certification requirements, President Obama's Secretaries of Defense did not, as the existing literature would predict,

---

68. Letter from Barack Obama, President of the United States, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Jan. 19, 2017) (available at Office of the Press Sec'y, *Letter from the President—Report with Respect to Guantanamo*, WHITE HOUSE, <http://obamawhitehouse.archives.gov/the-press-office/2017/01/19/letter-president-report-respect-guantanamo> [<http://perma.cc/SG8R-BLHU>]).

69. *Id.*

70. As Lee Wolosky, the State Department's Special Envoy for Closing Guantánamo, said, "[w]hat we're doing to make [closure] happen is *transfers*." Bruck, *supra* note 5.

71. Charlie Savage, *Decaying Guantánamo Defies Closing Plans*, N.Y. TIMES (Sept. 1, 2014), <http://www.nytimes.com/2014/09/01/us/politics/decaying-guantanamo-defies-closing-plans.html> [<http://perma.cc/2DV5-PP9S>]; see also SAVAGE, *supra* note 40, at 6262 (quoting Robert M. Chesney, who worked on detainee policy for the Obama Administration, saying, "Whatever hope there is [for closure] depends on quick progress in transferring as many detainees as possible").

72. Savage, *supra* note 63.

73. See Kathleen Hennessey & Ben Fox, *Obama Administration Rushing To Shrink Ranks at Guantanamo*, ASSOCIATED PRESS (June 5, 2016, 9:01 AM), [http://www.apnewsarchive.com/2016/Obama\\_administration\\_rushing\\_to\\_shrink\\_ranks\\_at\\_Guantanamo/id-ae119704ebd5428aa5ec0045d7c9e59b](http://www.apnewsarchive.com/2016/Obama_administration_rushing_to_shrink_ranks_at_Guantanamo/id-ae119704ebd5428aa5ec0045d7c9e59b) [<http://perma.cc/BWZ8-3CDS>] (noting that the Obama Administration is "running out of time and options" and that while the administration has picked up the pace, "it looks to be [too] little, too late to close the prison").

“simply go through the formality of filing the required papers.”<sup>74</sup> Were certifications little more than routine red tape, one would expect they would not have been such a sticking point. Guantánamo suggests that a new account is needed.

## II. CERTIFICATIONS AND BLAME

### A. Localizing Accountability Through Certifications

The academic literature on certifications dismisses their potential to control the Executive, and therefore struggles to account for those requirements’ role in thwarting the closure of Guantánamo Bay. This shortcoming stems from the literature overlooking a critical feature of certifications. Fundamentally, certifications should be understood as tools to *localize accountability* for a given judgment. As a consequence, certifications heighten the certifier’s risk of *personal blame* should that judgment be wrong. Central to blame is the belief that a harm could have been avoided but for the actions or omissions of an identifiable actor.<sup>75</sup> By conditioning governmental action upon the judgment of a particular individual, certifications make that individual a direct cause of that action, thereby setting the stage for the attribution of blame should harm result.

Certifications’ ability to connect a decision to a named individual stands in stark contrast to the anonymity of prototypical bureaucratic decision-making. Hannah Arendt memorably called bureaucracy “rule by Nobody,”<sup>76</sup> where it is “impossible to localize responsibility”<sup>77</sup> and there is no one “to answer for what is being done.”<sup>78</sup> While Arendt’s description was offered as a critique, the anonymous nature of a bureaucracy helps to insulate individuals from “extraneous pressures”<sup>79</sup> such as personal blame. In doing so, bureaucracy enables decisions that might be sound policy but are too risky for any individual to make alone.<sup>80</sup>

---

74. Horton & Sellier, *supra* note 21, at 859.

75. HOOD, *supra* note 10, at 6.

76. HANNAH ARENDT, *On Violence*, in *CRISES OF THE REPUBLIC* 103, 137 (1972).

77. *Id.* at 138.

78. *Id.* at 137-38; see also Dennis F. Thompson, *Moral Responsibility of Public Officials: The Problem of Many Hands*, 74 *AM. POL. SCI. REV.* 905, 907-08 (1980) (arguing that collective responsibility weakens democratic accountability).

79. ROBERT MERTON, *Bureaucratic Structure and Personality*, in *SOCIAL THEORY AND SOCIAL STRUCTURE* 249, 250 (1968); see also STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 62-63 (1993) (describing how bureaucratic insulation can assist in better decision-making).

80. See HOOD, *supra* note 10, at 98 (noting the use of group decision-making in high-stakes situations, such as assessing whether children are at risk of abuse or the risk posed by pedophiles).

While bureaucratic decision-making distributes the risk of blame across a system—there is safety in numbers and safety in anonymity<sup>81</sup>—certifications pierce that bureaucratic safety by plucking an individual out of the herd. By localizing accountability in a single person, certification requirements concentrate risk in that person. Personal responsibility brings personal vulnerability. Moreover, these certifications must be memorialized in writing, heightening the vulnerability: should things go wrong, there is a clear record both of the certifier’s responsibility and of her poor judgment.<sup>82</sup> This vulnerability changes the certifier’s overall decision-making calculus; under the right set of factors, the decisionmaker may become unwilling to make a decision that she would have made otherwise.<sup>83</sup>

Indeed, Guantánamo provides an example of the contrast between group and individual decision-making. Before a proposed transfer even reached the Defense Secretary’s desk, other officials had already determined that the transfer was appropriate. Under the terms of a 2011 executive order, prior to any transfer, a parole-like board of senior officials from six agencies had to determine by consensus that continued detention was not “necessary to protect against a significant threat to the security of the United States.”<sup>84</sup> But Congress’s NDAs specifically noted that these recommendations were non-binding and that “the

---

released from custody); *see also* R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL’Y 371, 388-89 (1986) (describing how, where there is no way of avoiding hard choices, politicians can “circle the wagons” to ensure “no one has to stick their neck out”).

81. *See generally* HOOD, *supra* note 10, at 97-100 (describing herding).
82. *See* SUZANNE GARMENT, SCANDAL: THE CRISIS OF MISTRUST IN AMERICAN POLITICS 295 (1991); *see also id.* at 1 (“Nothing goes on paper.’ The political appointee was explaining how top managers in her federal agency make their official decisions.”).
83. Worth exploring further, though noted only in passing here, are the bureaucratic countermeasures, contemplated or taken, that attempted to de-localize responsibility for the Guantánamo certifications and so dilute the risk. *Compare* SAVAGE, *supra* note 40, at 526-28, *and* Jason M. Breslow, *Chuck Hagel: Closing Guantanamo Is an “Imperfect Process,”* PBS (Feb. 21, 2017), <http://www.pbs.org/wgbh/frontline/article/chuck-hagel-closing-guantanamo-is-an-imperfect-process> [<http://perma.cc/G3PL-D7BB>] (recounting Attorney General Eric Holder’s proposal that the entire National Security Council sign the certification), *with* HOOD, *supra* note 10, at 97-100 (describing “herding” – collective decision-making – as a tactic to reduce blame on any given individual); *compare* Memorandum from Susan Rice, Assistant to the President for Nat’l Sec. Affairs, to the Secretary of Defense, “Guidance on Guantanamo Bay Detainee Transfers” 1-2 (May 24, 2014) (defining “substantially mitigate[d]” as a checklist of potential steps), *with* HOOD, *supra* note 10, at 93-97 (describing “protocolization” as a tool for limiting blame for the faulty exercise of discretion).
84. Exec. Order No. 13,567, 3 C.F.R. § 13567 (2012). Prior to the establishment of the parole-like board via the 2011 order, a six-agency task force reviewed detainees for transfer eligibility. Charlie Savage, *The Fight over Guantánamo’s Parole Board, Explained*, N.Y. TIMES (Feb. 17,

Secretary of Defense is responsible for any final decision to release or transfer an individual.”<sup>85</sup> Secretary Hagel acutely felt the difference between such group decision-making and his own ultimate responsibility, a weight which he expressed in multiple public interviews: “Everybody had a role in this, but again, it rolls back on one individual”;<sup>86</sup> “My name is going on that document. That’s a big responsibility.”<sup>87</sup> And, as Charlie Savage wrote, Secretary Hagel’s “risk-aversion and careful deliberation, stemming from the fact that he could be seen as personally accountable if any released detainee killed someone, was precisely what the drafters of the transfer-restrictions law had hoped to achieve.”<sup>88</sup>

The existing literature overlooks certifications’ power to create this personal accountability. Scholars argue that certifications are a weak tool because there is no effective way for the other branches to review the accuracy of the judgment in question;<sup>89</sup> without such review, the argument goes, the Executive can largely do as it pleases. But certification requirements demand not only a judgment but also a *person to vouch for that judgment*. The attendant risk of individual blame can

---

2017), <http://www.nytimes.com/2017/02/17/us/politics/guantanamo-bay-parole-periodic-review-board.html> [<http://perma.cc/RZT9-Q9R2>].

85. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023(b)(1)-(2), 125 Stat. 1298, 1564 (codified at 10 U.S.C. § 801 note).
86. Breslow, *supra* note 83. For an interesting potential analogue, California voters passed a 1988 constitutional amendment requiring the Governor to review cases where the state parole board recommends a convicted murderer be released. CAL. CONST. art. V, § 8(b). The amendment was intended to hold the Governor accountable in a Willie Horton-style case of high profile recidivism. While the law passed without much attention, the effects were dramatic: Governor Arnold Schwarzenegger reversed seventy-five percent of cases; Governor Gray Davis reversed ninety-nine percent. Said one former head of the California prison system: “I don’t know that inmates believed, or even practitioners believed, that the governor would reject as many cases as they did when it initially passed.” *This American Life: Long Shot*, CHI. PUB. RADIO (Jan. 8, 2010), <http://www.thisamericanlife.org/radio-archives/episode/398/transcript> [<http://perma.cc/2GP6-6KHQ>].
87. Charlie Savage & Helene Cooper, *Under Pressure, Hagel Promises To Act on Guantánamo Transfers*, N.Y. TIMES (May 29, 2014), <http://www.nytimes.com/2014/05/30/us/hagel-sets-his-own-timetable-on-deciding-guantanamo-transfers.html> [<http://perma.cc/NHT4-TNSE>]; see also, e.g., Breslow, *supra* note 83 (discussing Secretary Hagel’s description of how the NDAA “put the responsibility of certifying the detainees . . . solely on the shoulders of the secretary of defense”); Rebecca Shabad, *Report: Pentagon Officials Have Slowed Process To Close Gitmo*, CBS NEWS (Dec. 28, 2015, 5:33 PM) <http://www.cbsnews.com/news/report-pentagon-officials-have-slowed-process-to-close-gitmo> [<http://perma.cc/MTU5-UJWQ>] (“[B]y law, I [Hagel] am the one official in government charged with certification of release of detainees. I take that responsibility very seriously.”).
88. SAVAGE, *supra* note 40, at 519.
89. Chinen, *supra* note 6, at 272; Griffin, *supra* note 21, at 210; Quint, *supra* note 9, at 827, 827 n.221.

impede executive action even when formal review by Congress or the courts is unlikely.

Chinen likely comes closest to addressing certifications' relationship to accountability and blame. He examines how, by allowing Congress to pass the buck on difficult decisions, certifications *shift* risk from the legislative to the executive branch. But Chinen does not consider whether this risk transfer might change the decision that is ultimately made. Moreover, in his discussion of risk shifting, he treats the executive as monolithic. The executive, however, is not monolithic—it is made up of individuals, and only one of those individuals must put her name to a certification, with the accompanying risk of blame. By ignoring how certifications can shape decisions by localizing accountability in specific actors, the existing literature underestimates their potential power.

### *B. Predicting the Power of Certification Requirements*

Once certifications are understood as a means of localizing accountability in a particular actor, it is possible to theorize factors that make them effective—that is, their ability to influence the Executive to behave in ways it would have otherwise resisted. Certifications can be effective in different ways. They might, for example, raise the political costs of a decision by forcing the certifier to take personal ownership for it; such heightened costs could affect the timing of the decision or even its actual outcome.<sup>90</sup> Or certifications might cause delay, as at Guantánamo, by making the certifier more cautious when making difficult judgments. But generally, a certification's effectiveness will largely depend upon heightening the certifier's risk of blame while diminishing the certifier's chance for credit.

#### *1. Heightening the Risk of Blame*

Certifiers will be more reluctant to certify when they perceive a greater risk of blame. This risk of blame depends upon their perception of the amount of potential blame they might have to endure because of their certification and the likelihood they will actually have to endure it.

The first factor—the amount of blame that might be visited upon a certifier—is likely the most important in determining whether a certification will have bite.

---

90. Meyer's suggestion of "shadow" fact-finding committees and Chinen's suggestions of narrower, more objective certification criteria can be understood as attempts to constrain the Executive by raising the political costs of certifications that run roughshod over the truth. See Meyer, *supra* note 35, at 101; Chinen *supra* note 6, at 274.

The amount of blame largely depends upon the issue's salience to the decisionmaker's constituents. Some certification requirements, while perhaps concerning important issues, involve obscure policy determinations that are unlikely to attract large-scale attention<sup>91</sup>: an erroneous or unpopular certification as to the sources of funding for the Korean Peninsula Energy Development Organization,<sup>92</sup> for example, is less likely to attract significant blame because the issue flies below the public radar. But other certifications may attract overwhelming blame, particularly in a media environment that is hungry for scandal<sup>93</sup> and a public discourse often dominated by a politics of fear.<sup>94</sup>

The Guantánamo Bay certifications, for example, occurred against the backdrop of widespread fears of terrorism – were a detainee to recidivate, the Defense Secretary would have faced an enormous backlash. In fact, former British Prime Minister Tony Blair was dragged back into the British tabloids, ten years after leaving power, for having secured the 2004 release of a British Guantánamo detainee who later detonated himself in a 2017 Baghdad suicide bombing. Read one tabloid headline: “The ISIS suicide bomber YOU paid £1million! British fighter who blew himself up in Mosul was compensated for serving time in Gitmo – after Tony Blair got him freed – then fled to join ISIS.”<sup>95</sup> Faced with the very real prospect of being publicly excoriated for a bad decision, it is not surprising that officials were reluctant to risk their professional and personal reputations.<sup>96</sup> Indeed, Charles Stimson, a former Deputy Assistant Secretary of Defense for Detainee Affairs, characterized the certification requirements as a “poison pill”: “It

- 
91. Cf. ROBERT D. BEHN, *RETHINKING DEMOCRATIC ACCOUNTABILITY* 84 (2001) (noting how a Senator's attempts to publicize fraud “got the most press – the most public attention – not for the million-dollar mistakes, but for the small ones that everyone could understand”); Mary Douglas, *Risk as a Forensic Resource*, in *RISK* 1, 10 (Edward J. Burger, Jr. ed., 1993) (describing the evaluation of an outcome as “a political, aesthetic, and moral matter”).
92. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, 111 Stat. 2386, 2399-2400 (1997).
93. GARMENT, *supra* note 82, at 57.
94. FRANK FUREDI, *THE POLITICS OF FEAR* 1 (2005).
95. Alexander Robertson et al., *The ISIS Suicide Bomber YOU Paid £1million! British Fighter Who Blew Himself Up in Mosul Was Compensated for Serving Time in Gitmo – After Tony Blair Got Him Freed – Then Fled To Join ISIS*, DAILY MAIL (Feb. 22, 2017, 7:10 PM), <http://www.dailymail.co.uk/news/article-4244444/British-ISIS-fanatic-pictured-grinning-bomb-attack.html> [<http://perma.cc/M5W5-N4VE>].
96. Cf. SAVAGE, *supra* note 40, at 183 (noting that officials who try to halt national security programs put themselves at risk of blame for a future attack that the program might have prevented).



was basically, ‘Go ahead, I dare you.’ No [S]ecretary of [D]efense wants his name on that piece of paper.”<sup>97</sup>

Nor are certifications potent only in the context of international terrorism. The Adam Walsh Act, for instance, prohibits American citizens who have been convicted of certain sex offenses against minors from filing a family-based immigrant petition “unless the Secretary of Homeland Security, in the Secretary’s sole and unreviewable discretion, determines that the citizen poses no risk” to the petition’s beneficiary.<sup>98</sup> Top officials are particularly likely to want to avoid direct responsibility for outcomes that risk media firestorms (such as the re-offense of a convicted sex offender); they would prefer to set themselves up as “global resource allocators and after-the-fact scrutinizers” rather than direct decisionmakers.<sup>99</sup> Indeed, in the case of Walsh Act certifications, the Secretary has delegated his authority.<sup>100</sup> Even still, petitioners bear the burden of demonstrating “beyond any reasonable doubt” that they pose no risk to the beneficiary.<sup>101</sup> Adjudicators, moreover, may reject petitions on their own, while approvals must first be cleared by two supervisors.<sup>102</sup> Unsurprisingly, almost no petitions are approved.<sup>103</sup>

It also seems that multiple high-profile foreign affairs decisions during the early Trump Administration have been influenced at least in part by President Donald Trump’s reluctance to make certifications that could be politically costly with valued constituencies. While a candidate, for instance, President Trump fiercely campaigned against the Obama Administration’s nuclear deal with

---

97. Phil Hirschhorn, *11 Years in Guantanamo Without Trial or Charges*, CBS NEWS (May 31, 2013, 6:35 PM) <http://www.cbsnews.com/news/11-years-in-guantanamo-without-trial-or-charges> [<http://perma.cc/H6MU-C593>].

98. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 402, 120 Stat. 587, 622 (codified at 8 U.S.C. § 1154(a)(1)(A)(viii)(I)).

99. HOOD, *supra* note 10, at 140.

100. *Roland v. U.S. Citizenship & Immigration Servs.*, 850 F.3d 625, 627 n.1 (4th Cir. 2017). No such delegation of responsibility was possible with the Guantánamo certifications. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1023(b)(2).

101. U.S. Dep’t of Homeland Sec., No. HQDOMO 70/1-P, Guidance for Adjudication of Family-Based Petitions (Feb. 8, 2007).

102. U.S. Dep’t of Homeland Sec., No. HQ 70/1-P, Transmittal of SOP for Adjudication of Family-Based Petitions (Sept. 24, 2008).

103. *Bremer v. Johnson*, 834 F.3d 925, 929 (8th Cir. 2016) (noting that the U.S. Citizenship and Immigration Service has determined that judgments of “no risk” should be “rare”); Jennie Guilfoyle, *Updates on Family-Based Immigration from the VSC and NVC*, CATHOLIC LEGAL IMMIGR. NETWORK, <http://cliniclegal.org/resources/articles-clinic/updates-family-based-immigration-vsc-and-nvc> [<http://perma.cc/928J-F4ER>] (reporting that about one percent of petitions were approved in 2012).

Iran.<sup>104</sup> The Iran Nuclear Agreement Review Act, however, demanded that the President certify every ninety days that Iran was in compliance with the deal; that the suspension of U.S. sanctions was both “appropriate and proportionate” to Iran’s actions to end its illicit nuclear program; and that the suspension of sanctions was “vital” to American national security.<sup>105</sup> After his election, President Trump twice “reluctantly” certified the deal. But the President “could not bring himself to do that every 90 days,” even if international inspectors and American intelligence agencies agreed Iran was in compliance with the deal.<sup>106</sup> In October 2017, President Trump overruled his top national security advisers<sup>107</sup> and refused to certify that the suspension of sanctions was “appropriate and proportionate” to Iran’s actions,<sup>108</sup> thereby empowering Congress to fast-track a bill to re-impose the lifted sanctions.<sup>109</sup> Here, the structure of the certification requirement – which effectively required President Trump to affirmatively and repeatedly endorse a deal he had loudly denounced – created political costs he was not willing to accept.<sup>110</sup>

Similarly, certification requirements shaped President Trump’s decision to recognize Jerusalem as the capital of Israel. In 1995, Congress passed the Jerusalem Embassy Act, which dramatically slashed State Department funding until the President moved the American embassy in Israel to Jerusalem.<sup>111</sup> The President, though, could postpone the funding cuts without moving the embassy by determining every six months that postponement was “necessary to protect the

---

104. Mark Landler & David E. Sanger, *Trump Disavows Nuclear Deal, But Doesn’t Scrap It*, N.Y. TIMES (Oct. 13, 2017), <http://www.nytimes.com/2017/10/13/us/politics/trump-iran-nuclear-deal.html> [<http://perma.cc/6KB8-CUR2>].

105. Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, § 135(d)(6).

106. Landler & Sanger, *supra* note 104.

107. Mark Landler & David E. Sanger, *Trump To Force Congress To Act on Nuclear Deal*, N.Y. TIMES (Oct. 5, 2017), <http://www.nytimes.com/2017/10/05/world/middleeast/trump-iran-nuclear-deal.html> [<http://perma.cc/37JV-WDCT>].

108. *Id.* (reporting that President Trump warned aides he would not certify the deal a third time).

109. Iran Nuclear Agreement Review Act § 135(d)(6).

110. Vali Nasr, the Dean of the Johns Hopkins School of Advanced International Studies, said, “He doesn’t want to certify the Iran deal for more domestic reasons than international ones. He doesn’t want to certify that any piece of the Obama strategy is working.” Anne Gearan, “*He Threw a Fit*”: *Trump’s Anger Over Iran Deal Forced Aides To Scramble for a Compromise*, WASH. POST (Oct. 11, 2017), [http://www.washingtonpost.com/politics/he-threw-a-fit-trumps-anger-over-iran-deal-forced-aides-to-scramble-for-a-compromise/2017/10/11/6218174c-ae94-11e7-9e58-e6288544af98\\_story.html](http://www.washingtonpost.com/politics/he-threw-a-fit-trumps-anger-over-iran-deal-forced-aides-to-scramble-for-a-compromise/2017/10/11/6218174c-ae94-11e7-9e58-e6288544af98_story.html) [<http://perma.cc/PX76-AX2T>].

111. Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 3(b), 109 Stat. 398, 399.

national security interests of the United States.”<sup>112</sup> Past Presidents had campaigned on moving the embassy; upon confronting the diplomatic sensitivity of the issue, however, they ultimately reneged on their pledges and instead repeatedly issued the national security waivers.<sup>113</sup> President Trump also promised to move the embassy during the 2016 presidential campaign. While he signed the first waiver “grudgingly,” influential supporters were “deeply frustrated” by his doing so.<sup>114</sup> With the approach of the second waiver deadline, he indicated to aides that he would not sign a second waiver<sup>115</sup> and pressed them for more options.<sup>116</sup> In December 2017, on the week of the second waiver deadline, President Trump announced the formal recognition of Jerusalem as Israel’s capital and began a plan to relocate the embassy.<sup>117</sup> Again, the Jerusalem Embassy Act’s waiver was structured in such a way as to force the President to personally, affirmatively, and repeatedly delay the fulfillment of an important campaign promise. When President Trump was “[f]aced with disappointing evangelical and pro-Israel backers . . . or alarming allies and Arab leaders while jeopardizing his own peace initiative, the [P]resident sided with his key supporters.”<sup>118</sup>

One might argue that President Trump’s actions were independent of the certification requirements, given that he had campaigned against the Iran deal and in favor of moving the embassy to Jerusalem. Perhaps he would have taken his own actions on these issues in due course. But the timing of both the Iran and embassy decisions, along with reported accounts of his decision-making,<sup>119</sup>

---

112. *Id.* at § 7(a).

113. Josh Dawsey et al., *Trump Had for Months Been Determined to Move U.S. Embassy to Jerusalem* (Dec. 6, 2017), [http://www.washingtonpost.com/world/national-security/trump-had-for-months-been-determined-to-move-us-embassy-to-jerusalem/2017/12/06/f721e2ba-dab7-11e7-b1a8-62589434a581\\_story.html](http://www.washingtonpost.com/world/national-security/trump-had-for-months-been-determined-to-move-us-embassy-to-jerusalem/2017/12/06/f721e2ba-dab7-11e7-b1a8-62589434a581_story.html) [<http://perma.cc/46QU-AUMQ>].

114. Mark Landler, *For Trump, an Embassy in Jerusalem Is a Political Decision, Not a Diplomatic One*, N.Y. TIMES (Dec. 6, 2017), <http://www.nytimes.com/2017/12/06/us/politics/trump-embassy-jerusalem-israel.html> [<http://perma.cc/V9LY-T9TL>].

115. Dawsey et al., *supra* note 113.

116. Landler, *supra* note 114.

117. *Id.* While President Trump ultimately signed the second waiver, he made clear he was setting in motion plans to move the embassy, which mollified supporters. *Id.*

118. *Id.*

119. See Landler & Sanger, *supra* note 107; Landler, *supra* note 114 (pointing out that President Trump’s handling of the Jerusalem embassy issue was “not unlike his handling of the nuclear deal with Iran” and reporting that “[w]hen the six-month clock expired this month, Mr. Trump was determined to leave himself more options”); David Nakamura, *Trump Recognizes Jerusalem as Capital of Israel in Reversal of Longtime U.S. Policy*, WASH. POST (Dec. 6, 2017), <http://www.washingtonpost.com/politics/in-white-house-speech-trump-recognizes-jerusalem-as-capital-of-israel-in-reversal-of-longtime-us-policy/2017/12/06/de9322e6>

suggest that certifications played a role in forcing President Trump's hand. It is fair to conclude that the rhythm of the certification requirements, which demanded President Trump repeatedly affirm positions opposed by his political supporters, pressured the President to make significant foreign policy choices on a schedule he might not have chosen.<sup>120</sup>

These two cases illustrate, then, another relevant point: the structure of a certification influences the amount of blame incurred.<sup>121</sup> Since people tend to blame actors more harshly for sins of commission rather than omission,<sup>122</sup> the certification's "default rule" matters.<sup>123</sup> The Iran deal certification requirements, for example, likely would have been weaker if its structure had been inverted—had President Trump been required to make a certification to *disavow* the Iran deal, rather than to make certifications that repeatedly affirmed the deal, he likely would not have felt the pressure he did. Similarly, imagine a counterfactual where the Defense Secretary were still responsible for ensuring transferred Guantánamo detainees did not recidivate, but where the transfers approved by the parole-like board would be automatically approved unless the Secretary

---

-da9d-11e7-a841-2066faf731ef\_story.html [http://perma.cc/8E66-GYSM] (noting that President Trump was "anxious" to move forward on a declaration on Jerusalem as the deadline for the second waiver approached).

120. One might argue that the fact that other Presidents bit the bullet and made the Jerusalem certifications—like the fact that Secretary Carter ultimately made a number of transfers—call into doubt whether the certification requirements actually shaped these decisions. But the salience of blame risk can differ across individuals and across circumstances; the varying susceptibility to this pressure does not mean that such pressure does not exist. See HOOD, *supra* note 10, at 8 (comparing a politician on the eve of a close race with one on the eve of retirement and noting that "not everyone can be expected to care equally about all types of blame in all circumstances"); Weaver, *supra* note 80, at 377 (making a similar point).
121. See Weaver, *supra* note 80, at 381-82 (describing how the manner in which political choices are structured can be used to generate or avoid blame).
122. See, e.g., Peter DeScioli et al., *The Omission Strategy*, 22 PSYCHOL. SCI. 442, 442 (2011) (finding that "people condemn others less harshly when a moral offense occurs by omission rather than by commission, even when intentions are controlled" and concluding that actors choose omissions to avoid condemnation); Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76 (1991) (finding that subjects considered commissions causing harm to be worse than omissions causing harm, even when holding the actor's intention constant).
123. Cf. Griffin, *supra* note 21, at 174 (contrasting human rights provisions that prohibited aid *until* the President made a favorable determination, with other laws that provided aid *unless* the Executive made an unfavorable determination); Weaver, *supra* note 80, at 380 (discussing how legislators sought to avoid directly voting for their own pay raises—a politically losing proposition—by creating a process for automatic pay increases; when this attempt failed, however, they were forced to vote on the pay increases directly and so voted against them).

made a certification that affirmatively blocked the transfer.<sup>124</sup> Because the Secretary's error would be one of omission rather than commission, were a detainee to recidivate, the Secretary likely would face less blame.

In addition to the *amount* of blame a certifier expects she might face, the decision to certify will also depend on her perception of the *likelihood* she will actually face it. With certification requirements such as those in the Iran deal or Jerusalem Embassy Act, this calculation is straightforward: blame is assured, since it is the very act of certifying that incurs this blame.<sup>125</sup> In cases such as the Guantánamo certifications, however, the assessment is more complex. Not all certifications would trigger blame, only those where a detainee recidivated. In other words, the likelihood of blame in such circumstances turns on whether the certifier's judgment might be proven obviously wrong.

Certifications with objective criteria will be better yardsticks in gauging whether a certifier has made a wrong judgment. In general, certifications will involve either judgments based on policy criteria (such as whether an action is in the "national interest") or empirical criteria (such as whether a detainee "cannot" reengage in terrorism).<sup>126</sup> Judgments based on policy criteria tend to be less constraining because the criteria's meanings are often harder to pin down — reasonable people might differ as to what is in the national interest, for example. Because such standards are broad and contestable, they afford the decisionmaker greater latitude in justifying her decision.<sup>127</sup> It is easier, however, to challenge the accuracy of empirical judgments.<sup>128</sup> Concrete and ascertainable requirements

---

124. Some certifications are set up this way. See, e.g., Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1998, Pub. L. No. 105-118, 111 Stat. 2386, 2394 (1997) (empowering the President to withhold appropriated funds from Bosnia and Herzegovina if he certifies that the country has not complied with aspects of a peace agreement); International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113 724(c), 95 Stat. 1519, 1553 (cutting assistance to the Nicaraguan government if the President determines, *inter alia*, that the Nicaraguan government is aiding international terrorism).

125. *But see* Weaver, *supra* note 80, at 381 (noting that voters may fail to link policymakers to choices they have made).

126. *Cf.* Chinen, *supra* note 6, at 225-26 (noting some certification requirements are primarily statements of policy, others are primarily statements of fact, and others are a mixture of fact, policy, and sometimes law).

127. *See id.* at 274-75 (arguing that certification requirements should be either "very narrow" or "very broad," and pointing to a "national interest" certification as an example of a broad certification requirement).

128. Other scholars point out that even some empirical criteria can offer significant room for executive discretion. Meyer proposes creating still more objective standards, such as standards based on specific numerical quantities. He suggests, for instance, a statute could impose foreign aid restrictions based on whether a specified number of people had been victimized rather than on whether a country engaged in a "consistent pattern" of human rights abuses. Meyer,

are therefore more constraining because they expose the certifier to the embarrassment and blame that accompanies an obviously wrong judgment.<sup>129</sup> They also likely increase the administrative burden on the Executive because the decisionmaker will invest more time and resources into marshaling the information required to make a confident judgment.<sup>130</sup> Secretary Hagel, for instance, described the scrutiny he would apply to each of the Guantánamo transfers before making a certification:

I wanted assurance from my security people that in fact they had seen physically where these people were going to be, who was going to monitor them, how often the monitoring, what kind of relationships would they have, would they have cell phones, would they have Internet, what would they be doing, how would they be provided living accommodations. All those are factors that go into the ultimate decision.<sup>131</sup>

Such burdensome fact-finding can cause delay; having to make many such certifications will only compound the burden.

Certifications will be especially perilous when they demand a high degree of certainty about matters that, while concrete, are nonetheless uncertain. Predictions about the future—that a detainee “cannot” engage in terrorism or that a person poses “no risk” to family members—are especially fraught.<sup>132</sup> At the time of such a certification, it will be hard for the decisionmaker to know whether her judgment is right; with hindsight, it will be easy to prove whether her judgment was wrong. We can accordingly expect certifiers to be reluctant to make such certifications. And in situations where a certifier is required to make numerous certifications, as at Guantánamo, the certifier will have to confront the challenge of cumulative probability—low probability events, individually rare, grow likelier in the aggregate as the sample size increases. Where constituents have zero

---

*supra* note 35, at 101; *see also* Chinen, *supra* note 6, at 274 (suggesting that, with respect to an anti-narcotics certification, “Congress could impose numerical criteria, such as numbers of drug seizures, extraditions, etc., to determine whether a country has cooperated” with American anti-narcotics efforts).

129. Chinen, *supra* note 6, at 274 (arguing narrower criteria for certifications would deter the Executive from making controversial certifications because of the possibility of embarrassment or being caught in deception).

130. *Id.* at 271 (noting that certification requirement “impose a burden on the executive branch, in terms of the administrative costs of compliance, formulation, and implementation of policy”).

131. Breslow, *supra* note 83.

132. As a consequence, it will generally be less onerous for a certifier to vouch that certain procedures were followed than to vouch that certain outcomes will be achieved. *See* HOOD, *supra* note 10, at 93-97 (discussing protocolization).

tolerance for error, as can be the case in national security matters, the likelihood of a career-ending mistake grows.

In short, a certifier can sum up their blame risk by asking two commonsense questions: How likely am I to be blamed? And how bad will it be if I am?

## 2. *Minimizing the Chance for Credit*

One might argue that because risks and rewards are symmetric, mere accountability for a decision should not affect the outcome: while a decisionmaker might court blame for a bad decision, they equally might have the opportunity to claim credit for a good one.<sup>133</sup> But public officials are often risk-averse, since governmental success tends to be ignored while failure receives withering attention.<sup>134</sup> As one author wrote, officials “recognize that, if someone is holding them accountable, two things can happen: When they do something good, nothing happens. But when they screw up, all hell can break loose. Those whom we want to hold accountable have a clear understanding of what accountability means: Accountability means punishment.”<sup>135</sup>

Accordingly, for certifiers, the chance for credit is probably the less important half of the ledger. Nevertheless, the designer of a certification regime can strengthen a certification requirement not only by increasing the downside risk, but also by minimizing the certifier’s chance for any benefit. Calculating this opportunity for credit is broadly similar to calculating the danger for blame: the certifier must assess how much credit is on offer and how likely they are to get it. Accordingly, this paper omits an analogous discussion.

One point worth exploring specifically, though, is how a certification requirement’s *location* within the executive branch can diminish the certifier’s chance for credit. Different entities within the executive branch have different institutional interests.<sup>136</sup> The President, for example, is accountable for both the costs and benefits of a decision by virtue of being responsible for the entirety of the executive branch.<sup>137</sup> But even under the umbrella of a unitary Executive,

---

133. See BEHN, *supra* note 91, at 6 (critiquing definitions of accountability that equally emphasize blame and praise).

134. See HOOD, *supra* note 10, at 9-13; Weaver, *supra* note 80, at 371, 376 (arguing politicians are more motivated to avoid blame than to claim credit and that political appointees and bureaucrats are motivated to avoid blame too, respectively).

135. BEHN, *supra* note 91, at 3.

136. Allison, *supra* note 10, at 711.

137. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 94 (1994) (“Accountability and avoidance of factionalism, then, are two central val-

heads of individual departments often have narrower (and sometimes competing) interests.<sup>138</sup> Therefore, *where* the certification is located can structure the substantive decision by foregrounding some considerations while diminishing others. Certification requirements will become more of an obstacle when foisted upon an official who, by virtue of her institutional role, experiences only the downside risks of certification without the corresponding benefits.

Guantánamo illustrates how the location of a certification requirement can shape whether certifications are made.<sup>139</sup> The State Department, responsible for America's foreign policy, experienced Guantánamo as a diplomatic liability and stood to gain from its closure.<sup>140</sup> The Department of Defense, while deeply intertwined with American foreign policy, is not primarily responsible for it; it is responsible, however, for the safety of American troops around the globe. And so, it is unsurprising that institutionally, the Department of Defense would be more reluctant to transfer Guantánamo detainees, since it experiences much of the downside risk without the corresponding benefit. As Hagel asked, "[I]s there a bias the military would have, being more rigid in releasing some of these guys . . . ? Not many State Department people get killed – some do. Not many White House people get killed. It's [Department of Defense] people that get killed."<sup>141</sup> In choosing the Defense Secretary as the certifier, Congress tilted the playing field to ensure that special weight would be given to interests militating against transfers.<sup>142</sup>

---

ues of the framers' original executive."); Susan M. Davies, Comment, *Congressional Encroachment on Executive Branch Communications*, 57 U. CHI. L. REV. 1297, 1299-1300 (1990) (discussing the Framers' creation of the office of the President as a politically accountable figure in whom all executive power would reside).

138. See Allison, *supra* note 10, at 711. For a general discussion of bureaucratic politicking, see *id.* at 708-12.
139. Cf. Cohen, *supra* note 36, at 256-62 (illustrating how different interests can shape how actors perceive costs and benefits by offering an account of the "intense bureaucratic warfare" within President Carter's State Department over the conditioning of security assistance upon human rights concerns; while high political officials pushed for prioritizing human rights concerns, career officials consistently opposed such prioritization because they were not particularly concerned about human rights, and such prioritization jeopardized the maintenance of good relations with the governments in question, which they saw as their primary goal).
140. Bruck, *supra* note 5.
141. *Id.*; see also Kay & Youssef, *supra* note 64 (noting speculation that President Obama was considering asking Congress for an amendment to the certification requirement so that the President could issue the certifications rather than the Defense Secretary).
142. The certification's location may also be strategically important for a reason unrelated to risk-reward calculus – it may simply provide another tool for a bureaucracy to fight a policy that it already opposed. There were, for instance, widespread reports that elements of the Defense Department opposed the closure of Guantánamo. See, e.g., Levinson & Rohde, *supra* note 61;



### III. WEAPONIZING BLAME: THE AMERICAN SAFE ACT

Not all certification requirements are as dramatic as those used at Guantánamo. Many certifications may, in fact, be the ineffective formalities that commentators have posited.<sup>143</sup> While a certification's effectiveness is scalar rather than binary, the prior Part argued that we can expect certification requirements to be more powerful when they require the decisionmaker to (1) attest to particularized and uncertain facts (2) at the risk of overwhelming blame with (3) little chance for credit. The certification regime at Guantánamo was one attempt to deploy such powerful certifications. But it has not been the only attempt. An examination of the American SAFE Act—a bill that would have imposed crippling certification requirements on the Iraqi and Syrian refugee programs—offers another example of how Congress can craft a certification regime that effectively weaponizes blame to constrain executive action. And this examination also reveals that while some members of Congress themselves do not fully understand the power of certifications, others understand it too well.

#### A. An Uncertifiable Certification

In November 2015, coordinated terrorist attacks in Paris left 130 dead and hundreds wounded.<sup>144</sup> It was the worst terrorist attack in Europe in eleven years.<sup>145</sup> Shortly thereafter, Republican Representative Michael McCaul, Chairman of the House Homeland Security Committee, introduced H.R. 4038, the American Security Against Foreign Enemies Act of 2015 (American SAFE Act), which proposed to alter the screening process for Iraqi and Syrian refugees.<sup>146</sup>

The text of the bill was brief. At its heart were two certification requirements. First, before any Iraqi or Syrian refugee could enter the United States, the FBI Director would need to certify to the Secretary of Homeland Security and the Director of National Intelligence that “each [refugee] has received a background investigation that is sufficient to determine whether the covered alien is a threat

---

Shabad, *supra* note 87. The certification requirements provided cover—as one former senior Defense official said, they gave Defense officials “the ability to be openly in favor of transferring people but unable to do it, because of the law.” Bruck, *supra* note 5.

143. Note, *supra* note 37, at 2519 n.117.

144. *Paris Attacks: What Happened on the Night*, BBC NEWS (Dec. 9, 2015), <http://www.bbc.com/news/world-europe-34818994> [<http://perma.cc/VDL9-PT9J>].

145. *Attacks in Paris*, N.Y. TIMES, <http://www.nytimes.com/news-event/attacks-in-paris> [<http://perma.cc/ZNY5-JBF8>].

146. H.R. 4038, 114th Cong. (as introduced in House, Nov. 17, 2015).

to the security of the United States.”<sup>147</sup> Second, it required that such refugees may enter the United States only “after the Secretary of Homeland Security, with the unanimous concurrence of the Director of the Federal Bureau of Investigation and the Director of National Intelligence, certifies . . . that the covered alien is not a threat to the security of the United States.”<sup>148</sup>

The bill’s chief co-sponsor described the American SAFE Act as a “common sense” measure that would merely put a “pause” on Iraqi and Syrian refugee admissions until “the law enforcement experts are comfortable that we have got a process.”<sup>149</sup> But, as the framework articulated in this Comment makes clear, the SAFE Act’s certification requirements would have been less a pause than a poison pill.

First, the certifications required the nation’s top security officials to make difficult judgments about future behavior under extremely demanding standards. Representative Sheila Jackson Lee said it “asks the impossible” of law enforcement officials.<sup>150</sup> FBI Director James Comey agreed, telling lawmakers that because there are always risks with allowing foreigners into the United States, the legislation would make it impossible to admit any refugees.<sup>151</sup> The White House concurred, proclaiming that “[t]he certification requirement at the core of H.R. 4038 is untenable.”<sup>152</sup> Judgments that a refugee is “not a threat” are not only hard to make – if a judgment is wrong, it will be *obviously* wrong.

It would also be *catastrophically* wrong, possibly resulting in a terrorist attack. And the nation’s top law enforcement officials would bear a direct, formalized link to the attack—the refugee would never have been admitted but for their guarantees. The number of certifications the SAFE Act required exacerbated the risk, given the challenges of cumulative probability. The FBI Director would

---

147. *Id.*

148. *Id.* § 2(b).

149. 161 CONG. REC. H8383 (daily ed. Nov. 19, 2015) (statement of Rep. Hudson).

150. *Id.* at H8397 (statement of Rep. Jackson Lee).

151. Evan Perez, *First on CNN: FBI Director James Comey Balks at Refugee Legislation*, CNN (Nov. 19, 2015, 1:51 PM), <http://www.cnn.com/2015/11/19/politics/fbi-director-james-comey-refugee-legislation/index.html> [<http://perma.cc/E7SL-XPQQ>].

152. Office of Mgmt. & Budget, *Statement of Administration Policy: H.R. 4038 – American SAFE Act of 2015*, EXECUTIVE OFF. PRESIDENT 1 (Nov. 18, 2015), [http://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/114/saphr4038r\\_20151118.pdf](http://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/114/saphr4038r_20151118.pdf) [<http://perma.cc/C8PU-FPEB>]. The author does not know whether the Obama Administration explicitly considered its experience with the Guantánamo Bay certification requirements when taking this position, but it seems reasonable to think it might have.

have to certify approximately 200,000 refugees over the course of a ten-year tenure.<sup>153</sup> The chance that just *one* of those individuals might commit an act of terror is plausibly nontrivial. The sheer number of certifications would not only make the regime slow and administratively burdensome to implement;<sup>154</sup> it also would dramatically elevate the likelihood of blame.

Finally, the location of the certification makes them even more potent, as the risks and rewards of certification in the SAFE Act were asymmetric for the certifiers. The FBI Director, for instance, is not responsible for the success of the refugee program; he is responsible for law enforcement. If 200,000 refugees go on to live lives of unassuming middle-class prosperity, the public will neither notice nor thank him for it. But should just one of those refugees commit an act of terror, the public spotlight would be intense and unforgiving.

In sum, Attorney General Loretta Lynch seemed correct in her assessment of the bill's impact: "To have my FBI [D]irector or other members of the administration make personal guarantees *would effectively grind the program to a halt.*"<sup>155</sup>

### B. Reflecting on the American SAFE Act

Two days after its introduction, the American SAFE Act passed the House.<sup>156</sup> While the bill ultimately failed to achieve cloture in the Senate,<sup>157</sup> it received nearly fifty Democratic votes in the House—enough to override President

153. This number is calculated by taking the number of Iraqi and Syrian refugees admitted in Fiscal Year 2016. See Phillip Connor, *U.S. Admits Record Number of Muslim Refugees in 2016*, PEW RES. CTR. (Oct. 5, 2016), <http://www.pewresearch.org/fact-tank/2016/10/05/u-s-admits-record-number-of-muslim-refugees-in-2016> [<http://perma.cc/TZG9-4KSF>], and multiplying them by the FBI Director's ten-year term. Act of Oct. 15, 1976 Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427.

154. The Obama Administration claimed the SAFE Act would "create significant delays and obstacles" for the refugee program. Office of Mgmt. & Budget, *supra* note 152, at 1. The certification regime would obviously demand time and attention from the senior officials themselves. And Congressman Brad Sherman wryly noted, "If our security leaders just spend 2 hours on each [refugee] file, it will consume all of their working hours. ISIS cannot simultaneously and permanently incapacitate our security leaders. This bill does." 161 CONG. REC. H8388 (daily ed. Nov. 19, 2015) (statement of Rep. Sherman). Furthermore, resources would also be consumed by whatever additional lower-level bureaucratic protocols the principals would surely want put in place. See, e.g., Savage & Cooper, *supra* note 87 (describing the legwork Hagel wanted done before he was willing to sign off on a Guantánamo transfer).

155. Megan Cassella & Patricia Zengerle, *Defying Obama, House Passes Bill To Slow Syrian Refugees*, REUTERS (Nov. 19, 2015) (emphasis added), <http://ca.news.yahoo.com/u-house-passes-strict-screening-syrians-defying-veto-190805401.html> [<http://perma.cc/ST5J-6PEB>].

156. H.R. 4038, 114th Cong. (as passed by House without amendment, Nov. 19, 2015).

157. 162 CONG. REC. S111 (daily ed. Jan. 20, 2016).

Obama's promised veto.<sup>158</sup> But it seems that at least some Democratic legislators did not understand the dramatic consequences of the bill they were supporting. Indeed, after realizing that Democrats were beginning to support the measure, senior Obama Administration officials "raced"<sup>159</sup> to Capitol Hill to meet with Democratic legislators. The officials, however, "were unable to clearly explain the certification process."<sup>160</sup> Said Democratic Representative Sean Patrick Maloney, "I started out strongly opposed to it. But then I read the bill and realized that what it actually required was simple certification."<sup>161</sup> He voted for the measure, saying that "instead of slowing the program or pausing it, the Administration should agree to immediately certify refugees if they pass the current extensive screenings and we should all refocus on actual threats."<sup>162</sup> Other Democrats seemed to share his view: one said the bill "simply requires bureaucrats to file more reports and sign more papers" and echoed that the certifications should be made without changing anything;<sup>163</sup> another said the bill "doesn't hurt the refugee process, so put a certification stamp at the bottom and move on."<sup>164</sup> It seems, then, that unwary legislators shared the view of prior scholars – certifications are largely pro forma.

But the SAFE Act also shows how, for the savvy legislator, certification requirements can be a powerful tool, both substantively and politically.<sup>165</sup> Sub-

---

158. Jennifer Steinhauer & Michael D. Shear, *House Approves Tougher Refugee Screening, Defying Veto Threat*, N.Y. TIMES (Nov. 19, 2015), <http://www.nytimes.com/2015/11/20/us/politics/house-refugees-syria-iraq.html> [<http://perma.cc/LR58-B4FK>].

159. *Id.*

160. *Id.*

161. *Id.*

162. Press Release, Representative Sean Patrick Maloney, *Maloney Statement on American SAFE Act of 2015* (Nov. 19, 2015), <http://seanmaloney.house.gov/media-center/press-releases/maloney-statement-on-american-safe-act-of-2015> [<http://perma.cc/SM8L-5EZN>].

163. Lloyd Doggett, FACEBOOK (Nov 19, 2015) <http://www.facebook.com/lloyddoggett/videos/vb.154050553704/10153473074978705/?type=2&theater> [<http://perma.cc/P8MD-HAGQ>].

164. Sam Stein et al., *How the White House Lost Democrats on the Syrian Refugee Bill*, HUFFINGTON POST (Nov. 20, 2015), [http://www.huffingtonpost.com/entry/house-democrats-syria-refugees\\_us\\_564f5607e4b0879a5boac4f7](http://www.huffingtonpost.com/entry/house-democrats-syria-refugees_us_564f5607e4b0879a5boac4f7) [<http://perma.cc/RXM2-A3KX>]. The American SAFE Act even garnered the votes of Democrats who took an active stand on refugee issues: ten of the Democrats who voted for the bill had, two months earlier, urged President Obama to dramatically expand the refugee program to take in 100,000 Syrians refugees. *Id.*

165. One reporter called the bill a "brilliant strategic move" for congressional Republicans. Dara Lind, *Republicans Have Obama in a Corner on Syrian Refugees*, VOX (Nov. 19, 2015, 2:06 PM), <http://www.vox.com/2015/11/19/9762054/congress-obama-refugees-syria> [<http://perma.cc/BP5G-QKEF>].

stantively, the bill's architects harnessed the "fear of accountability in an inherently uncertain process"<sup>166</sup> to craft certification requirements that would have been fatal to the refugee program. But politically, the bill's sponsors were able to cast the legislation as innocuous: "We're not saying we're refusing. We're just saying we want a thorough and robust vetting process before they're brought in," argued Representative McCaul.<sup>167</sup> The bill's advocates could declare their commitment to refugees even as they closed the door on them.<sup>168</sup> Their tactic avoided the kind of direct attack on the refugee program that might have united the Democrats in its defense.<sup>169</sup>

At the same time, the American SAFE Act put the bill's opponents in a political bind. On the one hand, arguing that the certification requirements would meaningfully obstruct the refugee program risked undermining confidence in the program's security screenings. The Obama Administration had made intense efforts to assure the public that its refugee screenings were exhaustive and safe.<sup>170</sup> To concede that officials would be reluctant to certify the safety of refugees would be tantamount to conceding that the screenings were in fact risky. It is hard to argue that the public should trust a vetting process for which overseers do not want to be accountable. On the other hand, the more the White House touted the rigor of the refugee screenings, the less important it became to oppose the bill. The better the process, the more the certifications became a nonissue.

---

166. Russell Berman, *Republicans Try To Tangle the Refugee Program with Red Tape*, ATLANTIC (Nov. 19, 2015), <http://www.theatlantic.com/politics/archive/2015/11/republicans-try-to-kill-syrian-refugee-program-with-red-tape/416640> [<http://perma.cc/L94Y-M24C>].

167. *Id.*

168. See, e.g., 161 CONG. REC. H8382 (daily ed. Nov. 19, 2015) (statement of Rep. McCaul) ("The American SAFE Act also strikes an important balance between security and our humanitarian responsibilities. It sets up roadblocks to keep terrorists from entering the United States, while also allowing legitimate refugees who are not a threat to be resettled appropriately."); see also *id.* at H8385 (statement of Rep. Poe) ("[This legislation] has nothing to do with refugees as far as whether we accept refugees. Our country accepts refugees. We always have. That is clear. It is not the issue of refugees. It is the issue of letting ISIS terrorists get into the country to kill us . . ."). Refugee advocates were skeptical. Melanie Nezer, the chairwoman of Refugee Council USA, said the Republican message "masked the true impact of the legislation," which would effectively terminate the refugee program: "[T]his is a way to say [that] isn't what they're doing, but if you look at the legislation, that's actually what the result is." Berman, *supra* note 166.

169. Lind, *supra* note 165.

170. See, e.g., Liz Goodwin, *Obama Administration Defends Its Syrian Refugee Screening*, YAHOO (Nov. 17, 2015), <http://www.yahoo.com/news/obama-administration-defends-its-syrian-refugee-212248421.html> [<http://perma.cc/5SJH-UEQZ>]; Steinhauer & Shear, *supra* note 158 (quoting President Obama saying that the refugee screening process is "the most rigorous vetting process that we have" for anyone admitted to the country).

Democratic Representative Jim Himes, who voted for the bill, captured the dilemma: Obama officials “have persuaded us that this is a really good process, but they don’t want to certify it. That’s an inherently difficult argument to make.”<sup>171</sup> He was right. The real argument, of course, is that the risk of overwhelming blame means individuals should not be made personally accountable for these types of decisions at all. But this, too, is a difficult argument to make in American public life – who could oppose more “accountability” in government?<sup>172</sup>

This point touches upon the deeper irony of certification requirements. While the purpose of certifications is to localize accountability for individual decisions, they can actually *mask* accountability for decisions as well. The American SAFE Act would have hamstrung the Iraqi and Syrian refugee programs while simultaneously hiding who was responsible for the sabotage: the reluctant certifier, the most proximate obstacle to the programs’ success, would become a lightning rod for criticism.<sup>173</sup> The architects of that reluctance, however, would be more distant to the action. Powerful certification requirements thereby create accountability at a smaller scale while obscuring it at a larger one.

## CONCLUSION

Existing scholarship has dismissed certification requirements as toothless checks on the Executive. This Comment argues they can have unexpected bite. Drawing lessons from Guantánamo and elsewhere, it has aimed to offer a theoretical account of how certifications localize accountability and so concentrate the risk of blame. When targeted at high-stakes decisions, well-crafted certification requirements become tools of control. In politically fraught situations such as the transfer of detainees from Guantánamo or the security vetting of refugees from war-torn countries, the fear of blame will leave certifiers understandably reluctant to put their name on the line. The Executive’s priorities suffer as a result.

---

171. Mike DeBonis, *House Passes Bill To Tighten Flow of Syrian Refugees Over Obama’s Objections*, WASH. POST (Nov. 19, 2015), <http://www.washingtonpost.com/news/powerpost/wp/2015/11/19/house-moves-to-tighten-flow-of-syrian-refugees-over-obamas-objections> [http://perma.cc/2BMP-Z5EK].

172. See BEHN, *supra* note 91, at 2 (describing the public’s demand for accountability); MARK H. MOORE & MARGARET JANE GATES, *INSPECTORS-GENERAL: JUNKYARD DOGS OR MAN’S BEST FRIEND 1* (1986) (noting “an unquenchable thirst for accountability that cuts across the political spectrum”); *cf.* Weaver, *supra* note 80, at 381 (describing “hard to vote against” legislation).

173. The Obama Administration’s frustration with Secretaries Hagel and Carter, for instance, is discussed *supra* notes 59-67 and accompanying text.

If the American SAFE Act is any indication, while some legislators have yet to fully appreciate the potential power of certifications, others have realized that they can be a means of weaponizing risk to block executive action. Looking ahead, it is not hard to imagine shrewd politicians attempting to wield certification requirements to shape other issues that involve both difficult risk assessments and extreme blowback for being wrong. Such a possibility requires a reexamination of how certifications fit into a transparent and accountable system of governance.

DAVID MANNERS-WEBER\*

---

\* Yale Law School, J.D. 2017. I am grateful to Paul Gewirtz for his generous guidance on an earlier version of this paper. I would also like to thank Mark Chinen, Lara Finkbeiner, Jack Goldsmith, Becca Heller, Harold Koh, Noah Messing, Nicholas Parrillo, Jake Sullivan, Sam Thypin-Bermeo, and Camila YaDeau for their energizing conversations. Finally, my heartfelt thanks to Samir Doshi, Anthony Sampson, and Arjun Ramamurti for their thoughtful feedback and tireless work in editing this piece. Any errors are, of course, my own.