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## PRESIDENTIAL CERTIFICATIONS IN U.S. FOREIGN POLICY LEGISLATION

MARK A. CHINEN\*

In 1997 and 1998, the Clinton Administration certified that Mexico was one of several major drug-producing or drug-trafficking countries that had "cooperated fully with the United States" to achieve full compliance with international anti-narcotics goals.<sup>1</sup> Many argued that there was substantial evidence that Mexico should not be certified;<sup>2</sup> however, the

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1. Certification for Major Narcotics Producing and Transit Countries [Presidential Determination No. 97-18], 62 Fed. Reg. 11,589 (1997) (certifying Mexico for 1997). The other countries certified were Aruba, the Bahamas, Bolivia, Brazil, Cambodia, China, the Dominican Republic, Ecuador, Guatemala, Haiti, Hong Kong, India, Jamaica, Laos, Malaysia, Panama, Paraguay, Peru, Taiwan, Thailand, Venezuela, and Vietnam. *See id.* The Clinton Administration also certified Belize, Lebanon, and Pakistan on grounds of national interest, but chose not to certify Afghanistan, Burma, Colombia, Iran, Nigeria, or Syria. *See id.* *See also* Certification for Major Illicit Drug Producing and Drug Transit Countries [Presidential Determination No. 98-15], 63 Fed. Reg. 12,937 (1998) (certifying Mexico for 1998). The other countries certified were Aruba, the Bahamas, Belize, Bolivia, Brazil, China, the Dominican Republic, Ecuador, Guatemala, Haiti, Hong Kong, India, Jamaica, Laos, Malaysia, Panama, Peru, Taiwan, Thailand, Venezuela, and Vietnam. Cambodia, Colombia, Pakistan, and Paraguay were certified on national interest grounds. Afghanistan, Burma, Iran, and Nigeria were not certified. *See id.* *See also* Douglas Farah, *Despite Objections, Clinton Administration Certifies Mexico as Drug-Fighting Partner*, WASH. POST, Feb. 27, 1998, at A33; Tim Golden, *U.S. Lauds Mexico on Drug Efforts, Countering D.E.A.*, N.Y. TIMES, Feb. 27, 1998, at A1. As this article was being prepared for publication, on February 26, 1999, the Clinton Administration issued another certification for Mexico. Certification for Major Illicit Drug Producing and Drug Transit Countries [Presidential Determination No. 99-15], 64 Fed. Reg. 11,319 (1999). Again, the certification was issued despite criticism of Mexico's efforts to stop the flow of narcotics through the country. *See* Christopher S. Wren, *U.S. Gives Colombia and Mexico Nod on Drugs*, N.Y. TIMES, Feb. 27, 1999, at A6.

2. In 1997, the certification was issued just weeks after Mexico's top drug enforcement officer, Gutiérrez Rebello, had been arrested on suspicion of receiving bribes from Mexican drug traffickers. *See* Julia Preston, *Mexico's Drug Czar: Busted*, N.Y. TIMES, Feb. 23, 1997, § 4, at 2. In 1998, the certi-

certifications allowed Mexico to escape economic sanctions that otherwise would have been imposed by statute.<sup>3</sup>

In January 1998, the Administration certified that China had "provided clear and unequivocal assurances to the United States that it is not assisting and will not assist any nonnuclear-weapon state, either directly or indirectly, in acquiring nuclear explosive devices or the material and components for such devices."<sup>4</sup> Again, others argued that the certification was not justified,<sup>5</sup> but the certification allowed the United States to imple-

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fication was made despite allegations that a report by the Drug Enforcement Administration (DEA) had found that Mexico had not met its anti-narcotics goals and had not cooperated with the U.S. government in reaching those goals. See Farah, *supra* note 1, at A33. Thomas Constantine, administrator of the DEA, denied the existence of such a report in hearings before a House subcommittee, but stated that he did not believe that Mexico had accomplished its counter-narcotics goals or had succeeded in cooperating with the U.S. government in anti-narcotics efforts. See *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1999: Hearings Before the Subcomm. on Commerce, Justice, State, and the Judiciary Appropriations*, 105th Cong. 479-81 (1998).

3. See *infra* text accompanying notes 75-80.

4. Certification Pursuant to Section (b)(1) of Public Law 99-183 and to Section 902(a)(6)(B) of Public Law 101-246 [Presidential Determination No. 98-10], 63 Fed. Reg. 3447 (1998). See generally Tim Weiner, *U.S. Says China Isn't Helping Others Build Nuclear Bombs*, N.Y. TIMES, Dec. 11, 1997, at A5 (discussing background for the certification).

5. Concerns were heightened after it was reported that, in the month the certification was issued, U.S. officials had discovered and stopped secret negotiations between China and Iran over the sale of chemicals that could be used to enrich uranium for use in a nuclear explosive device. See Barton Gellman & John Pomfret, *U.S. Action Stymied China Sale to Iran; Chemical Involved Can Be Used to Enrich Uranium*, WASH. POST, Mar. 13, 1998, at A1. In anticipation of the certification, in November 1997, the House of Representatives approved a bill that would have extended from 30 to 120 days the time within which Congress could review a certification. See Political Freedom in China Act of 1997, H.R. 2358, 105th Cong. (1997). See generally Ashcroft: *Clinton Summit Decision was Wrong*, U.S. NEWSWIRE, Mar. 13, 1998, available in LEXIS, News Library, CURNWS File (discussing Senator Ashcroft's opposition to U.S. nuclear cooperation with China); *Clinton's Troubled China Deal: Why Congress is Suspicious of Promises of Good Behaviour*, FOREIGN REPORT, Nov. 27, 1997, available in LEXIS, News Library, CURNWS File (discussing Congressional concerns over the then-anticipated certification); Tim Weiner, *U.S. Weighs Deal to Halt Missile-Gear Sales by China*, N.Y. TIMES, Mar. 19, 1998, at A8 (discussing a report by the Congressional Research Service that China may be violating its commitment to abide by the Missile Technology Control Regime guidelines and reports by the U.S. intelligence community that China may be selling military technology to Iran and Pakistan).

ment a bilateral agreement it had entered into with China in 1985,<sup>6</sup> which in turn opened the door for U.S. companies to sell nuclear technology to China for civilian use.

Much of the debate surrounding these certifications focuses on whether they were justified. However there is also a question as to whether certifications should be required at all. Certification requirements—laws that require the President to certify as to particular conditions before acting<sup>7</sup>—appear throughout U.S. foreign policy legislation.<sup>8</sup> At least once in each administration, certifications have exposed the executive branch to severe criticism. A number of scholars<sup>9</sup> have discussed the requirements and their value, but more than a decade has passed since they have been examined in any detail.

I have two purposes in this article. The first is to assess the value of certification requirements by describing their operation in foreign affairs legislation and by accounting for their use and the controversies that attend them. I argue that

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6. Agreement for Cooperation Concerning Peaceful Uses of Nuclear Energy, July 23, 1985, U.S.-China, T.I.A.S. No. 12027.

7. Quite often, the term "certification" is used to describe the entire anti-narcotics review process. This article, however, looks at narrower legislative provisions, which may or may not be part of a wider review process, which prevent the President from acting, or which require him to act, unless he makes a certification of some kind.

8. In this article, the terms "foreign policy" and "foreign affairs" are intended to include defense matters.

9. See, e.g., Barry E. Carter, *International Economic Sanctions: Improving the Haphazard U.S. Legal Regime*, 75 CAL. L. REV. 1162 (1987) (citing certifications as an example of how difficult it is for Congress to control the President in foreign affairs matters and discussing how certifications can be tightened to strengthen such controls); Frank J. Garcia, *Americas Agreements—An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT'L L. 63, 100 n.198 (1997) (discussing foreign states' attitudes towards periodic requalifications for U.S. assistance); Amy S. Griffin, Comment, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U. L. REV. 163 (1983) (discussing weaknesses in certification requirements in human rights legislation); 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; 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 a controversial certification by the Carter administration that Nicaragua was not assisting rebels in El Salvador); Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 826-27 (1984) (discussing certification requirements and other Congressional methods to restrain the executive branch in foreign affairs).

these requirements result from unanswered questions about the respective roles of the legislative and executive branches in the formulation and implementation of U.S. foreign policy.<sup>10</sup> The requirements serve a number of purposes, of which the two most frequently cited are: 1) to control the executive branch in foreign affairs and 2) to influence foreign states. However, certification requirements are limited in their ability to perform either function—one reason why they are often criticized. Nevertheless, certification requirements perform other important tasks: they focus and encourage public debate on foreign policy matters; they help Congress and the President avoid or defuse harmful confrontations; and they shift the burden and the risk of decision-making from the legislative branch to the executive.

These sometimes conflicting purposes help to explain both the controversies that certification requirements engender and their widespread use despite such controversies. Because of their several uses, certification requirements are likely to remain part of U.S. foreign affairs legislation, but not without cost. If used too often, they hamper the executive branch's ability to conduct foreign policy and strain U.S. relations with other countries. But the greatest cost of certification requirements is that they encourage cynicism that is harmful to the rule of law.

The second purpose of this article is to suggest ways to minimize the costs of certification requirements. I argue that the number of certification requirements should be reduced. If Congress nevertheless wants to impose such requirements, either they should be drafted narrowly—so that it is clear when such requirements have been satisfied—or they should be drafted broadly—again, so that there is no question as to whether a certification is justified. Electing one of these alternatives is important because it is highly unlikely that such requirements will be subject to judicial review.

My findings are presented in four sections. I begin by sketching the features of certification requirements in current legislation. Next, I discuss the constitutional background out

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10. In taking this approach, I am indebted to scholars such as Harold Koh, who have discussed these recurring questions in other foreign policy contexts. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L. J.* 1255 (1988).

of which these requirements arise. Then, in what forms the greater part of this article, I describe and evaluate the several uses of certification requirements. I follow with a discussion of the costs such requirements impose and my recommendations for minimizing those costs.

### I. CURRENT LEGISLATION

Black's Law Dictionary defines a "certificate" as a "written assurance, or official representation, that some act has or has not been done, or some event occurred, or some legal formality has been complied with"<sup>11</sup> and a "certification" as "[t]he formal assertion in writing of some fact."<sup>12</sup> Congress often enacts legislation that requires the President to issue a certificate as to specific facts or conditions before he may act in a foreign policy matter. For example, before May 1998, the President was required to certify to Congress, before providing military assistance to Pakistan, that Pakistan did not "possess a nuclear explosive device and that the proposed United States military assistance program [would] reduce significantly the risk that Pakistan will possess a nuclear explosive device."<sup>13</sup> Before providing economic assistance to the Democratic Republic of the Congo, the President had to certify that the Congo was "cooperating fully with investigators from the United Nations in accounting for human rights violations committed in the Democratic Republic of Congo or adjacent countries."<sup>14</sup> Before expanding diplomatic ties with Vietnam, he had to certify that the Vietnamese government was cooperating fully in accounting for missing prisoners of war and persons missing in action.<sup>15</sup>

Certification requirements appeared early in U.S. history.<sup>16</sup> However, in the area of foreign affairs, they became

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11. BLACK'S LAW DICTIONARY 225 (6th ed. 1990).

12. *Id.* at 227.

13. 22 U.S.C. § 2375(e) (1994).

14. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 585, 111 Stat. 2386 (1997).

15. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 609, 111 Stat. 2440 (1997).

16. Such certifications involved both foreign and domestic policy. *See, e.g.*, Act of 1789 (providing that payment due to members and officers of the Senate shall be certified by the President and that the certificate is a suffi-

much more common in the 1970s, following two decades of relative acquiescence to the President, when Congress began to reassert itself in this area.<sup>17</sup> Since then, the number of certi-

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cient warrant of payment); Act of Aug. 5, 1854, 10 Stat. 587 (1854) (implementing Treaty Between the United States and the United Kingdom, signed June 1, 1854, and, among other things, providing for the elimination of certain customs duties on imports from Canada, upon a Presidential proclamation that he had received evidence that "the Imperial Parliament of Great Britain, and the Provincial Parliaments of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island, have passed laws on their part to give full effect to the provisions of the treaty . . ."); Act of Feb. 28, 1920, Ch. 91, 41 Stat. 474, 476-77 (1920) (codified at 49 U.S.C. § 1(15) (1925-26)) (authorizing the Interstate Commerce Commission to give preference to certain shipments upon a Presidential certification that "such preferences and priorities are essential to the national defense and security 'in time of war or threatened war'").

17. See Stephen B. Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246 (1982) (discussing the legislative history and executive implementation of § 502B of the Foreign Assistance Act, one of the first pieces of legislation representing Congress's growing assertiveness in foreign affairs). See also STEPHEN E. AMBROSE & DOUGLAS G. BRINKLEY, *RISE TO GLOBALISM: AMERICAN FOREIGN POLICY SINCE 1938*, 243-45 (8th rev. ed. 1997) (discussing Congress's increasing involvement in foreign affairs).

One of the earliest certification requirements in foreign affairs was added to the so-called first Hickenlooper Amendment. 22 U.S.C. § 2370 (1994). The amendment was enacted in 1962 in response to the expropriation of U.S. property by foreign countries, such as Cuba. Under the amendment, the President must terminate economic assistance to the government of any country that has seized the property of U.S. citizens or has committed equivalent acts. See *id.* At the time of its enactment, there was no waiver provision in the statute. The amendment was used sporadically and with mixed reviews. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 689-90 (2d ed. 1995).

In 1973, however, Congress inserted a waiver provision into the statute that provided that the President may not waive the provisions of the amendment "unless the President determines and certifies that such a waiver is important to the national interests of the United States." 22 U.S.C. § 2370(e)(1). The President is required to report such a waiver immediately to Congress. See *id.*

Certification requirements are but one of several legislative tools employed by Congress that reflect its growing assertiveness in foreign affairs. Other statutes have provided Congress's position on foreign policy issues. Other legislation has required the President to notify Congress after taking action on a foreign affairs matter. Still other pieces have required the President to consult with Congress before taking such action, earmarked appropriations for specific foreign policy purposes, provided for legislative vetoes of Presidential actions, or prohibited certain acts altogether. Often these

· fication requirements has mushroomed. Many appear in major pieces of foreign policy legislation such as the Foreign Assistance Act<sup>18</sup> and the Arms Export Control Act.<sup>19</sup> If one counts individual provisions that appear within those Acts, as well as those found in other legislation, certification requirements now appear in more than one hundred provisions relating to U.S. foreign policy.<sup>20</sup> Certification requirements figure in almost every major U.S. foreign policy issue: the use of force,<sup>21</sup> human rights,<sup>22</sup> narcotics,<sup>23</sup> terrorism,<sup>24</sup> arms control

measures were used in the same legislation. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, §§ 1202-1203, 111 Stat. 1629 (1997). Section 1202 states the position of Congress with respect to the presence of ground forces in Bosnia. *Id.* § 1202. Subsection 1203(a) then prohibits any funds appropriated or otherwise made available to the Department of Defense for fiscal year 1998 or thereafter from being used for deploying U.S. ground forces in Bosnia, unless the President, after consulting with bipartisan leadership in Congress, transmits to Congress a certification:

- (1) that the continued presence of United States ground combat forces, after June 30, 1998, in the Republic of Bosnia and Herzegovina is required in order to meet the national security interests of the United States; and
- (2) that after June 30, 1998, it will remain United States policy that United States ground forces will not serve as, or be used as, civil police in the Republic of Bosnia and Herzegovina.

*Id.* § 1203(a). Finally, subsection 1203(b) requires the President to provide a detailed report justifying and describing the continued presence of such forces in Bosnia.

18. 22 U.S.C. §§ 2151-2430i (1994).

19. 22 U.S.C. §§ 2751-2799aa-2.

20. *See infra*, Appendix.

21. *See, e.g.*, 50 U.S.C. § 1544(b) (1994). *See also supra* note 17.

22. *See, e.g.*, 22 U.S.C. § 2304. No security assistance may be given, and no licenses for the export of crime control equipment may be issued, to a country whose government is engaged in gross violations of internationally recognized human rights, unless the President certifies that "extraordinary circumstances exist warranting provision of such assistance and issuance of such licenses." *Id.* Similarly, military training and education may not be provided to such a country, unless the President certifies that "extraordinary circumstances exist warranting provision of such assistance." 22 U.S.C. § 2347.

23. *See infra* text accompanying notes 75-80.

24. *See, e.g.*, 22 U.S.C. § 2781 (Supp. II 1994). No defense articles or services may be sold or licensed for export to a country which the President certifies "is not cooperating fully with United States antiterrorism efforts." *Id.* However, the President may waive this restriction with respect to a spe-



and nuclear non-proliferation,<sup>25</sup> and the Middle East conflict.<sup>26</sup> They appear in legislation governing U.S. relations with countries such as Afghanistan,<sup>27</sup> Angola,<sup>28</sup> Burma,<sup>29</sup> Greece,<sup>30</sup> Ireland,<sup>31</sup> Japan,<sup>32</sup> the countries of the Middle

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cific transaction if the President determines that "the transaction is important to the national interests of the United States." *Id.*

25. *See, e.g.*, 22 U.S.C. § 2799aa-1 (1994). The President may waive economic sanctions against a country which is involved in the transfer of nuclear reprocessing technology or the transfer or use of nuclear explosive devices if, with respect to a country involved with the transfer of reprocessing technology, he certifies that "the termination of such assistance would be seriously prejudicial to the achievement of United States nonproliferation objectives or otherwise jeopardize the common defense and security," or, with respect to a country involved in the transfer or use of a nuclear explosive device, he certifies "that an immediate imposition of sanctions on that country would be detrimental to the national security of the United States." *Id.*

26. *See, e.g.*, Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 564, 108 Stat. 382, 484 (1994), *as amended by* Foreign Relations Laws Technical Amendments, Pub. L. No. 103-415, § 1(l), 108 Stat. 4299, 4301 (1994). Defense assistance may not be given to a government or international organization which, as a matter of policy, has asked for compliance or requested information in connection with the Arab boycott of Israel, unless the President determines and certifies to Congress that "that country or organization does not currently maintain a policy or practice of making such requests or solicitations." *Id.* *See also* Presidential Determination No. 96-41, 61 Fed. Reg. 43,137 (1996), pursuant to the Middle East Peace Facilitation Act of 1995, Title VI, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 603(c), 110 Stat. 755, 758-59 (1997).

27. *See infra* note 39.

28. *See* 12 U.S.C. § 635(b)(11) (1994). Angola is not eligible for Export-Import Bank of the United States (Exim Bank) financing for most products and services unless the President certifies that free and fair elections have been held in Angola and other steps towards democratization have been taken.

29. *See* Exec. Order No. 13,047, 3 C.F.R. 202 (1998).

30. *See* 22 U.S.C. § 2373(d) (1994). Before providing security assistance to Greece or Turkey, the President must certify that the furnishing of such assistance will be consistent with certain principles set forth in the statute.

31. *See* Presidential Determination No. 97-33, 62 Fed. Reg. 53,217 (1997), certifying Ireland under § 5(c) of the Anglo-Irish Agreement Support Act of 1986, Pub. L. No. 99-415, 100 Stat. 947, 948 (1986).

32. *See* Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8105, 104 Stat. 1856, 1902 (1990). Subsection (b) provides for annual reductions in the number of military personnel in Japan, unless the President certifies before the end of each fiscal year that "Japan has agreed to offset for that fiscal year the direct costs incurred by the United States

East,<sup>33</sup> North Korea,<sup>34</sup> Pakistan,<sup>35</sup> and the states of the former Soviet Union<sup>36</sup> and of the former Yugoslavia.<sup>37</sup> They also are present in legislation governing U.S. relations with multilateral organizations, such as the United Nations.<sup>38</sup>

Certification requirements vary widely in their content. Some are primarily statements of policy, for example: “[t]he proposed action is in the national security interest of the United States.” Others are primarily statements of fact: “country X does not possess nuclear weapons” or “[t]he government of Afghanistan has apologized officially and assumes responsibility for the death of Ambassador Adolph Dubs . . . .”<sup>39</sup> Still others might be described as a mixture of statements of fact, policy, and sometimes law—“military assistance to [c]ountry X will reduce the risk that [c]ountry X will develop or procure nuclear weapons on its own,” “country X is not engaged in a consistent pattern of gross violations of internationally recognized human rights,” or “country X has not implemented laws

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related to the presence of all United States military personnel in Japan, excluding the military personnel title costs.” *Id.* § 8105(b).

33. *See supra* note 26.

34. *See infra* note 84.

35. *See supra* text accompanying note 13.

36. *See infra* note 40 and text accompanying note 161.

37. *See* Presidential Determination No. 97-26, 62 Fed. Reg. 32,015 (1997) (waiving a prohibition of certain assistance to Serbia and Montenegro under § 1511 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, 1840 (1993) and § 540 of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-155 (1997)).

38. *See* 50 U.S.C. § 404g(a)(1) (1994). No intelligence information may be provided to the United Nations or its affiliates unless the President certifies to Congress that “the Director of Central Intelligence, in consultation with the Secretary of State and the Secretary of Defense, has established and implemented procedures, and has worked with the United Nations to ensure implementation of procedures, for protecting from unauthorized disclosure United States intelligence sources and methods connected to such information.” *Id.* The President may waive this requirement if he certifies to Congress that “providing such information to the United Nations or an organization affiliated with the United Nations, or to any officials or employees thereof, is in the national security interests of the United States.” 50 U.S.C. § 404g(a)(2).

39. 22 U.S.C. § 2374 (a) (1994).

which discriminate against religious organizations, in violation of its obligations under international law.”<sup>40</sup>

Most of these requirements are part of legislation that determines whether countries are eligible for U.S. economic or military assistance. Several important examples are given above, including the annual anti-narcotics review process discussed in the introduction.<sup>41</sup> In this regard, and as mentioned earlier, “certification” is sometimes used to refer to an entire process which requires countries to “re-qualify” for economic assistance.

Finally, some requirements allow Congress to overturn the President’s certification of a country. A good example is legislation on nuclear nonproliferation. The Arms Export Act forbids, among other things, economic or military assistance to any country that delivers or receives nuclear enrichment equipment, materials, or technology, unless certain statutory conditions are met.<sup>42</sup> However, the President may waive this

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40. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 577, 111 Stat. 2386, 2433-34 (1997). A certification’s content is an important factor in determining whether the courts can review a Presidential certification.

41. See *supra* text accompanying notes 1-3 and *infra* text accompanying notes 75-80. See also 22 U.S.C. § 2373 (1994) (requiring a certification before military assistance may be provided to Turkey or Greece); 22 U.S.C. § 2781 (Supp. II 1984) (prohibiting defense articles or services to be sold or licensed for export to a country that the President certifies “is not cooperating fully with United States antiterrorism efforts”); Iraq Sanctions Act of 1990, Pub. L. No. 101-513, § 586H, 104 Stat. 2047, 2052-53 (1990) (authorizing the President to use a certification to waive economic sanctions against Iraq).

An important exception, however, is the War Powers Resolution, which is intended to control the President’s ability to use U.S. armed forces abroad. 50 U.S.C. §§ 1542-48 (1994). Under the Resolution, the President must report to Congress within 48 hours of introducing U.S. armed forces into hostilities or in other specified situations. Within 60 days of submission of the report by the President, the President must terminate the use of U.S. armed forces unless Congress declares war, the 60-day limit is extended by law, or in the case of armed attack on the United States. The 60-day period may be extended for an additional 30 days if the President certifies 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.” 50 U.S.C. § 1544(b).

42. See 22 U.S.C. § 2799aa (1994). The supplying and receiving countries must agree to place all such items under multilateral supervision when avail-

ban if he certifies that "termination of such assistance would have a serious adverse effect on vital United States interests" and that "he has received reliable assurances that the country in question will not acquire or develop nuclear weapons or assist other nations in doing so."<sup>43</sup> Certification takes effect when it is received by Congress;<sup>44</sup> however, the statute gives Congress thirty days after receiving the certification to disapprove such assistance by joint resolution.<sup>45</sup> If the joint resolution is adopted, the President's certification ceases to be effective and all aid must stop.<sup>46</sup>

Certification requirements are common and in most cases certifications are issued without comment. However, every so often, as in the cases of Mexico and China discussed earlier, certifications become centers of controversy. The Reagan Administration was severely criticized for certifying that the government of El Salvador had met certain human rights criteria which qualified it to receive U.S. economic and military assistance during the 1980s.<sup>47</sup> A less familiar controversy surrounded a certification by the Bush Administration in the early 1990s which made Peru eligible for U.S. assistance. Under the International Narcotics Control Act of 1990,<sup>48</sup> the President was required to certify that Peru had met detailed requirements with respect to human rights before Peru was eligible to receive anti-narcotics assistance.<sup>49</sup> In 1991, the State Department issued a determination that Peru had met

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able, or the receiving country must agree with the International Atomic Energy Agency to place all such items under the safeguards system of the Agency.

43. 22 U.S.C. § 2799aa (b)(1).

44. *See* 22 U.S.C. § 2799aa (b)(2)(A).

45. *See id.*

46. *See id.*

47. *See* Horton & Sellier, *supra* note 9, at 842-55.

48. International Narcotics Control Act of 1990, Pub. L. No. 101- 623, 104 Stat. 3350 (1990).

49. In particular, § 4 of the Act required the President to determine that:

- (1) that country is implementing programs to reduce the flow of cocaine to the United States in accordance with a bilateral or multilateral agreement, to which the United States is a party, that contains specific, quantitative and qualitative, performance criteria with respect to those programs;
- (2) the armed forces and law enforcement agencies of that country are not engaged in a consistent pattern of gross violations of internationally recognized human rights, and the government

the human rights standard and announced a package of \$60 million in budgetary assistance and \$35 million in military assistance under the Act.<sup>50</sup> In its determination, the State Department argued that: “[N]either we nor major human rights groups within Peru believe that the democratically elected government of Peru is engaged in a consistent pattern of gross violations of internationally recognized human rights.”<sup>51</sup> In pressing its case, the State Department argued that President Fujimori had not been personally involved in any human rights abuses by the military; the Department also noted that progress was being made in three prominent pending human rights cases. Nevertheless, the certification met with protest. Members of the human rights community argued that there was no basis for such a determination. Congressional hearings were held on the certification, in which one member of Congress essentially accused the Bush Administration of lying.<sup>52</sup>

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of that country has made significant progress in protecting internationally recognized human rights, particularly in —

- (A) ensuring that torture, cruel, inhuman, or degrading treatment or punishment, incommunicado detention or detention without charges and trial, disappearances, and other flagrant denials of the right to life, liberty, or security of the person, are not practiced; and
  - (B) permitting an unimpeded investigation of alleged violations of internationally recognized human rights, including providing access to places of detention, by appropriate international organizations (including nongovernmental organizations such as the International Committee of the Red Cross) or groups acting under the authority of the United Nations or the Organization of American States; and
- (3) the government of that country has effective control over police and military operations related to counter-narcotics and counterinsurgency activities.

*Id.* § 4, 104 Stat. 3353-54.

50. See Determination Under Section 4(a) of the International Narcotics Control Act of 1990, 56 Fed. Reg. 38, 165 (1991); Holly Burkhalter, *The Peruvian PR Coup on Capitol Hill*, LEGAL TIMES, Sept. 23, 1991, at 26. The power to make the determination had been delegated to the State Department.

51. Dep't State, International Narcotics Control Act of 1990: Justification for Determination: Peru, reprinted in *Review of the Presidential Determination on Narcotics Control and Human Rights in Peru: Hearings Before the House Comm. on Foreign Affairs*, 102d Cong. 171 (1991) [hereinafter *Human Rights in Peru*].

52. See *id.* at 75 (statement of Ted Weiss, Chairman, Committee on Governmental Operations, Subcommittee on Human Resources and Intergovernmental Relations, stating that “It seems . . . [that] it is counterproductive

In the end, Congress and the Bush Administration compromised by delaying \$10 million in military assistance.<sup>53</sup>

What accounts for the controversies to which these legislative tools give rise? A partial answer comes from an examination of the constitutional realities that underlie the requirements, a topic I will now address.

## II. CONSTITUTIONAL UNCERTAINTY

Certification requirements can be explained in large part as manifesting and responding to the tensions inherent in a system, like that of the United States, in which national power is distributed among several branches of government.<sup>54</sup> Such tensions are particularly heightened in foreign affairs. The U.S. Constitution empowers both the executive and legislative branches to act in foreign matters, but the lines of responsibility are blurred.<sup>55</sup> Article I gives Congress several powers perti-

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to have the law on the books which we then not only ignore, but make fraudulent statements which everybody, on all sides, knows are fraudulent.”).

53. See Eugene Robinson, *U.S. Drug-Fighting Program in Peru "Enormously Delayed,"* WASH. POST, Nov. 24, 1991, at A28.

54. The policies underlying the separation of powers are well known. National power is distributed among the three branches in part to promote efficiency. Each branch is uniquely structured to fulfill a particular role in national government. The hallmark of this efficiency was the concentration of the executive power in a President able to act with dispatch. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 363 (2d ed. 1991).

At the same time, power is dispersed to prevent tyranny. See *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (stating that the “doctrine of the separation of powers was adopted . . . not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy.”). The separation of powers attempts to ensure that those who make law do not execute it, thereby seeking to prevent power from being concentrated in one branch of government at the expense of the governed. It also seeks to limit the reach of government by requiring a broad consensus among the three branches of government before such power can be exerted against the citizenry. Finally, it is meant to reduce the risk that factions will exercise undue influence over government. See STONE ET AL., *supra*, at 362-67.

55. The problem has been much discussed in the literature. For example, see the debates between Alexander Hamilton and James Monroe, writing under the pseudonyms Pacificus and Helvidius, *reprinted in THE LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793* (Scholars’ Facsimiles and Reprints 1976). See also ELLEN C. COLLIER, *HOUSE*

ment to foreign affairs, including the power to “lay and collect Taxes, Duties, Imposts and Excises;” to “provide for the common Defense and general Welfare of the United States;” to “regulate Commerce with foreign Nations;” to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;” to “declare” war; to “raise and support Armies;” and to “provide and maintain a Navy.”<sup>56</sup> At the same time, Article II grants the President powers relevant to foreign affairs: the “executive Power shall be vested” in the President;<sup>57</sup> the President serves as Commander in Chief of the armed forces;<sup>58</sup> he has the power—with the advice and consent of the Senate—to make treaties and appoint ambassadors;<sup>59</sup> and he is to receive ambassadors and other public ministers from other countries.<sup>60</sup> Not surprisingly, this division of power sometimes has led to disagreements between the two branches in the formulation and implementation of foreign policy.<sup>61</sup>

Courts and commentators have identified a number of principles to help overcome this impasse: reliance on the constitutional text, the Framers’ intent, custom, and the relative

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COMM. ON FOREIGN AFFAIRS, STRENGTHENING EXECUTIVE-LEGISLATIVE CONSULTATION ON FOREIGN POLICY, 98th Cong., 1st Sess. (Comm. Print No. 8 1983); EDWARD S. CORWIN ET. AL., *THE PRESIDENT: OFFICE AND POWERS, 1787-1984: HISTORY AND ANALYSIS OF PRACTICE AND OPINION* (5th rev. ed. 1984); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* (1990); Koh, *supra* note 10; VICTORIA MARIE KRAFT, *THE U.S. CONSTITUTION & FOREIGN POLICY: TERMINATING THE TAIWAN TREATY* (Contributions in Political Science No. 270, Bernard K. Johnpoll ed., 1991); Thomas E. Mann, *Making Foreign Policy: President and Congress, in A QUESTION OF BALANCE: THE PRESIDENT, THE CONGRESS, AND FOREIGN POLICY I* (Thomas E. Mann ed., 1990); Stefan A. Riesenfeld, *The Powers of the Congress and the President in International Relations: Revisited*, 75 CAL. L. REV. 405 (1987); Eugene W. Rostow, *Special Issue: The United States Constitution in its Third Century: Foreign Affairs: Distribution of Constitutional Authority: President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT’L L. 740 (1989).

56. U.S. CONST. art. I, § 8.

57. *Id.* art. II, § 1, cl. 1.

58. *See id.* art. II, § 2, cl. 1.

59. *See id.* art. II, § 2, cl. 2.

60. *See id.* art. II, § 3.

61. Disputes arose as early as Washington’s day, when Congress protested Washington’s declaration of U.S. neutrality in the war between France and England and his refusal to provide documents relevant to the negotiation of the Jay treaty. *See* CORWIN ET. AL., *supra* note 55, at 212.

strengths of each branch in engaging in foreign affairs.<sup>62</sup> Although each approach has influenced decision-making in this area, none is completely dispositive. For example, there is a strong argument that, all things being equal, the constitutional text should control. But in most cases, the text is not specific enough to provide more than general guidance in resolving disputes between the executive and the legislative branches in foreign affairs matters. One might look beyond the constitutional text for other sources of guidance. The Framers' intent is relevant, but such an approach presupposes that it is possible to determine the Framers' intent with respect to a particular issue. Alternatively, one may argue that the executive branch is simply better suited institutionally to conduct foreign affairs.<sup>63</sup> However, this approach presumes that efficiency is paramount, when the Constitution may in fact accept, and indeed mandate, inefficiency as the cost of preserving other values.<sup>64</sup>

Despite this quandary, many commentators would agree that today the executive branch is dominant in foreign affairs.<sup>65</sup> This dominance may stem from several factors: the text of the Constitution; the influence of strong Presidents, such as Washington, Jackson, Lincoln, and the two Roosevelts; the comparative institutional abilities of the two political

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62. See GLENNON, *supra* note 55, at 37-52.

63. See, e.g., THE FEDERALIST NO. 64 (John Jay), No. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Alexander Hamilton argued:

That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.

*Id.* at No. 70, at 424. Because the conduct of foreign affairs requires decision, activity, secrecy, and dispatch, so the argument goes, the President, as an individual, is much better suited for this role than Congress, as a collection of hundreds of individuals.

64. See GLENNON, *supra* note 55, at 47. See also *supra* note 52.

65. See, e.g., CORWIN ET. AL., *supra* note 55, at 215 ("From the point of view of the present moment, it is not extravagant to say that *immensely the most important single factor in the determination of American foreign policy has been presidential guidance of it.*") (emphasis in original); Koh, *supra* note 10, at 1291-1318 (discussing reasons why the President is dominant in foreign affairs).



branches;<sup>66</sup> and the reluctance of the courts to intrude in foreign policy matters.

This last factor is discussed in more detail in later sections. At this point it is important to note that: 1) the reluctance on the part of the courts is real and 2) it is debatable whether the judiciary should mediate between the legislative and executive branches. Dean Choper, for example, has argued that the "federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another; . . . their final resolution [should] be remitted to the interplay of the national political process."<sup>67</sup> In Choper's view, judicial intervention is unnecessary because the legislative and executive branches have tremendous incentives to guard their respective powers.<sup>68</sup> Others, however, have argued that judicial intervention is necessary to overcome the stalemate between the two political branches.<sup>69</sup> Regardless of how one comes out on this debate, in reality we are governed by a system in which important questions about the respective roles of the legislative and political branches remain unanswered. As will be seen in the next section, certification requirements both highlight and respond to this constitutional uncertainty.

### III. THE FUNCTIONS OF CERTIFICATION REQUIREMENTS

One way to understand and assess the value of certification requirements is to identify the purposes they serve and then evaluate how well they meet these aims. Certification requirements serve at least five purposes: 1) controlling execu-

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66. In a Note discussing the roles of Congress and the President in U.S. arms control policy, Kevin Sheehan asks whether a shift in control from the President to Congress in arms control policy would result in better accountability. Kevin P. Sheehan, Note, *Executive-Legislative Relations and the U.S. Arms Export Control Regime in the Post-Cold War Era*, 33 COLUM. J. TRANSNAT'L L. 179, 204 (1995). He observes that because of the Congressional committee structure, a shift in control would result in a shift in responsibility from the President, who is accountable to the entire nation, to committee chairs, who are accountable only to their respective home states or districts. He also questions whether a shift in control would result in better policy. *See id.*

67. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 263 (1982).

68. *See id.* at 275.

69. *See, e.g.,* HENKIN, *supra* note 55, at 69-91 (arguing, among other things, that judicial review is "necessary" in foreign affairs).

tive action in foreign affairs (and, conversely, exerting Congressional influence in U.S. foreign policy); 2) influencing the behavior of foreign states; 3) focusing and encouraging debate about foreign policy issues; 4) avoiding or diffusing confrontations between the President and Congress in foreign affairs; and 5) shifting the burden and risks of decision-making from the legislative to the executive branch.

#### A. *Controlling Executive Behavior*

One of the main purposes of certification requirements is to control the President in the area of foreign affairs and, conversely, to allow Congress to exert its influence in this area.<sup>70</sup> As will be discussed later, in difficult cases the requirements

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70. This article leaves largely unexplored the important question of whether Congress has the right to constrain the President in the first place. The issues are complex. For example, suppose Congress enacted legislation requiring the President to issue a certification before receiving the ambassador of a country with which the United States had established diplomatic relations. Such legislation would be highly suspect because the Constitution expressly gives the President power to receive ambassadors; the certification requirement would be seen as constraining a power expressly reserved to the President.

Suppose, however, Congress enacts legislation that touches on a matter clearly within the scope of its own powers, which nevertheless has a constraining effect on the President's powers. For example, Congress forbids the President from using any funds appropriated by any act of Congress to produce "lethal binary munitions," unless the President certifies that "the production of such munitions is essential to the national interest." 50 U.S.C. § 1519(a) (1994). Congress holds the power of the purse, which means that Congress should have the power to determine how that purse is used. See, e.g., Thomas M. Franck & Clifford A. Bob, *The Return of Humpty-Dumpty: Foreign Relations Law after the Chadha Case*, 79 AM. J. INT'L L. 912, 944 (1985) ("In seeking to co-determine U.S. foreign policy, Congress is on firmest constitutional ground when it deploys its undoubted discretion over government spending.") (citation omitted). But the prohibition may adversely affect the President's ability to act as Commander in Chief.

Congress also prohibits the President from sharing with the United Nations information gained from U.S. intelligence sources, unless the President certifies that adequate procedures have been implemented to protect against "unauthorized disclosure of United States intelligence sources and methods connected to such information." 50 U.S.C. § 404g(d)(1) (1994). Here, Congress could argue that such a prohibition is within its power to provide for the common defense, but the textual authority upon which Congress can base this prohibition is less clear—certainly, it is not as specific as the Constitutional provisions that give Congress the power of the purse. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

are not effective in this regard. In theory, however, they have some constraining effect on the executive branch.

Certification requirements shape decisions by requiring the executive branch to take into account the concerns they represent—they ensure that the President has covered all the bases before making a foreign policy decision. For example, by requiring the President to certify that China has made assurances that it is not engaged in proliferation activities, the certification requirement forces the President to take that factor into account as he determines whether to further economic relations with China.

In addition, certification requirements have formal characteristics that may have a constraining effect on the executive branch. A certification is a formal statement, often issued as a Presidential determination. The formality of such a statement alone may have a cautionary effect, but, more importantly, a certification forces the President to go on record as having stated that the substantive claims of a certification are true. A President—whether acting in good faith, wanting to avoid the embarrassment of being proven wrong, or simply unwilling to be caught in a lie—will consider carefully whether there are grounds for making such a representation.<sup>71</sup>

Moreover, it is usually in the President's interest to cooperate with Congress, if only because the costs of acting unilaterally are high, particularly if Congress opposes the action. For reasons discussed later, the President may be able to get away with issuing a highly controversial certification, but his ability to act in the future may be severely curtailed.<sup>72</sup> For

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71. Here, an analogy can be drawn to business certifications. Since certificates in business transactions tend to be relatively formal, they perform a cautionary function by requiring the certifying party to consider carefully the representations he or she is making. They also perform an evidentiary function because an individual is on record as having made representations about certain facts. Finally, they perform what might be termed a constitutive function, in that they serve as predicates for causes of action in the event there is a dispute between the parties. For example, they may form the basis for an action for fraud or for a defense of misrepresentation because they are representations upon which persons rely.

72. "[I]n the face of substantial congressional opposition, constitutionalism and politics will combine to produce a volatile mixture, one which seriously impairs the president's ability to conduct a consistent, coherent, and workable foreign policy on behalf of the nation." KRAFT, *supra* note 55, at 143.

one, Congress may refuse to cooperate with the President in matters where such cooperation is essential, such as the passage of legislation or the confirmation of Presidential appointees. On a more mundane level, Congress can express its disapproval by requiring administration officials to appear before it to justify certification decisions, a task that is both time-consuming and burdensome.<sup>73</sup>

Despite these Congressional controls, certification requirements are not particularly effective in controlling executive behavior. There are at least five factors which make the requirements porous: 1) ambiguities in drafting; 2) executive evaluations; 3) the strong temptation to use extra-statutory criteria in making certifications; 4) unwieldy Congressional methods of overturning certifications; and 5) the difficulty (if not impossibility) of obtaining judicial review.<sup>74</sup>

### 1. *Drafting*

Certification requirements often fail to restrain the executive because they are broadly drafted, thus making it relatively easy for an administration to make a colorable argument that a certification is justified. The anti-narcotics statute provides a good example—§ 490 of the Foreign Assistance Act requires the President to determine which countries are “major illicit drug producing countries” or “major drug-transit countries” and to inform Congress of his determination by November 1 of each year.<sup>75</sup> The statute requires the United States to im-

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73. This is true in other contexts. For example, one means of encouraging a government to comply with its treaty obligations is to require it to appear before an international body and explain such compliance. See Monica L. McHam, Comment, *All's Well that Ends Well: A Pragmatic Look at International Criminal Extradition*, 20 Hous. J. Int'l L 419, 441 n.152 (1998) (citing Frederic L. Kirgis, Jr., *Enforcing International Law*, ASIL INSIGHT, (Am. Soc'y Int'l L.) Jan.-Feb. 1996, at 2).

74. Several of these factors are identified and discussed with respect to Congressional control over the President in Koh, *supra* note 10, at 1291-1318.

75. 22 U.S.C. § 2291j(h) (1994). A “major illicit drug producing country” is defined as:

- (A) a country in which 1,000 hectares or more of illicit opium poppy is cultivated or harvested during a year;
- (B) 1,000 hectares or more of illicit coca is cultivated or harvested during a year; or

pose economic sanctions against such countries,<sup>76</sup> but these sanctions may be waived if the President makes one of two certifications. The President may certify that the country in question “has cooperated fully with the United States, or has taken adequate steps on its own, to achieve full compliance with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.”<sup>77</sup> Alternatively, he may certify that “the vital national interests of the United States require that the assistance withheld . . . be provided and that the United States not vote against multilateral development bank assistance for that country. . . .”<sup>78</sup>

The statute requires that the President take into account a number of factors when deciding whether to certify a country, which vary with the type of certification being made. When determining whether a country has cooperated with the United States, the President is required to:

[C]onsider the extent to which the country has—

- (A) met the goals and objectives of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, including action on such issues as illicit cultivation, production, distribution, sale, transport and financing, and money laundering, asset seizure, extradition, mu-

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- (C) 5,000 hectares or more of illicit cannabis is cultivated or harvested during a year, unless the President determines that such illicit cannabis production does not significantly affect the United States.

22 U.S.C. § 2291(e)(2). A “major drug-transit country” is defined as a country: “(A) that is a significant direct source of illicit narcotic or psychotropic drug or other controlled substances significantly affecting the United States; or (B) through which are transported such drugs or substances; [sic].” 22 U.S.C. § 2291(e)(5).

76. The President must withhold 50% of U.S. bilateral assistance to that country and the United States must oppose assistance from “multilateral development banks” to the country in question. *See* 22 U.S.C. § 2291j(a). “Multilateral development bank” means the International Bank for Reconstruction and Development, the International Development Association, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development. *See id.*

77. 22 U.S.C. § 2291(b)(1)(A).

78. 22 U.S.C. § 2291(b)(1)(B).

tual legal assistance, law enforcement and transit cooperation, precursor chemical control, and demand reduction;

- (B) accomplished the goals described in an applicable bilateral narcotics agreement with the United States or a multilateral agreement; and
- (C) taken legal and law enforcement measures to prevent and punish public corruption, especially by senior government officials, that facilitates the production, processing, or shipment of narcotic and psychotropic drugs and other controlled substances, or that discourages the investigation or prosecution of such acts.<sup>79</sup>

If the President certifies that it is in the national interest to waive sanctions, the President must include in the certification:

- (A) a full and complete description of the vital national interests placed at risk if United States bilateral assistance to that country is terminated pursuant to this section and multilateral development bank assistance is not provided to such country; and
- (B) a statement weighing the risk described in . . . subparagraph (A) against the risks posed to the vital national interests of the United States in combating narcotics or to take adequate steps to combat narcotics on its own.<sup>80</sup>

Even with these guidelines, however, interpreting and implementing the statute is difficult at best. What, for example, are the "goals and objectives" of the United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances?<sup>81</sup> The Convention itself provides that its goals in-

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79. 22 U.S.C. § 2291j(b)(2).

80. 22 U.S.C. § 2291j(b)(3).

81. United Nations Convention Against Illicit Traffic in Narcotics Drugs and Psychotropic Substances, *opened for signature* Dec. 20, 1988, 28 I.L.M. 493 (1989).

clude action on issues such as illicit cultivation, production, distribution, sale, transport, and financing; money laundering; asset seizure; extradition; mutual legal assistance; law enforcement and transit cooperation; precursor chemical control; and demand reduction.<sup>82</sup> But how many of these issues does a country have to address in a given year to qualify for certification? All of them? A majority of items? Just one? Ideally, a country would be expected to take action in all areas, but the statute does not expressly require this. Further, if a country has taken "action" on a particular issue—say, for example, by extraditing a suspect to the United States for prosecution—has it then met a goal or objective of the Convention, or is something more required? Add to this uncertainty the fact that a country need only have "cooperated" with the United States in taking "adequate steps" "to achieve full compliance" with these goals and objectives, and it is easy to see how an administration

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82. Not surprisingly, these issues coincide roughly with a number of concerns addressed by the Convention. They include the creation of drug-related offenses (art. 3), jurisdiction over such crimes (art. 4), confiscation of drug-related materials and funds (art. 5), extradition of persons suspected of having committed drug-related offenses (art. 6), mutual legal assistance in law enforcement (art. 7), transfers of criminal proceedings (art. 8), other forms of cooperation and training (art. 9), cooperation and assistance with respect to drug-transit states (art. 10), controlled delivery of narcotics (art. 11), the prevention of diversion of controlled substances (art. 12), the use of materials for the production of drugs (art. 13), crop eradication (art. 14), commercial carriers (art. 15), the lawful exportation of drugs (art. 16), illicit traffic by sea (art. 17), the suppression of criminal activities in free trade zones (art. 18), and preventing the use of mails for drug trafficking (art. 19). *See id.*

Paragraph 1 of the Convention states: "The purpose of this Convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension." *Id.* The Convention requires parties to criminalize certain drug-related activities. It also provides for international cooperation against drug traffickers. *See id.*

In the preamble, the parties express their concerns about the increase in the production, transport, and use of illicit narcotics and psychotropic substances. Among other things, the parties are "[d]etermined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing," *Id.* They also desire "to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic . . ." *Id.*

could conclude that, under the law, even a fairly recalcitrant country may nevertheless qualify for certification.<sup>83</sup>

## 2. *Executive Evaluations*

Certification requirements are often ineffective in controlling executive action because, by definition, the executive branch conducts the initial evaluations and fact-finding necessary to make a certification. It is the President who decides whether a country is cooperating with the United States in anti-narcotics activities or whether a country has improved its human rights record. In one respect, this allocation of responsibility simply reflects the comparative advantage that the executive branch enjoys in gathering relevant information. Certification requirements are designed in part for this reason. But in hard cases, the effect of this division of labor is to make it relatively easy for the executive branch to provide evidence to bolster arguments that a certification is correct—particularly if a statute, out of necessity or otherwise, has been broadly drafted. Such argumentation in turn shifts the burden of demonstrating that the certification is incorrect to Congress.<sup>84</sup>

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83. For example, Administration officials argued in 1997 that the then-recent arrest of Mexico's drug czar on grounds of corruption, although shocking, actually highlighted the seriousness with which Mexican officials were willing to fight corruption. See *Mexican and American Responses to the International Narcotics Threat: Hearing Before the Subcomm. on the Western Hemisphere, Peace Corps, Narcotics and Terrorism of the Senate Comm. on Foreign Relations*, 105th Cong. 49 (1997) [hereinafter *Mexican and American Responses*] (Statement of Robert S. Gelbard, Assistant Secretary of State) (arguing that "if the Gutierrez Rebello arrest revealed just how deeply rooted corruption is in Mexican counter drug institutions, it also showed unprecedented political courage by President Zedillo, and clearly demonstrated his deep commitment to addressing the high level political corruption that undermines Mexican drug control institutions. This is precisely the kind of progress we are trying to encourage.").

84. For example, under the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, 111 Stat. 2386, 2399 (1997), no more than \$30 million may be made available to the Korean Peninsula Energy Development Corporation (KEDO), and the funds may be used only for administrative expenses and heavy fuel oil costs associated with the Agreed Framework. No such funds may be obligated unless the President certifies that:

- (1)(A) the parties to the Agreed Framework are taking steps to assure that progress is made on the implementation of the January 1, 1992, Joint Declaration on the Denuclearization



### 3. *Extra-Statutory Criteria*

In difficult cases, the executive branch can be tempted to use extra-statutory criteria for determining whether a certification should be issued<sup>85</sup>—this is another reason why certification requirements are often ineffective. The executive branch almost always justifies a controversial certification by arguing that the substantive requirements of the certification have been met while, at the same time, asserting that other considerations weigh in favor of the certification.

Once again, the 1997 certification of Mexico is a case in point. Administration officials insisted that the decision to certify Mexico was based on the standards set forth in the statute.<sup>86</sup> When asked at a press conference whether the decision was influenced by other interests, State Department officials asserted that the decision was based purely on the requirements of the statute<sup>87</sup> and on evidence that Mexico had met

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of the Korean Peninsula and the implementation of the North-South dialogue, and (B) North Korea is complying with the other provisions of the Agreed Framework between North Korea and the United States and with the Confidential Minute;

- (2) North Korea is cooperating fully in the canning and safe storage of all spent fuel from its graphite-moderated nuclear reactors and that such canning and safe storage is scheduled to be completed by April 1, 1998; and
- (3) North Korea has not significantly diverted assistance provided by the United States for purposes for which it was not intended . . .

*Id.* at 2400. The President may waive this certification requirement if he determines that “it is vital to the national security interests of the United States.” *Id.*

The executive branch, with its control over the intelligence community, is in the best position to gather the information necessary to make such a certification. But suppose the President certified that all of the conditions for assistance were met and Congress disagreed? Of course, Congress can engage in fact-finding through the hearing process, but Congress would still have the burden of gathering sufficient evidence that would counter administration arguments that its certification was justified.

85. See Horton & Sellier, *supra* note 9, at 858-60.

86. See Madeleine K. Albright & Robert S. Gelbard, Press Briefing: International Narcotics Control Strategy Report, 1996, Feb. 28, 1997 (visited Oct. 27, 1998) <<http://secretary.state.gov/www/statements/970228.html>>.

87. Assistant Secretary for International Narcotics and Law Enforcement Affairs, Robert S. Gelbard, argued that:

those requirements.<sup>88</sup> However, statements by other Administration officials indicate that additional concerns *did* influence the certification decision. At the same press conference, the Secretary of State reminded the public of the importance of good relations between Mexico and the United States.<sup>89</sup> The same point was made more forcefully by Jeffrey Davidow, Assistant Secretary of State for Inter-American Affairs, in testimony before the House International Relations Committee days after the certification was issued.<sup>90</sup> Mr. Davidow began by reciting the improvements in cooperation between the United

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The decision was made on the basis of the assessment recommended to the President by the Secretary of State, taking into account the views of other relevant members of the Cabinet, as in previous years. The statute is very clear in terms of the scope provided for the decision, and on that basis it was made on counter-narcotics criteria and the discussions we have had with the Mexican Government over the last year and our view, our assessment of their action.

*Id.*

Based on this assessment, the Assistant Secretary continued, the Administration concluded that Mexico had met the requirements of the statute:

The President felt very clearly, as did the Secretary of State, as did I, in recommending this to the Secretary, that the test of the law is whether a government is cooperating with us fully; whether they are in compliance with the 1988 Vienna Convention. We felt that was a clear-cut decision here.

*Id.*

88. This included the extradition of drug-traffickers and the increased seizures of drugs. *See id.*

89. The Secretary of State noted the following:

Let us also remember that our relationship with Mexico is strong and among the most important we have with any country in the world. In the last few years, President Clinton has repeatedly stood by Mexico at difficult moments. He won ratification of NAFTA and acted decisively during Mexico's economic crisis. These decisions were not entirely popular, but they were right and they have paid off for the American people. In the long term, they will pay off even more.

This is another difficult but correct decision. It is designed to improve the climate for future cooperation, which is the goal of our policy. I am confident that it will serve the interests of the American people, and the President and I will look to Mexico in the coming months to help us ensure it does.

*Id.*

90. *See An Overview of U.S. Policy in the Western Hemisphere: Hearings Before the House Comm. on International Relations, 105th Cong. 21 (1997) (statement of Jeffrey Davidow).*

States and Mexico in counter-narcotics activities. However, he then turned to other considerations. He argued that the certification decision must be placed in the larger context of United States-Mexico relations,<sup>91</sup> that efforts to decertify Mexico would severely impact Mexico's efforts at democratic and economic reform,<sup>92</sup> and that focusing solely on certification would undermine President Zedillo's attempts to address other areas of concern to the United States.<sup>93</sup> Finally, Mr. Davidow warned that "decertification" might have an adverse effect on the Mexican economy.<sup>94</sup>

Comments such as these indicate that in hard cases, basing a certification decision solely on the criteria set forth in

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91. I think it's important that, as the certification decision is debated, we keep the importance of our overall relationship with Mexico in perspective. Our relations with Mexico are as important as those with any country in the world. We share a 1,900-mile border and Mexico is our third—and soon to be second—largest trading partner. Our economic relations with Mexico have a direct impact on the lives and livelihoods of hundreds of thousands of Americans.

*Id.* at 26.

92. Any effort to overturn the certification decision will have broad consequences for Mexico, and for us. President Zedillo is leading his country down a path of political reform toward more democracy and more honest elections. He has sustained a sensible macroeconomic course despite strong populist pressures to yield in the face of severe recession.

*Id.*

93. [President Zedillo] has pushed his bureaucracy toward a more open and pragmatic relationship with the United States on a variety of multilateral issues of interest to us, and more frank and constructive exchanges on our toughest non-drug bilateral issues, such as migration. His stances have not always been popular in Mexico. *To ignore this cooperation and to focus solely on the narcotics issues would undermine the policies President Zedillo has championed, and play into the hands of those political forces in Mexico that want to drag the country backward, not forward.*

*Id.* (emphasis added).

94. Economically, the likely effect of any successful action to overturn the President's decision would be higher Mexican interest rates and lower growth prospects, as the financial markets reacted to our "distancing" from Mexico. It is difficult to quantify this effect, but there is little doubt about its negative character.

*Id.* See also *Mexican and American Responses*, *supra* note 83, at 45-49 (statement of Lawrence H. Summers, Deputy Director, Department of the Treasury) (making similar arguments against the "decertification" of Mexico).

the statute is very difficult. Other considerations, such as economic relations and national security, almost invariably inform the decision.<sup>95</sup> In one respect, this impulse is understandable. As we have seen, certification requirements often appear in legislation which can have a significant impact on U.S. foreign policy—legislation which may require the imposition of economic sanctions on other countries or which may prevent the United States from providing military assistance. The executive branch may sincerely believe it is unwise to impose such sanctions or to refrain from providing such assistance, the legislation notwithstanding. In such circumstances, it is no surprise that the executive branch might be tempted to “stretch the facts” to make a requisite certification.<sup>96</sup>

#### 4. *Unwieldy Congressional Tools*

Certifications also fail to stop executive action because of the difficulty of overturning a certification, short of Congress enacting new legislation to block the proposed Presidential action. Part I of this article showed that some certification requirements are accompanied by provisions allowing Congress to veto the certifications. However, the Supreme Court decision in *Chadha*<sup>97</sup> calls into question Congress’s ability to overturn a Presidential certification by anything short of a joint resolution. In *Chadha*, the Court struck down a statute en-

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95. The case of Mexico is particularly telling because the Foreign Assistance Act, through a “vital interest” provision, provides a means to take those considerations into account. Yet, the Administration chose not to take that route.

96. President Clinton is reported to have acknowledged this very point with regard to “automatic sanctions legislation,” legislation which requires the United States to impose economic sanctions on countries for various reasons such as human rights, religious persecution, and nuclear proliferation. He is quoted as saying:

What always happens if you have automatic sanctions legislation is it puts enormous pressure on whoever is in the executive branch to fudge an evaluation of the facts of what is going on. And that’s not what you want. What you want is to leave the President some flexibility, including the ability to impose sanctions, some flexibility with a range of appropriate reactions.

Elaine Sciolino, *Clinton Argues for “Flexibility” Over Sanctions*, N.Y. TIMES, Apr. 28, 1998, at A1.

97. *Immigration and Nationalization Services v. Chadha*, 462 U.S. 919 (1983).

abling the House of Representatives to overturn, by resolution, the Attorney General's suspension of a deportation proceeding because it would be violative of the presentment clause. The Court found that a House resolution veto is essentially legislative in purpose and effect—an action “that had the purpose and effect of altering the legal rights, duties and relations of persons, . . . all outside the legislative branch.”<sup>98</sup>

The joint resolution is the only sure means by which Congress can overturn a Presidential certification after *Chadha*. Passed by both Houses and presented to the President for signature,<sup>99</sup> the joint resolution avoids the constitutional problems raised by a resolution passed by one House only or by a concurrent resolution. Indeed, several certification statutes provide that Congress has the power to override an executive certification by joint resolution.<sup>100</sup> However, a joint resolution by Congress that is capable of surviving a Presidential veto requires the two-thirds overriding vote of both Houses.

### 5. *Judicial Review*

*Chadha* makes it difficult for Congress to overturn a Presidential certification short of passing new legislation. But what if an interested party disagrees with a certification and seeks to overturn it in court? As discussed in Part II, the prospects for success here are dim because the courts are generally reluctant to involve themselves in foreign affairs. An array of doctrines—ripeness, mootness, standing, political question, and equitable discretion—bar parties from turning to the courts to resolve disputes over foreign affairs matters. Although all of these doctrines likely come into play in litigation involving a certification requirement, three merit particular attention. Posing the most significant hurdles to judicial review are the doctrines of standing, equitable discretion, and political question.

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98. *Id.* at 952.

99. See CARTER & TRIMBLE, *supra* note 17, at 208 n.1.

100. See, e.g., 19 U.S.C. § 2492(b)(3) (1994) (authorizing Congress to override by joint resolution a Presidential certification waiving economic sanctions against drug-producing or drug-transit countries); 22 U.S.C. § 2291j(d-e) (1994); 22 U.S.C. § 2799aa(b)(2)(A) (1994) (authorizing Congress to override by joint resolution a Presidential certification allowing economic assistance to a country that is engaged in the transfer of nuclear enrichment materials or technology).

a. *Standing*

Under Article III of the Constitution, the judicial power extends to “cases” and “controversies.”<sup>101</sup> Standing is part of a constellation of doctrines—including justiciability, ripeness, and mootness—that the courts have developed in response to the requirements of the constitutional text and the balance of powers concerns that underlie it. Unless a court limits itself to deciding actual cases, it embroils itself in issues that are best decided by the politically accountable branches of government.<sup>102</sup> The standing doctrine requires that a party have a personal stake in an actual case or controversy that is redressable by the court. The doctrine has a complex history; some would argue that it is in a state of doctrinal disarray.<sup>103</sup>

It is impossible to anticipate all of the ways in which standing issues might arise in a challenge to a Presidential certification. Yet, it is fair to say that standing poses a significant hurdle to judicial review. The difficulty in alleging standing can be seen by considering a hypothetical lawsuit in which a private U.S. citizen, a non-profit organization, and a member of Congress all challenge a Presidential certification that Country X is not engaged in a pattern of gross violations of internationally recognized human rights, thereby qualifying Country X to receive U.S. economic assistance. Under current law, to establish standing a plaintiff must demonstrate that: “(1) [it has] suffered an injury that is both ‘concrete and particularized’ and ‘actual or imminent,’ not ‘conjectural’ or ‘hypothetical;’ (2) that the injury is fairly traceable to the conduct of which [it] complain[s]; and (3) the injury is likely to be redressed by a court decision in [its] favor.”<sup>104</sup> What are the chances that

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101. U.S. CONST. art. III, § 2, cl. 1.

102. See *Raines v. Byrd*, 521 U.S. 811, 858 (1997) (citing *Allen v. Wright*, 468 U.S. 737, 752 (1984) (stating “the law of Art. III standing is built on a single basic idea—the idea of separation of powers”)).

103. See generally *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 798 (D.C. Cir. 1987) (“[T]he law of standing remains uncertain and unsettled in some of its major branches.”); Robert J. Pushaw, Jr., *Justiciability and the Separation of Powers: A Neo-federalist Approach*, 81 CORNELL L. REV. 393 (1996) (discussing the development of modern standing doctrine); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426-37 (1995).

104. *Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). See also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (citing three-part

these plaintiffs would satisfy the requirements of injury, causation, and redressability?

*Injury.* Except in rare circumstances,<sup>105</sup> it would be extremely difficult for a private citizen to allege injury resulting from an invalid certification. A party must allege injury in fact, with a high degree of particularity—a general interest in governmental compliance with the law is not enough to create standing.<sup>106</sup> This means that the U.S. citizen cannot argue that he or she has been injured simply because the certification is illegal. It is hard to imagine how an invalid certification would injure an individual in any other cognizable way.

Attempts to claim standing based on one's status as a taxpayer have been largely unsuccessful. As is true with standing law generally, a taxpayer challenging public expenditures must allege that she has suffered direct injury as a result of the alleged wrong and not merely that she has suffered an indirect injury common to all taxpayers.<sup>107</sup> In *Clark v. United States*,<sup>108</sup> for example, private taxpayers sued the United States for a refund of that portion of their taxes which had been used for assistance to El Salvador and the Nicaraguan *contras*. The plaintiffs argued that the assistance had been given in violation

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test); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990); *Allen v. Wright*, 468 U.S. 737 (1984); Elizabeth F. Schwartz, *Getting Away With Murder: Social Cleansing in Colombia and the Role of the United States*, 27 U. MIAMI INTER-AM. L. REV. 381, 411-15 (1996-97) (discussing standing to sue to enjoin U.S. assistance to Colombia).

105. Such a case might exist if the U.S. citizen had suffered human rights abuses in Country X. However, as is discussed later in this section, he or she would still have to satisfy the causation and redressability elements of standing.

106. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217-20 (1974).

107. See *Frothingham v. Mellon*, 262 U.S. 447 (1923). However, a taxpayer does establish standing to challenge the constitutionality of a Congressional enactment if he alleges (1) "the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution" and (2) "that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8." *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968).

108. 609 F. Supp. 1249 (D. Md. 1985).

of a provision of the Foreign Assistance Act which prohibits U.S. aid to countries that engage in a consistent pattern of gross violations of internationally recognized human rights.<sup>109</sup> The court dismissed the action, holding in part that under Article III plaintiff-taxpayers had to show that they suffered direct injury as a result of the allegedly illegitimate use of their funds.<sup>110</sup>

An organization might be better situated to allege sufficient injury for purposes of standing. The courts have found that an organization alleges sufficient injury where its organizational purpose has been thwarted by the alleged wrongdoing.<sup>111</sup> Thus, an organization whose purpose is to promote

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109. See 22 U.S.C. § 2304 (a)(2) (1994).

110. See *Clark*, 609 F. Supp. at 1251. Additionally, the court held that the Foreign Assistance Act did not create standing for a taxpayer or private citizen to sue for its enforcement. The court reasoned: "It is a section clearly enacted to effect [sic] the relationship between the Congress and the President over disbursing foreign aid funds in light of an official policy of concern for human rights. The only parties with standing to seek adjudication under section [502B] are the executive and legislative branches." *Id.*

111. The leading case is *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), in which the Supreme Court held that a non-profit corporation had standing to sue in its own capacity under the Fair Housing Act of 1968, 42 U.S.C. § 3604 (1994). The suit alleged that the defendants had engaged in racial steering in violation of § 804 of the Act. The complaint alleged that "Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices." *Havens*, 455 U.S. at 379. The Court concluded that if the defendants' steering practices had frustrated plaintiffs' efforts to provide counseling and other referral services to moderate and low-income home-seekers, there was "no question" that the organization had suffered injury in fact. "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests . . ." *Id.*

In *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987), Haitian Refugee Center, a non-profit organization, brought suit challenging the interdiction of Haitian refugees. The court found that the organization had alleged injury sufficient to satisfy the direct injury test by alleging in its complaint that its "purpose, as set forth in its by-laws, [was] to promote the well-being of Haitian refugees through appropriate programs and activities, including legal representation of Haitian refugees, education regarding legal and civil rights, orientation, acculturation, and social and referral services." The organization further alleged that "the HRC has been directly in-



human rights in Country X—by engaging in training, lobbying for human rights, and intervening on behalf of alleged victims of human rights abuses—could argue that it suffers injury by being forced to expend resources that would otherwise not have to be expended to combat human rights violations in that country.<sup>112</sup>

Members of Congress are held to the same standing requirements as other parties.<sup>113</sup> Yet here the concerns that underlie the standing doctrine are paramount—courts are particularly reluctant to enter into disputes between the political branches.<sup>114</sup> The Court of Appeals for the D.C. Circuit has held in a series of decisions that members of Congress have standing to challenge the legality of executive action, on the theory that illegal actions impair a legislator's official powers.<sup>115</sup> However, the Supreme Court's recent decision in

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jured by the interdiction program in that its organizational purpose has been thwarted." *Id.* at 799.

112. As I discuss in the next subsection, however, it may be difficult for such an organization to demonstrate causation and redressability. *See infra* note 123 and accompanying text.

113. *See, e.g.,* Reuss v. Balles, 584 F.2d 461, 466 (D.C. Cir. 1978) (stating that "a legislator receives no special consideration in the standing inquiry"); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (holding that a member of Congress lacked standing to bring suit alleging illegal activities by the CIA where he failed to allege cognizable injury resulting from such activities).

114. *See* Raines v. Byrd, 521 U.S. 811, 864 (1997) (Souter, J., concurring); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982).

115. *See* Barnes v. Kline, 759 F.2d 21, 28-29 (D.C. Cir. 1985); Moore v. U. S. House of Representatives, 733 F.2d 946, 950-54 (D.C. Cir. 1984); Riegle v. Federal Open Market Comm., 656 F.2d 873, 879 (D.C. Cir. 1981) (holding that a Senator had standing to challenge the constitutionality of the procedures established by the Federal Reserve Act for the appointment of the five Reserve Bank members of the Federal Open Market Committee) (dismissed on other grounds); Kennedy v. Sampson, 511 F.2d 430, 435-436 (D.C. Cir. 1974) (holding that a senator has standing to bring a suit for declaratory judgment that an act became law despite the executive's allegation that executive pocket veto had nullified it); Smith v. Atwood, 845 F. Supp. 911, 914-15 (D. D.C. 1994) (holding that a member of Congress would have standing to challenge the misinterpretation by the administrator of USAID of an amendment to the Foreign Assistance and Related Programs Act) (dismissed as moot). *But see* Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975); Holtzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973) (holding that a member of Congress has no standing to challenge constitutionality of American military operations in Vietnam war).

*Raines v. Byrd*<sup>116</sup> calls these lower court decisions into question. In *Raines*, the Court held that members of Congress do not have standing to challenge the constitutionality of the Line Item Veto Act. The plaintiffs had relied heavily on *Coleman v. Miller*,<sup>117</sup> a 1939 case which held that Kansas legislators alleged sufficient injury to obtain standing when—after Kansas legislators deadlocked in a vote that would have defeated the ratification of the “Child Labor” amendment to the U.S. Constitution—the Lieutenant Governor purportedly broke the tie by casting his vote for ratification.<sup>118</sup> The legislators argued that their votes had been nullified by the Lieutenant Governor’s action. The Court agreed, finding that the plaintiffs had “a plain, direct and adequate interest in maintaining the effectiveness of their votes.”<sup>119</sup>

In *Raines*, the plaintiffs argued that the Line Item Veto Act similarly diluted their voting power with respect to appropriations bills because the Act authorizes the President to cancel specific projects listed in such bills.<sup>120</sup> The Court rejected the argument, reasoning in part that the “abstract dilution of institutional power” alleged here did not rise to the level of vote nullification as in *Coleman*. It also pointed out that the plaintiffs were not deprived of adequate remedies in Congress because they could repeal the Act or exempt specific appropriations from the Act.<sup>121</sup>

Let us return to our hypothetical legislator. *Raines* makes uncertain a legislator’s ability to allege injury sufficient for Article III standing to challenge a Presidential certification. On the one hand, *Raines* may be distinguished in terms of the harm done to a legislator’s voting power. Suppose that our legislator is one of the majority who voted for the provision imposing the human rights certification requirement, and that

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116. 521 U.S. 811 (1997).

117. 307 U.S. 433 (1939).

118. *See id.* The plaintiffs argued that the Kansas Constitution did not allow the lieutenant governor to break deadlocks in this manner. *See id.* at 436.

119. *Id.* at 438.

120. *See Raines*, 521 U.S. at 856.

121. *See id.* at 2320-21. Nor did the court imply that someone with standing was barred from challenging the constitutionality of the statute. *See id.* The Act was held unconstitutional in *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

the President then issued a certification in a manner that clearly violated the law. Under these circumstances, the legislator's vote would in effect be nullified by the President's action, an injury closer to that suffered by the Kansas legislators in *Coleman* than that suffered by the members of Congress in *Raines*. On the other hand, it may also be argued that there is no institutional harm, at least to the extent present in *Coleman*, because the legislator, with her colleagues, can always respond by enacting further legislation that nullifies the President's acts.<sup>122</sup> That route was not available to the Kansas legislators; they could not have passed a statute revoking the ratification of the constitutional amendment.

*Causation and Redressability.* Even if the parties to our hypothetical lawsuit could allege sufficient injury to satisfy the standing doctrine, either the individual plaintiff or the organization would still have great difficulty demonstrating that that injury is traceable to the invalid certification or that overturning the certification (thereby halting economic assistance to Country X) would redress that injury.

Causation and redressability can be difficult to establish because the injuries complained of are often attributable to a third party not subject to suit. In *Talenti v. Clinton*,<sup>123</sup> for example, the U.S. Court of Appeals for the District of Columbia held that a private individual did not have standing to compel the President to withhold federal aid to Italy under the Helms Amendment to the Foreign Assistance Authorization Act.<sup>124</sup> The Helms Amendment prohibits foreign assistance under the Foreign Assistance Authorization Act, the Foreign Assistance Act, and the Arms Export Control Act to countries that have expropriated the property of U.S. persons without adequate compensation. The plaintiff alleged that the Italian government had expropriated his property without adequately compensating him. The appeals court affirmed the district court's dismissal of the case, reasoning in part that, even in the unlikely event that the President withheld assistance from It-

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122. The flaws in that argument are outlined in my discussion of the equitable discretion doctrine. See *infra* text accompanying note 201.

123. 102 F.3d 573 (D.C. Cir. 1996).

124. 22 U.S.C. § 2370a (g) (1994).

aly,<sup>125</sup> it was unlikely that such sanctions would force Italy to compensate the plaintiff.<sup>126</sup> The court concluded: "A court is rightly reluctant to enter a judgment which may have no real consequence, depending on the putative cost-benefit analyses of third parties over whom it has no jurisdiction and about whom it has almost no information."<sup>127</sup>

The traceability and redressability requirements would prove daunting for our hypothetical individual and organization. First, the plaintiffs would have to show that their injuries could be traced to U.S. economic or military assistance to Country X. The human rights organization would be required to allege facts which showed that U.S. economic assistance was at least partially responsible for continued human rights abuses in Country X, which in turn thwarted the organization's purpose by requiring it to devote more of its resources

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125. The Helms Amendment allows the President to waive the sanctions if he certifies that it is in the national interest to do so. *See id.*

126. The court said:

In order to find standing, we would have to assume that the Italian government would respond to the suspension of aid by negotiating a resolution of Talenti's claim. We have no reason to think a foreign government would be so inclined. The suspension of foreign assistance is a contentious act that may threaten diplomatic relations and undermine American influence abroad. It seems equally plausible that a foreign government would find it in the country's long-term interest to forego American aid to save face. . . .

Talenti v. Clinton, 102 F.3d 573, 578 (D.C. Cir. 1996).

127. *Id.* (citing Branton v. F.C.C., 993 F.2d 906, 912 (D.C. Cir. 1993)). *See also* Smith v. Atwood, 845 F. Supp. 911 (D.D.C. 1994). There, the court held that two Chinese nationals lacked standing to challenge an interpretation by the Administrator of USAID of the Kemp Kasten Amendment to the Foreign Assistance and Related Programs Act, Pub. L. No. 99-88, 99 Stat. 293 (1985). The Amendment provided that none of the funds appropriated under the bill may be used to fund organizations the President has determined "support or participates in the management of a program of coerced abortion or involuntary sterilization." *Atwood*, 845 F. Supp. at 912. The plaintiffs, together with a member of Congress, alleged that the head of USAID, to whom the President had delegated the authority to make the determination, had illegally failed to determine that the United Nations Fund for Population Activities was supporting or participating in a program of coerced abortion or involuntary sterilization in the People's Republic of China. The court acknowledged that the plaintiffs had described "some barbaric actions" that might befall them should they be forced to return to China, but found that the relationship of such actions to the law in question was "too remote;" therefore, the plaintiffs failed to meet both the causation and redressability prongs of the standing test. *See id.* at 914.

to combat such abuses. Such links may be very difficult to draw, even though direct causation need not be demonstrated.<sup>128</sup> Second, even if a court were to accept that the alleged injuries were traceable to such economic assistance, the court might well conclude that the plaintiff cannot show that Country X would stop such abuses if the United States were forced to withhold assistance.<sup>129</sup>

A Congressperson, however, who alleges injury by vote nullification could more easily demonstrate the necessary causation and redressability. In this case, the nullification would be readily traceable to the President's illegal certification and a decision holding the certification invalid would redress that injury.

#### b. *Equitable Discretion*

Members of Congress are likely candidates to challenge a Presidential certification in the courts. However, the equitable discretion doctrine could be used to bar such a challenge. This doctrine holds that the courts will not hear cases brought by members of Congress where the legislators "could have obtained from Congress the substantial equivalent of the judicial relief sought. . . ."<sup>130</sup> The doctrine addresses the concern that

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128. There need not be a direct cause and effect relationship between the alleged wrong and the injury complained of. See *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997).

129. Ruling that such sanctions would produce the desired effect would give the court pause, because the court would enter the realm of crafting foreign policy:

Given the complexity and interdependence of our society and governmental policies, it will often be possible to allege with some plausibility that a change in a governmental policy is likely to cause other persons or institutions to modify their behavior in ways beneficial to the plaintiff. If such allegations were routinely accepted as sufficient to confer standing, courts would be thrust into a far larger role of judging governmental policies than is presently the case, or than seems desirable.

*Haitian Refugee Center v. Gracey*, 809 F.2d 794, 805 (D.C. Cir. 1987) (citing *Northwest Airlines v. FAA*, 795 F.2d 195, 204 n.2 (D.C. Cir. 1986)).

Of course, one could conceive of a situation in which it is clear that U.S. assistance is absolutely essential for a third party's actions. In such cases, the traceability and redressability prongs would be more easily satisfied.

130. *Gregg v. Barrett*, 771 F.2d 539, 543 (D.C. Cir. 1985) (citing Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 242 (1981)).

“in such cases the court is asked to intrude into the internal functionings of the legislative branch itself.”<sup>131</sup> The courts view the legislator’s dispute as primarily one with his or her colleagues, not with the executive branch.<sup>132</sup>

One of the few cases in which members of Congress challenged a Presidential certification turned on the equitable discretion doctrine. In *Crockett v. Reagan*,<sup>133</sup> twenty-nine members of Congress sued President Reagan and cabinet members for providing military assistance to El Salvador in violation of the War Powers Clause of the Constitution,<sup>134</sup> the War Powers Resolution,<sup>135</sup> and §502B of the Foreign Assistance Act.<sup>136</sup> Section 502B provides, in part, that “no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”<sup>137</sup> Further, §728 of the International Security and Development Cooperation Act of 1981<sup>138</sup> conditioned assistance to El Salvador on periodic certifications by the President that the government of El Salvador was: 1) making “a concerted and significant effort to comply with internationally recognized human rights;” 2) “achieving substantial control over all elements of its own armed forces so as to bring

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131. *Id.*

132. See *Melcher v. Federal Open Market Committee*, 836 F.2d 561 (D.C. Cir. 1987) (holding that suit challenging constitutionality of method for choosing members of the Federal Open Market Committee should be dismissed on grounds of equitable discretion); *Gregg v. Barrett*, 771 F.2d 539 (D.C. Cir. 1985) (affirming dismissal of suit challenging accuracy of the Congressional Record, in part on grounds of equitable discretion); *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984) (affirming on grounds of equitable discretion suit challenging constitutionality of the Tax Equity and Fiscal Responsibility Act); *Jagt v. O’Neill*, 699 F.2d 1166 (D.C. Cir. 1982) (affirming dismissal of Congressmembers’ suit challenging the House committee appointments system); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir. 1981) (affirming on grounds of equitable discretion the dismissal of a Senator’s suit challenging the constitutionality of the Federal Reserve Act); Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981).

133. 558 F. Supp. 893 (D. D.C. 1982), *aff’d*, 720 F.2d 1355 (D.C. Cir. 1983).

134. U.S. CONST. art. I, § 8, cl. 11.

135. 50 U.S.C. §§ 1541-48 (1994).

136. 22 U.S.C. § 2304 (1994).

137. 22 U.S.C. § 2304(a)(2).

138. Pub. L. No. 97-113, § 728, 95 Stat. 1519 (1981).

an end to indiscriminate torture and murder of Salvadoran citizens by these forces;" 3) "making continued progress in implementing essential economic and political reforms, including the land reform program;" and 4) "committed to the holding of free elections."<sup>139</sup> President Reagan had issued two such certifications, but Congress took no action to end assistance to El Salvador. The plaintiffs, who argued that the certifications were completely indefensible, asked the court to reexamine them.<sup>140</sup>

The court refused to do so, holding that the equitable discretion doctrine constrained it from adjudicating the claim on the merits.<sup>141</sup> The court stated that: "[W]hen a member of Congress is a plaintiff in a lawsuit, concern about the separation of powers counsels judicial restraint even where a private plaintiff may be entitled to relief."<sup>142</sup> Where the plaintiff's dispute appears to be primarily with his or her fellow legislators, the court reasoned, a court no longer mediates between the two political branches, but rather runs the risk of thwarting Congress's will by allowing a plaintiff "to circumvent the processes of democratic decisionmaking."<sup>143</sup> Here, the court argued, Congress had addressed the issue of human rights in El Salvador by imposing certification requirements. The President had issued the required certifications, and Congress as a whole had not chosen to respond. The court observed: "Whatever infirmities the President's certifications may or may not suffer, it is clear under these circumstances plaintiffs' dispute is primarily with their fellow legislators who have authorized aid to El Salvador while specifically addressing the human rights issue, and who have accepted the President's certifications."<sup>144</sup>

The court concluded that, while a court might not agree with the President's assessment of human rights in El Salvador and thereby find that the President had acted in violation of the Foreign Assistance Act, "the equitable discretion doctrine

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

140. *See id.*

141. *See id.* With respect to the claims under the Constitution and the War Powers Resolution, the court found that under the circumstances of this case, the claims were nonjusticiable political questions. *See id.* at 901.

142. *Id.* at 902.

143. *Id.*

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

prevents consideration of these issues on behalf of congressional plaintiffs."<sup>145</sup>

The equitable discretion doctrine is a unique creature of the D.C. Circuit and has not been adopted by the Supreme Court. But suits by members of Congress challenging the propriety of a certification are most likely to be brought in the U.S. District Court for the District of Columbia. If members of Congress chose to bring an action challenging a Presidential certification in district court, the equitable discretion doctrine could pose a significant bar to judicial review. This is particularly true if the legislation imposing the certification requirement also contains provisions allowing for a legislative veto by joint resolution. It would be no surprise if a court concluded that, in providing for a legislative veto, Congress granted itself the sole means by which a controversial certification could be challenged. A court could reasonably conclude that the plaintiff legislators simply failed to persuade their colleagues to pass the joint resolution and, hence, deny review.

### c. *Political Question Doctrine*

The political question doctrine is "a judicial policy declaring that certain cases, or questions in cases, that are within the constitutional and statutory jurisdiction of the federal courts and that otherwise meet all the requirements and indicia for adjudication are nonetheless nonjusticiable."<sup>146</sup> The courts are reluctant to intervene in matters that are better left for resolution by the political branches.<sup>147</sup>

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145. *Id.* at 903. For a critical discussion of the equitable discretion doctrine, see Sophia C. Goodman, Note, *Equitable Discretion to Dismiss Congressional-Plaintiff Suits: A Reassessment*, 40 CASE W. RES. L. REV. 1075 (1990).

146. HENKIN, *supra* note 55, at 81. The political question doctrine has been the subject of much criticism. See, e.g., Nancy-Ann E. Minn, *Toward More Intelligent National Security Policy Making: The Case for Reform of Arms Control Impact Statements*, 54 GEO. WASH. L. REV. 174 (1986) (discussing how the political question doctrine should not be used to bar judicial review of arms control impact statements).

147. See *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.").



The conditions under which the doctrine applies were set out in *Baker v. Carr*.<sup>148</sup>

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>149</sup>

The doctrine does not preclude a court from ever hearing a case dealing with foreign matters; the court in *Carr* stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>150</sup> However, the lower courts often use the doctrine to bar suit in cases involving foreign policy and national security issues.<sup>151</sup> If

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148. 369 U.S. 186, 217 (1962).

149. *Id.* at 217.

150. *Id.* at 211.

151. *See, e.g., Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998) (holding that the political question doctrine barred the court from hearing an action brought by Turkish navy sailors for death and personal injury suffered when two missiles fired by U.S.S. Saratoga struck a Turkish vessel during NATO exercises); *Hoang v. United States*, 14 F.3d 160 (2d Cir. 1994). In *Hoang*, the court found that the political question doctrine barred an action by citizens of South Vietnam who claimed title to assets of the Republic of South Vietnam that had been frozen by the United States after the fall of South Vietnam. The court reasoned that adjudicating the issue would require a determination of the proper successor to South Vietnam and would interfere with the President's ability to use the assets in negotiations with the Vietnamese government. *Hoang*, 14 F.3d at 163. *See also Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985) (holding that the political question doctrine bars challenge to the deployment of cruise missiles in the United Kingdom); *Flynn v. Shultz*, 748 F.2d 1186 (7th Cir. 1984). There, the Seventh Circuit affirmed summary judgment in favor of Secretary of State George Shultz. Plaintiffs sought to compel the Secretary

a Presidential certification entails certain political judgments, it is unlikely that a court will be willing to entertain a challenge.<sup>152</sup>

So far, this article has demonstrated that several factors combine to make certification requirements a relatively weak (although not completely ineffective) means of controlling executive behavior: poor drafting, the lack of effective legislative means to overturn certifications, executive fact-finding, the temptation on the part of the executive to apply extra-statutory criteria, and the reluctance of the courts to intervene in foreign affairs matters. As is discussed below, it is this weakness which is partly to blame for the frustration many feel about presidential certifications. However, before beginning that discussion, it is useful to examine the other functions of certification requirements.

### B. *Influencing the Behavior of Foreign States*

Supporters of certification requirements argue that they serve as a means, however imperfect, of influencing the behavior of foreign states.<sup>153</sup> This perspective raises at least three questions with respect to evaluating such requirements: 1) To what extent is the end sought by certification requirements (i.e., the influencing of state behavior) valid under international law?; 2) If the end is valid, to what extent should certification requirements, as a means to that end, be permitted?; and 3) How effective are certification requirements in securing that end?

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to authorize the testimony of a State Department consular official and to take other actions allegedly mandated by 22 U.S.C. § 1732. In *Cranston v. Reagan*, 611 F. Supp. 247 (D.D.C. 1985), the court dismissed on political question grounds an action against the administration alleging that separate agreements between the United States and Sweden and Norway were in violation of the Nuclear Non-Proliferation Act because the agreements contained advance consent provisions to the transfer of spent nuclear fuel, allegedly violating the statutory requirement that consideration of such transfers be made on a case-by-case basis.

152. However, as I discuss in Part IV, the political question doctrine should not bar review of every kind of certification.

153. I use the terms "states" and "countries" interchangeably.

### 1. *Certification Requirements and International Law*

Certification requirements have been criticized by commentators both within the United States and abroad, who argue that certification processes violate international legal norms. The latest round of criticism stems from the controversy over the annual narcotics certification process. In a letter to *The New York Times*, the Consul General of Mexico stated that: "Mexico does not recognize any legitimacy in the process of certification which goes against international law and the spirit of cooperation between our countries."<sup>154</sup> He criticized the process as an "interventionist practice in the internal affairs of States."<sup>155</sup> The Mexican Congress echoed this criticism: "We reaffirm our condemnation against any certification process because it is a unilateral action that breaks international order violently and aims to undermine our self-determination and sovereign responsibility to fight drug trafficking."<sup>156</sup> Mexico is not alone in its criticism of these requirements.<sup>157</sup>

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154. Letter from Jorge Pinto, Consul General of Mexico, to the Editor of *The New York Times* (Feb. 18, 1996). The letter appears not to have been published in the Times, but portions of the letter were released to the newswires by the Mexican government. See, e.g., Larry Lufner, *Columbians bitter over decertification*, WASH. TIMES, May 7, 1996, at A10 (quoting the relevant language). A Spanish version of the Mexican government's press release containing excerpts from the letter is available on the internet at <http://www.quicklink.com/mexico/gob96feb/bol37.htm>.

155. *Id.*

156. *Congress Unanimously Condemns U.S. Certification Process*, BBC Summary of World Broadcasts, Feb. 28, 1997, available in LEXIS, News Library, News Sources Directory, BBC Summary of World Broadcast File.

157. For example, the acting Foreign Minister of Ecuador disagreed with "the view that a state has the authority to certify or not the activities of another state of the international community." *Acting Foreign Minister Questions USA's Drug Certification Process*, BBC Summary of World Broadcasts, Mar. 6, 1997, available in LEXIS, News Library, News Sources Directory, BBC Summary of World Broadcast File. "Certification," he said, "should not be a right to be conferred on anyone." Ecuador is "prepared to join any initiative aimed at stressing the need for this policy to cease, because these are matters that fall exclusively within the sovereign purview of every state." *Id.* The acting Minister argued that Ecuador had been doing its part to control drug trafficking, but said, "we do not want to authorize any state to certify the behavior of others." *Id.* See also *Assembly Special Session on Countering World Drug Problem Together Concludes at Headquarters*, M2 Presswire, June 11, 1998, available in LEXIS, News Library, News Sources Directory, M2 Presswire File (discussing the fact that several speakers at a special session of the U.N. Gen-

The attack has at least two prongs, the first of which is specific to drug enforcement, but also applies to other areas. Like Mexico, some criticize the United States's unilateral actions with regard to certain states, arguing that the International Narcotics Control Board "is the only organ in charge of international control and evaluation."<sup>158</sup> According to those critics, certain areas of international concern, such as narcotics, are subject only to multilateral supervision and control; unilateral acts, such as an annual anti-narcotics certification process, violate international law.

This argument has some merit, for in some instances the United States may be prevented under international law from acting unilaterally *vis-à-vis* another country.<sup>159</sup> However, it is difficult to assess the merits of the argument as it applies to certification requirements, both those specific to anti-narcotics concerns and those which apply to other areas. As has been shown, certification requirements appear in legislation that addresses many issues: narcotics, terrorism, nuclear proliferation, arms control, human rights, trade, etc. International law also addresses these areas of concern. A complete evaluation of this argument requires determining whether the various

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eral Assembly argue that: "Using certification procedures counters the concepts of cooperation, multilateralism and respect for the sovereignty and independence of States").

158. *Assembly Special Session on Countering World Drug Problem Together Concludes at Headquarters*, *supra* note 155. See also OAS, *Rio Group, Venezuela, Colombia Reject US Certification Process*, BBC Summary of World Broadcasts, Feb. 23, 1998, available in LEXIS, News Library, News Sources Directory, BBC Summary of World Broadcast File (reporting that the Organization of American States (OAS), the Rio Group, Venezuela, and Colombia have criticized the U.S. anti-narcotics certification process, in part because of its unilateral nature).

159. For example, there are strong arguments that under the terms of Article XXIII of the Dispute Settlement Understanding of the World Trade Organization, the United States is precluded under the agreement from taking unilateral action against a country that it believes is violating the GATT. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multinational Trade Negotiations, Annex 2, app. 1, art. XXIII, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 1244 (1994). See also C. O'Neil Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 VAND. J. TRANSNAT'L L. 209, 270-72 (1997) (arguing that unilateral action by the United States in this instance would violate the Understanding).

sources of international law (treaties, custom, etc.) covering these matters create a system which prohibits unilateral action thereunder, an undertaking I do not attempt here.

The second prong of the attack on the requirements is somewhat more far-reaching, in that it applies to all certification requirements. It is argued that certification requirements violate a fundamental principle of international law: the tenet that a state has the right to conduct its own internal affairs free from outside interference. Can it be argued persuasively that certification requirements violate this principle of independence?<sup>160</sup>

Certification requirements, whether or not they are part of a periodic certification process, are designed in part to influence state behavior. The requirements act as carrot and stick. If a country fails to meet the criteria set forth in a certification requirement, significant consequences may result. Often, the country will not qualify for economic assistance from the United States or it will be subject to economic sanctions. One must concede that the matters addressed by certification requirements do intrude into a country's internal affairs. For example, legislation that requires the withdrawal of economic assistance from Russia unless the President certifies that the Russian government is not discriminating against religious groups<sup>161</sup> clearly touches on matters that, until relatively recently, were thought to be exclusively domestic in scope. But even if used in this manner, do certification requirements and the legislation imposing them violate international law?

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160. Before proceeding further, it may be useful to raise and dismiss another potential issue. Certifications often require the executive branch to make judgments about a state. A state, for example, is certified as systematically violating human rights or as a major drug-producing country. A state may quite naturally be offended by such characterizations. Making judgments about states may or may not be wise diplomacy, and may even insult the country in question, but it is far from clear whether such characterizations alone violate international law by threatening that state's sovereignty or autonomy, at least as those concepts are currently understood. States make judgments about other states all the time. One country agrees to cooperate with another in security matters based on a judgment that the country in question is reliable. The European Community determines that another state may become a member based on judgments about that state's economy. The Council of Europe decides to admit a member after determining that it meets certain human rights criteria.

161. See *supra* note 40.

Here, one enters a much broader debate concerning the validity of coercion, particularly economic coercion, under international law, a topic well beyond the reach of this article.<sup>162</sup> But since so many certifications appear in connection with economic assistance and economic sanctions, the issues warrant some discussion.

As a preliminary matter, economic assistance is generally thought of as being purely voluntary. If extending aid is voluntary, it would seem to follow that the withdrawal of assistance also is at the sole discretion of the donor country.<sup>163</sup> Indeed, one might be wary of creating a rule of international law in

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162. A number of scholars have examined this issue. See, e.g., *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* (Richard B. Lillich ed., 1976) [hereinafter *ECONOMIC COERCION*]; Domingo E. Acevedo, *The U.S. Measures Against Argentina Resulting from the Malvinas Conflict*, 78 AM. J. INT'L L. 323 (1984); Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989); Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405 (1985); Shane M. McGee, . . . *Or I'll Take My Toys and Go Home: The Iran and Libya Sanctions Act of 1996*, 20 HOUS. J. INT'L L. 111 (1997); Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, 68 AM. J. INT'L L. 591 (1974); Patricia Surling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 AM. U. J. INT'L L. & POL'Y 1 (1996).

163. See Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405 (1985) (arguing that there is no legal obligation to give economic aid or to continue giving such aid, no matter how much dependence such aid has caused). But might state A be estopped from withdrawing assistance in part because promises of further assistance made by state A to state B have induced state B to rely on such assurance? Estoppel is recognized as a general principle of international law, and is motivated by concepts of good faith and reliance. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 638 (3rd ed. 1979). Under international law, the elements for estoppel are: 1) a clear and unambiguous statement; 2) the statement must be voluntary, unconditional, and authorized; and 3) reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement. In theory, a state, by virtue of an unconditional, unilateral promise to provide economic assistance to another state which causes that state to rely, may be bound to that promise or statement. But it is unlikely that a state would make such promises. See *id.* But see *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20) (holding that the French statement that it would soon stop nuclear testing in the atmosphere was legally binding). See also Geoffrey R. Watson, *The Death of Treaty*, 55 OHIO ST. L. J. 781 (1994) (discussing the development in international law of analogs to promissory estoppel).

which assistance is obligatory, outside an agreement to the contrary. Such a rule could deter states from providing *any* assistance out of fear that they would be obliged to continue such assistance. Yet, realistically, the withdrawal of assistance, and sometimes the threat of withdrawal, produces real effects on a country and is often intended to do so.<sup>164</sup>

There is considerable scholarly debate over whether economic coercion is permissible under international law.<sup>165</sup> Article 2(1) of the U.N. Charter provides that: "The Organization is based on the principle of the sovereign equality of all its Members."<sup>166</sup> The vision is of "a community consisting primarily of states having a uniform legal personality."<sup>167</sup> A corollary of the principle of equality is the principle of non-intervention—the preservation of the value Louis Henkin coins "state impermeability," namely that "[t]he law requires other states and the international system to relate to the state as a whole, as a monolith. Except as the state has agreed otherwise, other states may not penetrate its territory, its society, its political-legal system."<sup>168</sup>

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164. Phil Davison, for example, notes that the United States's "decertification" of Colombia for narcotics reasons resulted in a delay of U.S. aid to the country and made it difficult for Colombia to attract loans. Phil Davison, *US Sets Mexico and Colombia a Tough Drugs Test*, INDEP., Feb. 28, 1997, at 12. Davison also reports that the United States was contemplating additional sanctions, such as refusing landing rights to Colombian aircraft, rescinding preferential tariffs, and submitting Colombian citizens traveling to the United States to onerous searches. *See id.* All of these efforts were calculated to force Colombia to take stronger measures against narcotics trafficking. *See id.*

165. Economic coercion can, of course, take several forms. It includes (roughly in order of increasing severity): the denial of economic assistance, the withdrawal of assistance, unilateral trade embargoes, attempts to cause international organizations (such as the IMF) to deny economic benefits, multilateral trade embargoes, and blockades. In this section, I focus primarily on the denial and withdrawal of economic assistance.

166. U.N. CHARTER art. 2, para. 4.

167. BROWNLIE, *supra* note 163, at 287.

168. LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 101 (1995). *See also* Damrosch, *supra* note 162, at 1-12 (discussing the textual evidence for a customary norm of nonintervention in internal affairs).

The Charter therefore protects Members from intervention by the United Nations in "matters which are essentially within the domestic jurisdiction of any State . . . ."<sup>169</sup>

At the same time, the principle of non-intervention embodied in the Charter is not absolute. For example, if there is a threat to the peace, breach of the peace, or an act of aggression, the Security Council may authorize the use of measures, including "complete or partial interruption of economic relations," to maintain or restore international security.<sup>170</sup> But what if there is no breach of the peace and a state imposes unilateral economic sanctions? Developing countries traditionally argue that Article 2(4) of the Charter, which prevents states from threatening or using force against the territorial integrity or the political independence of other states,<sup>171</sup> also prevents the use of economic coercion. But other states, usually developed ones, counter that Article 2(4)—subject to the right of self-defense preserved in Article 51—prohibits only the use of armed force and does not preclude the threat or use of other types of coercion in foreign affairs.<sup>172</sup>

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169. U.N. CHARTER art. 2, para. 7. Provisions of the Charter of the Organization of American States are even more express. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3. Article 15 provides that: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." 2 U.S.T. at 2419, 119 U.N.T.S. at 56. This prohibition purports to forbid not only armed intervention "but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements." 2 U.S.T. at 2420, 119 U.N.T.S. at 56. Further, Article 16 provides: "No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind." 2 U.S.T. at 2420, 119 U.N.T.S. at 56.

170. U.N. CHARTER arts. 39 and 41.

171. Article 2(4) of the Charter provides that member states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ." *Id.* art. 2(4).

172. See Acevedo, *supra* note 162, at 323 (arguing that under some circumstances, the imposition of economic sanctions by a state may cross the bounds of permissible behavior under international law); Lee C. Buchheit, *The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations*, in ECONOMIC COERCION, *supra* note 162, at 51-2 (discussing debate among developing and developed countries about the scope of Article 2(4)); Richard B. Lillich, *Economic Coercion and the International Legal Order*, in ECONOMIC COERCION, *supra* note 162, at 76 (same).



Customary international law also establishes the principle of non-intervention in the internal affairs of states. But, in practice, states often use the threat or use of economic coercion in their foreign policy. Lori Damrosch points out that states commonly provide economic benefits to other states on certain conditions, which indicates that this practice, with the aim of encouraging certain behavior, is "legitimate."<sup>173</sup> The issue becomes much more difficult when a state *withdraws* benefits or threatens to do so. Yet, even here, states often use economic sanctions to influence domestic matters such as changes in government. Again, some countries have invoked international norms, including nonintervention, in opposing such sanctions. However, other countries reject such arguments, negating any assertion that there is a generally-accepted customary norm with respect to sanctions.<sup>174</sup> The fact that both sanctioning and sanctioned states are able to garner support for their respective positions indicates that there is no international consensus on this matter.<sup>175</sup>

The International Court of Justice touched briefly on this issue in the *Nicaragua* case.<sup>176</sup> Nicaragua asserted that the United States, through economic sanctions, had engaged in an unlawful, indirect intervention in Nicaragua's internal affairs. U.S. economic assistance had been halted, resulting in a 90% reduction in Nicaragua's sugar quota and the imposition of a trade embargo. Nicaragua admitted in principle that some of the actions, in and of themselves, were permitted under international law but argued that, taken together, they constituted "a systematic violation of the principle of non-intervention."<sup>177</sup> The court rejected this argument. Although acknowledging that certain economic sanctions might in principle constitute violations of specific treaties, such as the GATT (an issue that the court found to be outside its jurisdiction), the court was "unable to regard such [economic sanctions] as a breach of the customary-law principle of non-intervention."<sup>178</sup>

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173. Damrosch, *supra* note 162, at 30.

174. *See id.* at 32.

175. *See id.* at 33-34.

176. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 115-16 (June 27).

177. *Id.* at 126.

178. *Id.*

## 2. *Effectiveness*

Even if one concludes that certification requirements are not prohibited by international law, the question still remains whether such requirements are effective in influencing the behavior of states. Of course, effectiveness will depend on the consequences that follow if a state fails to satisfy the criteria set out in a certification requirement (i.e., the effect that the threat or realization of such consequences has on state behavior). Certification requirements figure in a number of different kinds of actions that have direct effects on a foreign state. Discussion of the effectiveness of the threat or imposition of economic sanctions is warranted because so many certification requirements are tied to such sanctions.

Even those who support the use of economic sanctions to achieve foreign policy goals concede that it is extremely difficult to assess the effectiveness of the threat or use of economic sanctions in influencing state behavior. For one thing, it is extremely difficult, if not impossible, to draw a direct causal link between threatened or imposed sanctions and a desired policy goal.<sup>179</sup> A state may act for any number of reasons, only one of which may be to avoid sanctions. A second related point is that it is not easy to define the precise goal of such sanctions. Were economic sanctions imposed on South Africa to cause the South African government to end apartheid? To create conditions that prodded the South African government in that direction? Merely to express U.S. condemnation of such oppression? Or were they imposed for all of these reasons? Obviously, the success or failure of sanctions depends on which goal one chooses to name.<sup>180</sup>

Despite these problems, several commentators argue that the threat or use of economic sanctions has had some measure

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179. See, e.g., "The Gulf War: The Law of International Sanctions," Proceedings of the 85th Annual Meeting of the American Society of International Law 172 (1991) (remarks of Kimberly Ann Elliot) (assessing the effectiveness of economic sanctions is more a judgment than a science); "Effects and Effectiveness of Economic Sanctions," Proceedings of the 84th Annual Meeting of the American Society of International Law 206-207 (1990) (remarks of Michael P. Malloy) (tracing the effectiveness of sanctions in any causal sense is not easy).

180. Elliot, *supra* note 179, at 172.

of success.<sup>181</sup> In 1987, Barry Carter pointed to studies indicating that economic sanctions successfully helped the United States topple Haiti's Duvalier, Uganda's Idi Amin, Chile's Allende, and the Dominican Republic's Trujillo.<sup>182</sup> In 1991, the Institute for International Economics examined 116 cases in which sanctions were threatened or imposed and found that in 34% of the cases, sanctions "made [at least] a modest contribution to the goal sought by the [sanctioning] country and that the goal was in part realized."<sup>183</sup> However, speaking for the Institute, Kimberly Elliot was quick to point out that the effectiveness of such sanctions had decreased markedly since the 1970s, due in large part to the relative decline of the United States's influence in the world economy.<sup>184</sup>

Supporters of the certification process make similar arguments: certifications are a blunt tool, but are useful in persuading states to act in ways consistent with U.S. interests.<sup>185</sup> For example, in support of the annual anti-narcotics certification process, a joint committee of the House and Senate wrote that certifications served in part to emphasize to foreign governments that the United States is serious about narcotics control: "In testimony before the Congress in recent years, executive branch officials have repeatedly stated that the certification process, while flawed in their judgment, has succeeded in highlighting to foreign governments the seriousness which the

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181. See G. HUFBAUER & J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* (2d ed. 1990).

182. Carter, *supra* note 9, at 1163.

183. Elliot, *supra* note 179, at 172. The study also concluded that "cases involving modest goals—such as human rights, nuclear non-proliferation, discouraging support of terrorism, the release of political prisoners—. . . succeeded about a third of the time." *Id.*

184. See *id.*

185. See, e.g., *U.S. Annual Drug Certification: Hearings Before the House Comm. on International Relations*, 105th Cong. (1998) (statement of John P. Walters, Former Acting Director and Deputy Director of Supply Reduction, Office of National Drug Control Policy) (arguing that "[c]ommon sense reveals that certification works: at an absolute minimum, nations routinely take actions seeking to avoid 'decertification' that it is difficult to believe would have taken place without this process") available in LEXIS, Legis Library, CNGTST file; *Mexican and American Responses*, *supra* note 83, at 54 (statement of Robert S. Gelbard, Assistant Secretary of State) (arguing that "President Clinton has . . . used certification as a powerful and effective tool to exact greater narcotics control performance abroad").

U.S. Government attaches to the issues of narcotics control."<sup>186</sup>

Since most supporters concede that economic sanctions are an imperfect means of achieving a country's foreign policy goals, the most telling criticism of sanctions is not that they are ineffective,<sup>187</sup> but that their costs outweigh their benefits. Whether this is a valid criticism depends on a number of factors. For example, if the United States is unable to garner multilateral support for economic sanctions, their effectiveness is likely to be minimal while the cost to U.S. business will be high. Moreover, if the United States is inconsistent in imposing sanctions, this may also be counterproductive. Riordan Roett argues, in connection with the anti-narcotics process, that certifications are not effective in fighting narcotics, not only because they antagonize friendly nations, but also because drug traffickers can circumvent the process by operating in countries that the United States cannot afford to "decertify."<sup>188</sup> The question then becomes whether it is worth antagonizing other nations if the benefits to the United States are small.

### C. *Encouraging Debate*

Although certification requirements are relatively unsuccessful at controlling executive behavior and only moderately effective in influencing the behavior of states, they perform the additional function of encouraging and focusing debate on particular foreign policy issues.<sup>189</sup> The debate occurs on at

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186. International Cooperation Act Of 1991, H.R. REP. NO. 225 (Part B) (1991) [hereinafter Conference Report]. See also *U.S. and Mexican Counter-drug Efforts Since Certification: Cooperation on Drug Control: Hearings Before Senate Caucus on International Narcotics Control and the Senate Foreign Relations Comm.*, 105th Cong. 2 (1997) (statement of Senator Charles E. Grassley) (stating that certification is "a tool the State Department makes clear is not only working but is critical in ensuring continued cooperation").

187. After all, it is unrealistic to expect any foreign policy tool to be completely effective in achieving U.S. foreign policy goals.

188. *Open Session on the Western Hemisphere Today: A Roundtable Discussion: Hearing Before the Subcomm. on the Western Hemisphere of the House Comm. on International Relations*, 105th Cong. 61 (1997) (statement of Riordan Roett).

189. See, e.g., Conference Report, *supra* note 186 ("The committee of conference firmly believes that certification serves a useful purpose in focusing attention on narcotics issues, both within the Congress and the executive branch."); Horton & Sellier, *supra* note 9, at 859 ("By forcing a foreign pol-

least two levels. The first centers on whether the particular criteria of a certification have been met. Thus, there is controversy as to whether Mexico has indeed cooperated with the United States in achieving anti-narcotics goals. There is dispute as to whether China is preventing the proliferation of nuclear weapons technology. But certification requirements also give rise to a broader discussion—that is, to what extent should concerns such as anti-narcotics, proliferation, and human rights, all of which are embodied in certification requirements, influence U.S. foreign policy? Thus, the debate about Mexico has involved not only arguments about whether Mexico meets the criteria set forth in the statute, but also whether U.S. concerns about illicit narcotics merit jeopardizing relations with a neighboring country. Intense debate ensued over U.S. drug enforcement strategy, both prior to and after the certification of Mexico, as did debate over the role human rights should play in foreign policy following the certifications of El Salvador in the 1980s and Peru in the early 1990s.<sup>190</sup>

#### D. *Defusing Confrontations*

Certification requirements do more than encourage debate. They also serve as a safety valve, which helps the legislative and executive branches avoid direct confrontations over foreign policy matters. In a world in which the lines of responsibility between the two political branches are blurred, certification requirements represent a compromise. Congress is allowed to exert its authority in foreign affairs by imposing the requirements, but their flexibility gives the President wide discretion to act. As discussed earlier, the fact is that most certifications are made without significant opposition from Congress or the public.

Certification requirements also dampen, or at least divert, conflict even where a certification is controversial. In such times, the debate is most often framed in terms of whether the certification is accurate or justified. As long as the executive branch can justify issuing a certification, it can claim that it was

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icy issue to the forefront of a busy political agenda [through the certification process], Congress has indeed made it impossible for the El Salvador issue to fade from public and congressional consciousness . . .”).

190. See *supra* text accompanying notes 47-53.

acting under color of law. Compare a controversy framed in these terms with one that would arise if the President took an action that was expressly prohibited by Congress. There, the issues become more ominous—one is forced to decide whether Congress had the right to prohibit the President from acting and, if so, what must be done in response to the President's failure to obey the will of Congress. These are matters that no one wants to confront unless absolutely necessary—certification requirements make it easier to avoid them, or at least to pretend that they can be avoided.

### E. *Allocating Decision-Making and Risk*

Certification requirements also allow Congress to shift the burden and responsibility for difficult foreign policy decisions to the President. On the one hand, this shift may be perfectly appropriate. To the extent that there are legitimate reasons for allowing the President to lead in foreign affairs, the burdens and risks associated with setting foreign policy are properly placed on the President's shoulders. Statutes that prevent the President from acting unless he first certifies that national interests are at stake or that other conditions have been met may be a Congressional acknowledgment that the President has a comparative advantage in making those kinds of decisions.

On the other hand, more than one observer notes that Congress is often reluctant to take strong stands on foreign affairs issues. Harold Koh writes:

Congress could regularly block executive decisions by joint resolution or appropriations cutoff, so long as it could override a presidential veto by a two-thirds vote. Why hasn't Congress done this regularly? In many cases, a critical mass of Members has simply been unwilling to take responsibility for setting foreign policy, preferring to leave the decision—and the blame—with the President.<sup>191</sup>

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191. Koh, *supra* note 10, at 1304. See also James D. Humphrey II, Note, *Foreign Affairs Powers and "The First Crisis of the 21st Century:" Congressional vs. Executive Authority and the Stabilization Plan for Mexico*, 17 MICH. J. INT'L L. 181, 195-96 (1995) (discussing Congressional and executive responses to the Mexican peso crisis).

Certification requirements shift decision-making and blame to the President, while allowing Congress to take the moral high ground on foreign policy issues.<sup>192</sup> No one wants foreign countries to use U.S. assistance to develop weapons of mass destruction, and no one wants to support a government that engages in human rights abuses or that permits the production or distribution of illicit narcotics. Congress passes legislation which purports to stop the United States from providing such assistance. However, like all countries, the United States constantly weighs competing interests when it formulates foreign policy—a very difficult, and often distasteful, task. Allowing the President to waive such restrictions if he certifies that it is in the national interest to do so gives him a way to circumvent such legislation, but the waiver also forces him to make the hard choices that are part and parcel of policy formation—choices that Congress is often reluctant to make. This is also true with more factual certifications. Congress can argue that it is taking tough stands in foreign affairs by requiring the President to certify that strict statutory criteria have been met before acting. Such legislation places the onus on the President, who must make the difficult call whether, for example, a potential recipient of U.S. assistance does not engage in human rights abuses, or whether a country is cooperating with the United States in its war against drugs. If the President is wrong, he has no one to blame but himself and his staff.<sup>193</sup>

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192. “[T]he certification process allows Congress to appear to be exercising some oversight of the President, while in fact the ultimate decision about continued aid is left to the President’s discretion.” Horton & Sellier, *supra* note 9, at 858.

193. Similar reasons have been given to explain the delegation of Congressional powers to administrative agencies:

There are severe political costs to precise solutions of problems; no such costs attach if Congress merely identifies a problem and asks administrators to solve it. If the administrators fail, members of Congress may blame them. A broad delegation of authority thus allows Congress to claim the credit for identification of a problem while insulating it from attack if particular solutions exacerbate that problem.

STONE ET AL., *supra* note 54, at 415-16.

It should be observed, however, that in theory, certification requirements might also serve to shift responsibility from the President to Congress when the executive branch is engaged in diplomacy with other countries. This is most true when the certification is factual in nature and when the

#### IV. CERTIFICATION AND THE RULE OF LAW IN FOREIGN AFFAIRS

##### A. *The Costs of Certification Requirements*

This discussion has shown that certification requirements are weak methods of exerting Congressional influence in foreign affairs. As such, they reflect unanswerable questions about the proper limits and respective roles of executive and legislative power in the formulation and execution of foreign policy. At the same time, the requirements serve other purposes, which may explain why they are used so frequently despite their ineffectiveness in controlling executive behavior.

However, certification requirements exact significant costs. First, they impose a burden on the executive branch, in terms of the administrative costs of compliance, formulation, and implementation of policy. Most are familiar with the argument that the executive branch should have primary responsibility for the conduct of foreign affairs because it is better to have only one Secretary of State, not some 535 of them.<sup>194</sup> One must also ask whether the task of determining whether the administration has complied with over 100 certification requirements is an unnecessary burden on the executive branch.

Second, certification requirements impose costs on U.S. relations with the states that are the subjects of those certifications. This is particularly true when, as is so often the case with certifications, economic assistance or economic sanctions are at stake. States like Mexico and Colombia have made clear that the annual certification process adversely affects their relations with the United States.<sup>195</sup>

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certification does not provide the President with a broad "national security" or "national interest" waiver. In such instances, the executive branch can argue to a foreign country that, although it would be inclined to take a particular action (say, for example, to provide economic assistance), its hands are tied by statute.

194. There are, of course, limitations to this argument. See *supra* text accompanying notes 54 and 64.

195. See Peter Hakim, *U.S. Drug Certification Process is in Serious Need of Reform*, CHRISTIAN SCIENCE MONITOR, Mar. 27, 1997, at 15 (arguing that the anti-narcotics certification process provokes conflict between the United States and other countries); Kathy Lewis, *Clinton Rethinking Certification Options*, DALLAS MORNING NEWS, May 2, 1997, at 10A (quoting Mexican Ambassador Jesus Silva-Herzog as saying: "We Mexicans, we feel that we have been insulted, and we haven't been treated in the way that you treat a neighbor.");



Certifications exact an even greater cost. Earlier, this article discussed how unilateral action by the executive branch in foreign affairs is costly because it ultimately hampers the executive's ability to implement long-term foreign policy goals.<sup>196</sup> However, unilateral action inflicts a greater cost insofar as it undermines the rule of law:

The pattern of executive-legislative relations, whereby the president act[s] unilaterally and Congress responds with its law-making power only to find that the president later disregards the law when political circumstances permit, has two detrimental effects. First, it contributes to a public perception of Congress as inefficacious . . . . Second, it works to undermine a principal tenet of our constitutionalism, namely, the belief that government is based on 'the rule of law, not of men.'<sup>197</sup>

Certification requirements are almost predisposed to create situations where the same detrimental effects occur. This is because certification requirements, for all of the reasons discussed above, are ultimately ineffective in controlling executive behavior. 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, even if the President does not disregard the certification process. As has been shown, many certification requirements are so porous, and their enforcement so unlikely, that the President need only give colorable arguments to justify a particular certification. When this happens, and particularly when there is substantial evidence to the contrary, the public is left with the impression that the President runs roughshod over the law, with Congress unable to exercise its prerogatives in foreign affairs. The controversies surrounding the certifications of El Salvador in the 1980s, the certification of Peru earlier in this

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Stanley Meisler, *Push to End Certification Intensifies: Narcotics: the Recent Battle Over Mexico's Status has Led to a Growing Desire in Congress and the White House for Another System*, L.A. TIMES, May 26, 1997, at A11 (discussing, among other things, strained relations between Mexico and the United States as a result of the anti-narcotics certification process).

196. See *supra* text accompanying notes 72-73.

197. KRAFT, *supra* note 55, at 154.

decade, and the certifications of Mexico in the past two years all demonstrate this point.

The damage to the rule of law caused by such certifications spreads beyond the domestic sphere. One of the criticisms leveled against the annual anti-narcotics certification process is that some countries are practically guaranteed certification, while others are not. This is because the United States believes it cannot afford to withdraw economic assistance from some countries, while others are not as important to U.S. interests.<sup>198</sup> The disparity results in inconsistencies in the application of the law which do not go unnoticed by the international community. As an expert has noted: “[T]he certification process and associated policy initiatives are likely to command decreasing international respect—and in general to yield diminishing returns over time—if certain countries are granted de-facto permanent exemptions because of their ‘special relationship’ with the United States.”<sup>199</sup>

#### B. *Reducing the Costs of Certification Requirements*

Given that the costs of certification requirements are high, what can be done to minimize them? In this section, I suggest that, if certification requirements are to remain a part of our foreign policy, changes must be made in the legislation that imposes them and in their enforcement. Congress should reduce the number of certification requirements it enacts. If Congress believes that a certification requirement is desirable, the criteria for the certification should be either very narrow or very broad. This makes it more likely that the courts will be inclined to exercise review, which is necessary if these requirements are to have the force of law.

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198. Rensselaer Lee observes that since 1986, when the anti-narcotics certification process was first established, Mexico has been consistently certified, despite complaints that Mexico has been unsuccessful and unwilling to fight drugs, while Iran has consistently been decertified, despite the fact that it has a vigorous counter-narcotics program. *Perspectives on Certification: Hearings Before the Subcomm. on the Western Hemisphere, Peace Corps, Narcotics and Terrorism of the Senate Comm. on Foreign Relations, 105th Cong. 2* (1998) (testimony of Rensselaer W. Lee, III).

199. *Id.*

### 1. *Legislation*

An obvious way to minimize the costs imposed by certification requirements is to reduce their number. Congress should use legislative tools, such as earmarking and—when constitutional—express prohibitions, to influence foreign policy. If Congress wants to avoid being heavy-handed, yet still wants the President to take into account factors such as human rights, non-proliferation, or narcotics in framing his foreign policy, Congress should require the President to issue reports (roughly analogous to environmental impact statements) assessing the likely impact a contemplated action would have on a particular area of concern.

Alternatively, if Congress insists on inserting a certification requirement into foreign policy legislation, it should ensure that the criteria for the certification are either very narrow or very broad. Very narrow criteria would require that the certification turn on precise and, ideally, readily verifiable factual criteria, which would make the justification of a particular certification readily apparent. With respect to the anti-narcotics certification process, for example, Congress could impose numerical criteria, such as numbers of drug seizures, extraditions, etc., to determine whether a country has cooperated with the United States in anti-narcotics efforts.

Imposing narrower criteria for certifications would reduce the number of controversies harmful to the rule of law. First, it would deter the executive branch from making controversial certifications at the outset. In such circumstances, the constraining features of certification requirements (discussed in Part II), are more likely to have some effect, i.e., the possibility of embarrassment or, in rare cases, being caught in pure deception. Furthermore, if the executive branch goes forward with a controversial certification, tighter criteria would tend to reduce controversy; the determination of whether a certification was justified would be easier, thereby making it easier for Congress, or ideally the courts, to review and overturn such a certification if necessary.

As has been shown, however, Congress often finds it undesirable to impose such narrow criteria, which may be an inadequate means of addressing a particular foreign policy concern or which, in some circumstances, could block the President from acting in an emergency. In such instances, where

Congress still wishes to impose a certification requirement, the criteria should then be very broad. One example might be a certification that the contemplated action is in the national interest. A broad-based certification such as this one might seem unpalatable. In effect, it would force the executive branch to concede that a country normally ineligible to receive economic assistance (say, because it fails to meet internationally recognized human rights standards) should nevertheless qualify for assistance because it is in the national interest to maintain relations with it. Yet, such a concession at least creates greater transparency in the decision-making process. The nation would be spared the controversy and cynicism that arises when the executive branch certifies that a recipient of U.S. assistance meets human rights standards, but considerable evidence stands starkly to the contrary.<sup>200</sup>

## 2. *Judicial Enforcement*

The framing of narrower certification requirements is a necessary (but not sufficient) condition for greater judicial review—a second means of reducing the costs of certifications. It is hard to see how such requirements will have the force of law if the courts are unwilling to step in when gross violations of the statutes implementing them are alleged. The alternative is to have laws with no remedy. A thorough discussion of this issue requires a close examination of the policies and fundamental rationales underlying judicial reluctance to intervene in foreign affairs matters. It is not the purpose of this article to undertake that task. I will, however, tentatively com-

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200. Michael Glennon has made similar arguments with respect to instances when the executive branch has completely disregarded the law on national security grounds. He writes:

Rather than defending a manifest transgression of the law, the rule of law would be better served by acknowledging the transgression and arguing from necessity rather than legality. Arthur Schlesinger has wisely written that while the Framers did not rule out the possibility that "crisis might require the executive to act outside the Constitution" neither did they intend to confer constitutional legitimacy on such acts, believing that the "legal order would be better preserved if departures from it were frankly identified as such than if they were anointed with a fictitious legality and thereby enabled to serve as constitutional precedents for future action."

GLENNON, *supra* note 55, at 284 (citing ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* 8 (1973)).

ment on how the standing, equitable discretion, and political question doctrines inform judicial review of certification requirements. Of these, the equitable discretion and political question doctrines (even in their current forms) should not be used to bar judicial review of certifications in all cases. Until there are significant changes in the standing doctrine, however, standing will continue to impose a significant hurdle to judicial review.

*Equitable Discretion.* As discussed earlier, this doctrine stems from the belief that the courts should not circumvent normal democratic processes.<sup>201</sup> The idea that the courts should not intervene in cases involving a dispute between a member of Congress and his or her colleagues is compelling. But there is a danger that every dispute involving the legality of a Presidential action could be construed in this way, thereby precluding members of Congress from ever obtaining review of Presidential action. There must be times when the courts should step in to break the potentially endless cycle of executive action, legislation overturning of such action, executive action overturning that action, and so on. If a member of Congress is able to demonstrate the requisite standing to challenge a certification, then at some point the court should be willing to hear the case.

*The Political Question Doctrine.* The political question doctrine poses one of the most difficult hurdles to judicial review of a controversial certification,<sup>202</sup> but courts should not apply the doctrine too broadly.

Leaving aside questions of the constitutionality of imposing constraints on the executive branch, there are two likely kinds of disputes related to a certification requirement: procedural disputes and substantive disputes. Procedural disputes concern executive or legislative compliance with the procedural requirements of a statute imposing a certification requirement. Substantive disputes concern whether a certification is justified in light of the statutory criteria governing it.

Procedural disputes should almost never be barred from review. Asking a court to interpret the procedural requirements of a particular statute is a task courts are authorized to

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201. See *supra* text accompanying note 130.

202. See *supra* text accompanying notes 146-52.

undertake and, indeed, have undertaken in the past.<sup>203</sup> Suppose a statute requires the President to certify to Congress that Country A has removed certain weapons from Country B before economic assistance may be provided to Country A. Then suppose the President provides the assistance without issuing the required certification. It is difficult to see how any of the *Baker* factors are implicated in overturning executive action for failure to follow procedures set out in legislation.

Of course, a more difficult case arises when there is a substantive dispute. What happens, for example, if the President certifies that a particular action is vital to the interests of the United States, or certifies that a particular country is cooperating with the United States in the war against drugs? Should a court, in light of the political question doctrine, review these kinds of decisions?

Answering this question is difficult. First, there is the broad range of certifications the executive branch makes. Second, the present state of the law is unclear. The courts have never held that the political question doctrine bars adjudication of a controversy over the substance of a certification.<sup>204</sup> At first glance, it appears unlikely that such an action would survive scrutiny under *Baker*, especially considering whether the controversy involves a lack of judicially discoverable and manageable standards. A court would probably decide that it was unable to create standards for determining whether a certification was substantively "correct."

Faced with a controversy over substance, however, the court should first determine what kind of certification the executive has made. If the statute requires a certification clearly based on policy (such as a certification that a particular action is in the national interest), then a court ought to refuse to hear the case. In such situations, prudential concerns underlying the *Baker* factors carry the most weight—the formulation and implementation of foreign policy rests with the political branches. Deciding, for example, whether the President was

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203. See, e.g., *Adkins v. United States*, 68 F.3d 1317, 1326 (3rd Cir. 1996) (holding that the political question doctrine does not bar a suit in which a retired officer alleged procedural violations in connection with the Secretary of the Army's decision to deny the officer promotion).

204. They have, however, been asked to consider this issue. See *Crockett*, 558 F.Supp. at 902.

correct in certifying that a particular action was in the interest of the United States would require, at a minimum, a court to answer, in essence, the question of what the foreign policy and security interests of the United States are. The courts have rarely, if ever, answered this, poorly equipped as they are to do so. Moreover, if there are competing foreign policy interests, the court would have to choose which interests are controlling.<sup>205</sup> Then the court would have to determine whether the contemplated action would further those interests. It is hard to imagine a court making these kinds of decisions.

But even here there is room for debate. Courts frequently determine the interests of the United States. For example, in determining whether the state secrets doctrine blocks the discovery of potentially sensitive information, the court must determine whether the information, if disclosed, would reasonably be expected to have an adverse effect on U.S. security interests.<sup>206</sup> Furthermore, faced with the task of statutory interpretation, courts frequently glean and pronounce Congressional policy in order to determine whether a particular judicial outcome furthers that policy or defeats it.

However, in statutory interpretation, the underlying policy behind a statute is either express or implied. The court's task is to apply the statute in manner consistent with that policy. Congress has formulated the policy, having chosen among competing interests. Certification requirements, by contrast, are sometimes part of statutory schemes that *invite* the consideration and weighing of competing policy interests. Thus, a statute that forbids the production of chemical weapons expresses a policy that because such weapons represent a danger to society, the United States should not contribute to their development. The incorporation of an exception that allows for the production of such weapons if the President certifies that such an action is in the United States's security interests invites more policy-making. In such instances, the courts should not intervene.

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205. This is true unless the statute in question expressly states that a particular element of foreign policy, such as human rights considerations, is controlling. This, in my view, would rarely be the case.

206. See *United States v. Reynolds*, 345 U.S. 1 (1953); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

What about certifications that appear on their face to be more factual in nature? Courts make and review factual findings all the time. Yet even here a number of problems arise, all of which may deter a court from entering the fray. For example, say a factual certification involves classified information. It could be argued that there are no judicially "discoverable" standards with which to adjudicate the issue.

The courts have refused to exercise jurisdiction over cases in which classified information is involved. In *Sanchez-Espinoza v. Reagan*,<sup>207</sup> for example, the court dismissed on political question grounds a suit brought by Nicaraguan citizens, members of Congress, and private citizens seeking to enjoin U.S. activities against Nicaragua. Members of the House of Representatives alleged, among other things, that certain members of the Reagan Administration had violated the so-called Boland Amendment,<sup>208</sup> which prohibited the Central Intelligence Agency (CIA) and the Department of Defense from using any of the funds provided in the Department of Defense Appropriations Act of 1983 for military activities aimed at overthrowing the government of Nicaragua. Using the political question doctrine to dismiss the case, the court reasoned, in part, that the lack of judicially discoverable or manageable standards required such dismissal. The court believed that holding otherwise would require it to look into sensitive military affairs, and it questioned whether covert activities of the CIA and the military in Nicaragua would be discoverable under the state secrets doctrine.<sup>209</sup>

Given this reluctance to delve into classified matters, courts might be more likely to dismiss a challenge to a certification that involves state secrets. For example, if Congress challenged a Presidential certification that Country X does not possess nuclear weapons, the government could argue that the only way to prove or disprove this assertion would require the disclosure of information that is privileged under the state secrets doctrine.

The mere fact that a case might involve sensitive information, however, should not automatically preclude review. The

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207. 568 F. Supp. 596 (D.D.C. 1983).

208. Pub. L. No. 97 - 337, § 793, 96 Stat. 1830, 1865 (1982). The Boland Amendments have been compiled at 26 I.L.M. 433, 440 (1987).

209. See *Sanchez-Espinoza*, 568 F. Supp. at 600.



*Sanchez-Espinoza* court did not go far enough in its analysis.<sup>210</sup> The court should have asked at least two additional questions, stemming from state secrets analysis. Assuming, *arguendo*, that certain classified information is central to prove the plaintiff's case, the court should ask whether the plaintiff can continue its case based on evidence that is not privileged. If not, the court should determine whether the case should be dismissed on those grounds or whether, in fairness to the plaintiff, the relative positions of the parties should be adjusted to account for the application of the privilege. These two prongs already form part of the state secrets analysis. Thus, the state secrets doctrine, not the political question doctrine, should be used in substantive controversies over a certification that involves classified material. To be sure, a number of cases may not be allowed to go forward because evidence needed to prove the plaintiff's case is privileged. However, the plaintiff should at least be given the opportunity to present evidence that is not privileged but sufficient to prove its case.

Another set of controversies may arise when certifications are "factual," yet move beyond what may be termed verifiable propositions of fact. A certification such as "Pakistan does not possess nuclear weapons" may be deemed "factual." A statement that is more akin to an "assessment" of a given fact situation goes further, as it may entail policy judgments normally left to the political branches. For example, how would a court adjudicate the validity of a certification that a country has cooperated fully with the United States in achieving compliance with international anti-narcotics requirements? Here, the certification appears to be based on a mixture of policy, fact, and law. Of course, any resolution of these issues turns on the facts of a given case. Yet courts appear to be more willing to hear cases involving these kinds of questions if the cases can be framed in terms of statutory interpretation or constitutionality. Three examples are relevant here.

In *Population Institute, Population Council v. McPherson*,<sup>211</sup> plaintiffs challenged a decision by the U.S. Agency for International Development (USAID) to withhold funds for China that had been earmarked by Congress for the United Nations Fund

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<sup>210</sup> For this reason, the "judicially discoverable standards" prong is flawed.

<sup>211</sup> 797 F.2d 1062 (D.C. Cir. 1986).

for Population Activities (UNFPA). USAID defended its action by arguing that the Foreign Assistance and Related Programs Appropriations Act of 1985<sup>212</sup> prohibited the agency from funding "any organization . . . which . . . supports or participates in the management of a program of coercive abortion or involuntary sterilization." It further claimed that the political question doctrine barred the plaintiffs from bringing the case. The district court agreed and dismissed the case.

On appeal, the D.C. circuit rejected USAID's argument, finding that the *Baker* factors did not preclude review. In particular, the court conceded that part of the Administrator's decision rested on his assessment of China's policies with respect to abortion. However, the court found that the Administrator's decision also rested on a comparison of that assessment with his interpretation of the requirements of the statutory prohibition. And, although the court might have deferred to USAID's judgment with respect to the former, it felt no need to do so with respect to the latter:

The question that is then presented for our review is whether the Administrator has arrived at the determination that he is required to make by statute with due regard for the intent of Congress in enacting that statute. Simply because the result of that determination will have an effect on international relations does not completely strip the courts of the power and duty to review the legislative interpretation that supports the decision. The judiciary is well situated to decide if the Administrator has relied upon a supportable interpretation of the amendment.<sup>213</sup>

Four years later, in *Dellums v. Bush*,<sup>214</sup> the court found that the political question doctrine would not bar the judiciary from deciding whether military actions against Iraq constituted "war" for purposes of the War Powers clause. In that case, members of Congress sought an injunction preventing President Bush from initiating hostilities against Iraq without first securing a declaration of war or other authorization from Congress. The Department of Justice argued that the political

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212. Pub. L. No. 98-473, 98 Stat. 1837, 1887-88 (1984).

213. *McPherson*, 797 F.2d at 1068-69.

214. 752 F. Supp. 1141 (D.D.C. 1990).

question doctrine precluded the court from determining whether the President was required to seek such a declaration or authorization.

The court rejected the Department of Justice's argument, observing that "courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for purposes of the constitutional War Clause."<sup>215</sup> The court was not persuaded by arguments that the political question doctrine barred the case from being heard because resolution of the issue would embroil the court in foreign affairs. The court reasoned that the *Baker* principles do not bar courts from hearing cases just because they might have some connection with foreign affairs. It pointed out that the courts have a long history of determining whether the country was at war for purposes of construing treaties, statutes, and insurance contracts.<sup>216</sup> Because the complaint alleged that there were massive concentrations of troops in Saudi Arabia and that the President intended to invade Iraq (as evidenced by the procurement of a U.N. Security Council vote authorizing the use of force against Iraq), and in light of the factors discussed, the court concluded: "[A]n offensive entry into Iraq by several hundred thousand United States servicemen under the conditions described above could be described as a 'war' within the meaning of Article I, Section 8, Clause 11, of the Constitution."<sup>217</sup>

Thus, there are instances where courts are willing to hear questions of law and fact that bear on foreign and military affairs. However, the facts in *Dellums* are quite extraordinary; it could be argued that anyone at that time—let alone the court—would make no other conclusion but that the United States was indeed preparing to go to war against Iraq. A dispute about a certification could arise on closer facts, however. Even the *Dellums* court speculated that in close cases it might be prepared to grant greater deference to the political branches: "That is not to say that, assuming that the issue is factually close or ambiguous or fraught with intricate technical military and diplomatic baggage, the courts would not defer to the political branches to determine whether or not particular

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215. *Id.* at 1145.

216. *See id.* at 1146.

217. *Id.*

hostilities might qualify as a 'war.'"<sup>218</sup> Here, the court seemed to say that in such cases the political question doctrine might bar review of controversies between Congress and the President.

Such was the case in *Lowry v. Reagan*,<sup>219a</sup> a case decided three years before *Dellums*. The issue was whether a Presidential decision to reflag Kuwaiti ships to protect them against Iran constituted a violation of the War Powers Resolution.<sup>220</sup> The answer turned on whether the U.S. action constituted "hostilities" for purposes of the resolution. The court found that the political question doctrine, particularly the judicially discoverable and manageable standards prong, barred it from resolving the question. The court reasoned that the very fact that the War Powers Resolution does not define the term "hostilities" implies that Congress wanted the political branches alone to resolve any disputes regarding whether a particular situation constitutes hostilities.<sup>221</sup> It stated that this factual determination, i.e., whether the action constituted hostilities, if undertaken by the court, would be hampered by lack of intelligence information and expertise.<sup>222</sup>

The court's reasoning in *Lowry* leaves much to be desired. For one thing, if Congress leaves a term in a statute undefined, it does not necessarily follow that Congress wants the political branches to define it. Indeed, one may infer the exact opposite: by not defining a term, Congress may intend the courts to fill in the statute's contours through decisional law. Second, with respect to the need for intelligence information, as this article argues above, a party bringing a complaint should have the opportunity to present unclassified information to substantiate its claims. Alternatively, such evidence can be reviewed by the court *in camera*. But this is not to say that there will never be an instance when deciding whether a particular certification is justified involves close questions of fact and law. In such instances, it may well be appropriate to deny review.

*Standing.* Modern standing doctrine poses a significant hurdle to judicial review of a certification—for individuals,

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218. *Id.* at 1145.

219. 676 F. Supp. 333 (D.D.C. 1987).

220. 50 U.S.C. §§ 1541-1548 (1994).

221. *See id.* at 340 n.53.

222. *See id.*

special interest groups, and members of Congress alike.<sup>223</sup> As this article argues above, under current law it is still possible for members of Congress to demonstrate the required standing. How likely is it that individuals or private interest groups will achieve standing to challenge a certification? The concepts of injury, causation, and redressability will undoubtedly continue to change according to prevailing jurisprudential currents. Yet no matter how these elements are construed, the courts are not likely to conclude that they are empowered to entertain citizen suits any time soon. The injury requirement, or some equivalent thereof, will generally continue to bar individuals from challenging certification requirements in the courts. Individuals will continue to have their only recourse at the polls. As discussed above, individuals from abroad, as well as special interest groups, may have better chances with claims that they have suffered sufficient injury, but the problem of third-party actors makes it difficult for such plaintiffs to overcome the hurdles of causation and redressability.

A total rethinking of the standing doctrine must occur before individuals and public interest groups will be able to successfully allege standing in order to challenge certification requirements. Until the requisite changes occur, standing will continue to prove a significant bar to judicial review.<sup>224</sup> This makes it even more important for Congress to act sparingly in enacting certification requirements. Except in very rare cases, certification requirements will not be enforced by the courts.

## V. CONCLUSION

This article began with two controversies involving certification requirements. The aims of this discussion were twofold: first, to provide a framework for understanding and evaluating this relatively simple legislative tool, which—appearing throughout our foreign policy legislation—has the potential to

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223. See *supra* text accompanying notes 101-29.

224. Some scholars have suggested that justiciability doctrines like standing, ripeness, and mootness should be separated from Article III concerns. See, e.g., Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 605 (1992) (arguing that the mootness doctrine can be separated from Article III policy concerns and made into a prudential doctrine); Patricia M. Wald, *The Cinematic Supreme Court: 1991-92 Term*, 7 AD-MIN. L. REV. AM. U. 238, 239 (1993) (arguing that the three-prong standing test cannot be derived from the “case or controversy” requirement).

harm the rule of law; and second, to suggest ways in which such harm can be avoided. It should now be clearer that certification requirements, and the controversies which attend them, are emblematic. They represent, if not an underlying problem, an underlying reality, in the manner in which we have organized our national government. Many of the problems associated with these requirements will not disappear until the underlying reality changes, which is not likely, nor perhaps even desirable. Yet greater knowledge of this tool, including its capabilities, limitations, and costs, leads to the conclusion that it should be used more wisely and less often. When it is used, the certification requirement should be crafted to make it less likely that controversies such as those surrounding the certifications of Mexico and China will happen again.

## APPENDIX

RECENT U.S. FOREIGN POLICY  
LEGISLATION IMPOSING PRESIDENTIAL  
CERTIFICATION REQUIREMENTS

## I. LEGISLATION CONCERNING SPECIFIC STATES

*Afghanistan*

22 U.S.C. § 2374 (1994).

*Albania*

Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8115, 112 Stat. 2279, 2327 (1998) (also listed under "Macedonia," "Yugoslavia," and "Deployment of U.S. Armed Forces Abroad").

*Angola*

12 U.S.C. § 635(b)(11) (1994) (also listed under "Financial Organizations" and "Human Rights").

*Australia*

22 U.S.C. § 2776 (1994) (also listed under "Japan," "New Zealand," "NATO," and "Defense Assistance").

*Bosnia and Herzegovina*

Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1004(c), 112 Stat. 1920, 2112 (1998).

Department of Defense Appropriations Act, 1998, Pub. L. No. 105-56, § 8132, 111 Stat. 1203, 1250 (1997).

National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1203, 111 Stat. 1629, 1929 (1997).

1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, § 16, 112 Stat. 58, 66 (1998).

*Burma*

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166 (1996) (also listed under "Human Rights" and "Narcotics").

Customs and Trade Act of 1990, Pub. L. No. 101-382, § 138, 104 Stat. 629, 653 (1990) (also listed under "Human Rights" and "Narcotics").

*Chile*

International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 726(b), 95 Stat. 1519, 1554 (1981), *as amended by* Pub. L. No. 99-83, sec. 715, §726 (c) 99 Stat. 190, 247 (1985) and Foreign Operations, Export Financing, and Related Programs Appropriations Act, Pub. L. No. 101-513, Title V, § 544(b), 104 Stat. 1979, 2019 (1990) (also listed under "Human Rights" and "Terrorism").

*China*

Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1512, 112 Stat. 1920, 2174 (1998).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 523, 111 Stat. 2386, 2412 (1997) (also listed under "Cuba," "Iran," "Iraq," and "Libya").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 523, 110 Stat. 3009, 3009-148 (1997) (also listed under "Cuba," "Iran," "Iraq," "Libya," and "North Korea").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 523, 110 Stat. 704, 729 (1996) (also listed under "Cuba," "Iran," "Iraq," and "Libya").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No.



103-106, § 523, 108 Stat. 1608, 1632 (1995) (also listed under "Cuba," "Iran," "Iraq," and "Libya").

Chinese Student Protection Act of 1992, Pub. L. No. 102-404, § 2(c), 106 Stat. 1969, 1970 (1992) (also listed under "Human Rights").

Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, § 902, 104 Stat. 15, 83 (1990).

*Cuba*

22 U.S.C. § 6006 (1994) (also listed under "Human Rights").

22 U.S.C. § 6062 (1994).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 523, 111 Stat. 2386, 2412 (1997) (also listed under "China," "Iran," "Iraq," and "Libya").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 523, 110 Stat. 3009, 3009-148 (1997) (also listed under "China," "Iran," "Iraq," "Libya," and "North Korea").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 523, 110 Stat. 704, 729 (1996) (also listed under "China," "Iran," "Iraq," and "Libya").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No. 103-106, § 523, 108 Stat. 1608, 1632 (1995) (also listed under "China," "Iraq," "Iran," and "Libya").

*Democratic Republic of Congo*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 585, 111 Stat. 2386, 2437 (1997) (also listed under "Human Rights").

*Greece*

22 U.S.C. § 2373 (1994) (also listed under "Turkey" and "Defense Assistance").

*Haiti*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 562, 111 Stat. 2386, 2427 (1997) (also listed under "Economic Reform" and "Human Rights").

*Iran*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 523, 111 Stat. 2386, 2412 (1997) (also listed under "China," "Cuba," "Iraq," and "Libya").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 523, 110 Stat. 3009, 3009-148 (1997) (also listed under "China," "Cuba," "Iraq," "Libya," and "North Korea").

Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, §§ 8-9, 110 Stat. 1541, 1545-47 (1996) (also listed under "Libya").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, 110 Stat. 704, 718 (Also listed under "Financial Organizations").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 523, 110 Stat. 704, 729 (1996) (also listed under "China," "Cuba," "Iraq," and "Libya").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No. 103-106, § 523, 108 Stat. 1608, 1632 (1995) (also listed under "China," "Cuba," "Iraq," and "Libya").

*Iraq*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 534, 111 Stat. 2386, 2416 (1997).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 523, 111 Stat. 2386, 2412 (1997) (also listed under "China," "Cuba," "Iran," and "Libya").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 523, 110 Stat. 3009, 3009-148 (1996) (also listed under "China," "Cuba," "Iran," "Libya," and "North Korea").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 533, 110 Stat. 3009, 3009-152 (1996) (also listed under "Serbia and Montenegro").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 523, 110 Stat. 704, 729 (1996) (also listed under "China," "Cuba," "Iran," and "Libya").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No. 103-106, § 523, 108 Stat. 1608, 1632 (1995) (also listed under "China," "Cuba," "Iran," and "Libya").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1994, Pub. L. No. 103-87, § 539, 107 Stat. 931, 957 (1993).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1993, Pub. L. No. 102-391, § 573, 106 Stat. 1633, 1666 (1993).

Iraq Sanctions Act of 1990, Pub. L. No. 101-513, § 586H, 104 Stat. 1979, 2052-54 (1990).

*Ireland*

Anglo-Irish Agreement Support Act of 1986, Pub. L. No. 99-415, § 5, 100 Stat. 947, 948 (1986).

*Japan*

22 U.S.C. § 2776 (1994) (also listed under "Australia," "New Zealand," "NATO," and "Defense Assistance").

Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8105, 104 Stat. 1856, 1902 (1990).

Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8125(f), 102 Stat. 2270, 2270-60 (1988), *as amended by* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1623(3), 103 Stat. 1352, 1606 (1989) (also listed under "South Korea" and "Deployment of U.S. Armed Forces Abroad").

*Liberia*

Peace Process in Liberia, Pub. L. No. 102-270, § (b), 106 Stat. 106, 106-07 (1992).

*Libya*

Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 8, 110 Stat. 1541, 1546 (1996) (also listed under "Iran").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 523, 111 Stat. 2386, 2412 (1997) (also listed under "China," "Cuba," "Iran," and "Iraq").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 582, 111 Stat. 2386, 2435 (1997).

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 523, 110 Stat. 3009, 3009-148 (1996) (also listed under "China," "Cuba," "Iran," "Iraq," and "North Korea").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 523, 110 Stat. 704, 729 (1996) (also listed under "China," "Cuba," "Iran," and "Iraq").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1995, Pub. L. No. 103-106, § 523, 108 Stat. 1608, 1632 (1995) (also listed under "China," "Cuba," "Iran," and "Iraq").

*Macedonia*

Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8115, 112 Stat. 2279, 2327 (1998) (also listed under "Albania" "Yugoslavia," and "Deployment of U.S. Armed Forces Abroad").

*Mauritania*

Human Rights, Refugee, and Other Foreign Relations Provisions Act of 1996, Pub. L. No. 104-319, § 202, 110 Stat. 3864, 3866 (1996) (also listed under "Human Rights").

*New Zealand*

22 U.S.C. § 2776 (1994) (also listed under "Australia," "Japan," "NATO, and "Defense Assistance").

*North Korea*

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 523, 110 Stat. 3009, 3009-148 (1997) (also listed under "China," "Cuba," "Iran," "Iraq," and "Libya").

*Pakistan*

22 U.S.C. § 2375 (1994) (also listed under "Arms Control/Non-Proliferation").

*Russia*

Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1304, 112 Stat. 1920, 2163 (1998) (also listed under "Arms Control/Non-Proliferation").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, 111 Stat. 2386, 2396 (1997) (also listed under "Arms Control/Non-Proliferation") [tit. II, under heading "Assistance for the New Independent States of the Former Soviet Union" (j)].

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 577, 111 Stat. 2386, 2432 (1997) (also listed under "Human Rights").

National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1406, 111 Stat. 1629, 1961 (1997) (also listed under "Arms Control/Non-Proliferation").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 9002(o)(1), 110 Stat. 3009, 3009-131 (1996) (also listed under "Arms Control/Non-Proliferation").

National Defense Authorization Act for 1994, Pub. L. No. 103-160, § 1612, 107 Stat. 1547, 1850 (1993) (also listed under "Arms Control/Non-Proliferation").

*Serbia and Montenegro*

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 533, 110 Stat. 3009, 3009-152 (1996) (also listed under "Iraq").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 540, 110 Stat. 3009, 3009-155 (1996).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 540A, 110 Stat. 704, 737 (1996) (also listed under "Human Rights").

National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1511, 107 Stat. 1547, 1840 (1993).

*Slovenia*

NATO Enlargement Facilitation Act, Pub. L. No. 104-208, § 606, 110 Stat. 3009, 3009-173 (1996) (also listed under "NATO").

*South Korea*

Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8125(f), 102 Stat. 2270, 2270-41 (1988), *as amended by* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1623(3), 103 Stat. 1352, 1606 (1989) (also listed under "Japan" and "Deployment of U.S. Armed Forces Abroad").

*Turkey*

22 U.S.C. § 2373 (1994) (also listed under "Greece" and "Defense Assistance").

*Ukraine*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, 111 Stat. 2386, 2396 (1997) [tit. II, under heading "Assistance for the New Independent States of the Former Soviet Union" (k)].

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 9002(q), 110 Stat. 3009, 3009-132 (1996).

*Vietnam*

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 609, 111 Stat. 2440, 2517 (1997).

*Yugoslavia*

Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8115, 112 Stat. 2279, 2327

(1998) (also listed under "Albania," "Macedonia," and "Deployment of U.S. Armed Forces Abroad").

*Middle East/Persian Gulf*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 586, 111 Stat. 2386, 2437 (1997).

Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, tit. IV, § 403, 105 Stat. 647, 721 (1991) (also listed under "Arms Control/Non-Proliferation" and "Defense Assistance").

*Newly Independent States*

22 U.S.C. § 2295a (1994) (also listed under "Human Rights").

22 U.S.C. § 5852 (1994) (also listed under "Arms Control/Non-Proliferation").

22 U.S.C. § 5902 (1994) (also listed under "Arms Control/Non-Proliferation" and "Human Rights").

22 U.S.C. § 5952 (1994) (also listed under "Arms Control/Non-Proliferation" and "Human Rights").

50 U.S.C. § 2333 (1994) (also listed under "Arms Control/Non-Proliferation").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, tit. II, 110 Stat. 704, 713 (1996) (also listed under "Arms Control/Non-Proliferation").

National Defense Authorization Act for 1996, Pub. L. No. 104-106, § 1208, 110 Stat. 186, 470 (1996) (also listed under "Arms Control/Non-Proliferation").

Soviet Nuclear Threat Reduction Act of 1991, Pub. L. No. 102-228, § 211, 105 Stat. 1691, 1693 (1991), *as amended by* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1421(a),



106 Stat. 2315, 2565 (1992) and National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1204, 110 Stat. 186, 470 (1996) (also listed under "Arms Control/Non-Proliferation").

National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 223, 101 Stat. 1019, 1056 (1987), *as amended by* Act For Reform In Emerging New Democracies and Support and Help for Improved Partnership with Russia, Ukraine, and Other New Independent States, Pub. L. No. 103-199, Title II, § 203(a), 107 Stat. 2317, 2321 (1993) (also listed under "Strategic Defense Initiative").

*Palestine Liberation Organization*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 552, 111 Stat. 2386, 2422 (1997).

Foreign Operations, Export Financing, and Related P Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 566, 111 Stat. 2386, 2428 (1997).

Middle East Peace Facilitation Act of 1995, Title VI, Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. Law No. 104-107, § 603(c), 110 Stat. 755, 758-59 (1997).

Global Climate Protection Act of 1987, Pub. L. No. 100-204, Title X, § 1005, 101 Stat. 1407, 1408 (1987).

## II. LEGISLATION CONCERNING MULTILATERAL ORGANIZATIONS

*North Atlantic Treaty Organization (NATO)*

22 U.S.C. § 2776 (1994) (also listed under "Australia," "Japan," "New Zealand," and "Defense Assistance").

NATO Enlargement Facilitation Act, Pub. L. No. 104-208, § 606, 110 Stat. 3009, 3009-173 (1996) (also listed under "Slovenia").

*United Nations*

50 U.S.C. § 404g (Supp. 1993).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 564, 111 Stat. 2386, 2428 (1997).

*International Energy Agency*

42 U.S.C. § 6274 (1994).

## III. LEGISLATION ON SPECIFIC FOREIGN POLICY ISSUES

*Abortion*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 518, 111 Stat. 2386, 2311 (1997).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 518, 110 Stat. 704, 727 (1996).

*Arab Boycott*

Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 564, 108 Stat. 382, 484 (1994), *as amended by* Foreign Relations Laws Technical Amendments, Pub. L. No. 103-415, § 1(l), 108 Stat. 4299, 4301 (1994) (also listed under "Defense Assistance").

*Arms Control/Non-Proliferation*

12 U.S.C. § 635(b)(4) (1994) (also listed under "Financial Organizations").

22 U.S.C. § 2375 (1994) (also listed under "Pakistan").

- 22 U.S.C. § 2797a (1994).
- 22 U.S.C. § 2797b (1994).
- 22 U.S.C. § 2798 (1994).
- 22 U.S.C. § 2799aa (1994).
- 22 U.S.C. § 2799aa-1 (Supp. 1994).
- 22 U.S.C. § 5605 (1994).
- 22 U.S.C. § 5852 (1994) (also listed under “Newly Independent States”).
- 22 U.S.C. § 5902 (1994) (also listed under “Newly Independent States” and “Human Rights”).
- 22 U.S.C. § 5952 (1994) (also listed under “Newly Independent States” and “Human Rights”).
- 22 U.S.C. § 6301 (1994).
- 22 U.S.C. § 6303 (1994).
- 50 U.S.C. § 1516 (1994).
- 50 U.S.C. § 1519 (1994).
- 50 U.S.C. § 1519a (1994).
- 50 U.S.C. § 2333 (1994) (also listed under “Newly Independent States”).
- 50 U.S.C. appendix § 2410b (1994).
- 50 U.S.C. appendix. § 2410c (1994).
- Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1304, 112 Stat. 1920, 2163 (1998) (also listed under “Russia”).
- Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No.

105-118, 111 Stat. 2386, 2396 (1997) (also listed under "Russia") [tit. II, under the heading "Assistance for the New Independent States of the Former Soviet Union" (j)].

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, 111 Stat. 2386, 2399 (1997) [tit. II, under the heading "Non-Proliferation, Anti-Terrorism, Demining and Related Programs"] (Korean Peninsula Energy Development Corporation).

National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 1406, 111 Stat. 1629, 1961 (1997) (also listed under "Russia").

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 9002(o)(1), 110 Stat. 3009, 3009-131 (1996) (also listed under "Russia").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, Title II, 110 Stat. 704, 713 (1996) (also listed under "Newly Independent States").

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, Title IV, 110 Stat. 704, 721 (1996) (Korean Peninsula Energy Development Corporation).

National Defense Authorization Act for 1996, Pub. L. No. 104-106, § 1208, 110 Stat. 186, 470 (1996) (also listed under "Newly Independent States").

National Defense Authorization Act for 1996, Pub. L. No. 104-106, § 1209, 110 Stat. 186, 472 (1996).

National Defense Authorization Act for 1994, Pub. L. No. 103-160, § 1612, 107 Stat. 1547, 1850 (1993) (also listed under "Russia").

Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, § 403, 105 Stat. 647, 721 (1991) (also listed under "Middle East/Persian Gulf" and "Defense Assistance").

Soviet Nuclear Threat Reduction Act of 1991, Pub. L. No. 102-228, § 211, 105 Stat. 1691, 1693 (1991), *as amended by* National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1421(a), 106 Stat. 2315, 2565 (1992) and National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1204, 110 Stat. 186, 470 (1996) (also listed under "Newly Independent States").

Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, tit. IV, 105 Stat. 647, 718 (1991) (also listed under "Middle East/Persian Gulf" and "Defense Assistance").

*Defense Assistance*

12 U.S.C. § 635(b)(6) (1994) (also listed under "Financial Organizations," "Human Rights," and "Narcotics").

22 U.S.C. § 2304 (1994) (also listed under "Human Rights").

22 U.S.C. § 2373 (1994) (also listed under "Greece" and "Turkey").

22 U.S.C. § 2753 (1994).

22 U.S.C. § 2776 (1994) (also listed under "Australia," "Japan," "New Zealand," and "NATO").

22 U.S.C. § 2781 (Supp. II 1996) (also listed under "Terrorism").

22 U.S.C. § 2796a (1994).

Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 564, 108 Stat. 382, 484 (1994), *as amended by* Foreign Rela-

tions Laws Technical Amendments, Pub. L. No. 103-415, § 1(1), 108 Stat. 4299, 4301 (1994) (also listed under "Arab Boycott").

Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102-138, Title IV, § 403, 105 Stat. 647, 721 (1991) (also listed under "Middle East/Persian Gulf" and "Arms Control/Non-Proliferation").

*Deployment of U.S. Armed Forces Abroad*  
50 U.S.C. § 1544 (1994).

Department of Defense Appropriations Act, 1999, Pub. L. No. 105-262, § 8115, 112 Stat. 2279, 2327 (1998) (also listed under "Albania," "Macedonia," and "Yugoslavia").

Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8125(f), 102 Stat. 2270, 2270-41 (1988), *as amended by* National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1623(3), 103 Stat. 1352, 1606 (1989) (also listed under "Japan" and "South Korea").

*Economic Reform*

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 562, 111 Stat. 2386, 2427 (1997) (also listed under "Haiti" and "Human Rights").

*Environment*

Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, § 609, 103 Stat. 988, 1037 (1989).

*Export Controls*

50 U.S.C. appendix § 2402 (1994).

50 U.S.C. appendix § 2404 (1994).

50 U.S.C. appendix § 2405 (1994).

50 U.S.C. appendix § 2406 (1994).

*Expropriation*

22 U.S.C. § 1975 (1994).

22 U.S.C. § 2364 (1994).

22 U.S.C. § 2370(e) (1994).

22 U.S.C. § 2370a (1994).

*Financial Organizations*

12 U.S.C. § 635(b)(11) (1994) (Export-Import Bank)  
(also listed under "Angola" and "Human Rights").

12 U.S.C. § 635(b)(4) (1994) (Export-Import Bank)  
(also listed under "Arms Control/Non-Prolifera-  
tion").

12 U.S.C. § 635(b)(6) (1994) (Export-Import Bank)  
(also listed under "Defense Assistance," "Human  
Rights," and "Narcotics").

Foreign Operations, Export Financing, and Related  
Programs Appropriations Act, 1996, Pub. L. No.  
104-107, 110 Stat. 704, 718 (1996) [tit. IV, under  
the heading "Contribution to the International De-  
velopment Bank for Reconstruction and Develop-  
ment"] (World Bank) (also listed under "Iran").

*Human Rights*

12 U.S.C. § 635(b)(2) (1994) (also listed under "An-  
gola" and "Financial Organizations").

12 U.S.C. § 635(b)(6) (1994) (also listed under "De-  
fense Assistance," "Financial Organizations," and  
"Narcotics").

22 U.S.C. § 2295a (1994) (also listed under "Newly  
Independent States").

22 U.S.C. § 2304 (1994) (also listed under “Defense Assistance”).

22 U.S.C. § 5902 (1994) (also listed under “Newly Independent States” and “Arms Control/Non-Proliferation”).

22 U.S.C. § 5952 (1994) (also listed under “Newly Independent States” and “Arms Control/Non-Proliferation”).

22 U.S.C. § 6006 (1994) (also listed under “Cuba”).

Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 570, 110 Stat. 3009, 3009-166 (1996) (also listed under “Burma” and “Narcotics”).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 562, 111 Stat. 2386, 2427 (1997) (also listed under “Economic Reform” and “Haiti”).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 104-208, § 577, 111 Stat. 2386, 2432 (1997) (also listed under “Russia”).

Human Rights, Refugee, and Other Foreign Relations Provisions Act of 1996, Pub. L. No. 104-319, § 202, 110 Stat. 3864, 3866 (1996) (also listed under “Mauritania”).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 585, 111 Stat. 2386, 2437 (1997) (also listed under “Democratic Republic of Congo”).

Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1996, Pub. L. No. 104-107, § 540A, 110 Stat. 704, 737 (1996) (also listed under “Serbia and Montenegro”).



Chinese Student Protection Act of 1992, Pub. L. No. 102-404, § 2(c), 106 Stat. 1969, 1970 (1992) (also listed under "China").

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19 U.S.C. § 2492 (1994).

22 U.S.C. § 2291j (1994).

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