

# The Missing *D* in U.S. Foreign Relations Law

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*United States foreign relations law once subsisted on the outskirts of constitutional and international law. Now a recognized field of scholarship in its own right, foreign relations law addresses some of the most important questions of our time, such as whether the President may unilaterally conduct strikes against Iran or withdraw from the Paris Climate Agreement. For all its importance, however, U.S. foreign relations law has developed with blinders on. U.S. foreign policy embraces at least three *D*s: defense, diplomacy, and development. Yet foreign relations law scholarship has approached the critical questions of the field almost exclusively through the lens of defense and diplomacy. This Article highlights the missing *D* in U.S. foreign relations law and, in so doing, makes two primary contributions.*

*First, the Article expands the field of foreign relations law to embrace development fully and demonstrates how that embrace qualifies the conventional wisdom on core issues, such as the scope of presidential power, the relationship between the President and Congress, and the role of U.S. states and cities in foreign affairs. Second, the Article introduces a new research agenda for foreign relations law scholarship. If foreign relations law could significantly neglect an established component of U.S. foreign policy for so long, what else is missing? Drawing on the characteristics of development aid, the Article identifies avenues for research that may uncover further areas of neglect.*

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#### INTRODUCTION

Previously dwelling on the outskirts of constitutional and international law,<sup>1</sup> U.S. foreign relations law is now a field of study in its own right.<sup>2</sup> Its arrival stems not only from the emergence of a cadre of dedicated scholars but also from the growing importance of foreign affairs in an interconnected world.

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1. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, at viii (1972) (suggesting that, for all but a few government attorneys, “the law of foreign affairs fell somewhere between the constitutional lawyer and the international lawyer”).

2. See, e.g., Curtis A. Bradley, *What Is Foreign Relations Law?*, in *THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW* 3, 8–13 (Curtis A. Bradley ed., 2019) (discussing the emergence of U.S. foreign relations law as a field of study and concluding that it has existed since at least the 1950s, though the first textbook did not appear until 1987). Indeed, U.S. foreign relations law has recently given rise to comparative foreign relations law. See *id.* at 7 (introducing the book’s focus as the “commonalities and variations in . . . foreign relations law across national jurisdictions”).

Foreign relations law explores the legal boundaries within which the United States conducts foreign relations.<sup>3</sup> The constitutional questions presented are some of the most pressing of our time: may the President withdraw from the Paris Climate Agreement?<sup>4</sup> The Iran Nuclear Deal?<sup>5</sup> Must Congress authorize the President to conduct strikes against Iran or commit troops to Syria?<sup>6</sup> May international human rights claims be heard in U.S. courts?<sup>7</sup> May individual states, such as California, pursue international climate standards that the federal government has not?<sup>8</sup> These sorts of questions—collectively addressing the distribution of foreign affairs powers between the President, Congress, and the courts; the relative foreign relations roles of state and federal governments; and the domestic legal status of international law—are the focus of U.S. foreign relations law.<sup>9</sup> They have reached the Supreme Court with increasing frequency in recent years.<sup>10</sup>

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3. See, e.g., CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS*, at xix (7th ed. 2020) (explaining that U.S. foreign relations law “examines the constitutional and statutory law that regulates the conduct of U.S. foreign relations”); Bradley, *supra* note 2, at 3 (defining foreign relations law as “the domestic law of each nation that governs how that nation interacts with the rest of the world”).

4. See, e.g., Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Feb. 21, 2021), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html>.

5. See, e.g., Mark Landler, *Trump Abandons Iran Nuclear Deal He Long Scorned*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html>.

6. See, e.g., Charlie Savage, *Iran and Presidential War Powers, Explained*, N.Y. TIMES (Jan. 9, 2020), <https://www.nytimes.com/2020/01/06/us/politics/war-powers-resolution-iran.html>.

7. See, e.g., Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 458, 473 (2001) (suggesting that Congress should decide the scope of international human rights litigation in U.S. courts given the costs of that litigation).

8. See, e.g., Hiroko Tabuchi & Coral Davenport, *Justice Dept. Investigates California Emissions Pact That Embarrassed Trump*, N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/climate/automakers-california-emissions-antitrust.html> (reporting that the federal government invoked antitrust law to scrutinize a recent deal between California and four significant automakers to lower auto emissions).

9. See BRADLEY, DEEKS & GOLDSMITH, *supra* note 3, at xix; see also Bradley, *supra* note 2, at 4 (highlighting the distribution-of-authority questions on which foreign relations law focuses).

10. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (dissolving a preliminary injunction against President Trump’s revised travel ban); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403, 1407 (2018) (concluding that foreign corporations cannot be sued for international human rights violations under the Alien Tort Statute); *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094, 2096 (2015) (holding that the President alone has the authority to recognize foreign states); *Bond v. United States*, 572 U.S. 844, 859–60 (2014) (applying a federalism canon of statutory construction to limit the reach of a federal statute implementing treaty obligations); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013) (limiting international human rights litigation under the Alien Tort Statute by applying the presumption against extraterritoriality); *Arizona v. United States*, 567 U.S. 387, 410, 416 (2012) (restricting state involvement in immigration enforcement); *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (constraining the extraterritorial application of U.S. securities law); *Samantar v. Yousuf*, 560 U.S. 305, 314–15 (2010) (concluding that the Foreign Sovereign Immunity Act does not govern foreign official immunity); *Boumediene v. Bush*, 553 U.S. 723, 795 (2008) (finding that the constitutional right to habeas extends to foreign nationals detained at Guantánamo Bay); *Medellín v. Texas*, 552 U.S. 491, 506–14 (2008) (addressing whether treaty obligations are self-executing); *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95, 635 (2006) (limiting the Executive’s ability to try foreign nationals by military commission); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732–33, 738 (2004) (permitting, with constraints, the creation of federal common law causes of action based on the customary international law of human

Yet, for all its importance and newfound prominence, foreign relations law suffers from a significant gap. Foreign policy is often said to rest on three *Ds*: defense, diplomacy, and development.<sup>11</sup> However, foreign relations scholars have analyzed the constitutional questions in foreign relations law almost exclusively through the lens of two of those *Ds*: defense and diplomacy.<sup>12</sup> As a result, foreign relations law boasts a robust literature on issues such as war powers<sup>13</sup> and the authority to enter and terminate international agreements.<sup>14</sup> But U.S. foreign relations law neglects consideration of the third *D*—development.<sup>15</sup>

This Article remedies that neglect and, in so doing, seeks to make two primary contributions. First, the Article integrates international development into U.S. foreign relations law, both expanding the field's focus and adjusting conventional wisdom that has developed based on a narrow view of foreign policy. Second, the Article introduces a new research agenda for foreign relations law scholars. Given that foreign relations law has neglected international development for decades, there is a risk that it also neglects other facets of foreign policy. Drawing on the characteristics of development, the Article identifies avenues for uncovering additional areas of omission within foreign relations law, promising further refinement of the field.

The Article proceeds as follows. Part I establishes that U.S. foreign policy embraces three *Ds*—defense, diplomacy, and development. Part II illustrates how U.S. foreign relations law has emphasized defense and diplomacy, neglecting development. Part III focuses on the Article's first contribution. It demonstrates how expanding the scholarly aperture to include development shifts the conventional wisdom on key issues in foreign relations law, such as the scope of

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rights); *Hamdi v. Rumsfeld*, 542 U.S. 507, 519, 533 (2004) (upholding, in a plurality decision, executive detention in the United States of a U.S. citizen designated as an “enemy combatant” while requiring certain due process protections).

11. This Article does not delve into disagreements about how the three *Ds* should factor into U.S. foreign policy. See, e.g., Lisa Schirch, *A 3D Approach to US Foreign Policy*, HUFFINGTON POST (May 25, 2011), [https://www.huffpost.com/entry/a-3d-approach-to-us-forei\\_b\\_821270](https://www.huffpost.com/entry/a-3d-approach-to-us-forei_b_821270) [<https://perma.cc/V2HA-Z76F>] (endorsing one, while rejecting another, version of a “3D” foreign policy). For purposes of this Article, it is sufficient to observe that development, like defense and diplomacy, is a part of U.S. foreign policy.

12. See *infra* Part II.

13. See, e.g., BRADLEY ET AL., *supra* note 3, at 627–737 (introducing legal issues surrounding war powers and citing scholarship on those issues).

14. See, e.g., *id.* (collecting sources addressing treaty termination); *id.* at 393, 397 (collecting sources regarding the constitutionality and fungibility of congressional-executive agreements); *id.* at 407 (collecting sources regarding the propriety of sole executive agreements).

15. Although foreign relations law scholars have neglected international development, international development has not escaped the attention of all legal scholars. A body of law and development scholarship addresses “efforts to transform legal systems in developing countries to foster economic, political, and social development.” David M. Trubek, *Law and Development 50 Years On*, in 13 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES 443, 443 (James D. Wright ed., 2d ed. 2015).

presidential power in foreign affairs. Part IV develops the second primary contribution of the Article, inaugurating a new research agenda to identify additional areas of neglect within U.S. foreign relations law that may lead to further revision of the field.

### I. THE THREE *Ds* OF UNITED STATES FOREIGN POLICY

Although development is an established part of U.S. foreign policy, the phrase “three *Ds*” is relatively new.<sup>16</sup>

#### A. ORIGINS OF THE “THREE *Ds*” PHRASE

Fittingly for an expression that describes foreign policy, the phrase may well be an import.<sup>17</sup> A Swedish newspaper slipped into English in August 2002 to use the phrase.<sup>18</sup> Domestically, sources often credit President George W. Bush’s 2002 National Security Strategy as adding development to defense and diplomacy to create the three *Ds*.<sup>19</sup> However, the actual term does not appear in the

16. Other versions of the “three *Ds*” phrase existed previously. *See, e.g.*, U.N. GAOR, 24th Sess., 1660th mtg. at 12, U.N. Doc. A/C.1/PV.1660 (Oct. 21, 1969) (“[The Indonesian] delegation has in mind particularly the principles and institutional bodies pertaining to the three *Ds*: development, decolonization and disarmament.” (quoting an Indonesian Foreign Minister)); GEORGE P. SHULTZ, TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE 403 (1993) (“We worked endlessly with Congress to get the funds necessary to implement a strategy of diplomacy backed by strength and based on the three *Ds*: democracy, development, and defense.”); Christopher Layne, *The Unipolar Illusion Revisited: The Coming End of the United States’ Unipolar Moment*, 31 INT’L SECURITY 7, 35 (2006) (“To uphold NATO’s primacy, the Clinton administration proclaimed the so-called Three *D*’s: [European Security and Defense Identity] must not diminish NATO’s role, duplicate its capabilities, or discriminate against alliance members that do not belong to the EU.”); Barry Schweid, *Clinton Has Opportunities, if the World Will Let Him*, ASSOCIATED PRESS, Dec. 10, 1992 (“Charles William Maynes, editor of Foreign Policy magazine, would like the next administration to grapple also with what the former foreign service officer calls the three *Ds*: defense, development and democracy.”).

17. That said, the Swedish reference suggests that the phrase may have already existed in the English language. *See infra* note 18. The Swedish newspaper is the first published use of the phrase identified by a review of digitally searchable sources.

18. *See* Jan Blomgren, *Europa bor bli en partner USA kan ta pa allvar*, SVENSKA DAGBLADET (Swed.), Aug. 11, 2002, at s22 (“Bildt använder stundtals engelska uttryck, som när han talar om ‘three *D*’s: Defence, diplomacy och development.”). This sentence translates in English to, “Bildt occasionally uses English expressions, such as when he talks about ‘three *D*’s’: Defense, diplomacy and development.” *Id.*

19. *See, e.g.*, *Nominations of the 110th Congress—Second Session, Hearings Before the S. Comm. on Foreign Relations*, 110th Cong. 90–94 (Feb. 7, 2008) (statement of Jeffrey J. Grieco, Nominee, USAID Assistant Administrator for Legislative and Public Affairs), <https://www.foreign.senate.gov/imo/media/doc/GriecoTestimony080207p.pdf> [<https://perma.cc/KL2V-EK46>]; SUSAN B. EPSTEIN, CONG. RESEARCH SERV., R41173, FOREIGN AID REFORM, NATIONAL STRATEGY, AND THE QUADRENNIAL REVIEW 2 (2010); OVERSEAS DEV. INST., HUMANITARIAN POLICY GRP., BEYOND THE CONTINUUM: THE CHANGING ROLE OF AID POLICY IN PROTRACTED CRISES 50 (Adele Harmer & Joanna Macrae eds., 2004), <https://perma.cc/KNJ7-FT8Q>; ALLISON STANGER, ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY 131 (2009); Jude Howell, *Civil Society, Aid, and Security Post-9/11*, 12 INT’L J. NOT-FOR-PROFIT L. 4, 20–21 (2010); J. Brian Atwood, M. Peter McPherson & Andrew Natsios, *Arrested Development: Making Foreign Aid a More Effective Tool*, FOREIGN AFF. (Nov./Dec. 2008), <https://www.foreignaffairs.com/articles/2008-11-01/arrested-development>.

Strategy.<sup>20</sup> The phrase does appear in a 2003 *Washington File* article reporting on a panel at which Edward Fox, then Assistant Administrator for Legislative and Public Affairs at the U.S. Agency for International Development (USAID), “said that following the Cold War and September 11, 2001, terrorist attacks, U.S. foreign policy has become identified with ‘three Ds’—defense, diplomacy and development.”<sup>21</sup> Shortly thereafter, Canadian officials began referring to the three *Ds* of foreign policy and incorporated the term into the Canadian National Security Policy of 2004.<sup>22</sup> In the United States, the phrase became common under the Obama Administration.<sup>23</sup> Senator Johnny Isakson used the phrase in summarizing Secretary of State nominee Hillary Rodham Clinton’s testimony at her confirmation hearing.<sup>24</sup> Starting the next month in a speech on U.S.–Asia relations, Secretary Clinton began using the phrase with regularity.<sup>25</sup>

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20. See generally THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), <https://2009-2017.state.gov/documents/organization/63562.pdf> [<https://perma.cc/ZWK9-3244>].

21. Kathryn McConnell, *New Aid Program Would Assist Countries’ Growth, Larson Says*, WASH. FILE, Feb. 12, 2003.

22. On March 20, 2003, the Honorable Susan Whelan, Minister for International Cooperation of Canada, used the phrase in a statement to the Standing Committee on Foreign and International Trade in the Canadian House of Commons. See *Meeting of Standing Comm. on Foreign Affairs & Int’l Trade*, 37th Parliament, 2nd Sess. (Can. 2003), <https://www.ourcommons.ca/DocumentViewer/en/37-2/FAIT/meeting-24/evidence#Int-463107> (statement of Hon. Susan Whelan, Minister for International Cooperation) (“I’ve been speaking very often and working very closely with my colleagues from the Departments of Foreign Affairs and International Trade and National Defence about strengthening our relationships. We’re working together around the so-called three Ds of diplomacy, defence, and development.”). The National Security Policy, with its reference to the three *Ds*, was released in April 2004. See SECURING AN OPEN SOCIETY: CANADA’S NATIONAL SECURITY POLICY 47 (2004), <http://publications.gc.ca/collections/Collection/CP22-77-2004E.pdf> (click continue to publication) [<https://perma.cc/5HAM-QRJ7>]. Canadian Prime Minister Paul Martin followed up on the release of the policy with a speech on April 29, 2004, in Washington, D.C., during which he discussed the three *Ds*, specifically invoking the phrase. Paul Martin, *Paul Martin Discusses Global Security – April 29, 2004*, at 14:17, CPAC (Apr. 29, 2004), <https://www.cpac.ca/en/programs/headline-politics/episodes/90004682> [<https://perma.cc/4WZN-RC2X>]. Later sources began calling the Canadian approach the “3D approach,” rather than the three *Ds*. See Erin Simpson, *From Inter-dependence to Conflation: Security and Development in the Post 9/11 Era*, 28 CANADIAN J. DEV. STUD. 263, 272 (2007); MAX G. MANWARING, STRATEGIC STUDIES INST., DEFENSE, DEVELOPMENT, AND DIPLOMACY (3D): CANADIAN AND U.S. MILITARY PERSPECTIVES 3 (2006), <https://apps.dtic.mil/dtic/tr/fulltext/u2/a456853.pdf> [<https://perma.cc/P97B-ERYR>].

23. A Lexis news search for (“three d’s” or “three ds”) /p (diplomacy and development) in U.S. news sources returned thirty-six results during the Bush administration and 194 results during the Obama administration.

24. *Senate Confirmation Hearing: Hillary Clinton*, N.Y. TIMES (Jan. 13, 2009), <https://www.nytimes.com/2009/01/13/us/politics/13text-clinton.html> (“Also, twice in your opening remarks which were extensive and, really, appreciated because you really covered some very important topics, you referred to what I call the three D’s—diplomacy, development, and defense—on two different occasions.”).

25. See, e.g., Hillary Rodham Clinton, U.S. Sec’y of State, Remarks at the Asia Society (Feb. 13, 2009) (transcript available at <https://2009-2017.state.gov/secretary/20092013clinton/rm/2009a/02/117333.htm> [<https://perma.cc/G5NM-CJGY>]).

## B. DEFINITIONS OF DEFENSE, DIPLOMACY, AND DEVELOPMENT

Although an oversimplification, the “three *Ds*” phrase helps capture key components of U.S. foreign policy: defense, diplomacy, and development.<sup>26</sup> As used in this Article, defense refers to preparation for, and actual use of, military force. Although this Article speaks separately of development and humanitarian assistance at times, development or development aid in this Article includes long-term assistance to developing countries in sectors such as water, education, health, democracy, environment, and also humanitarian assistance—the provision of aid in response to natural or manmade disasters. Diplomacy embraces both the nonmilitary means and the subjects of relations between states and international organizations that extend beyond defense and development.

The three categories are highly interconnected. Military force may be used for humanitarian purposes as President Barack Obama purported to do in Libya.<sup>27</sup> Development aid may be provided as a carrot to influence votes in the U.N. General Assembly as Ambassador Nikki Haley advocated.<sup>28</sup> And one of the primary means of diplomacy—international agreements—may be used to address defense or development cooperation.<sup>29</sup> Most problematic for purposes of this Article, foreign assistance includes the provision of military equipment and support.<sup>30</sup> Although military assistance and arms sales to foreign countries may, in certain circumstances, further development objectives,<sup>31</sup> these forms of aid are

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26. That said, even the three *Ds* may obscure key elements of foreign policy by, for example, lumping trade, human rights, the environment, and a range of other topics under diplomacy.

27. See, e.g., Letter from President Barack Obama to Speaker John Boehner and Senator Daniel Inouye, President Pro Tempore of the Senate (Mar. 21, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya> [<https://perma.cc/7Q5H-U6CF>] (notifying Congress that the President had ordered the use of force in Libya to “prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya”).

28. See Nikki Haley, *American Foreign Aid Should Only Go to Our Friends*, FOX NEWS (Feb. 28, 2019), <https://www.foxnews.com/opinion/amb-nikki-haley-american-foreign-aid-should-only-go-to-our-friends> [<https://perma.cc/867F-K76G>] (arguing that foreign assistance should be tied, among other things, to supportive votes at the United Nations).

29. See *infra* text accompanying note 162.

30. See 22 U.S.C. §§ 2301–2345, 2347–2349bb-6 (2018) (governing provision of foreign military assistance).

31. See *id.* § 2301 (expressing the sense of Congress that “creating an environment of security and stability in the developing friendly countries [is] essential to their more rapid social, economic, and political progress”); *id.* § 2302 (supporting, with certain qualifications, foreign military aid “for the purpose of assisting foreign military forces in less developed friendly countries . . . to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries”); *id.* § 2347(a) (extending “military education and training” to “legislators and individuals who are not members of the government, if the . . . training would (i) contribute to responsible defense resource management, (ii) foster greater respect for and understanding of the principle of civilian control of the military, (iii) contribute to cooperation between military and law enforcement personnel with respect to counternarcotics law enforcement efforts, or (iv) improve military justice systems and procedures in accordance with internationally recognized human rights”).

not limited to developing countries<sup>32</sup> and fit more naturally within the *D* of defense. Thus, this Article focuses on development aid, which, as defined, embraces both long-term development and humanitarian assistance but not military aid.

### C. THE THIRD *D* IN UNITED STATES FOREIGN POLICY

Although the “three *D*s” phrase is relatively new, the phenomenon it captures is not. Development assistance has been a feature of U.S. foreign policy for decades. The United States engaged in occasional ad hoc development assistance as far back as the 1800s,<sup>33</sup> but official embrace of development assistance as a continuing component of U.S. foreign policy can be traced to President Truman’s 1949 inaugural address.<sup>34</sup> In the fourth point (Point IV) of that address,<sup>35</sup> President Truman announced “a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas.”<sup>36</sup> The proposal expanded beyond the postwar reconstruction and relief reflected most notably in the Marshall Plan to include long-term development assistance.<sup>37</sup> About a decade later, the United States built on Point IV with the enactment of the Foreign Assistance Act (FAA).<sup>38</sup> If Point IV was the launch, the FAA was the landing. With its enactment, development assistance became a permanent, if often controversial, part of U.S. foreign policy.<sup>39</sup> The FAA of 1961, as amended,<sup>40</sup> remains the cornerstone of U.S. development assistance.<sup>41</sup>

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32. See, e.g., *id.* § 2301 (prioritizing assistance to “countries in danger of becoming victims of aggression or in which the internal security is threatened by internal subversion inspired or supported by hostile countries”); *id.* § 2311(a) (authorizing the President “to furnish military assistance, on such terms and conditions as he may determine, to any [eligible] friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace”); *id.* § 2348 (authorizing “[t]he President . . . to furnish assistance to friendly countries and international organizations . . . for peacekeeping operations and other programs carried out in furtherance of the national security interests of the United States”); *id.* §§ 2349–2349a (authorizing the President to spend a designated amount to construct air bases for Israel).

33. See VERNON W. RUTTAN, UNITED STATES DEVELOPMENT ASSISTANCE POLICY: THE DOMESTIC POLITICS OF FOREIGN ECONOMIC AID 33 & n.3, 35–37, 49 (1996). *But cf. id.* at 34 (noting the rejection of proposals to provide funds for Irish and Russian famines in the 1800s on the grounds that Congress could not constitutionally appropriate funds for such efforts).

34. See *id.* at 33.

35. The principal conference room at USAID is, as a result, named Point IV.

36. RUTTAN, *supra* note 33, at 33 (quoting Harry S. Truman, Inaugural Address of the President, *in* 20 DEP’T ST. BULL., Jan. 30, 1949, 123, 125).

37. See *id.* at 33, 49.

38. See *id.* at 78.

39. See *id.* at 76–77, 92; President John F. Kennedy, Remarks to a Group of Overseas Mission Directors of the Agency of International Development (June 8, 1962) (transcript available at <https://blog.usaid.gov/2011/08/50th-anniversary-president-kennedy-addresses-usaid-mission-directors> [<https://perma.cc/FK6C-MAPF>]) (explaining it was “a well-known fact” that “foreign assistance[] is not a popular program in the United States,” though supported by presidents since Truman, by Congress, and ultimately by U.S. citizens).

40. See RUTTAN, *supra* note 33, at 100–03 (discussing various amendments to the FAA).

41. See *id.* at 93; MARIAN L. LAWSON & EMILY M. MORGENSTERN, CONG. RESEARCH SERV., R40213, FOREIGN AID: AN INTRODUCTION TO U.S. PROGRAMS AND POLICY 1 (2019) [hereinafter CRS, FOREIGN AID], <https://fas.org/spp/crs/row/R40213.pdf> [<https://perma.cc/NBF4-YDDR>].



Over the years, the motivations for (and policies governing)<sup>42</sup> development assistance have fluctuated. For many years, for example, the threat of communism was the primary driver of assistance.<sup>43</sup> Economic interests and altruism have also played prominent roles.<sup>44</sup> Whatever the motivation, development assistance continues to be a key component of U.S. foreign policy by many measures, including financial resources, international scope, and institutional involvement, as detailed in the paragraphs that follow.

While spending on development aid has waxed and waned over the years, the development aid budget has remained significant. For example, although the Trump Administration actively sought to decrease development aid,<sup>45</sup> even during the first fiscal year of the Administration, Congress authorized roughly \$31 billion for such aid.<sup>46</sup>

The United States' development aid contributions make it the single largest donor internationally.<sup>47</sup> In 2017, for example, U.S. contributions represented twenty-four percent of the official development assistance provided by countries who are members of the Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD).<sup>48</sup> The United States has maintained its position as lead donor for most years since World War II.<sup>49</sup>

Development aid is a key part of both bilateral and multilateral relations. Aid from the United States reaches many countries. The U.S. Agency for International Development (USAID), for example, works in more than 100 countries.<sup>50</sup> Similarly, the United States actively influences and partners with a host of multilateral aid organizations, from U.N. entities such as the United Nations Development Programme to the World Bank and the OECD.<sup>51</sup>

42. See RUTTAN, *supra* note 33, at 472–73.

43. See, e.g., *id.* at 62–63, 68–79, 86–87, 120–21, 474.

44. See, e.g., CRS, FOREIGN AID, *supra* note 41, at 3–4.

45. See *infra* text accompanying notes 195–98.

46. See CRS, FOREIGN AID, *supra* note 41, summary. This figure excludes funds authorized for military and other security assistance as well as contributions to multilateral institutions. *Id.*

47. *Id.* at 25. That said, when contributions are “calculated as a percentage of gross national income,” the United States ranks low. *Id.*

48. *Id.*

49. *Id.* at 24–25.

50. See *Who We Are*, USAID, <https://www.usaid.gov/who-we-are> [<https://perma.cc/S4P6-G34X>] (last visited Apr. 25, 2021).

51. Indeed, the Foreign Assistance Act of 1961 directs the United States to engage with multilateral institutions in its development efforts. See, e.g., 22 U.S.C. § 2151-1(a) (2018) (“Assistance to other developing countries should generally consist of programs which facilitate their access to private capital markets, investment, and technical skills, whether directly through guarantee or reimbursable programs by the United States Government or indirectly through callable capital provided to the international financial institutions.”); *id.* § 2151b-2(c)(3) (“The President shall coordinate the provision of [HIV/AIDS] assistance . . . with the provision of related assistance by the Joint United Nations Programme on HIV/AIDS (UNAIDS), the United Nations Children’s Fund (UNICEF), the World Health Organization (WHO), the United Nations Development Programme (UNDP), the Global Fund to Fight AIDS, Tuberculosis and Malaria and other appropriate international organizations (such as the International Bank for Reconstruction and Development), relevant regional multilateral development institutions, national, state, and local governments of partner countries, other international

On the domestic front, development aid similarly involves a range of executive departments and agencies. USAID is the principal player with roughly 10,000 staff and \$20 billion in obligations in recent years.<sup>52</sup> Yet USAID is far from alone. Other departments and agencies engaged in nonmilitary foreign assistance include the Departments of State, Health and Human Services, and Treasury; the Millennium Challenge Corporation; Peace Corps; Trade and Development Agency; Inter-American Foundation; African Development Foundation; and the new U.S. International Development Finance Corporation.<sup>53</sup> Development aid is entrenched across the Executive. Even in the Trump Administration, the Administrator of USAID had a designated role on the National Security Council.<sup>54</sup> And leaders from within diplomacy and defense recognize the important role of development in foreign policy.<sup>55</sup> Beyond the Executive, various congressional committees—principally the Senate Foreign Relations and House Foreign Affairs Committees on the authorizing side, and the Senate and House State, Foreign Operations, and Related Programs Subcommittees on the appropriations side—exercise jurisdiction over issues of development assistance.<sup>56</sup>

In short, on many levels—from resources to reach to institutional entrenchment—development aid is an integral feature of U.S. foreign policy and the foreign policy establishment.

## II. U.S. FOREIGN RELATIONS LAW'S FOCUS ON DEFENSE AND DIPLOMACY

Although development has been part of U.S. foreign policy for decades, U.S. foreign relations law has neglected that role to this day, as evidenced by the two law school texts on the subject. The first textbook on U.S. foreign relations law

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actors, appropriate governmental and nongovernmental organizations, and relevant executive branch agencies . . . .” (footnote omitted)); *id.* § 2152j-1(c) (“The President should promote the meaningful participation of women in conflict prevention, in coordination and consultation with international partners, including, as appropriate, multilateral organizations, stakeholders, and other relevant international organizations . . . .”).

52. See CRS, FOREIGN AID, *supra* note 41, at 11 (estimating obligations for fiscal year 2017 and providing personnel numbers for 2018).

53. See *id.* at 10–14. The U.S. International Development Finance Corporation combines the Overseas Private Investment Corporation and the Development Credit Authority of USAID. See *id.* at 14.

54. See President Donald J. Trump, *National Security Presidential Memorandum: Organization of the National Security Council, the Homeland Security Council, and Subcommittees*, WHITE HOUSE (Apr. 4, 2017), <https://perma.cc/DU2B-TDB9> (listing the Administrator of USAID as a regular attendee of the National Security Council Deputies Committee).

55. For example, in 2017, over 100 retired admirals and generals wrote to Congress to oppose cuts to the development and diplomacy budgets, sharing their “strong conviction that elevating and strengthening diplomacy and development alongside defense are critical to keeping America safe.” Letter from Former Admirals and Generals to Speaker Paul Ryan, Senate Majority Leader Mitch McConnell, House Minority Leader Nancy Pelosi & Senate Minority Leader Chuck Schumer (Feb. 27, 2017) [hereinafter Letter from Military Leaders], [http://www.usglc.org/downloads/2017/02/FY18\\_International\\_Affairs\\_Budget\\_House\\_Senate.pdf](http://www.usglc.org/downloads/2017/02/FY18_International_Affairs_Budget_House_Senate.pdf) [<https://perma.cc/QE2P-SF5W>].

56. CRS, FOREIGN AID, *supra* note 41, at 26.

was published in 1987,<sup>57</sup> almost forty years after development aid became official foreign policy in President Truman's Point IV proposal.<sup>58</sup> That textbook, currently coauthored by Sean D. Murphy, Edward T. Swaine, and Ingrid Wuerth, is now in its fifth edition.<sup>59</sup> The other U.S. foreign relations law text, presently coauthored by Curtis A. Bradley, Ashley S. Deeks, and Jack L. Goldsmith, was first published in 2003,<sup>60</sup> more than half a century after Point IV, and is in its seventh edition.<sup>61</sup> Both are lengthy: the Bradley–Deeks–Goldsmith text is just under 900 pages; the Murphy–Swaine–Wuerth text is just over. But in those 1,800 pages, the texts give only passing consideration to the impact of foreign assistance, let alone development aid, on foreign relations law. Together, the texts touch on the influence of foreign assistance generally and of development aid specifically on U.S. foreign relations law in only a handful of pages, as illustrated in the paragraphs that follow.

The two texts include some of the same observations. Both note that through the appropriations power, Congress plays a significant role in foreign relations, including assistance. Bradley, Deeks, and Goldsmith, for example, briefly observe that “Congress’s appropriations power . . . gives it significant control over billions of dollars in U.S. foreign aid” and that “Congress often conditions [that] aid on the satisfaction of certain human rights practices in the donee country.”<sup>62</sup> Murphy, Swaine, and Wuerth similarly cite the Foreign Assistance Act of 1961 as a “centerpiece” of Congress’s exercise of the “appropriations power in the field of U.S. foreign relations,” and they discuss how Congress has—through amendments to the FAA and the enactment of other statutes, including appropriations bills—imposed increasing limitations on the Executive and influenced the direction of foreign aid and policy.<sup>63</sup> The two casebooks also discuss presidential power to enter congressional–executive agreements based on foreign assistance–related statutes.<sup>64</sup>

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57. See generally THOMAS M. FRANCK & MICHAEL J. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* (1987). The first Restatement of U.S. foreign relations law—labeled the “Restatement (Second)” because it was part of the second series of Restatements published by the American Law Institute—appeared in 1965. Bradley, *supra* note 2, at 11.

58. See *supra* Section I.C.

59. See generally SEAN D. MURPHY, EDWARD T. SWAINE & INGRID WUERTH, *U.S. FOREIGN RELATIONS LAW: CASES, MATERIALS, AND PRACTICE EXERCISES* (5th ed. 2018).

60. See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (2003).

61. See BRADLEY ET AL., *supra* note 3.

62. *Id.* at 148; see also MURPHY ET AL., *supra* note 59, at 879 (providing a practice exercise in which Congress considers legislation suspending foreign aid to pressure Venezuela to improve its human rights practices).

63. MURPHY ET AL., *supra* note 59, at 567–68; *cf. id.* at 603 (arguing that presidential use of non-appropriated funds to advance foreign policy would corrupt that policy as donor countries would expect a quid pro quo in the form “of foreign assistance, military assistance, arms sales, [or] trade concessions” (partially excerpting Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758, 765 (1989)).

64. In a pair of text notes, Bradley, Deeks, and Goldsmith discuss whether two statutes bearing on military and intellectual property assistance support presidential power to enter congressional–executive agreements. See BRADLEY ET AL., *supra* note 3, at 391 (questioning whether congressional–executive

Each text also contains unique references to the role of foreign assistance in foreign relations law. Quoting Professor Louis Henkin, the Bradley–Deeks–Goldsmith casebook explains that many foreign affairs powers—the power “to grant or withhold foreign aid” among them—are not clearly grounded in the Constitution’s text.<sup>65</sup> Murphy, Swaine, and Wuerth note that since the Founding, “Congress has enacted legislation related to many foreign policy issues including . . . foreign aid.”<sup>66</sup>

These brief references are the closest the two texts come to considering the impact of foreign assistance and development aid on questions of foreign relations law. There are indeed other references to foreign assistance in both texts.<sup>67</sup> Yet many of the references are empirical—for example, scattered historical references to times when the United States has provided aid.<sup>68</sup> Others are excerpts from judicial opinions that address the preemptive effect of a federal statute prohibiting aid,<sup>69</sup> note Congress’s power to deny foreign aid to countries recognized by the President,<sup>70</sup> and highlight Congress’s use of the legislative veto in foreign aid legislation.<sup>71</sup> And there is discussion of whether the President may authorize

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agreements based on the Act for International Development of 1961 are valid where the Act does not expressly authorize such agreements); *id.* at 405 (noting scholarly concern that the Prioritizing Resources and Information for Intellectual Property Act of 2008 did not support the Obama Administration’s effort to enter a congressional–executive agreement where the Act merely mandated an interagency plan to support foreign governments with technical assistance). Similarly, Murphy, Swaine, and Wuerth include a legal memo that identifies foreign assistance statutes that authorize the President to enter congressional–executive agreements. See Memorandum from Carol Schwab, Assistant Legal Adviser for Political & Military Affairs, U.S. Dep’t of State (Aug. 15, 2002), in MURPHY ET AL., *supra* note 59, at 366–69. The memo concludes that no legal barriers prevent USAID from negotiating and entering agreements that provide the framework for, and implement, development efforts in host countries. See MURPHY ET AL., *supra* note 59, at 369.

65. BRADLEY ET AL., *supra* note 3, at 26 (quoting LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 14–15 (2d ed. 1996)).

66. MURPHY ET AL., *supra* note 59, at 17.

67. Both texts provide excerpts of statutes that reference and amend the FAA. See BRADLEY ET AL., *supra* note 3, at 886, 891 (reproducing provisions of the Foreign Sovereign Immunity Act that cross-reference the FAA); *id.* at 97 (quoting the Second Hickenlooper Amendment to the FAA); MURPHY ET AL., *supra* note 59, at 807 (same); *id.* at 707–08 (highlighting a scholarly article arguing that the Hickenlooper Amendment to the FAA supports the conclusion that Congress may, by legislation, abrogate the political question doctrine).

68. See BRADLEY ET AL., *supra* note 3, at 639, 656 (noting aid to Vietnam, aid to Greece and Turkey during the Cold War, the Marshall Plan, and the Berlin airlift). More generically, in explaining covert action, the Bradley–Deeks–Goldsmith text cites foreign aid as an example of an overt action that can be taken in foreign affairs. *Id.* at 696.

69. See *id.* at 222–27 (excerpting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000), in which the Court found that a federal statute prohibiting certain aid to Burma preempted a Massachusetts law imposing different state sanctions); MURPHY ET AL., *supra* note 59, at 614–18 (same).

70. See BRADLEY ET AL., *supra* note 3, at 206 (excerpting Justice Scalia’s dissent in *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2120 (2015), in which he notes that Congress may “express its own views about [the legitimacy of claims to statehood or territory] by declaring war, restricting trade, denying foreign aid, and much else besides” (emphasis added)).

71. See MURPHY ET AL., *supra* note 59, at 41 (excerpting the statutory appendix to Justice White’s dissent in *INS v. Chadha*, 462 U.S. 919 (1983), in which he cites the Act for International Development of 1961, which allows Congress to terminate foreign assistance funds through a concurrent resolution); *cf. id.* at 42–43 (comparing the legislative veto, which the Court held unconstitutional, with

military force for humanitarian reasons.<sup>72</sup> Despite sharing the term “humanitarian,” however, this final issue more aptly belongs to the *D* of defense than development.

In short, beyond the handful of references described above, neither text comes near to covering the implications of development assistance for U.S. foreign relations law, though both spend hundreds of pages on issues of diplomacy and defense. Foreign relations law scholarship does not make up the gap.<sup>73</sup>

### III. FOREIGN RELATIONS LAW THROUGH THE LENS OF DEVELOPMENT

This Article moves beyond this limited treatment to incorporate more fully the third *D* of foreign policy into U.S. foreign relations law. Incorporating development into foreign relations law has significant implications. As this Part demonstrates, looking through the lens of development shifts the understanding of three foundational areas: the scope of presidential power, the empirical relationship between the President and Congress, and the role of states and cities in foreign affairs.

#### A. THE PRESIDENT’S CONSTITUTIONAL POWERS IN FOREIGN AFFAIRS

As mentioned above, one of the principal issues of foreign relations law is the separation of foreign affairs power within the federal government. The President is widely perceived to be the lead player in foreign affairs.<sup>74</sup> Thus, for example, foreign affairs issues play a far more significant role in presidential elections than in the selection of members of Congress or the judiciary.<sup>75</sup> Presidents themselves assert broad foreign affairs authority. Indeed, one of President Trump’s impeachment defenses was that, in his dealings with Ukraine, he was acting “in an area where it’s almost impossible to abuse authority, because he has almost absolute authority in that area.”<sup>76</sup> Presidential prominence is not merely a perception or political assertion, however.

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constitutional delegations of authority to the Executive, such as that in the Millennium Challenge Act of 2003, which conditioned aid on a country’s commitment to specified principles evaluated not by congressional resolution but by nongovernmental bodies).

72. See BRADLEY ET AL., *supra* note 3, at 660–63, 670–71, 673, 691, 773, 776; MURPHY ET AL., *supra* note 59, at 474, 506–14, 520.

73. A significant exception is a 1988 comment that assesses and advocates for greater congressional control over foreign assistance. See Jeffrey A. Meyer, Comment, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 94–110 (1988).

74. See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (famously describing the President “as the sole organ of the federal government in the field of international relations”).

75. See, e.g., Brandice Canes-Wrone, William G. Howell & David E. Lewis, *Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis*, 70 J. POL. 1, 5 (2008).

76. Marshall Cohen, *The Case for and Against Impeaching President Donald Trump*, CNN (Nov. 12, 2019, 11:11 AM), <https://www.cnn.com/2019/11/12/politics/trump-impeachment-arguments/index.html> [<https://perma.cc/7DLJ-D2XM>] (quoting former Senator Rick Santorum).

An influential strain in foreign relations law maintains that the President's constitutional power over foreign affairs is preeminent.<sup>77</sup> This school of thought, evident in scholarship and judicial opinion,<sup>78</sup> grounds the President's constitutional foreign affairs power in five primary sources: the President's enumerated powers, the Vesting Clause, the Take Care Clause, historical practice, and functionalism.<sup>79</sup> Each provides a basis for vigorous claims of presidential power in diplomacy and defense. As this Part demonstrates, however, none supports broad presidential power when it comes to development. Through the lens of development, the President's foreign affairs power appears weak.

### 1. Enumerated Powers

The President's enumerated powers provide ready support for significant authority in defense and diplomacy. Article II, Section Two of the Constitution begins by designating the President the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."<sup>80</sup> As Commander in Chief, the President sits atop the defense apparatus. Similarly, the President exercises significant control over the primary agents and instruments of diplomacy. He "nominate[s], and by and with the Advice and Consent of the Senate, . . . appoint[s] Ambassadors, other public Ministers and Consuls"<sup>81</sup> and "receive[s] Ambassadors and other public Ministers" from foreign states.<sup>82</sup> "[W]ith the Advice and Consent of the Senate, [the President also] . . . make[s] Treaties, provided two thirds of the Senators present concur."<sup>83</sup>

By contrast, none of the President's enumerated powers directly addresses development. That does not mean that the President lacks any power over development. To the extent development is interwoven with defense and diplomacy, the President may claim some authority with regard to development.<sup>84</sup> There is no question that such links exist. Development assistance furthers the security goals of defense by, for example, reducing the pull of terrorism; containing debilitating

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77. See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233–36, 238, 252–56, 261–62 (2001) [hereinafter Prakash & Ramsey, *Executive Power*] (noting that "[m]any scholars . . . assert[] that the President is the primary locus of foreign affairs power" and offering a constitutional theory to support substantial presidential power in foreign affairs).

78. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 429 (2003); *Curtiss-Wright Exp. Corp.*, 299 U.S. at 320 (1936); SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 110–41 (2015).

79. See *infra* Sections III.A.1–5.

80. U.S. CONST. art. II, § 2, cl. 1.

81. *Id.* art. II, § 2, cl. 2.

82. *Id.* art. II, § 3.

83. *Id.* art. II, § 2, cl. 2.

84. *Cf. Meyer, supra* note 73, at 93 (noting that the President's commander-in-chief power "has less force in economic development assistance than in military assistance").

health threats; and promoting stable, citizen-responsive democracies.<sup>85</sup> Defense and development may also be closely connected in operation.<sup>86</sup> Military conflicts may result from, generate, or give way to humanitarian and development needs.<sup>87</sup> Military assets may be used to deliver humanitarian assistance or may provide the security necessary for the provision of such assistance by others.<sup>88</sup> Although these links exist, military matters and resources are more contextual than core to development. Development usually occurs without a link to military action. The President's military powers thus, as a general rule, yield little authority to control development.

The President's diplomatic powers are more promising. Development assistance may advance the goals of diplomacy by, for example, strengthening bilateral ties and generating greater support in multilateral institutions like the U.N. General Assembly.<sup>89</sup> Development and diplomacy are also intimately linked in practice. Because development is a feature of international relations, diplomatic channels are used to discuss and agree upon the provision and receipt of development assistance. Similarly, international agreements create development partnerships between the United States, foreign states, and international organizations.<sup>90</sup> The President can thus use her diplomatic tools to pursue development projects. At the end of the day, however, those tools are no more specific to development than to any other matter that might arise in international relations, such as international adoption, postal exchange, or war.

To emphasize the weakness of the President's enumerated powers with regard to development assistance, it is helpful to note the relative strength of Congress's powers, principally due to the powers to tax, spend, and regulate foreign commerce.<sup>91</sup> The Constitution vests in Congress the authority to raise federal revenue

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85. See, e.g., Letter from Military Leaders, *supra* note 55; THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 38–40 (2017) [hereinafter 2017 NSS], <https://perma.cc/36PK-A47L>.

86. See, e.g., USAID, USAID POLICY ON COOPERATION WITH THE DEPARTMENT OF DEFENSE 1 (2015), <https://www.usaid.gov/sites/default/files/documents/1866/USAIDPolicyCooperationDoD.pdf> [<https://perma.cc/GH3E-JQAX>] (identifying guiding and operating principles and context “for USAID cooperation with [the Department of Defense]”).

87. Yemen is a good example. The military conflict there has generated crushing humanitarian needs that will persist after the conflict ends. See, e.g., *Yemen Crisis: What You Need to Know*, UNICEF, <https://www.unicef.org/emergencies/yemen-crisis> [<https://perma.cc/ZE4M-YGRE>] (last visited Feb. 25, 2021).

88. See, e.g., JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-29: FOREIGN HUMANITARIAN ASSISTANCE, at I-7 to I-9 (2019), [https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3\\_29.pdf](https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_29.pdf) [<https://perma.cc/N3AT-3AAF>].

89. See *supra* note 28 and accompanying text.

90. See generally, e.g., USAID, ADS CHAPTER 308: AGREEMENTS WITH PUBLIC INTERNATIONAL ORGANIZATIONS (2020), <https://perma.cc/T4GY-8Y4T> (outlining USAID rules governing agreements with public international organizations); *infra* notes 162–64 and accompanying text.

91. See Meyer, *supra* note 73, at 89–93 (discussing the arguments for presidential and congressional primacy in foreign assistance and concluding that “[c]ongressional power over foreign assistance is greater than the President’s” when it comes to “economic development and humanitarian assistance”). But see Don Wallace, Jr., *The President’s Exclusive Foreign Powers over Foreign Aid: Part I*, 1970 DUKE L.J. 293, 320–21, 327–28; Don Wallace, Jr., *The President’s Exclusive Foreign Affairs*

and to legislate its uses.<sup>92</sup> Although the President plays a role in taxing and appropriations (as the President does with all legislation), “[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” securing Congress’s preeminence in appropriations.<sup>93</sup> Development assistance, in practice, utilizes significant federal revenue to engage private entities, public international organizations, and foreign governments, making the appropriation power key to the provision of development assistance.<sup>94</sup>

Congress is also empowered to “regulate Commerce with foreign Nations.”<sup>95</sup> The overlap between foreign commerce and development is not complete, but it is significant. As with defense and diplomacy, development may advance U.S. interests by, for example, creating export markets,<sup>96</sup> but linkages between development and foreign commerce are far more extensive. Official development assistance (ODA) from the United States pales in comparison to private capital flows to developing countries.<sup>97</sup> From 2013 to 2014, for example, over \$179 billion in private capital flowed from the United States to the developing world, which is more than five times the amount of U.S. ODA (\$33.1 billion).<sup>98</sup> In light of this fact, U.S. ODA involves partnering with the private sector and facilitating private sector engagement with the developing world.<sup>99</sup> This is reflected, for example, in USAID’s recently released *Private-Sector Engagement Policy*.<sup>100</sup> It is also reflected in the Better Utilization of Investments Leading to Development Act of 2018 (BUILD Act), which transformed the Overseas Private Investment Corporation into the U.S. International Development Finance Corporation (DFC) and gave the DFC expanded power not only to insure companies as they enter risky developing markets but also to issue loan guarantees to facilitate access to credit in developing economies, promote and support opportunities for private investment, and even acquire equity in companies to advance economic

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*Powers over Foreign Aid: Part II*, 1970 DUKE L.J. 453, 471–85 (relying on functional considerations, historical practice, judicial precedent, democratic principles, and constitutional text and structure to argue that foreign aid is a “new core area” of presidential power and that various congressional attempts to control foreign aid are unconstitutional).

92. See U.S. CONST. art. I, § 8, cl. 1 (granting Congress the “Power To lay and collect Taxes, Duties, Imposts and Excises”); *id.* amend. XVI (granting Congress the “power to lay and collect taxes on incomes . . . without apportionment among the several States, and without regard to any census or enumeration”).

93. *Id.* art. I, § 9, cl. 7.

94. Of course, the appropriation power, like treaty-making and military authorities, is not specific to development.

95. U.S. CONST. art. I, § 8, cl. 3.

96. See, e.g., 2017 NSS, *supra* note 85, at 38–39.

97. See HUDSON INST., THE INDEX OF GLOBAL PHILANTHROPY AND REMITTANCES 9 (9th ed. 2016), <https://s3.amazonaws.com/media.hudson.org/files/publications/201703IndexofGlobalPhilanthropyandRemittances2016.pdf> [<https://perma.cc/3Y3L-658H>].

98. See *id.* Remittances (\$108.7 billion) and private philanthropy (\$43.9 billion) from the United States also exceeded U.S. ODA. *Id.*

99. See, e.g., 2017 NSS, *supra* note 85, at 39.

100. See USAID, PRIVATE-SECTOR ENGAGEMENT POLICY 4 (2019), [https://www.usaid.gov/sites/default/files/documents/1865/usaid\\_psepolicy\\_final.pdf](https://www.usaid.gov/sites/default/files/documents/1865/usaid_psepolicy_final.pdf) [<https://perma.cc/J7U7-NLDF>].



growth.<sup>101</sup> This focus is not entirely new, of course. The Millennium Challenge Corporation, for example, has long invested in infrastructure projects that advance economic growth in developing countries.<sup>102</sup> The point is that U.S. development efforts involve commerce with foreign nations in a host of ways, implicating Congress's foreign commerce power.

Like the President, Congress also possesses general powers that may be trained on development. Congress is authorized "[t]o make Rules for the Government and Regulation of the land and naval Forces."<sup>103</sup> So, like the President, Congress may influence how defense forces are used to support development efforts. Similarly, the Senate has a key role in ratifying treaties<sup>104</sup> and Congress in authorizing congressional–executive agreements.<sup>105</sup> Through enumerated powers or the Necessary and Proper Clause, Congress may then implement these agreements, advancing development commitments in international agreements through legislation.<sup>106</sup>

Ultimately, Congress's enumerated powers support a strong claim to preeminence in development. By contrast, when it comes to this *D* of foreign policy, the President's power is subordinate, or at least contestable, from an enumerated powers perspective. Foreign relation law's focus on defense and diplomacy obscures this fact.

## 2. Vesting Clause

The Vesting Clause does little to bolster claims of presidential power with regard to development. The Vesting Clause Thesis of presidential prominence in foreign affairs is rooted in textual differences between Articles I and II of the Constitution, which address the legislative and executive powers, respectively.<sup>107</sup> Article I vests in Congress "[a]ll legislative Powers herein granted,"<sup>108</sup> whereas Article II vests in the President "[t]he executive Power."<sup>109</sup> The President receives, the argument goes, all "executive Power" not delegated elsewhere,

101. *See, e.g.*, Pub. L. No. 115-254, § 1412(a), 132 Stat. 3485, 3486 (establishing the DFC); *id.* § 1421(b)(1), 132 Stat. at 3492 (granting authority to make loans and guaranties); *id.* § 1421(c)(1), 132 Stat. at 3493 (granting equity authority); *id.* § 1421(d), 132 Stat. at 3494 (granting insurance authority); *id.* § 1421(e)(1), 132 Stat. at 3494 (granting authority to promote and support private investment); Adva Saldinger, *A New US Development Finance Agency Takes Flight*, DEVEX (Oct. 4, 2018), <https://www.devex.com/news/a-new-us-development-finance-agency-takes-flight-93572> [<https://perma.cc/M5LT-DRAG>]. The Development Credit Authority that issued loan guarantees previously resided at USAID and will remain accessible to USAID missions. *See Saldinger, supra*.

102. *See, e.g.*, *Roads and Transportation Infrastructure*, MILLENNIUM CHALLENGE CORP., <https://www.mcc.gov/sectors/sector/transportation-infrastructure> [<https://perma.cc/F75U-UD8J>] (last visited Feb. 28, 2021).

103. U.S. CONST. art. I, § 8, cl. 14.

104. *See id.* art. II, § 2, cl. 2.

105. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2) & cmts. a, e (AM. LAW INST. 1987).

106. *See* U.S. CONST. art. I, § 8, cl. 18.

107. *See id.* arts. I–II.

108. *Id.* art. I, § 1, cl. 1.

109. *Id.* art. II, § 1, cl. 1.

whereas Congress receives only the legislative powers enumerated in the Constitution.<sup>110</sup> This thesis was advanced by Hamilton as Pacificus and countered by Madison as Helvidius in the famous Helvidius–Pacificus debate shortly after the Founding.<sup>111</sup>

Among modern foreign relations law scholars, the most prominent advocates of the Vesting Clause Thesis are Professors Saikrishna Prakash and Michael Ramsey.<sup>112</sup> They argue that the executive power vested in the President in 1789 was understood to include “a ‘residual’ foreign affairs power.”<sup>113</sup> Thus, the President may exercise “foreign affairs powers that were traditionally part of the executive power,” except insofar as the Constitution specifically allocates executive powers, such as “the power to declare war,” to another actor.<sup>114</sup> The Vesting Clause Thesis has found some support on the Supreme Court.<sup>115</sup> Moreover, presidents and proponents of executive power continue to rely on the thesis to advance claims of broad presidential power in defense and diplomacy.<sup>116</sup> The thesis remains contested, however.<sup>117</sup>

Even if the Vesting Clause Thesis were uniformly accepted, it would not establish broad presidential power over the *D* of development. At the time of

110. See, e.g., Alexander Hamilton, *Pacificus No. 1* (June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 38–40, 42 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

111. For Hamilton’s position, see *supra* note 110 and James Madison, “*Helvidius*” *Number 1* (Aug. 24, 1793), in 15 THE PAPERS OF JAMES MADISON 66, 67, 80 (Thomas A. Mason et al. eds., 1985) (summarizing Hamilton’s argument in the course of responding to it). For Madison’s position, see Madison, “*Helvidius*” *Number 1*, in 15 THE PAPERS OF JAMES MADISON, *supra*, at 67–73 and James Madison, “*Helvidius*” *Number 2* (Aug. 31, 1793), in 15 THE PAPERS OF JAMES MADISON, *supra*, at 80–87.

112. See Prakash & Ramsey, *Executive Power*, *supra* note 77, at 234–35, 252–62; Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1592–96 (2005) [hereinafter Prakash & Ramsey, *Defense*]; see also PRAKASH, *supra* note 78, at 110–41 (developing the Vesting Clause Thesis). *But see* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 551 (2004) (challenging the Vesting Clause Thesis on textual and historical grounds). As Prakash and Ramsey note, their “theory of presidential power [is] essentially equivalent to the one” advanced by Hamilton in *Pacificus No. 1*. Prakash & Ramsey, *Executive Power*, *supra* note 77, at 329.

113. Prakash & Ramsey, *Executive Power*, *supra* note 77, at 234.

114. *Id.* at 234–35. Conversely, the President lacks power to address “matters that were not part of the traditional executive power, even where [those matters] touch upon foreign affairs.” *Id.* at 235. Thus, for example, “the President cannot claim power over appropriations and lawmaking, even in the foreign affairs arena, by virtue of the executive power.” *Id.*

115. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096–97 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part) (“Our Constitution . . . vests the residual foreign affairs powers of the Federal Government—*i.e.*, those not specifically enumerated in the Constitution—in the President by way of Article II’s Vesting Clause.”). *But see id.* at 2086 (majority opinion) (declining to address the Vesting Clause Thesis).

116. See, e.g., Brief for the Respondents at 16–18, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628) (relying on the Vesting Clause and historical practice to support presidential power to recognize foreign states and governments).

117. See, e.g., Julian David Mortensen, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1173 (2019) (arguing that the executive power was one of many royal authorities and that it refers only to the power to effectuate prior exercises of legislative power).

ratification, executive power was not understood to include development as a philosophical or historical matter.

*a. Philosophical Understanding of Executive Power*

Several eighteenth-century political philosophers, but principally John Locke, Baron de Montesquieu, and William Blackstone, are credited with establishing the Founding-Era understanding of “executive power.”<sup>118</sup> Much like today’s foreign relations law scholars, these philosophers described the executive power over foreign affairs<sup>119</sup> in terms of diplomacy and defense.

Locke, for example, viewed the foreign affairs power<sup>120</sup> as embracing “the Power of War and Peace, Leagues and Alliances, and all the Transactions with all Persons and Communities without the Commonwealth.”<sup>121</sup> The specific powers on which Locke focuses—“War and Peace, Leagues and Alliances”—are the stuff of defense and diplomacy. Blackstone and Montesquieu demonstrate a similar focus.<sup>122</sup>

Beyond the three most influential—Locke, Blackstone, and Montesquieu—other political philosophers of the day likewise described foreign affairs powers that the executive might possess in terms of defense and diplomacy.<sup>123</sup> Indeed,

118. See Prakash & Ramsey, *Executive Power*, *supra* note 77, at 266, 271–72.

119. Eighteenth-century philosophers agreed that the executive power primarily consisted of the power to enforce the law, but they recognized a secondary executive power over foreign affairs (or, in Locke’s case, a “federative” power that, while separate, was also exercised by the executive). See *id.* at 268–70.

120. Although he was not always consistent, see JOHN LOCKE, TWO TREATISES OF GOVERNMENT 368, 399 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (describing the executive power as including the power “to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion”); Prakash & Ramsey, *Executive Power*, *supra* note 77, at 267–68 (noting that “Locke sometimes used executive power interchangeably with the federative power”), Locke used the label “federative” rather than “executive” for foreign affairs powers. LOCKE, *supra*, at 410–12. Yet Locke believed both federative and executive powers should be lodged in the same actor, LOCKE, *supra*, at 411–12; Prakash & Ramsey, *Executive Power*, *supra* note 77, at 267, laying the foundation for later scholars to fold the federative into the executive power, Prakash & Ramsey, *Executive Power*, *supra* note 77, at 266.

121. LOCKE, *supra* note 120, at 411.

122. In Blackstone’s view, the executive power was vested in the British monarch. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*183, \*242–43. As the sole “representative of [the] people” “[w]ith regard to foreign concerns,” *id.* at \*245, the monarch exercised the power to send and receive ambassadors, see *id.* at \*245, “make treaties, leagues, and alliances,” *id.* at \*249, “mak[e] war and peace,” *id.*, grant safe-conducts, *id.* at \*251–52, deport foreign citizens, see *id.*, and, with the assistance of lower level executive officials, issue letters of marque and reprisal, see *id.* at \*250–51. To Blackstone, the executive power over foreign affairs thus centered on diplomacy and defense. For Montesquieu, the focus was the same. The executive power included the power to “make[] peace or war, send[] or receive[] embassies, establish[] the public security, and provide[] against invasions.” 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 185 (Legal Classics Library ed., 1984) (1751).

123. See, e.g., J.L. DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 63 (John MacGregor ed., London, Henry G. Bohn 1853) (1771) (explaining, in discussing the executive power, that the king “is, with regard to foreign nations, the representative and the depository of all the power and collective majesty of the nation; he sends and receives ambassadors; he contracts alliances; and has the prerogative of declaring war, and of making peace, on whatever conditions he thinks proper”); 3 E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL

Thomas Rutherford went so far as to call the “external executive power” the “military executive power,” while recognizing that the power, in practice, often extends beyond “what is strictly called military” to include “making war or peace, . . . engaging in alliances for an increase of strength, either to carry on war or to secure peace, . . . entering into treaties,” or “making leagues to restore peace, . . . and . . . adjusting the rights of a nation in respect of navigation, trade, &c. by conventions or agreements.”<sup>124</sup>

Given the eighteenth-century understanding that the executive power focused on diplomacy and defense, it would be difficult to argue that the President has constitutional power over development by virtue of possessing the executive power. Perhaps an argument could be constructed on Locke’s suggestion that the executive power extends to “all the Transactions with” entities outside a state’s borders. Such transactions, in the abstract, could include development aid. Yet the history of state involvement in development, laid out in the next Section, forecloses that possibility.

#### *b. History of State Involvement in Development*

State-sponsored development assistance, though prominent today, was not at the Founding when the executive power was vested in the President. Part II briefly summarized the U.S. history of development aid as a part of foreign policy to show that, notwithstanding its neglect in foreign relations law, development has figured in U.S. foreign policy for more than fifty years. This Section briefly traces the international history of state involvement in development assistance to demonstrate that state—let alone executive—engagement in development matured long after the Founding. Any power vested in the President by Article II thus fails to reach development.

Although many trace the beginnings of international development aid to the mid-1900s,<sup>125</sup> some see roots as far back as the late 1700s and early 1800s.<sup>126</sup> The

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LAW 69, 100, 160–61, 235–36, 393 (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758) (describing interacting with foreign states, treaty-making, engaging in war, pursuing the rights of citizens harmed by foreign subjects, and utilizing and holding ambassadors liable as powers that may be assigned to, or reside in, the ruler who holds the executive power).

124. THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW 273–76 (2d ed., Baltimore, William & Joseph Neal 1832); *see id.* at 281. In addition to seeing some of what is associated in practice with the external executive power as legislative in nature, Rutherford argued that the external executive power is naturally subject to legislative control, including the legislative power to raise, discipline, and pay the military and executive impotence to assume certain international commitments without legislative approval. *See id.* at 277–79. As a result, the discretion often left to those exercising the external executive power, such as the power to regulate ambassadors or to command the military forces, comes in his view from positive law, not natural law or emergency. *See id.* at 277–81, 284–85.

125. *See* MICHAEL BARNETT, EMPIRE OF HUMANITY: A HISTORY OF HUMANITARIANISM 2 (2011).

126. *See id.* at 30, 40. Barnett traces the history of what he terms “humanitarianism,” which he defines to include both “emergency humanitarianism” and “alchemical humanitarianism.” *Id.* at 22. What he terms “emergency humanitarianism” is more commonly referred to as humanitarian assistance. *See* BARNETT, *supra* note 125, at 37; *see also* CRS, FOREIGN AID, *supra* note 41, at 8 (describing “humanitarian assistance” as “devoted largely to the immediate alleviation of human suffering in emergencies, both natural and man-made, as well as problems resulting from conflict[s] associated with

early precedents of development assistance, however, were dominated by abolitionists, missionaries, and others seeking to “civilize” non-Western cultures.<sup>127</sup> These were mostly private efforts,<sup>128</sup> conducted by private citizens or organizations on behalf of private individuals or groups—most prominently, slaves and the wounded—rather than by or for other countries.<sup>129</sup> Moreover, this was an age of colonialism. As a result, many of these efforts were not so much directed toward independent sovereigns but toward other parts of a state’s empire.<sup>130</sup> This history alone undermines the notion that the executive power vested in the President at the Founding includes power over development. The length of time it took for states to become fully engaged in development strengthens the point.

It was the mid-1800s when states truly began to participate in humanitarian efforts as reflected in the adoption of the Geneva Conventions, with their protections for war wounded, and the formation of the quasi-public International Committee of the Red Cross.<sup>131</sup> The private monopoly on such assistance, however, only began to erode in earnest with World War I.<sup>132</sup> The conflict’s scale demonstrated the need for large, long-term private organizations and for the involvement of states and international organizations.<sup>133</sup> Simultaneously, the war and its aftermath began to demonstrate that humanitarian efforts, both unilateral and multilateral, could advance states’ interests.<sup>134</sup> Thus, for example, “several international humanitarian organizations, including the High Commissioner for Refugees,” emerged at this time.<sup>135</sup>

More broadly, this was a time when Western states began to recognize more obligations toward their own citizens, which laid the groundwork not only for the welfare state but also for further official development assistance.<sup>136</sup> The Great

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failed or failing states”). “Alchemical humanitarianism” is more commonly referred to as development assistance. *See* BARNETT, *supra* note 125, at 39; *see also* CRS, FOREIGN AID, *supra* note 41, at 8 (describing “development assistance . . . as long-term efforts that may have the effect of preventing future crises from emerging”).

127. *See* BARNETT, *supra* note 125, at 30, 57–75.

128. *See id.* at 168. Alexis de Tocqueville observed this phenomenon in early nineteenth-century America. He stated,

Americans of all ages, all stations in life, and all types of dispositions are forever forming associations. . . . Americans combine to give fêtes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. . . . In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840).

129. BARNETT, *supra* note 125, at 30, 68, 104.

130. *See id.* at 100.

131. *See id.* at 79–81.

132. *See id.* at 30, 87, 168.

133. *See id.* at 86–87.

134. *See id.* at 87–88.

135. *Id.* at 30; *see id.* at 88.

136. *See id.* at 21, 94, 99–100.

Depression and a growing sense “that economic stability[, secured at least in part by government,] underpinned domestic and international stability” hastened the expansion of official assistance.<sup>137</sup>

World War II solemnized the marriage of the state and development. In the United States, for example, the federal government began regulating aid agencies, first in an effort to preserve U.S. neutrality and then to ensure consistency with war efforts.<sup>138</sup> Global governance of aid organizations emerged in parallel.<sup>139</sup>

Confronting the horrors of World War II led to a new sense of international community, the construction of an international human rights architecture, and a flurry of efforts in Europe that sought not just immediate relief but reconstruction.<sup>140</sup> Development assistance became a serious concern among states.<sup>141</sup> The international community established new international organizations, such as the World Health Organization and the Food and Agriculture Organization, to deal with such matters.<sup>142</sup> A host of new nongovernmental organizations, including prominent organizations such as Catholic Relief Services, Cooperative for American Remittances to Europe (CARE), Oxford Famine Relief Committee (Oxfam), and World Vision International, also arose.<sup>143</sup> Development efforts extended well beyond European reconstruction.<sup>144</sup>

With the advent of the Cold War, development engagement increased with newly independent states, motivated in part by the desire to contain communism and ensure security.<sup>145</sup> For both compassionate and self-interested reasons, states became “increasingly central to the funding, regulation, and organization of humanitarian action.”<sup>146</sup> Previously private development assistance became significantly public.<sup>147</sup> It also figured as a critical component of foreign policy.<sup>148</sup> Private nongovernmental organizations became implementing partners of the state, and states formed international organizations to assist in state efforts.<sup>149</sup>

Pursuing the historical arc of state engagement with development any further is unnecessary to demonstrate that this engagement is a modern phenomenon.

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137. *Id.* at 99; *see id.* at 110.

138. *Id.* at 108–09.

139. *See id.* at 108–11.

140. *See id.* at 102–03. Although less prominent in memory than the Marshall Plan, humanitarian and development efforts outside Europe existed both immediately before and after World War II. *See* RUTTAN, *supra* note 33, at 33, 35–36, 39–40, 42–43.

141. *See* BARNETT, *supra* note 125, at 101 (citing WALT WHITMAN ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (3d ed. 1991)); *id.* at 105.

142. *See id.* at 110, 168–69.

143. *Id.* at 112–21.

144. *See id.* at 108, 118–22, 168; RUTTAN, *supra* note 33, at 39–40, 42–43, 65.

145. *See* BARNETT, *supra* note 125, at 100–01, 108.

146. *Id.* at 104; *see id.* at 107, 124.

147. *See id.* at 104.

148. *See, e.g., id.* at 104, 124, 133.

149. *See id.* at 104–05, 107–08, 147.

Suffice it to say that since the Cold War, state involvement with development has only increased.<sup>150</sup>

As this history demonstrates, the state and development have become closely connected, but that connection is of recent vintage. The picture was very different at the Founding. Consequently, while any executive power vested in the President in 1789 embraces defense and diplomacy, neither eighteenth-century political philosophy nor state practice supports a reading of the Vesting Clause that generates presidential power over development.

### 3. Take Care Clause

Nor does the Take Care Clause of Article II. That Clause mandates that the President “take Care that the Laws be faithfully executed.”<sup>151</sup> Although this provision reads like a duty, it may also be a source of foreign affairs power, especially if the law the President is bound to execute includes international law.<sup>152</sup> The President might then take unilateral action to execute a treaty obligation or comply with customary international law, exercising discretion in interpreting both in the process. Under this view of the Take Care Clause, more international law means more presidential power to execute.

In defense and diplomacy, there is both established and expanding international law.<sup>153</sup> The law of war continues to develop to address the current prominence of nonstate armed actors, intrastate conflicts, and new weaponry, such as

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150. Indeed, during the last decade of the twentieth and into the twenty-first century, the relationship between the state and development actors reached a new level of intimacy. *See id.* at 168–69. This intimacy resulted, in significant part, from three phenomena. First, humanitarian and development workers came to perceive their work as falling on a “relief-development continuum.” *Id.* at 168. Thus, humanitarian aid expanded beyond addressing immediate needs to addressing root causes. *Id.* at 167–68; *see id.* at 196–97. The continuum eventually extended as far as state and peacebuilding. *See id.* at 168. The result is that just as “[s]tates have become increasingly important to all aspects of humanitarianism, . . . humanitarian organizations have taken on state-like functions such as providing public goods and serving as de facto government ministries.” *Id.* at 222. In working to construct and reinvent host states, development furthers the interests of donor states that see national security threats in weak and failing states that breed terrorism. *See id.* at 163–65, 168, 192. On both donor and recipient ends, then, development efforts became enterprises of statehood. Second, human rights came to dominate development work and organizations, with a resulting emphasis on changing the behavior and character of states rather than merely attending to the immediate needs of their citizens. *See id.* at 166–67, 197–209. Third, humanitarian efforts, quite surprisingly, became linked to a particular aspect of statehood—the use of force—in multiple ways. *See id.* at 174, 176–77, 179–80, 187–93. For example, in Libya, the United States intervened militarily to “prevent a humanitarian disaster.” Letter from President Barack Obama to Speaker John Boehner and Senator Daniel Inouye, *supra* note 27. The concept of humanitarian intervention demonstrates how closely intertwined the state and its use of force have become with humanitarian assistance. *See* BARNETT, *supra* note 125, at 192–93, 236.

151. U.S. CONST. art. II, § 3.

152. *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. c (AM. LAW INST. 1987) (“That international law and agreements of the United States are law of the United States means also that the President has the obligation and the necessary authority to take care that they be faithfully executed.”).

153. *See, e.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

armed drones and autonomous weapons.<sup>154</sup> Similarly, with the advent of globalization and the evolution of international law, the subjects of diplomacy have expanded beyond traditional areas, such as trade and navigation, to more recent topics such as adoption and environmental policy.<sup>155</sup>

The same cannot be said when it comes to development and humanitarian assistance. Currently, there is no widely accepted international law regime specific to humanitarian assistance or development.<sup>156</sup> There have been efforts to recognize and operationalize a right to development, but those efforts have not yet produced a body of international development law.<sup>157</sup> The law of war, though also called humanitarian law, focuses on when and how force may be used appropriately, rather than on how to deliver humanitarian assistance more broadly.<sup>158</sup> The U.N. General Assembly and humanitarian organizations have endorsed four principles of humanitarian assistance: humanity, neutrality, impartiality, and operational independence.<sup>159</sup> Under these principles, humanitarian efforts must address human suffering wherever found, “not take sides in hostilities or engage in [political, racial, religious, or ideological] controversies,” provide relief “on the basis of need alone,” and stand apart “from the political, economic, military or other objectives” of any actor in the location of humanitarian relief.<sup>160</sup> Yet these remain international principles, rather than binding customary international law.<sup>161</sup> The Take Care Clause speaks of faithfully executing the law.

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154. See generally, e.g., Rebecca Crootof, *War Torts: Accountability for Autonomous Weapons*, 164 U. PA. L. REV. 1347 (2016) (proposing “war torts,” a parallel to “war crimes,” to address damage caused by autonomous weapons).

155. See, e.g., Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, *adopted and opened for signature*, May 29, 1993, S. TREATY DOC. NO. 105-51 (2000); *infra* note 328.

156. That does not mean that the area is completely lawless. Human rights law can apply in both development and humanitarian contexts. Similarly, refugee law applies to particular aspects of humanitarian crises. See, e.g., *Refugees*, UNITED NATIONS, <https://perma.cc/99UZ-SC9G> (last visited Mar. 1, 2021) (highlighting the scope of the world’s refugee crisis and the humanitarian assistance that may be provided to refugees).

157. See, e.g., U.N. Human Rights Council, Working Group on the Right to Development, Draft Convention on the Right to Development, with Commentaries, U.N. Doc. A/HRC/WG.2/21/2, at 5–7 (Jan. 17, 2020) (highlighting prior declarations of a right to development, noting the lack of effective operationalization of such a right, and proposing a draft treaty in response).

158. See, e.g., Advisory Serv. on Int’l Humanitarian Law, *What is International Humanitarian Law?*, INT’L COMMITTEE RED CROSS (July 2004), [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf) [<https://perma.cc/Z748-BD9Z>] (explaining that “[i]nternational humanitarian law is also known as the law of war or the law of armed conflict” and “is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict”). Thus, although the development of humanitarian law is relevant to the history of state engagement with development and humanitarian needs, see *supra* notes 131, 150 and accompanying text, it does not provide a general body of law to govern the provision of humanitarian or development assistance.

159. See *OCHA on Message: Humanitarian Principles*, U.N. OFF. FOR COORDINATION HUMANITARIAN AFF., (June 2012), [https://www.unocha.org/sites/dms/Documents/OOM-humanitarian\\_principles\\_eng\\_June12.pdf](https://www.unocha.org/sites/dms/Documents/OOM-humanitarian_principles_eng_June12.pdf) [<https://perma.cc/WBU6-UNFR>].

160. *Id.*

161. *See id.*



On the surface, the landscape of international agreements governing development assistance looks more robust, potentially providing obligations that the President may assert power to execute under the Take Care Clause. The Executive enters agreements with host countries for the provision of development assistance,<sup>162</sup> and as noted, the United States provides development assistance to many countries in the world.<sup>163</sup> Thus, a web of development agreements exists. A closer look, however, reveals that these are not the sort of agreements that would give rise to significant presidential power. In the typical agreements negotiated by USAID, for example, recipient countries assume obligations—such as exempting development assistance from taxation and providing privileges and immunities to development workers—but, beyond commitments regarding funding and cooperation, the United States assumes few obligations.<sup>164</sup> As a result, these agreements leave little to no opportunity for the President to expand presidential power. Even if the Take Care Clause is a source of presidential power, then the Clause is little more than a thumbtack in the quiver of presidential power when it comes to development assistance.

#### 4. Historical Practice

Historical practice, by contrast, has consistently been one of the sharpest arrows in the President’s quiver in the realms of defense and diplomacy. Among other things, the President has been able to enter international agreements without the participation of the Senate or even both house of Congress based in part on historical practice.<sup>165</sup> Similarly, presidents have an extensive history of authorizing uses of force that can be cited to support presidential power over the use of force. Indeed, the United States has deployed its armed forces abroad in hundreds of instances, but “Congress has declared war only eleven times.”<sup>166</sup>

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162. See, e.g., *U.S. Signs Landmark Agreement with the Government of Tunisia and USAID Tunisia Becomes Full Mission*, USAID (Aug. 30, 2019), <https://www.usaid.gov/tunisia/program-updates/aug-2019-usaid-tunisia-becomes-full-mission-doag-signing-tunisian-government> [<https://perma.cc/4EYY-HSN5>].

163. See *supra* text accompanying note 51.

164. See, e.g., USAID, ADS CHAPTER 349: INTERNATIONAL AGREEMENTS para. 349.3.1.1 (Feb. 4, 2003), <https://www.usaid.gov/sites/default/files/documents/1876/349.pdf> [<https://perma.cc/S3DZ-4WSV>] (describing the terms of framework agreements for assistance to a foreign state); USAID, ADS CHAPTER 350: GRANTS TO FOREIGN GOVERNMENTS paras. 350.1, 350.3.1, 350.3.1.1–.3 (July 23, 2003), <https://www.usaid.gov/sites/default/files/documents/1876/350.pdf> [<https://perma.cc/H25L-HJHA>] (regulating the terms of the most common agreement used for a bilateral grant to a foreign government); USAID, DEVELOPMENT OBJECTIVE AGREEMENT AND BILATERAL PROJECT AGREEMENT TEMPLATE [NON-HEALTH]: A MANDATORY REFERENCE FOR ADS CHAPTERS 350 AND 220 (July 28, 2014), [https://www.usaid.gov/sites/default/files/documents/1868/350mac\\_0.pdf](https://www.usaid.gov/sites/default/files/documents/1868/350mac_0.pdf) [<https://perma.cc/BJA9-SW8M>] (providing a template for the most common agreement used for a bilateral grant to a foreign government).

165. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 679–80, 679 n.8 (1981) (relying on historical practice to uphold presidential authority to settle claims of U.S. nationals against foreign states through sole executive agreement).

166. MURPHY ET AL., *supra* note 59, at 460. This figure does not come close to capturing Congress’s involvement in the use of force, *see id.*, but it is useful for presidents who argue that history favors presidential power over the use of force.

The Supreme Court recently reaffirmed the importance of historical practice in resolving separation-of-powers questions.<sup>167</sup> As a result, the President might successfully claim power over development if there were “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” of the President exercising such power.<sup>168</sup> This Article has already explored the history of development, both in the United States and internationally.<sup>169</sup> On that history, any claim to presidential power over development based on historical practice is quickly dispatched. State-led development was not a phenomenon at the time of the Founding, and development only became part of U.S. foreign policy in the mid-twentieth century.<sup>170</sup> Although that is a long time for development to suffer neglect at the hands of foreign relations law, it falls short of the longstanding historical practice that would create “a gloss on ‘executive Power.’”<sup>171</sup> Moreover, the overall trend has been toward more congressional oversight over development assistance, weakening the President’s contemporary position.<sup>172</sup> In the end, historical practice is a fruitful source of presidential power in defense and diplomacy but yields a meager harvest in the field of development. Once again, expanding the analysis to include the field of development produces a different perspective on the President’s power over foreign affairs.

## 5. Functionalism

Finally, functionalism. Although the Constitution often eschews efficiency to deliberately hinder the concentrated and speedy exercise of power, functional considerations have carried significant weight in determining the President’s constitutional power over foreign affairs.<sup>173</sup> Functional considerations inure to the benefit of the presidency, because when compared to Congress, the President is better able to speak with one voice, act quickly, maintain secrecy, and gather information from U.S. agents overseas.<sup>174</sup> These presidential strengths are often key to effective defense and diplomacy. Although they undoubtedly may be beneficial in development aid as well, they are arguably less necessary. For instance, the information gathered by spies or military officials and the President’s ability

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167. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091–94 (2015) (reviewing historical practice to decide a question regarding separation of powers in foreign affairs after noting that “[i]n separation-of-powers cases this Court has often ‘put significant weight upon historical practice’” (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014))).

168. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

169. See *supra* Part I; Section III.A.2.

170. See *supra* text accompanying note 34.

171. *Youngstown*, 343 U.S. at 611 (Frankfurter, J., concurring) (quoting U.S. CONST. art. II, § 1, cl. 1); cf. *INS v. Chadha*, 462 U.S. 919, 944–45, 959 (1983) (holding the legislative veto unconstitutional even though it had been used for fifty years and with increasing frequency).

172. See Meyer, *supra* note 73, at 72–88, 110.

173. See, e.g., *United States v. Curtiss–Wright Exp. Corp.*, 299 U.S. 304, 320–21 (discussing the President’s functional advantages).

174. See, e.g., David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1033–34 (2015).

to maintain secrecy are not likely to be day-to-day needs in development. Development efforts are usually conducted in the open with the consent of the receiving country. Although the need to act quickly arises in the face of humanitarian crises, development involves technical planning, long-term execution, and even longer monitoring for effectiveness.<sup>175</sup> And not infrequently, a split voice may be helpful. For example, presidential willingness, but congressional reluctance, to provide aid absent progress against official corruption may advance development goals. In short, the President's functional strengths may not be so critical in development aid.

More fundamentally, unlike at least some aspects of defense and diplomacy, development aid is an elective part of foreign policy. No matter how isolationist, the United States could not reasonably forego communicating to some degree with, or defending itself against, other countries, but it need not respond to humanitarian crises or development challenges abroad. Indeed, the country existed for roughly 150 years before development became embedded in foreign policy.<sup>176</sup> As a result, there is arguably no need to resort to functional arguments to find a constitutional power in the President to engage in development aid. It is enough for the President to exercise statutorily delegated authority, which, for functional reasons, is likely to be granted.<sup>177</sup>

In sum, in the arenas of defense and diplomacy, the President's enumerated powers, the Vesting Clause, the Take Care Clause, historical practice, and functional arguments present a strong case for presidential power. As this Part demonstrates, they do not when it comes to development. Not one of the traditional sources of presidential power supports a comparable case for presidential power over development. Approaching the question of presidential power from the development angle alters our sense of the President's constitutional powers in foreign affairs.

#### B. RELATIONSHIP BETWEEN THE PRESIDENT AND CONGRESS

Integrating development also revises understanding of the empirical relationship between Congress and the President in foreign affairs.<sup>178</sup> When it comes to that relationship, the conventional view is that Congress routinely abdicates its foreign affairs power to the President.<sup>179</sup> For example, the United States enters

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175. See, e.g., USAID, ADS CHAPTER 201: PROGRAM CYCLE OPERATIONAL POLICY (July 23, 2020), <https://perma.cc/SNE5-85CY>.

176. See *supra* Section I.C.

177. See generally Moore, *supra* note 174, at 1033–35 (discussing functional reasons why Congress might delegate foreign affairs power to the President).

178. Cf. Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517, 518–19 (2013) (asserting briefly that “the conventional wisdom about the executive branch’s dominance [and Congress’s feebleness] in foreign affairs may be overstated—especially outside the context of wars and crises”).

179. See, e.g., BRADLEY ET AL., *supra* note 3, at 187 (“Congress has delegated a substantial amount of its foreign policy decisionmaking power to the President.”); Moore, *supra* note 174, at 1030–39 (discussing theories as to why Congress has delegated significant foreign affairs power to the President).

most international agreements as *ex ante* congressional–executive agreements.<sup>180</sup> That is, rather than use the Article II treaty process under which the President negotiates but two-thirds of the Senate must approve an agreement,<sup>181</sup> the President obtains the approval of a majority of both houses of Congress.<sup>182</sup> Critically, that approval generally comes beforehand in legislation that authorizes the President to negotiate and enter agreements, such that Congress never votes on the actual agreement.<sup>183</sup> Further, the President has argued that approval to enter such agreements need not be express.<sup>184</sup> The result is that the President has acquired broad power over the making of international agreements in part through *ex ante* congressional authorization.<sup>185</sup>

In significant ways, the relationship between Congress and the President in development conforms to the traditional narrative of congressional abdication and presidential ascension. Congress has delegated broad development authority to the President.<sup>186</sup> The FAA alone authorizes the President to use a wide variety of tools, often “on such terms and conditions as he may determine,” for a wide range of development purposes.<sup>187</sup>

As to the toolkit, the President is authorized to pursue development goals both bilaterally and multilaterally through grants, contracts, loans, creation of organizations, debt forgiveness, and establishment of foreign missions, among other options.<sup>188</sup> Similarly, the President may pursue

180. See, e.g., Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1258, 1260 (2008) (calculating that between 1980 and 2000 the ratio of Article II treaties to congressional–executive agreements was roughly 375 to 3,000).

181. U.S. CONST. art. II, § 2, cl. 2.

182. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2) & cmts. a, e (AM. LAW INST. 1987).

183. See Hathaway, *supra* note 180, at 1256.

184. See Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 *GEO. L.J.* 725, 732–33 (2013). The President has also pursued sole executive agreements, “mak[ing] international law based on . . . independent constitutional authority.” *Id.* at 732 & n.50.

185. See, e.g., Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 *YALE L.J.* 140, 144–47 (2009).

186. See, e.g., Meyer, *supra* note 73, at 72 (“Congress has always granted the President wide discretion to manage foreign assistance.”); see also *id.* at 72–88 (outlining the history of congressional delegation to and oversight of the President in the realm of foreign assistance).

187. See generally 22 U.S.C. § 2151t(a) (2018) (authorizing the President “to furnish assistance, on such terms and conditions as [the President] may determine, to countries and areas through programs of grant and loan assistance, bilaterally or through regional, multilateral, or private entities” “to carry out the purposes of” the development assistance authorities provided in this part of the Code).

188. See 22 U.S.C. § 2151a(g)(1) (2018) (“may continue United States participation in and may make contributions to the International Fund for Agricultural Development”); § 2151b(e)(2) (“to study the complex factors affecting population growth in developing countries and to identify factors which might motivate people to plan family size or to space their children”); § 2151b-3(f) (“to provide [through the USAID Administrator] increased resources to the World Health Organization and the Stop Tuberculosis Partnership”); § 2151g (permitting transfer of a certain amount of funds from one approved purpose to others); § 2151t(b) (“to make loans . . . on such terms and conditions as he may determine [with certain limitations], in order to promote the economic development of countries and areas”); § 2151t(d) (to grant a certain amount of “assistance, on such terms and conditions as the President may determine, to research and educational institutions in the United States for the purpose of

development goals in a host of sectors, including agriculture, environment, water, sanitation, nutrition, education, health, disaster prevention and response, good governance, and human rights.<sup>189</sup> The President is also

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strengthening their capacity to develop and carry out programs concerned with the economic and social development of developing countries”); § 2151u(b) (“to pay transportation charges on shipments by the American National Red Cross and by [registered] United States voluntary agencies”); § 2151v(b) (“to make assistance under this part available on a grant basis to the maximum extent that is consistent with the attainment of United States development objectives”); § 2151v(c) (to forgo principal and interest payments on certain debts owed by “relatively least developed countries”); § 2211a(a) (“to increase the availability of credit . . . to micro, small, and medium-sized enterprise clients lacking full access to capital, training, technical assistance, and business development services”); § 2212(b) (“to increase the availability of financial services to micro, small, and medium-sized enterprises and households lacking full access to credit and other financial services”); § 2221(a) (“in order to further [designated development] purposes,” “to make voluntary contributions on a grant basis to international organizations and to programs administered by such organizations, and in the case of the Indus Basin Development Fund . . . to make grants and loans [with some restrictions but otherwise] . . . on such terms and conditions as he may determine”); § 2221(f) (“to permit United States participation in the International Fertilizer Development Center and . . . to use any of the funds made available under this part for the purpose of furnishing assistance to the Center on such terms and conditions as he may determine”); § 2221(h) (“to permit the United States to participate in and to use . . . [certain] funds . . . for the purpose of furnishing assistance (on such terms and conditions as the President may determine) to the International Food Policy Research Institute”); § 2228(b)(1), (4) (“to establish an International Muslim Youth Opportunity Fund and to carry out programs” “to improve the education environment in predominantly Muslim countries”); § 2274(b)(1), (c) (“to participate in” “a Central American Development Organization”); § 2292a(d)(1) (“It is the policy of the United States that the funds made available [for international disaster aid] are intended to provide the President with the greatest possible flexibility to address disaster-related needs as they arise and to prepare for and reduce the impact of natural and man-made disasters.”); § 2391(a) (to “maintain special missions or staffs outside the United States” to conduct foreign assistance); § 2395(b) (to “make loans, advances, and grants to, make and perform agreements and contracts with, or enter into other transactions with, any individual, corporation, or other body of persons, friendly government or government agency, whether within or without the United States, and international organizations” consistent with the purposes and provisions of foreign assistance); § 2395(d) (to “accept and use in furtherance of [foreign assistance purposes], money, funds, property, and services of any kind made available by gift, devise, bequest, grant, or otherwise for such purpose”); § 2395(g) (to exercise certain authorities, including “acquiring and disposing” . . . of property,” in connection with making assistance loans); § 2395(i) (to arbitrate and settle “[c]laims arising as a result of investment guaranty operations . . . on such terms and conditions as the President may direct”); § 2399b(b) (to file suit or withhold funds in response to false claims against assistance funds); § 2430c(a)(1) (to reduce certain debts of qualifying countries); § 2431f(a)(1)(A) (to sell, reduce, or cancel certain debts and credit to facilitate “debt-for-nature swap[s]”); §§ 2431f(a)(2), 2431g(d) (to take certain actions to facilitate debt buybacks in support of tropical forest and coral reef ecosystem conservation).

189. See 22 U.S.C. § 2151a(a)(1) (2018) (“on such terms and conditions as he may determine, for agriculture, rural development, and nutrition”); § 2151a(b)(3) (“to provide assistance . . . for forestry projects”); § 2151b(b) (“on such terms and conditions as he may determine, for voluntary population planning”); § 2151b(c) (“on such terms and conditions as he may determine, for health programs”); § 2151b-2(c)(1) (“on such terms and conditions as the President may determine, for HIV/AIDS”); § 2151b-3(c) (“on such terms and conditions as the President may determine, for the prevention, treatment, control, and elimination of tuberculosis”); § 2151b-4(c) (“on such terms and conditions as the President may determine, for the prevention, treatment, control, and elimination of malaria”); § 2151c(a) (“on such terms and conditions as he may determine, for education, public administration, and human resource development”); § 2151d(b)(1) (“on such terms and conditions as he may determine, to enable [developing] countries to prepare for and undertake development of their energy resources”); §

authorized to assist particular countries and regions.<sup>190</sup>

In many cases, the President's authority comes with mandatory or hortatory directions on how it is to be exercised.<sup>191</sup> In other instances, the President may

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2151d(d)(1)–(5) (“on such terms and conditions as he may determine, for . . . programs of technical cooperation and development, particularly the development efforts of United States private and voluntary agencies and regional and international development organizations; . . . programs of research into . . . the process of economic development”; “disaster preparedness and response”; “programs designed to help solve special development problems[; and] programs of urban development”); § 2151n(e) (“for openly carrying out programs and activities which will encourage or promote increased adherence to civil and political rights”); § 2151p(b) (“for developing and strengthening the capacity of developing countries to protect and manage their environment and natural resources”); § 2151q(b) (“to assist countries in protecting and maintaining wildlife habitats and in developing sound wildlife management and plant conservation programs”); § 2152(a) (“to provide assistance for the rehabilitation of victims of torture”); § 2152c(a)(1) (“to establish programs that combat corruption, improve transparency and accountability, and promote other forms of good governance in [qualifying] countries”); § 2152d(a) (“for programs, projects, and activities designed to meet the minimum standards for the elimination of trafficking”); § 2152f(c) (“for programs in developing countries to provide basic care and services for orphans and other vulnerable children”); § 2152h(b) (“for programs in developing countries to provide affordable and equitable access to safe water, sanitation, and hygiene”); § 2174(a)–(b) (“on such terms and conditions as he may specify, to [hospital centers,] schools and libraries [abroad] . . . founded or sponsored by United States citizens”); § 2220b(a) (“on such terms and conditions as he shall determine,” to advance agricultural research, problem-solving, and productivity); § 2291(a)(4) (“to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of narcotic and psychotropic drugs and other controlled substances, or for other anticrime purposes”); § 2292(b) (“to furnish assistance to any foreign country, international organization, or private voluntary organization, on such terms and conditions as he may determine, for international disaster relief and rehabilitation, including assistance relating to disaster preparedness, and to the prediction of, and contingency planning for, natural disasters abroad”); § 2292(c)(1) (“to make available emergency food assistance, including in the form of funds, transfers, vouchers, and agricultural commodities . . . acquired through local or regional procurement, to meet emergency food needs arising from manmade and natural disasters”); § 2346(a) (“to furnish assistance to countries and organizations, on such terms and conditions as he may determine, in order to promote economic or political stability” when “special economic, political, or security conditions . . . require economic support for countries or in amounts which could not be justified solely under” typical development authorities).

190. See 22 U.S.C. § 2151r(b) (2018) (“to develop a long-term comprehensive development program for the Sahel and other drought-stricken nations in Africa”); § 2152e(a) (“under such terms and conditions as the President may determine, to carry out a program to improve building construction codes and practices in Ecuador, El Salvador, and other Latin American countries”); § 2179(a) (“if he determines it to be feasible, . . . to participate in the development of a large-scale water treatment and desalting prototype plant and necessary appurtenances . . . in Israel”); § 2201(a)–(b) (to assist “disadvantaged children[, including those fathered by United States citizens,] in Asian countries where there has been or continues to be a heavy presence of United States military and related personnel in recent years”); § 2293(b) (“to furnish project and program assistance, on such terms and conditions as he may determine in accordance with the policies contained in this section, for long-term development in sub-Saharan Africa”); §§ 2295, 2295b(i) (“to provide assistance [in a range of sectors] to the independent states of the former Soviet Union” “on such terms and conditions as the President may determine”); §§ 2296(b)(1), 2296a(b)–(c), 2296c(b)–(c), 2296d(b), 2296e(c) (“to provide[, among other things, certain] humanitarian . . . [market facilitation, border control, democracy, rule of law, civil society,] and economic reconstruction assistance for the countries of the South Caucasus and Central Asia” “on such terms and conditions as the President may determine”).

191. See, e.g., 22 U.S.C. § 2151c(b) (2018) (dictating, among other things, that education assistance provided by the President “shall be used primarily to expand and strengthen nonformal education methods, especially those designed to improve productive skills of rural families and the urban poor and to provide them with useful information; [and] to increase the relevance of formal

rely on “notwithstanding authority,” the power to overcome other provisions of law in providing assistance.<sup>192</sup> By any measure, the provisions of the FAA authorize the President to exercise broad power with regard to development.

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education systems to the needs of the poor, especially at the primary level, through reform of curricula, teaching materials, and teaching methods, and improved teacher training”); § 2151c(c)(3)(E)(iii)(I) (mandating that the programs and activities the President funds “shall include appropriate targets, metrics, and indicators that . . . move a country along the path to graduation from assistance”); § 2151c(c)(4) (requiring the President to prioritize countries with certain characteristics); §§ 2151h, 2151v (d)–(e) (requiring cost sharing by some recipient countries for certain types of assistance); § 2151i (prioritizing “use of funds . . . [for] the development and use of cooperatives”); § 2151k(b)(1) (requiring the President to use a certain amount of funds “for assistance on such terms and conditions as the President may determine to encourage and promote the participation and integration of women as equal partners in the development process”); § 2151n (prohibiting certain assistance “to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, . . . unless such assistance will directly benefit the needy people in such country”); § 2151p(c)(1) (requiring, under certain circumstances, the performance and consideration of environmental analyses); § 2152f(d)(1) (requiring “the President [to] establish a monitoring and evaluation system to measure the effectiveness of United States assistance to orphans and other vulnerable children”); § 2169(c) (expressing “the sense of the Congress that the President should increase, to the extent practicable, the funds provided by the United States to multilateral lending institutions and multilateral organizations in which the United States participates for use by such institutions and organizations in making loans to foreign countries”); § 2218(a) (requiring that in exercising various development authorities, “emphasis shall be placed on assuring maximum participation in the task of economic development on the part of the people of the developing countries, through the encouragement of democratic private and local governmental institutions”); § 2370(f) (prohibiting, as a general rule, provision of assistance to Communist countries); § 2371(a), (d) (prohibiting, absent presidential waiver, a broad range of assistance “to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism”); § 2378-1(a)–(b) (prohibiting assistance, unless in the national interest, to a country whose government “restricts . . . the transport or delivery of United States humanitarian assistance”); § 2401 (requiring that foreign assistance “[p]rograms . . . be identified appropriately overseas as ‘American Aid’”); § 2420(a)–(c) (prohibiting the use of foreign assistance funds “to provide training or advice, or provide any financial support, for [foreign] police, prisons, [internal intelligence] or other law enforcement forces,” with certain exceptions—for example, “the provision of professional public safety training, to include training in internationally recognized standards of human rights”); *cf.* § 2166 (requesting that “[t]he President . . . seek and . . . take appropriate action . . . to further and assist in the advancement of African regional development institutions, including the African Development Bank”).

192. *See, e.g.*, 22 U.S.C. § 2151b(c)(4) (2018) (“Assistance made available under [various statutory provisions] . . . may be made available notwithstanding any other provision of law that restricts assistance to foreign countries,” with certain specified exceptions such as the limitation on “assistance to organizations that support or participate in a program of coercive abortion or involuntary sterilization.”); § 2151x-1(a) (“For the purpose of reducing dependence upon the production of crops from which narcotic and psychotropic drugs are derived, the President may provide assistance to a foreign country under [certain statutes] to promote the production, processing, or the marketing of products or commodities, notwithstanding any other provision of law that would otherwise prohibit the provision of assistance to promote the production, processing, or the marketing of such products or commodities.”); § 2151x-2(a) (“For the purpose of reducing dependence upon the production of crops from which narcotic and psychotropic drugs are derived, the President may provide economic assistance for a country which, because of its coca production, is a major illicit drug producing country . . . to promote the production, processing, or the marketing of products which can be economically produced in such country, notwithstanding [certain] provisions of law. . . .”); § 2152c(a)(4) (permitting nondirect governmental assistance for good governance programs “notwithstanding any other provision of law that restricts assistance to foreign countries,” with specified exceptions); §§ 2152d, 2420 (authorizing assistance “to meet the minimum standards for the elimination of trafficking” notwithstanding the statutory prohibition on financial support to foreign law enforcement); § 2174(b) (authorizing the President to assist certain

Authorizing legislation is only part of the story, however. In the exercise of delegated authority, the President depends on appropriations.<sup>193</sup> Although

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hospitals, schools, and libraries abroad “notwithstanding the provisions of the Mutual Defense Assistance Control Act of 1951”); § 2179(c) (authorizing “the President [to] enter into contracts with public or private agencies and with any person [in support of a desalination project] without regard to” certain provisions of law); § 2211d (“Notwithstanding any other provision of law, amounts made available for development assistance for micro, small, and medium-sized enterprises under any provision of law other than this . . . may be provided to further the purposes of this subpart.”); § 2212(e) (“Assistance [to expand access to financial services for micro, small, and medium-sized enterprises] may be provided under this section without regard to [the procurement restrictions of] section 2354(a) of this title.”); § 2220d(a) (authorizing the President to repurpose funds toward certain agricultural research, problem-solving, and productivity efforts without regard to certain statutory provisions addressing cost-sharing and funding caps); § 2223 (exempting funds for World Bank development efforts in the Indus Basin from certain requirements of U.S. law); § 2261(a)(1) (authorizing the President, “[n]otwithstanding any other provision of law,” to repurpose certain funds for approved development activities in response to “unanticipated contingencies”); § 2291(a)(4) (authorizing the President “to furnish [anti-drug or anti-crime] assistance” “[n]otwithstanding any other provision of law”); § 2292(b), (c)(1) (authorizing the President, with certain limitations, to provide international disaster assistance, including emergency food aid, “notwithstanding any other provision of this chapter or any other Act”); § 2293(i)(2) (authorizing the provision of “training and training facilities, in sub-Saharan Africa, for doctors and other health care providers, notwithstanding any provision of law that restricts assistance to foreign countries”); § 2346b(b) (authorizing otherwise earmarked economic support funds for emergency use); § 2364(a)(1) (authorizing the President to provide certain foreign assistance “without regard to” the laws governing that assistance “when the President determines, and so notifies in writing the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate, that to do so is important to the security interests of the United States”); § 2378(a)(1), (b) (authorizing the President, “[n]otwithstanding any other provision of law,” to provide assistance, when in the national interest, “to the government of any country that provides lethal military equipment to . . . a terrorist government”); § 2393(a) (authorizing the conduct of foreign assistance “without regard to [most] . . . provisions of law . . . regulating the making, performance, amendment, or modification of contracts and the expenditure of funds of the United States Government”); § 2396(a)(13), (b)–(c) (authorizing the use of assistance funds for various purposes, including acquiring office space and housing abroad, without regard to other provisions of law); § 2430(c)(a)(1), (3) (authorizing reduction of certain debts of qualifying countries notwithstanding other provisions of law); § 2431e(a)(1) (authorizing the President to reduce certain debts “[n]otwithstanding any other provision of law”); § 2431f(a)(1)(A) (authorizing the President to sell, reduce, or cancel certain debts and credit to facilitate “debt-for-nature swap[s]” “[n]otwithstanding any other provision of law”); § 2431f(a)(2) (authorizing the President, “[n]otwithstanding any other provision of law,” to take certain actions to facilitate debt buybacks in support of tropical forest and coral reef ecosystem conservation); § 2431f(a)(4) (directing the President, “[n]otwithstanding any other provision of law, [to] . . . establish the terms and conditions under which loans and credits may be sold, reduced, or canceled”). Notwithstanding authority may appear in other statutes as well, such as the annual appropriations act. *See, e.g.*, Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 7033(c), 133 Stat. 2534, 2869 (2019) (authorizing the use of certain funds “for assistance for ethnic and religious minorities in Iraq and Syria” “notwithstanding any other provision of law”); *id.* § 7034(a), 133 Stat. at 2869 (making certain funds “available for victims of war, displaced children, displaced Burmese, and to combat trafficking in persons and assist victims of such trafficking, . . . notwithstanding any other provision of law”). As the D.C. Circuit has affirmed, notwithstanding provisions are as broad as their language suggests. *See Crowley Caribbean Transp., Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989).

193. *See* ROBERT KEITH, CONG. RESEARCH SERV., 98-721, INTRODUCTION TO THE FEDERAL BUDGET PROCESS 7 (2008) (“An authorization for a discretionary spending program is only a license to enact an appropriation. The amount of budgetary resources available for spending is determined in annual appropriations acts.”). When the President exercises enumerated presidential powers, some assert that the President is constitutionally entitled to funds. *See, e.g.*, J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162, 1163, 1183. Because Congress’s powers predominate in the realm of



“Congress has not enacted into law a comprehensive foreign assistance authorization measure since 1985,” it has kept a tight leash on the President through appropriations.<sup>194</sup> This is true with regard to executive efforts both to limit and to carry out development assistance.

As noted, the Trump Administration actively sought to limit development spending. Most significantly, the Administration repeatedly proposed cutting the development assistance budget by roughly one-third.<sup>195</sup> In addition, the Administration threatened to use the rescission process at the end of the fiscal year to force the expiration of development funds<sup>196</sup> and imposed daily caps on development spending at the end of the fiscal year when much development spending occurs.<sup>197</sup> The Administration also diverted funding away from certain areas, such as the Northern Triangle countries of Central America due to migration concerns.<sup>198</sup> In these attempts, the Administration was rebuffed by Congress.<sup>199</sup> Most significantly, the development budget remained healthy notwithstanding the President’s efforts, demonstrating the limits of the President’s control over levels of development aid.<sup>200</sup>

When it comes to execution, Congress is even more active. Through a variety of mechanisms, Congress remains involved in deciding how development funds

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development assistance, *see supra* Section III.A.1, the question of whether the President may act without congressional appropriation is less salient in that realm.

194. CRS, FOREIGN AID, *supra* note 41, at 27; *see also* Matthew B. Lawrence, *Disappropriation*, 120 COLUM. L. REV. 1, 58–60 & n.260 (2020) (noting the leverage that appropriation provides to Congress over the Executive, including when permanent legislative commitments depend on temporary appropriations); Meyer, *supra* note 73, at 97 (noting Congress’s better but still imperfect record of passing “a regular foreign aid authorization and appropriations bill” prior to 1985). Harold Koh, writing in the wake of the Iran–Contra scandal, suggested that procedural and appropriations limits imposed by Congress are ineffective in controlling the President. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1300–03 (1988). This Section provides an example to the contrary.

195. *See, e.g.*, Raj Kumar, *What to Watch for in 2020*, DEVEX (Jan. 2, 2020), <https://www.devex.com/news/what-to-watch-for-in-2020-96289> [<https://perma.cc/F6Y5-7X92>] (“[T]he Trump administration has put forward three budget proposals that slash foreign aid by approximately a third.”).

196. A presidential proposal to rescind funds that Congress has appropriated freezes those funds for forty-five days unless Congress approves rescission. *See, e.g.*, Michael Igoe, *White House Abandons Plan to Rescind Billions in US Foreign Aid*, DEVEX (Aug. 29, 2018), <https://www.devex.com/news/white-house-abandons-plan-to-rescind-billions-in-us-foreign-aid-93352> [<https://perma.cc/HN4P-D58E>]. If the proposal is made within forty-five days of the end of the fiscal year, the funds may expire while frozen. *See id.*

197. *See, e.g., id.*; Kumar, *supra* note 195; Nick Wadhams, *White House Targets Foreign Aid Cash with Caps Limiting Spending*, BLOOMBERG (Aug. 12, 2019, 4:26 PM), <https://www.bloomberg.com/news/articles/2019-08-12/white-house-targets-foreign-aid-cash-with-caps-limiting-spending>.

198. *See, e.g.*, Teresa Welsh, *Following Review, US ‘Will Not Provide New Funds’ to Central America*, DEVEX (June 18, 2019), <https://www.devex.com/news/following-review-us-will-not-provide-new-funds-to-central-america-95126> [<https://perma.cc/ZJ8M-F2FA>].

199. *See* Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, § 7045(a)(1)(A), 133 Stat. 2534, 2903 (2019) (legislating that “not less than \$519,885,000 should be made available for assistance for” Central American countries, including those of the Northern Triangle); *see also* Igoe, *supra* note 196 (reporting on congressional pushback to the Trump Administration’s efforts to reduce, divert, and rescind foreign aid); Kumar, *supra* note 195 (same); Wadhams, *supra* note 197 (same).

200. *See, e.g.*, Igoe, *supra* note 196; Kumar, *supra* note 195.

are used. At the outset, Congress requires the Executive to submit a “congressional budget justification” with “the President’s budget” proposal, explaining why requested development appropriations are needed.<sup>201</sup> In the appropriations statute Congress actually enacts, Congress designates where and how funds may, or must, be spent.<sup>202</sup> These designations begin with appropriations to named accounts with relatively broad purposes, such as the Operating Expenses, Development Assistance, Global Health Programs, and International Disaster Assistance accounts.<sup>203</sup> Congressional control extends far beyond the account level, however.<sup>204</sup> As illustrated in an extended footnote below, Congress in the fiscal year 2020 Appropriations Act expressly directs program funds—often with specific instructions—to countries, international organizations, sectors, and initiatives.<sup>205</sup> In addition to these specific statutory directives, Congress provides

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201. Further Consolidated Appropriations Act § 7061(e)(1), 133 Stat. at 2925.

202. This discussion focuses on appropriations connected to USAID to illustrate the active role Congress plays in U.S. development efforts.

203. See Further Consolidated Appropriations Act, 2020, div. G, tit. II, Operating Expenses, 133 Stat. at 2825 (2019) (appropriating more than \$1 billion to the operating expenses account); *id.* Capital Investment Fund, 133 Stat. at 2826 (appropriating over \$210 million “for overseas construction and related costs and for the procurement and enhancement of information technology and related capital investments”); *id.* div. G, tit. III, Global Health Programs, 133 Stat. at 2827 (appropriating over \$3 billion “for global health activities”); *id.* at 2828 (appropriating nearly \$6 billion to the State Department for HIV/AIDS related efforts); *id.* (providing a contribution of roughly \$1.5 billion to the Global Fund to Fight AIDS, Tuberculosis and Malaria); *id.* (permitting “up to 5 percent of the aggregate amount of funds made available to the Global Fund in fiscal year 2020 . . . [to] be made available to USAID for technical assistance related to the activities of the Global Fund”); *id.* at 2829 (appropriating “up to \$17,000,000 [of certain funds] . . . for administrative expenses of the Office of the United States Global AIDS Coordinator”); *id.* Development Assistance (appropriating nearly \$3.5 billion for certain activities authorized by the Foreign Assistance Act of 1961); *id.* International Disaster Assistance (providing over \$4 billion “for international disaster relief, rehabilitation, and reconstruction assistance,” roughly \$2 billion of which is for “Overseas Contingency Operations/Global War on Terrorism”); *id.* Transition Initiatives (appropriating roughly \$92 million “for international disaster rehabilitation and reconstruction assistance . . . and to support transition to democracy and long-term development of countries in crisis”); *id.* Complex Crises Fund, 133 Stat. at 2829–30 (appropriating \$30 million “to prevent or respond to emerging or unforeseen foreign challenges and complex crises overseas,” up to five percent of which “may be used for administrative expenses”); *id.* Economic Support Fund (appropriating more than \$3 billion for economic support efforts); *id.* Democracy Fund (appropriating \$95 million for USAID’s democracy-promotion activities); *id.* Assistance for Europe, Eurasia and Central Asia, 133 Stat. at 2830–31 (appropriating \$770 million for statutorily designated countries in Europe, Eurasia, and Central Asia). USAID funds in accounts other than the operating expenses and capital investment accounts are collectively referred to as program funds.

204. *But cf.* Meyer, *supra* note 73, at 72 & n.14, 103 & n.158 (asserting that in 1988, “appropriations [were largely] in lump sums”).

205. See Further Consolidated Appropriations Act § 7030, 133 Stat. at 2864 (requiring funds “be made available for programs” that “advance the adoption of secure, next-generation communications networks and services, including 5G” and that “counter the establishment of insecure communications networks and services . . . promoted by the People’s Republic of China”); § 7031(d)(1), 133 Stat. at 2866 (mandating use of funds to advance “transparency and accountability of expenditures and revenues related to the extraction of natural resources . . . and to prevent the sale of conflict diamonds”); § 7032(a)(1), 133 Stat. at 2867 (requiring at least \$2.4 billion “be made available for democracy programs”); § 7032(d), 133 Stat. at 2868 (prioritizing the use of democracy funds for government

“institutions that demonstrate a commitment to democracy and the rule of law”); § 7032(f), 133 Stat. at 2868 (requiring USAID to use funds, especially through “grants and cooperative agreements,” to continue implementing “civil society and political competition and consensus building programs”); § 7032(h), 133 Stat. at 2868 (mandating “not less than [\$20 million] . . . to support and protect civil society activists and journalists who have been threatened, harassed, or attacked”); § 7032(i)(2), 133 Stat. at 2868–69 (requiring “not less than [\$10 million]” for freedom of expression and media independence programs); § 7033(b), 133 Stat. at 2869 (requiring that funds “be made available for humanitarian assistance for vulnerable and persecuted religious minorities”); § 7034(e)(1), 133 Stat. at 2870 (requiring that funds “be made available to carry out the Program for Research and Training on Eastern Europe and the Independent States of the Former Soviet Union”); § 7034(m), 133 Stat. at 2874 (requiring that certain funds “be made available[, as appropriate,] for the regular collection of feedback obtained directly from beneficiaries”); § 7034(o)(1), 133 Stat. at 2874 (permitting the use of certain funds for “loan guarantees for Egypt, Jordan, Tunisia, and Ukraine”); § 7034(p)(1), 133 Stat. at 2875 (requiring that “not less than [\$50 million] . . . be made available for Local Works”); § 7035(a)(7), 133 Stat. at 2878 (requiring “not less than [\$7.5 million] . . . be made available for assistance to eliminate inhumane conditions in foreign prisons and other detention facilities”); § 7041(a)(2), 133 Stat. at 2884–85 (requiring “not less than [\$125 million] . . . be made available for assistance for Egypt,” including for democracy and “development programs in the Sinai,” and including “not less than [\$40 million] . . . for higher education programs, including not less than [\$15 million] for scholarships”); § 7041(c)(1), 133 Stat. at 2886 (requiring that certain funds “be made available for . . . bilateral economic,” stabilization, and humanitarian assistance for Iraq, as well as “programs to protect and assist religious and ethnic minority populations”); § 7041(d)(1)–(2), 133 Stat. at 2887 (requiring “not less than [\$1 billion]” in fiscal year 2020 Economic Support Funds “be made available for assistance” to Jordan, including “not less than [\$745 million] . . . for budget support for the Government of Jordan,” and from prior appropriation acts “not less than [\$125 million],” including \$100 million “for budget support” and \$25 million “for programs to increase electricity transmission to neighboring countries, including Iraq”); § 7041(e)(1), 133 Stat. at 2887 (requiring that funds “be made available for assistance for Lebanon”); § 7041(f)(1), 133 Stat. at 2888 (requiring that funds “be made available for stabilization assistance for Libya”); § 7041(g)(1), 133 Stat. at 2888 (requiring that funds “be made available for assistance for the Western Sahara”); § 7041(i)(1), 133 Stat. at 2889 (requiring that “not less than [\$40 million] . . . be made available . . . for non-lethal stabilization assistance for Syria,” including “not less than [\$7 million] . . . for emergency medical and rescue response and chemical weapons use investigations”); § 7041(j), 133 Stat. at 2890 (requiring at least \$191.4 million under the fiscal year 2020 Appropriations Act “be made available for assistance for Tunisia,” and “not less than [\$50 million]” from prior appropriations); § 7041(k)(4), 133 Stat. at 2891 (approving the use of funds “for private sector partnership programs for the West Bank and Gaza if . . . authorized”); § 7041(l), 133 Stat. at 2892 (requiring funds “be made available for stabilization assistance for Yemen”); § 7042(d), 133 Stat. at 2892 (requiring funds “be made available for the Democratic Republic of the Congo for stabilization, global health, and bilateral economic assistance”); § 7042(e), 133 Stat. at 2892 (requiring funds “be made available . . . for assistance for Cameroon, Chad, Niger, and Nigeria for . . . democracy, development, and health programs; . . . individuals targeted by foreign terrorist and other extremist organizations[;] . . . individuals displaced by violent conflict; and . . . counterterrorism”); § 7042(f), 133 Stat. at 2892 (requiring “not less than [\$60 million] . . . be made available for assistance for Malawi,” including “up to [\$10 million] . . . for higher education programs”); § 7042(g), 133 Stat. at 2892 (requiring funds “be made available for stabilization, health, development, and security programs in the countries of the Sahel region”); § 7042(h)(1)–(2) (requiring that “not less than [\$15 million] . . . be made available for democracy programs and not less than [\$8 million] . . . for conflict mitigation and reconciliation programs” in South Sudan and limiting the types of assistance that may be provided to South Sudan’s central government); § 7042(i)(1)–(2), 133 Stat. at 2893 (designating the types of assistance that may be provided to Sudan’s government); § 7042(j)(2), 133 Stat. at 2894 (limiting “assistance for the central Government of Zimbabwe” to “health and education,” absent a certification and report from the Secretary of State); § 7043(a), 133 Stat. at 2894–95 (requiring that “not less than [\$131.4 million] . . . be made available for assistance for Burma,” including “for programs to promote ethnic and religious tolerance and to combat gender-based violence, including in [certain Burmese states]” and “for community-based organizations operating in Thailand to provide . . . assistance to internally displaced

persons in eastern Burma”; also appropriating funding to “ethnic groups and civil society . . . to help sustain ceasefire agreements and further prospects for reconciliation” and “for programs to support the [voluntary] return of . . . internally displaced persons . . . consistent with international law”; but prohibiting funding to organizations “controlled by the armed forces of Burma” or advocating ethnic or religious violence); § 7043(b), 133 Stat. at 2895 (requiring “not less than [\$82.5 million] . . . be made available for assistance for Cambodia,” including for such things as “research and education programs associated with the Khmer Rouge”; and contemplating assistance “for democracy, health, education, and environment programs”); § 7043(c)(1), 133 Stat. at 2896 (requiring “not less than [\$1.4 billion] . . . be made available to support the implementation of the Indo-Pacific Strategy and the Asia Reassurance Initiative Act”); § 7043(c)(2), 133 Stat. at 2896 (requiring “not less than [\$300 million] . . . be made available for a Countering Chinese Influence Fund”); § 7043(d), 133 Stat. at 2896 (requiring “not less than [\$34.2 million] . . . be made available for assistance for Laos”); § 7043(e)(3)(A), 133 Stat. at 2897 (requiring that funds “be made available for the promotion of human rights in North Korea”); § 7043(h)(2), 133 Stat. at 2898–99 (requiring that “not less than [\$8 million] . . . be made available to nongovernmental organizations to support activities which preserve cultural traditions and promote sustainable development, education, and environmental conservation in Tibetan communities,” “not less than [\$6 million]” to assist scattered Tibetan communities, and “not less than [\$3 million] . . . to strengthen the capacity of the Central Tibetan Administration”); § 7043(i), 133 Stat. at 2899 (requiring that “not less than [\$159.6 million] . . . be made available for assistance for Vietnam,” including “not less than [\$13 million] . . . for health and disability programs in areas sprayed with Agent Orange” and “not less than [\$20 million]” for dioxin remediation); § 7044(a)(1)(A)–(C), (2)(B), (3)(A), 133 Stat. at 2899–901 (mandating that funds “made available for assistance for Afghanistan” be used for certain purposes, including to implement the USAID Country Development Cooperation Strategy; “to continue support for [coeducational] institutions of higher education in Kabul”; “for programs that protect and strengthen the rights of Afghan women and girls and promote the political and economic empowerment of women” to the greatest extent practicable through local grants; and “for an endowment . . . for [a coeducational] institution of higher education in Kabul”; also permitting funding “for reconciliation programs and . . . reintegration activities for former combatants who have renounced violence against the Government of Afghanistan”; “for an endowment to empower women and girls; and . . . for an endowment for higher education”); § 7044(b), 133 Stat. at 2901 (requiring “not less than [\$198.3 million] . . . be made available for assistance for Bangladesh,” including “not less than [\$23.5 million] . . . to address the needs of communities impacted by [Burmese] refugees”; “not less than [\$10 million] . . . to protect freedom of expression and due process of law; and . . . not less than [\$23.3 million] . . . for democracy programs, of which not less than [\$2 million] . . . for such programs for the Rohingya community in Bangladesh”); § 7044(c)(1), 133 Stat. at 2901–02 (requiring “not less than [\$130.2 million] . . . be made available for assistance for Nepal, including for earthquake recovery and reconstruction . . . and democracy programs”); § 7044(d)(2), 133 Stat. at 2902 (requiring “not less than [\$15 million] . . . be made available for democracy programs and not less than [\$10 million] . . . for gender programs” in Pakistan); § 7044(e)(1), 133 Stat. at 2902 (requiring funds “be made available for assistance for Sri Lanka for democracy and economic development programs” and contemplating funding to the central government “for humanitarian assistance, victims of trauma, and technical assistance to promote fiscal transparency and sovereignty”); § 7044(f), 133 Stat. at 2903 (requiring that funds “be made available for assistance for Afghanistan, Pakistan, and other countries in South and Central Asia to significantly increase the recruitment, training, and retention of women in the judiciary, police and other security forces, and to train judicial and security personnel . . . to prevent and address gender-based violence, human trafficking, and other practices that disproportionately harm women and girls”); § 7045(a)(1)(A), 133 Stat. at 2903 (directing that “not less than [\$519.8 million of fiscal year 2020 funds] should be made available for assistance for Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama,” with a priority on “address[ing] the key factors that contribute to the migration of unaccompanied, undocumented minors to the United States” as well as funding for “global health, humanitarian, development, democracy, border security, and law enforcement programs . . . including for programs to reduce violence against women and girls and to combat corruption, and for support of commissions against corruption and impunity, as appropriate”; also requiring “not less than [\$45 million] for support of offices of Attorneys General and of other entities and activities to combat corruption and impunity”); § 7045(a)(1)(B), 133 Stat. at 2903 (directing that “not less than [\$527.6

million of fiscal year 2019 funds] should be made available for assistance for Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama”); § 7045(b)(1), 133 Stat. at 2904 (requiring that “not less than [\$448.2 million] . . . be made available for assistance for Colombia”); § 7045(d), 133 Stat. at 2906 (requiring that “not less than [\$60 million] . . . be made available for the Caribbean Basin Security Initiative”); § 7045(e)(1), 133 Stat. at 2906 (requiring that “not less than [\$30 million] . . . be made available for democracy programs for Venezuela”); § 7045(e)(2), 133 Stat. at 2906 (requiring that funds “be made available for assistance for communities in countries supporting or . . . impacted by refugees from Venezuela, including Colombia, Peru, Ecuador, Curacao, and Trinidad and Tobago”); § 7046(a)(1), 133 Stat. at 2906 (requiring that “not less than [\$132 million] . . . be made available for assistance for Georgia”); § 7046(a)(2), 133 Stat. at 2906 (requiring that “not less than [\$448 million] . . . be made available for assistance for Ukraine”); § 7047(d)(1), 133 Stat. at 2909 (requiring funds “be made available to carry out the purposes of the Countering Russian Influence Fund . . . and . . . to enhance the capacity of law enforcement . . . in countries in Europe, Eurasia, and Central Asia”); § 7047(d)(2), 133 Stat. at 2909 (requiring funds be “made available for assistance for the Eastern Partnership countries . . . to advance the implementation of Association Agreements and trade agreements with the European Union, and to reduce their vulnerability to [Russian] economic and political pressure”); § 7047(e), 133 Stat. at 2909 (requiring funds “be made available to support democracy programs in the Russian Federation and other countries in Europe, Eurasia, and Central Asia, including to promote Internet freedom”); § 7050(a)–(b), 133 Stat. at 2913–14 (requiring that “not less than [\$65.5 million] . . . be made available for programs to promote Internet freedom globally,” emphasizing countries of U.S. national interest that “restrict freedom of expression on the Internet,” seeking nongovernmental matching of funds, ensuring that certain funds are available for priorities such as supporting “civil society [efforts] to counter . . . repressive Internet-related laws,” and requiring State Department concurrence on fund allocations); § 7051(b), 133 Stat. at 2916 (requiring funds “be made available . . . for assistance to eliminate torture and other cruel, inhuman, or degrading treatment or punishment by foreign police, military or other security forces in countries receiving assistance” under the fiscal year 2020 Appropriations Act); § 7057(b), 133 Stat. at 2918 (requiring that funds appropriated for the U.N. Population Fund that are “transferred to the ‘Global Health Programs’ account . . . be made available for family planning, maternal, and reproductive health activities”); § 7058(a), 133 Stat. at 2919 (requiring that “not less than [\$575 million] . . . be made available for family planning/reproductive health, including in areas where population growth threatens biodiversity or endangered species”); § 7058(b)(1)–(2), 133 Stat. at 2919–20 (providing certain funds “be made available [for] combat[ing] an infectious disease or public health emergency” and “[u]p to [\$10 million] . . . for the Emergency Reserve Fund”); § 7059(a)(1)–(3), 133 Stat. at 2920 (requiring that funds “be made available to promote gender equality . . . worldwide,” making “funds available to implement the Women’s Entrepreneurship and Economic Empowerment Act,” and appropriating “up to [\$100 million] . . . for the Women’s Global Development and Prosperity Fund”); § 7059(b), 133 Stat. at 2920 (requiring “not less than [\$50 million] . . . be made available . . . to increase leadership opportunities for women in countries where women and girls suffer discrimination due to law, policy, or practice, by strengthening protections for women’s political status, expanding women’s participation in political parties and elections, and increasing women’s opportunities for leadership positions in the public and private sectors at the local, provincial, and national levels”); § 7059(c)(1), 133 Stat. at 2920 (requiring “not less than [\$165 million] . . . be made available to implement a multi-year strategy to prevent and respond to gender-based violence”); § 7059(c)(2), 133 Stat. at 2920–21 (requiring that funds “that are available to train foreign police, judicial, and military personnel . . . address, where appropriate, prevention and response to gender-based violence and trafficking in persons, and . . . promote the integration of women into the police and other security forces”); § 7059(d), 133 Stat. at 2921 (designating that certain funds “should be made available to support a multi-year strategy to expand, and improve coordination of, [U.S.] Government efforts to empower women as equal partners in conflict prevention, peace building, transitional processes, and reconstruction efforts . . . and to ensure the equitable provision of relief and recovery assistance to women and girls”); § 7059(e), 133 Stat. at 2921 (requiring “not less than [\$15 million] . . . be made available to[, *inter alia*,] support women and girls who are at risk from extremism and conflict”); § 7060(a)(1)(A)–(B), 133 Stat. at 2921 (requiring that “not less than [\$875 million] . . . be made available for” basic and secondary education assistance, including “not less than [\$125 million] . . . for contributions to multilateral partnerships that support education”); § 7060(a)(2), 133 Stat. at 2921–22

allocation tables for program funds in the joint explanatory statement<sup>206</sup> incorporated into the Act by reference.<sup>207</sup> Sometimes congressional allocations designate

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(requiring that “not less than [\$235 million] . . . be made available for” higher education assistance, including “not less than [\$35 million] . . . for . . . partnerships between higher education institutions in the United States and developing countries focused on building the capacity of higher education institutions and systems in” those countries); § 7060(b), 133 Stat. at 2922 (requiring that “not less than [\$17 million] . . . be made available for [USAID] cooperative development programs . . . and not less than [\$30 million] . . . for the American Schools and Hospitals Abroad program”); § 7060(c)(1)(A), 133 Stat. at 2922 (permitting certain funds to “be used . . . to support environment programs”); § 7060(c)(2)(A), 133 Stat. at 2922 (requiring that “not less than [\$315 million] . . . be made available for biodiversity conservation programs”); § 7060(c)(2)(B), 133 Stat. at 2922 (requiring that “not less than [\$100.7 million] . . . be made available to combat the transnational threat of wildlife poaching and trafficking”); § 7060(c)(4), 133 Stat. at 2923 (requiring that “not less than [\$135 million] . . . be made available for sustainable landscapes programs”); § 7060(c)(5), 133 Stat. at 2923 (requiring that “not less than [\$177 million] . . . be made available for adaptation programs”); § 7060(c)(6), 133 Stat. at 2923 (requiring that “not less than [\$179 million] . . . be made available for renewable energy programs”); § 7060(d), 133 Stat. at 2923 (requiring that “not less than [\$1 billion] . . . be made available for food security and agricultural development programs” and permitting a contribution to the Global Crop Diversity Trust); § 7060(e), 133 Stat. at 2923 (requiring that “not less than [\$265 million] . . . be made available to support the development of, and access to financing for, micro, small, and medium-sized enterprises that benefit the poor, especially women”); § 7060(f), 133 Stat. at 2923 (requiring that “not less than [\$67 million] . . . be made available . . . to combat trafficking in persons internationally”); § 7060(g), 133 Stat. at 2923 (requiring that “not less than [\$30 million] . . . be made available to support people-to-people reconciliation programs . . . including between Israelis and Palestinians living in the West Bank and Gaza”); § 7060(h), 133 Stat. at 2923–24 (requiring that “not less than [\$450 million] . . . be made available for water supply and sanitation projects,” including “not less than [\$225 million] . . . for programs in sub-Saharan Africa, and . . . not less than [\$15 million]” for local community initiatives “to build and maintain safe latrines”); § 7064(a), 133 Stat. at 2928–29 (approving “up to [\$100 million]” for hiring foreign service officers at home and abroad “on a limited appointment basis”); 7064(e), 133 Stat. at 2929 (providing use of bilateral economic assistance funds to pay for detailed or employed individuals working on disasters); § 7064(f), 133 Stat. at 2929 (providing use of certain funds “to employ up to 40 personal services contractors in the United States,” without “more than 15 . . . assigned to any bureau or office,” to support “new or expanded overseas programs and activities . . . until permanent direct hire personnel are hired and trained”); § 7064(h), 133 Stat. at 2929 (providing use of funds for senior foreign service limited appointments to support Afghanistan and Pakistan); § 7065(a)(1), 133 Stat. at 2930 (requiring that “not less than [\$200 million] . . . be made available for the Relief and Recovery Fund for assistance for areas liberated or at risk from, or under the control of, the Islamic State of Iraq and Syria [or similar] organizations, including for stabilization assistance for vulnerable ethnic and religious minority communities affected by conflict”); § 7065(d), 133 Stat. at 2931 (requiring that \$25 million “be made available for the [World Bank’s] Global Concessional Financing Facility . . . to provide financing to support refugees and host communities”); § 7066(a)–(b), 133 Stat. at 2931 (requiring that funds “be made available for [USAID] programs and activities . . . to address the needs and protect and promote the rights of people with disabilities in developing countries, including initiatives that focus on independent living, economic self-sufficiency, advocacy, education, employment, transportation, sports, and integration,” as well as “the cost of translation” and five percent “for management, oversight, and technical support”). Congress may also direct the use of operating expense funds. *See, e.g.*, § 7064(i)(1), 133 Stat. at 2930 (designating that operating expense funds “are made available to support 1,850 permanent Foreign Service Officers and 1,600 permanent Civil Service staff” at USAID).

206. The fiscal year 2020 Appropriations Act treats the explanatory statement of the House Appropriations Committee “as if it were a joint explanatory statement of a committee of conference.” *Id.* § 4, 133 Stat. at 2536. As a result, this Article refers to the House Report for Division G of that Act as a joint explanatory statement.

207. *See id.* § 7019(a), 133 Stat. at 2855 (requiring that program funds “be made available at not less than the amounts specifically designated in the . . . tables included in the [joint] explanatory statement”).

minimum or maximum funding levels as small as \$5 million or even less.<sup>208</sup> Congress's detailed management of the allocation of funds significantly limits the Executive's discretion to decide where and how to provide aid.

Congress does permit some discretion. For example, as a general rule for program funds, the USAID Administrator may deviate "10 percent below the minimum amounts specifically designated in the" joint explanatory statement's allocation tables, but only by 5 percent for Global Programs supported by Economic Support Funds, and not at all with regard to Global Health Programs or "amounts designated by [the Appropriations] Act as minimum funding requirements."<sup>209</sup>

At the same time, Congress binds discretion in various other ways. In addition to affirmatively directing how and where funds are spent, Congress imposes a raft of prohibitions on the use of funds.<sup>210</sup> In addition, Congress limits the length of

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208. *See, e.g., id.* § 7031(b)(3), 133 Stat. at 2865 (requiring that at least \$5 million be dedicated to efforts to improve the budget transparency of governments receiving government-to-government assistance); § 7034(c), 133 Stat. at 2870 (requiring "not less than [\$5 million]" for atrocities prevention programs); § 7050(e), 133 Stat. at 2915 (appropriating up to \$2.5 million in surge funding for "Internet freedom programs in closed societies" upon a secretarial determination and report of national interest); § 7065(b), 133 Stat. at 2931 (requiring that "not less than [\$2.5 million] . . . be made available for programs to counter violent extremism in Asia, including within the Buddhist community"); § 7065(c), 133 Stat. at 2931 (requiring that "[\$5 million] . . . be made available to the Global Community Engagement and Resilience Fund . . . on a cost-matching basis . . . to the maximum extent practicable").

209. *Id.* § 7019(b)–(d), 133 Stat. at 2855–56.

210. *See id.*, div. G, tit. III, 133 Stat. at 2827 (prohibiting the transfer of funds to organizations or programs involved in "coercive abortion or involuntary sterilization" as well as the use of funds "to pay for the performance of abortion as a method of family planning[,] . . . to motivate or coerce any person to practice abortions," or "to lobby for or against abortion"); *id.* (making funds available "only to voluntary family planning projects" that, *inter alia*, do not impose quotas or provide incentives for "family planning acceptors"); *id.*, 133 Stat. at 2828 (prohibiting discrimination "in awarding grants for natural family planning" against applicants who only offer "natural family planning" due to "religious or conscientious commitment[s]"); tit. III, 133 Stat. at 2829–30 (prohibiting the use of Complex Crises funds "for lethal assistance or . . . natural disasters"); § 7007, 133 Stat. at 2844 (prohibiting the use of designated foreign assistance funds "to finance directly any assistance or reparations for the governments of Cuba, North Korea, Iran, or Syria"); § 7008, 133 Stat. at 2844 (prohibiting the use of designated foreign assistance funds "to finance directly any assistance to the government of any country whose duly elected head of government is deposed by military coup" unless the "assistance [is] to promote democratic elections or public participation in democratic processes"); § 7010(c), 133 Stat. at 2847 (prohibiting the use of assistance funds "to promote the sale or export of tobacco or tobacco products"); § 7012, 133 Stat. at 2848 (prohibiting, absent presidential waiver, "assistance to the government of any country . . . in default" to the United States for more than one year on a loan made under a program funded by the fiscal year 2020 Appropriations Act); § 7013 (a)–(b), (d), 133 Stat. at 2849 (prohibiting the use of funds under new bilateral agreements that do not exempt U.S. assistance from taxation or provide reimbursement, and requiring withholding of assistance to the central government and reprogramming of funds when "taxes [imposed on assistance] have not been reimbursed"); § 7018, 133 Stat. at 2855 (prohibiting funding for performance of, inducement toward, or biomedical research regarding abortion or "involuntary sterilization as a method of family planning"); § 7021, 133 Stat. at 2856–57 (prohibiting use of certain funds to assist foreign governments that support terrorism, subject to presidential waiver); § 7025, 133 Stat. at 2858–59 (restricting assistance to other countries to develop export capacities that would harm U.S. producers); § 7031(a)(5), 133 Stat. at 2865 (prohibiting use of government-to-government assistance to service debts to international financial institutions); § 7034(h), 133 Stat. at 2871 (noting that the Secretary of State should withhold bilateral assistance funds intended for a central government "that is not taking appropriate steps" concerning

child abduction); § 7037(a), (c)–(d), 133 Stat. at 2880–81 (prohibiting use of funds “to support a Palestinian state unless the Secretary of State determines and certifies to the appropriate congressional committees that . . . the governing entity of a new Palestinian state” meets certain requirements, the President waives these requirements, or the funds are used “to help [the governing entity] meet the requirements”); § 7038, 133 Stat. at 2881 (prohibiting “assistance to the Palestinian Broadcasting Corporation”); § 7039(c)(1), 133 Stat. at 2882 (prohibiting use of West Bank and Gaza funds to honor terrorists); § 7040(a)–(b), 133 Stat. at 2883 (prohibiting the provision of certain funds to the Palestinian Authority absent a presidential waiver); § 7040(f)(1)–(2), (5), 133 Stat. at 2884 (prohibiting use of programmatic funds to assist the Palestine Liberation Organization, to pay personnel salaries of the Palestinian Authority in Gaza, or to assist Hamas, or, with limited exception, certain organizations connected to Hamas); § 7041(a)(2), 133 Stat. at 2884–85 (prohibiting “cash transfer assistance or budget support” for Egypt absent certification and report “that the Government of Egypt is taking consistent and effective steps to stabilize the economy and implement market-based economic reforms”); § 7041(i)(2)(A)–(C), 133 Stat. at 2889 (prohibiting assistance to Syria “that supports or otherwise legitimizes the Government of Iran, foreign terrorist organizations[,] . . . or a proxy of Iran in Syria”; or that advances Russian strategic goals contrary to U.S. security interests; and noting that assistance “should not be used in areas . . . controlled by a government led by Bashar al-Assad or associated forces”); § 7041(k)(2)(A), 133 Stat. at 2890 (prohibiting, absent a waiver by the Secretary of State, the use of economic support funds for the Palestinian Authority if the Authority achieves standing in the United Nations “outside an agreement negotiated between Israel and the Palestinians,” or supports an International Criminal Court investigation against “Israeli nationals . . . for alleged crimes against Palestinians”); § 7041(k)(3), 133 Stat. at 2891 (requiring the Secretary of State to reduce funds to the Palestinian Authority in an amount equal to the value of “payments for acts of terrorism” made by the Authority or related entities); § 7043(c)(3), 133 Stat. at 2896 (prohibiting the use of certain funds “for any project or activity that directly supports or promotes . . . [China’s] Belt and Road Initiative . . . [or] the use of technology . . . developed by the People’s Republic of China,” absent a national security determination by the Secretary of State); § 7043(e)(1), 133 Stat. at 2896–97 (prohibiting, absent waiver, the use of funds to assist “the central government of a country . . . [that] engages in significant transactions contributing materially to the malicious cyber-intrusion capabilities of the Government of North Korea”); § 7043(e)(3)(B), 133 Stat. at 2897 (prohibiting the use of certain funds “for assistance for the Government of North Korea”); § 7043(f)(2), 133 Stat. at 2897 (prohibiting the financing of “any grant, contract, or cooperative agreement with the [People’s Liberation Army]” or affiliated entities); § 7044(a)(1)(D), 133 Stat. at 2900 (prohibiting the use of certain funds for Afghanistan “for any program, project, or activity that,” as stated in the Consolidated Appropriations Act, Pub. L. No. 116-6, § 7044(a)(1)(C), 133 Stat. 13, 350, “cannot be sustained, as appropriate, by the Government of Afghanistan or another Afghan entity; . . . is not accessible . . . [to] effective oversight” as required by federal law; “initiates any new, major infrastructure development; or . . . includes” an individual or organization credibly “involved in acts of grand corruption, illicit narcotics production or trafficking, or . . . a gross violation of human rights”); § 7045(b)(5), 133 Stat. at 2905 (prohibiting the use of Colombian assistance funds to pay “reparations to conflict victims or compensat[e] . . . demobilized combatants” as part of a peace agreement); § 7046(b), 133 Stat. at 2906–07 (prohibiting “assistance for a government of an Independent State of the former Soviet Union if such government directs any action in violation of the territorial integrity or national sovereignty of any other [such] Independent State,” absent presidential determination that such assistance “is in the national security interest of the United States”); § 7047(a), 133 Stat. at 2907 (prohibiting “assistance for the central Government of the Russian Federation”); § 7047(b)(1), (c)(1), 133 Stat. at 2908 (prohibiting, absent secretarial waiver, “assistance for the central government of a country that the Secretary of State determines and reports . . . [1] has taken affirmative steps intended to support or be supportive of the Russian Federation annexation of Crimea or other territory in Ukraine” or “[2] has recognized the independence of, or has established diplomatic relations with, the Russian Federation occupied Georgian territories of Abkhazia or Tskhinvali Region/South Ossetia”); § 7047(c)(2), 133 Stat. at 2909 (prohibiting funding “to support the Russian Federation occupation of the Georgian territories of Abkhazia and Tskhinvali Region/South Ossetia”); § 7048(b)(1), (3), 133 Stat. at 2910 (prohibiting, absent secretarial waiver, payment of “expenses for any [U.S.] delegation to any [U.N.] specialized agency, body, or commission . . . chaired or presided over by a country, the government of which the Secretary of State has determined . . . supports international



time for which funds remain available, requiring the Executive to return to Congress for further appropriations.<sup>211</sup>

Even after Congress has directed fund allocations, it keeps a close eye on the use of such funds. Pursuant to Section 653(a) of the FAA, within thirty days of enactment of an appropriations statute, the Executive must identify, for Congress's review, "each foreign country and international organization to which the United States Government intends to provide any portion of the funds . . . and . . . the amount of funds . . . , by category of assistance, that the United States Government intends to provide to each."<sup>212</sup> Under the fiscal year 2020 Appropriations Act, USAID must also submit, within forty-five days of enactment, "an operating plan" for the agency's operating expenses, detailing "the uses of such funds at the program, project, and activity level."<sup>213</sup> Within ninety days of enactment, USAID must likewise submit "spend plans" for funds allocated to certain countries ("Afghanistan, Iraq, Lebanon, Pakistan, Columbia, and countries in Central America");<sup>214</sup> initiatives ("counter[ing] Russian influence and aggression," "Power Africa," and "the Indo-Pacific Strategy");<sup>215</sup> and sectors

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terrorism"); § 7048(e), 133 Stat. at 2911–12 (prohibiting payment of other countries' U.N. dues or "the costs for participation of another country's delegation at international conferences held under the auspices of multilateral or international organizations"); § 7051(a), 133 Stat. at 2916 (prohibiting use of funds "to support or justify the use of torture and other cruel, inhuman, or degrading treatment or punishment by any [U.S.] official or contract employee"); § 7055(a)–(c), 133 Stat. at 2917 (prohibiting, absent secretarial waiver, the use of certain funds to assist "the central government of a country" "with which the United States maintains diplomatic relations and . . . has an extradition treaty" if the country notifies the State Department that it refuses to extradite an "individual indicted for a [serious] criminal offense" "in violation of . . . the treaty"); § 7056(1)–(4), 133 Stat. at 2918 (prohibiting the use of program funds in certain ways that are likely to, or do, result in U.S. job losses; that, with some exception, "contribute[] to the violation of internationally recognized workers' rights . . . in the recipient country"; or that "would prohibit . . . any coal-fired or other power-generation project" intended to "provide affordable electricity in" certain countries, to increase U.S. exports, or to prevent U.S. job losses); § 7060(c)(2)(D), 133 Stat. at 2922 (prohibiting biodiversity program funds from being "used to support the expansion of [any] industrial scale extractive activity[, including logging,] into [certain] primary/intact tropical forests").

211. The default under the fiscal year 2020 Appropriations Act is that unobligated funds will expire at the end "of the current fiscal year." *Id.* § 7011. That said, the Act authorizes global health; development assistance; economic support; democracy; and Europe, Eurasia, and Central Asia funds; and a portion of fiscal year 2020 operating expense funds to "remain available until September 30, 2021." *See id.* div. G, tit. II, 133 Stat. at 2825–26 (operating expenses); *id.* tit. III, 133 Stat. at 2827 (global health programs); *id.* tit. III, 133 Stat. at 2829 (development assistance); *id.* tit. III, 133 Stat. at 2830 (economic support fund); *id.* (assistance for Europe, Eurasia, and Central Asia). By contrast, international disaster assistance, transition initiative funds, and complex crises funds are made "available until expended," *id.* tit. III, 133 Stat. at 2829 (international disaster assistance); *id.* (transition initiatives); *id.* tit. III, 133 Stat. at 2829–30 (complex crises), and HIV/AIDS funds are made "available until September 30, 2024," *id.* tit. III, 133 Stat. at 2827 (global health programs); *cf. id.* § 7020, 133 Stat. at 2856 (restricting the use of fiscal year 2020 programmatic appropriations "to make any pledge for future year funding for any multilateral or bilateral program" unless certain conditions are met); § 7034(p)(1), 133 Stat. at 2875 (appropriating funds for "Local Works" to "remain available until September 30, 2024").

212. Foreign Assistance Act of 1961 § 653(a), 22 U.S.C. § 2413(a) (2018).

213. Further Consolidated Appropriations Act, 2020 § 7061(a), 133 Stat. at 2924.

214. *Id.* § 7061(b)(1)(A), 133 Stat. at 2924.

215. *Id.* § 7061(b)(1)(B), (D)–(E), 133 Stat. at 2924.

(democracy, education, environment, food security and agriculture, trafficking in persons, reconciliation, and water and sanitation).<sup>216</sup> These spend plans must include “realistic and sustainable goals, criteria for measuring progress, and a timeline for achieving such goals; . . . amounts and sources of funds by account; . . . how such funds will complement other ongoing or planned programs; and . . . implementing partners, to the maximum extent practicable.”<sup>217</sup>

As USAID implements its development plans, it remains subject to a host of notification,<sup>218</sup> consultation,<sup>219</sup> certification,<sup>220</sup> and reporting<sup>221</sup> requirements. To illustrate, the fiscal year 2020 Appropriations Act prohibits USAID from

216. *See id.* §§ 7060(a), (c)–(h), 7061(b)(1)(E), 133 Stat. at 2921–24; *see also id.* § 7050(c), 133 Stat. at 2915 (requiring the Secretary of State and the CEO of the U.S. Agency for Global Media to submit “spend plans for funds . . . for programs to promote Internet freedom globally,” including programs run by USAID). The joint explanatory statement permits the submission of multiple “partial spend plans . . . following consultation.” 165 CONG. REC. H11,061, H11,437 (daily ed. Dec. 17, 2019) (explanatory statement regarding H.R. 1865, Further Consolidated Appropriations Act, 2020, Section 7061).

217. Further Consolidated Appropriations Act, 2020 § 7034(r)(6), 133 Stat. at 2876. These spend plans do not satisfy “notification requirements” in the fiscal year 2020 Appropriations Act or the FAA. *Id.* § 7061(d), 133 Stat. at 2925.

218. Under the Further Consolidated Appropriations Act, 2020, Division G, many appropriations and actions are subject to the “regular notification procedures of the Committees on Appropriations.” *See id.*, div. G, tit. II, 133 Stat. at 2826 (capital investment funds); *id.* tit. III, 133 Stat. at 2827–29 (USAID use of funds to provide technical assistance to Global Fund activities); *id.*, 133 Stat. at 2829–30 (complex crises funds, “except that such notifications shall be transmitted at least 5 days prior to the obligation of funds”); § 7008, 133 Stat. at 2844 (resumption of assistance to a “government . . . whose duly elected head . . . [was] deposed by military coup” but has since been replaced by “a democratically elected government”); § 7009(b)(3), 133 Stat. at 2845 (certain interagency fund transfers); § 7014(a), 133 Stat. at 2850 (reprogramming, in the face of legal impossibility, of funds designated for specific programs “for other programs within the same account”); § 7015(g), 133 Stat. at 2853 (bilateral assistance funds “made available for a trust fund held by an international financial institution”); § 7015(h), 133 Stat. at 2853 (funds for various programs, including Power Africa and the Women’s Global Development and Prosperity Fund); § 7015(i), 133 Stat. at 2854 (reprogramming of certain funds not obligated or programmed due to legal restrictions); § 7015(j), 133 Stat. at 2854 (any “[p]rogrammatic, funding, [or] organizational changes resulting from implementation of any foreign assistance review or realignment”); § 7021(b)(2), 133 Stat. at 2857 (presidential waiver of prohibition on bilateral assistance to a foreign government that supports terrorism); § 7026(b)(3), 133 Stat. at 2860 (obligation of “cash transfer or nonproject sector assistance”); § 7027(a), (b), 133 Stat. at 2861 (“assistance in support of programs of nongovernmental organizations” and certain assistance related to the Food for Peace Act in countries subject to restrictions); § 7031(a)(2), 133 Stat. at 2864 (certain “direct government-to-government assistance”); § 7032(i)(2), 133 Stat. at 2868–69 (certain funds for freedom of expression and media independence programs); § 7034(c), 133 Stat. at 2870 (certain funds for atrocities prevention programs); § 7034(e)(3), 133 Stat. at 2870 (certain funds for private sector partnerships); § 7034(j), 133 Stat. at 2872 (use of notwithstanding authority related to funds for countering extremism); § 7034(n), 133 Stat. at 2874 (exercise of authority related to the HIV/AIDS Working Capital Fund); § 7034(o)(1), 133 Stat. at 2874 (use of certain funds for “loan guarantees for Egypt, Jordan, Tunisia, and Ukraine”); § 7039(f) (“[f]unds made available . . . for [the] West Bank and Gaza”); § 7041(i)(1), 133 Stat. at 2889 (certain funds “for non-lethal stabilization assistance for Syria”); § 7041(k)(4), 133 Stat. at 2891 (certain funds “for private sector partnership programs for the West Bank and Gaza”); § 7043(c)(2), 133 Stat. at 2896 (exercise of transfer authority related to the Countering Chinese Influence Fund); § 7045(a)(2)(B), 133 Stat. at 2904 (reprogramming of funds away from certain governments of Central America); § 7045(e)(2), 133 Stat. at 2906 (certain funds for communities impacted by Venezuelan migration); § 7050(e), 133 Stat. at 2915–16 (transfer and merging of surge funds for “Internet freedom programs”); § 7057(b), 133 Stat. at 2918 (transfer of funds appropriated for the U.N. Population Fund “to the ‘Global Health Programs’ account”); § 7058(b), 133 Stat. at 2919–20 (certain funds related to outbreaks of infectious

obligating operating expenses and certain other funds to “create new programs; . . .

disease, international public health emergencies, and the Emergency Reserve Fund); § 7059(e), 133 Stat. at 2921 (certain funds “to support women and girls who are at risk from extremism and conflict”); § 7060(a)(1), 133 Stat. at 2921 (certain funds “for the support of non-state schools”); § 7060(a)(2), 133 Stat. at 2921–22 (certain funds “for assistance for higher education”); § 7060(c)(1)(B), 133 Stat. at 2922 (certain funds “to support environment programs”); § 7060(g), 133 Stat. at 2923 (certain funds for “people-to-people reconciliation programs”); § 7062(a)(1), 133 Stat. at 2925 (funds “used to implement a reorganization, redesign, or other plan”); 7064(e), 133 Stat. at 2929 (certain funds to pay the cost of detailees or employees working on disasters); § 7065(a)(1), 133 Stat. at 2930 (transfer of funds “made available for the Relief and Recovery Fund”); § 7065(c), 133 Stat. at 2931 (certain funds for “the Global Community Engagement and Resilience Fund”); § 7067, 133 Stat. at 2932 (use of “interest earned [by nongovernmental organizations] . . . for the purpose for which . . . assistance was provided to that organization”). “[R]egular notification procedures of the Committees on Appropriations” means such Committees are notified not less than 15 days in advance of the obligation of funds.” 165 CONG. REC. H11,426 (daily ed. Dec. 17, 2019) (explanatory statement regarding H.R. 1865, Further Consolidated Appropriations Act, 2020, Section 7061). Within those fifteen days, the Committees can place holds on the Agency’s proposed action.

The fiscal year 2020 Appropriations Act requires notification outside the regular notification procedures as well. *See* div. G, tit. III, 133 Stat. at 2830–31 (requiring that notification of assistance for Europe, Eurasia, and Central Asia funds include “information . . . on the use of notwithstanding authority” and that the Committees on Appropriations be informed of later uses of that authority “at the earliest opportunity and to the extent practicable”); § 7017, 133 Stat. at 2855 (requiring notification within five days of any presidential decision not to comply with the Appropriations Act for constitutional reasons and of “any resulting changes to program or policy”); § 7034(f), 133 Stat. at 2871 (requiring the USAID Administrator to inform the Appropriations Committees if an otherwise mandated direct vetting option is not feasible in a new partner vetting program); § 7068(a), 133 Stat. at 2932 (requiring “at least 15 days” advance notice before funding of Enterprise Funds).

219. *See id.* div. G, tit. II, 133 Stat. at 2826 (requiring the USAID Administrator, within sixty days of enactment, to consult “on changes to the account structure” for operating expenses); *id.* tit. III, 133 Stat. at 2829 (requiring the Secretary of State to consult prior to repurposing certain funds toward transition initiatives); § 7012, 133 Stat. at 2848 (requiring the President to consult before providing assistance funds to a government in default to the United States); § 7013(e)(2), 133 Stat. at 2849 (requiring the Secretary of State to consult before exercising the authority to provide assistance to a government that taxes U.S. assistance); § 7015(j), 133 Stat. at 2854 (requiring prior consultation on any “[p]rogrammatic, funding, [or] organizational changes resulting from implementation of any foreign assistance review or realignment”); § 7019(b), 133 Stat. at 2855 (requiring prior consultation before the USAID Administrator exercises discretion to reduce funding for countries or international organizations by up to ten percent below what Congress has designated); § 7031(a)(2), 133 Stat. at 2864 (requiring consultation prior to “direct government-to-government assistance”); § 7032(i)(2), 133 Stat. at 2868–69 (requiring prior consultation on funding for freedom of expression and media independence programs); § 7034(e)(3), 133 Stat. at 2870 (requiring “prior consultation with the appropriate congressional committees” regarding funds for private sector partnerships); § 7034(f), 133 Stat. at 2871 (requiring consultation prior to beginning or significantly altering the scope of a partner vetting program); § 7034(j), 133 Stat. at 2872 (requiring “prior consultation with the appropriate congressional committees” before exercising notwithstanding authority related to countering extremism funds); § 7034(o)(1), 133 Stat. at 2874 (requiring prior consultation regarding use of funds for “loan guarantees for Egypt, Jordan, Tunisia, and Ukraine”); § 7035(a)(7), 133 Stat. at 2878 (requiring consultation “on the proposed uses of funds [to eliminate inhumane conditions in foreign prisons] prior to obligation and not later than 60 days after enactment of” the fiscal year 2020 Appropriations Act); § 7041(g)(1), 133 Stat. at 2888 (requiring “the Secretary of State, in consultation with the [USAID Administrator, to] . . . consult . . . on the proposed uses of [assistance] funds” for Western Sahara “not later than 90 days after the enactment of this Act and prior to the obligation of such funds”); § 7041(i)(4), 133 Stat. at 2890 (requiring consultation before funds for Syrian assistance are made available); § 7041(k)(4), 133 Stat. at 2891 (requiring prior consultation regarding funds “for private sector partnership programs for the West Bank and Gaza”); § 7042(e), 133 Stat. at 2892 (requiring prior consultation regarding funds for “Cameroon, Chad, Niger, and Nigeria”); § 7042(h)(2), 133 Stat. at 2893 (requiring prior consultation regarding

suspend or eliminate a program, project, or activity; . . . close, suspend, open, or

“assistance for the central Government of South Sudan”); § 7042(i)(3), 133 Stat. at 2893 (requiring prior consultation on “any new program or activity in Sudan”); § 7043(a)(1), (4), 133 Stat. at 2894–95 (requiring prior consultation regarding funds “for assistance for Burma” and in particular for “[a]ny new program or activity in Burma initiated in fiscal year 2020”); § 7043(c)(2), 133 Stat. at 2896 (requiring prior consultation regarding the Countering Chinese Influence Fund); § 7045(e)(2), 133 Stat. at 2906 (requiring prior consultation regarding funds for communities impacted by Venezuelan migration); § 7046(b), 133 Stat. at 2906–07 (requiring consultation before the President determines that “assistance for a government of an Independent State of the former Soviet Union . . . is in the national security interest” notwithstanding that government’s “action in violation of the territorial integrity or national sovereignty of any other [such] Independent State”); § 7050(e), 133 Stat. at 2915–16 (requiring consultation prior to transfer and merging of surge funds for “Internet freedom programs”); § 7051(b) (requiring prior consultation on funds for “assistance to eliminate torture . . . by foreign police, military or other security forces”); § 7058(b), 133 Stat. at 2920–21 (requiring prior consultation on certain infectious disease outbreak funds); § 7059(a)(2), 133 Stat. at 2920 (requiring consultation “on the implementation of” the Women’s Entrepreneurship and Economic Empowerment Act); § 7059(e), 133 Stat. at 2921 (requiring prior consultation on funds “to support women and girls who are at risk from extremism and conflict”); § 7060(a)(1), 133 Stat. at 2921 (permitting the USAID Administrator to “reprogram [basic education] funds between countries” after consultation); § 7060(a)(2), 133 Stat. at 2922 (requiring the USAID Administrator to consult within forty-five days of enactment about “the proposed uses of funds for . . . partnerships” “between higher education institutions in the United States and developing countries”); § 7060(g), 133 Stat. at 2923 (requiring the USAID Administrator to consult “prior to the initial obligation of funds” for “people-to-people reconciliation programs”); § 7062(a)(1), (2)(A)–(C), 133 Stat. at 2925–26 (requiring that the USAID Administrator consult “with the appropriate congressional committees” prior to “implement[ing] a reorganization, redesign, or other plan,” defined to include expanding or downsizing “bureaus and offices,” “official presence overseas,” or workforce); § 7065(d), 133 Stat. at 2931 (requiring consultation prior to funding the World Bank’s Global Concessional Financing Facility). Prior consultation is defined as “pre-decisional engagement between [the agency] and the Committees on Appropriations during which the Committees are provided a meaningful opportunity to provide facts and opinions to inform: (1) the use of funds; (2) the development, content, or conduct of a program or activity; or (3) a decision to be taken.” 165 CONG. REC. H11,426 (daily ed. Dec. 17, 2019) (explanatory statement regarding H.R. 1865, Further Consolidated Appropriations Act, 2020, Section 7061).

220. See, e.g., Further Consolidated Appropriations Act, 2020, § 7008, 133 Stat. at 2844 (allowing the resumption of assistance to a “government . . . whose duly elected head . . . is deposed by military coup . . . if the Secretary of State certifies and reports to the appropriate congressional committees that . . . a democratically elected government has taken office”); § 7013(e), 133 Stat. at 2849 (permitting the Secretary of State to provide assistance to a government that taxes U.S. assistance if the Secretary reports that, *inter alia*, it is in “the foreign policy interests of the United States” to do so); § 7014(b), 133 Stat. at 2850 (allowing a one-year extension on the availability of funds in certain circumstances based on a determination and prompt report by the USAID Administrator to the Appropriations Committees); § 7037(a), 133 Stat. at 2880–81 (allowing use of funds “to support a Palestinian state” if the Secretary of State “certifies to the appropriate congressional committees that . . . the governing entity of a new Palestinian state” meets certain requirements); § 7039(a), 133 Stat. at 2881–82 (requiring Secretary of State certification “that procedures have been established to assure the [U.S.] Comptroller General . . . will have access to appropriate [U.S.] financial information in order to review the uses of [certain U.S.] assistance . . . for the West Bank and Gaza”); § 7040(b), (e), 133 Stat. at 2883–84 (permitting funding to the Palestinian Authority if the President certifies that it “is important to the national security interest” and if the Secretary of State certifies and reports that the Palestinian Authority meets certain conditions); § 7040(f)(1)–(2), 133 Stat. at 2884 (requiring presidential certification for assistance to a “power-sharing government of which Hamas is a member”); § 7041(a)(1), 133 Stat. at 2884 (requiring Secretary of State certification “for assistance for the Government of Egypt”); § 7041(a)(2), 133 Stat. at 2884–85 (requiring Secretary of State certification that the Government of Egypt is meeting certain requirements for “cash transfer assistance or budget support”); § 7041(f)(2), 133 Stat. at 2888 (requiring the Secretary of State to “certify and report . . . that all practicable steps have been taken to ensure that mechanisms are in place for [fund] monitoring, oversight, and control” prior to “the initial obligation of funds . . . for

reopen a mission or post; create, close, reorganize, downsize, or rename bureaus,

assistance for Libya”); § 7041(k)(2)(A)(ii), 133 Stat. at 2890 (permitting the Secretary of State to waive a prohibition on funding to the Palestinian Authority if the Secretary certifies the waiver “is in the [U.S.] national security interest” and reports on “how the waiver and the continuation of assistance would assist in furthering Middle East peace”); § 7042(j)(1)–(2), 133 Stat. at 2893–94 (restricting the types of assistance to Zimbabwe’s central government “unless the Secretary of State certifies and reports . . . that the rule of law has been restored”); 7043(b)(2), 133 Stat. at 2895 (prohibiting the obligation or expenditure of funds for certain types of assistance to the Cambodian government “unless the Secretary of State certifies and reports that such Government is taking effective steps to . . . strengthen regional security and stability, . . . assert its sovereignty against interference by the People’s Republic of China . . . and . . . respect the rights, freedoms, and responsibilities” of the Cambodian Constitution); § 7043(e)(1), 133 Stat. at 2896–97 (prohibiting and permitting, based on Secretary of State determinations and reports, assistance to central governments that contribute to North Korea’s “malicious cyber-intrusion capabilities”); § 7044(e)(2), 133 Stat. at 2902 (permitting “assistance for the central Government of Sri Lanka. . . only if the Secretary of State certifies and reports” that the “Government is taking effective and consistent steps to . . . respect and uphold the rights and freedoms of [Sri Lankans] regardless of ethnicity and religious belief,” “assert its sovereignty against interference by the People’s Republic of China[,] and . . . promote reconciliation between ethnic and religious groups”); § 7045(a)(2) (A), (C), 133 Stat. at 2903–04 (permitting certain funds to be used to assist “the central government[] of El Salvador, Guatemala, [or] Honduras” only if the Secretary of States “certifies and reports . . . that such government is” taking a variety of steps, including “combating corruption and impunity,” working “to increase transparency,” supporting judicial independence, and “informing its citizens of the dangers of the journey to the southwest border of the United States”); § 7045(c), 133 Stat. at 2905–06 (prohibiting the use of certain funds to assist Haiti’s central government “unless the Secretary of State certifies and reports . . . that [the] government is taking effective steps . . . to . . . strengthen the rule of law[,] . . . combat corruption, . . . increase government revenues, . . . and . . . resolve commercial disputes between [U.S.] entities and the Government of Haiti”); § 7047(b)(1), (c)(1), 133 Stat. at 2907–08 (permitting funding to central governments supportive of Russian aggression in Ukraine and Georgia “if the Secretary [of State] determines and reports” that such assistance “is in the national interest”); § 7048(b)(3), 133 Stat. at 2910 (permitting funding of a U.S. delegation to a U.N. body led by a country that supports terrorism “if the Secretary [of State] determines and reports . . . that to do so is important to the national interest of the United States, including a description of the national interest served”); § 7050 (e), 133 Stat. at 2915 (requiring the Secretary of State to make a national interest determination and report prior to surging funding for “Internet freedom programs in closed societies”); § 7055(c), 133 Stat. at 2917 (permitting the Secretary of State to waive the prohibition on assistance to central governments of countries refusing extradition to the United States “if the Secretary certifies” that doing so “is important to the national interest”); § 7058(b)(1), 133 Stat. at 2919 (permitting the use of certain funds “[i]f the Secretary of State determines and reports” on the existence of a qualifying “international infectious disease outbreak” or “Public Health Emergency of International Concern”).

221. See Further Consolidated Appropriations Act, 2020, div. G, tit. II, 133 Stat. at 2826 (prohibiting the use of certain funds for “the construction . . . , purchase, or long term lease of offices for use by [USAID], unless the USAID Administrator has identified such proposed use of funds in a report submitted to the Committees on Appropriations at least 15 days prior to the obligation of funds”); *id.* tit. III, 133 Stat. at 2827–29 (requiring the USAID Administrator to provide a report within sixty days to the Committees on Appropriations on certain violations of family planning provisions); *id.* tit. III, 133 Stat. at 2829 (requiring “the USAID Administrator [to] . . . submit a report to the Committees on Appropriations at least 5 days prior to beginning a new program of assistance” with transition initiative funds); § 7002, 133 Stat. at 2842 (requiring departments and agencies receiving funds to “provide to the Committees on Appropriations a quarterly accounting of cumulative unobligated balances and obligated, but unexpended, balances by program, project, and activity”); § 7009(e), 133 Stat. at 2846 (requiring the transmission of certain Inspector General audits “to the Committees on Appropriations”); § 7013(h), 133 Stat. at 2850 (requiring the Secretary of State to report on actions taken with regard to foreign taxation of U.S. assistance); § 7021(a)(1)–(3), 133 Stat. at 2857 (requiring a report on a presidential determination to waive the prohibition on assistance to foreign governments that “provide[] lethal military equipment to a country the government of which . . . supports international terrorism”); § 7031(a)(3), 133 Stat. at 2864 (requiring the USAID Administrator to report to the Appropriations

centers, or offices; or . . . contract out or privatize any functions or activities presently performed by Federal employees” without providing the Appropriations Committees notice fifteen days in advance, unless USAID previously justified the obligation to the Committees.<sup>222</sup> Similarly, for most of its programmatic accounts,

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Committees if the Administrator determines that the continuation of government-to-government assistance “is in the national interest” notwithstanding evidence “of material misuse of such assistance”); § 7031(a)(4), 133 Stat. at 2865 (requiring the Secretary of State to submit with the 2021 budget justification “amounts planned for [government-to-government] assistance . . . by country, proposed funding amount, source of funds, and type of assistance”); § 7031(b)(2)–(3), 133 Stat. at 2865 (requiring the Secretary of State to report on the progress of countries receiving government-to-government assistance toward “meeting the minimum requirements of fiscal transparency” and on the use of funds to help such governments do so); § 7032(e), 133 Stat. at 2868 (requiring a report on efforts to ensure elements of democracy programs are not “subject to . . . prior approval by the government of any foreign country”); § 7034(h), 133 Stat. at 2871 (requiring the Secretary of States to report “within 15 days of withholding funds” for the assistance of a central government “not taking appropriate steps” regarding child abduction); § 7034(n), 133 Stat. at 2874 (requiring the Secretary of State to “include in the congressional budget justification an accounting of budgetary resources, disbursements, balances, and reimbursements related to” the HIV/AIDS Working Capital Fund); § 7040(d), 133 Stat. at 2883 (requiring a presidential report if the President waives the prohibition on funding the Palestinian Authority); § 7040(f)(1)–(2), (4), 133 Stat. at 2884 (requiring a presidential report as well as an initial and quarterly reports from the Secretary of State if the President waives the prohibition on funding a “power-sharing government of which Hamas is a member”); § 7041(a)(1), 133 Stat. at 2884 (permitting “assistance for the Government of Egypt” only if the Secretary of State reports that Egypt is “sustaining the strategic relationship with the United States; and . . . meeting its obligations under the 1979 Egypt-Israel Peace Treaty”); § 7041(a)(2), 133 Stat. at 2885 (requiring certification and a report for “cash transfer assistance or budget support” to the Government of Egypt); § 7041(k)(1), 133 Stat. at 2890 (requiring the Secretary of State to report, “[p]rior to the initial obligation of funds,” that certain assistance to the West Bank and Gaza meets approved purposes such as “advanc[ing] Middle East peace . . . [or] address[ing] urgent humanitarian needs”); § 7041(k)(3), 133 Stat. at 2891 (requiring the Secretary of State to report the amount of assistance withheld from the Palestinian Authority due to terrorist payments “prior to the obligation of funds for the Palestinian Authority”); § 7044(a)(2)(B), 133 Stat. at 2900 (requiring the USAID Administrator to report before “obligation of funds for . . . an endowment” “for [a coeducational] institution of higher education in Kabul” and annually “on the expenditure of funds generated from such an endowment”); § 7047(e), 133 Stat. at 2909 (requiring, within “90 days after enactment [of the fiscal year 2020 Appropriations Act], the Secretary of State, in consultation with the [USAID] Administrator . . . [to] submit . . . a comprehensive, multiyear strategy for the promotion of democracy in” “the Russian Federation and other countries in Europe, Eurasia, and Central Asia”); § 7061(c), 133 Stat. at 2925 (requiring the USAID Administrator to submit within forty-five days of enactment of the fiscal year 2020 Appropriations Act “a detailed report on spending of” Development Credit Authority funds); § 7062(b), 133 Stat. at 2926 (requiring the USAID Administrator to report within “30 days after enactment of [the fiscal year 2020 Appropriations] Act, and quarterly thereafter until September 30, 2021, . . . on the status of USAID’s reorganization”); § 7064(i)(2), 133 Stat. at 2930 (requiring the USAID Administrator to report within sixty days of enactment of the fiscal year 2020 Appropriations Act “and every 60 days thereafter until September 30, 2021, . . . on the on-board personnel levels, hiring, and attrition . . . on an operating unit-by-operating unit basis” and to submit “a hiring plan, including timelines, for maintaining the agency-wide, on-board Foreign Service Officers and Civil Service staff at not less than the levels specified” by Congress); § 7068(b)–(c), 133 Stat. at 2932 (requiring the President to submit a plan “[p]rior to the distribution of any assets resulting from any liquidation, dissolution, or winding up of an Enterprise Fund” and “[p]rior to a transition to and operation of any private equity fund . . . under an existing Enterprise Fund”).

222. Further Consolidated Appropriations Act, 2020 § 7015(a), 133 Stat. at 2850–51; *see also* § 7015(b), 133 Stat. at 2851 (requiring fifteen days’ advance notice before the reprogramming of operating expense and certain other “funds in excess of \$1,000,000 or 10 percent, whichever is less, that” would, *inter alia*, “augment[] or change[] existing programs, projects, or activities” or “reduce[] by 10 percent funding for any existing program, project, or activity, or numbers of personnel by 10 percent

USAID must provide notice fifteen days in advance of spending more than it previously justified to Congress on any “program[], project[], activit[y], type[] of material assistance, countr[y], or other operation[].”<sup>223</sup> There is some wiggle room: USAID may reprogram funds to support “a program, project or activity” provided that the reprogrammed funds are “less than 10 percent of the amount previously justified to Congress for obligation for such program, project, or activity for the current fiscal year.”<sup>224</sup> On the other hand, for certain countries the notification requirements are even more stringent. As to these countries, even funds previously justified to Congress are subject to the Committee’s “regular notification procedures.”<sup>225</sup> Those procedures require notice at least fifteen days prior to “the obligation of funds.”<sup>226</sup>

The provisions discussed above appear in the fiscal year 2020 Appropriations Act. Additional directives and oversight requirements appear in congressional reports,<sup>227</sup> most notably the joint explanatory statement.<sup>228</sup> Although requirements that appear only in reports like the joint explanatory statement are not legally binding, they may be practically so. Given Congress’s active oversight of

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as approved by Congress”); § 7061(a) (imposing “the notification and reprogramming requirements of section 7015” on operating plans for operating expenses or bilateral assistance funds that change “levels of funding for programs, projects, and activities specified in the congressional budget justification, [the Appropriations] Act, or . . . the tables included in the explanatory statement”). For an explanation of the accounting level at which “program, project, and activity” are defined for different funds, see § 7023, 133 Stat. at 2858.

223. Further Consolidated Appropriations Act, 2020 § 7015(c), 133 Stat. at 2851.

224. *Id.*, 133 Stat. at 2852. In addition, any advance notification requirements “may be waived if failure to do so would pose a substantial risk to human health or welfare.” *Id.* § 7015(e), 133 Stat. at 2853. Even in such circumstances, however, notification must “be provided as early as practicable, but in no event later than 3 days after taking the action” requiring notification and must provide “an explanation of the emergency circumstances.” *Id.*

225. *Id.* § 7015(f), 133 Stat. at 2853. The countries subject to this special notification requirement are “Afghanistan, Bahrain, Burma, Cambodia, Colombia, Cuba, Egypt, El Salvador, Ethiopia, Guatemala, Haiti, Honduras, Iran, Iraq, Lebanon, Libya, Mexico, Nicaragua, Pakistan, Philippines, the Russian Federation, Somalia, South Sudan, Sri Lanka, Sudan, Syria, Uzbekistan, Venezuela, Yemen, and Zimbabwe.” *Id.*

226. 165 CONG. REC. H11,426 (daily ed. Dec. 17, 2019) (explanatory statement regarding H.R. 1865, Further Consolidated Appropriations Act, 2020).

227. *See id.* (directing agencies implementing the fiscal year 2020 Appropriations Act “to comply with the directives, reporting requirements, and instructions contained in [the House and Senate Reports] as though stated in [the joint] explanatory statement”).

228. *See, e.g., id.* (directing the USAID Administrator “to submit notifications for the obligation of funds . . . not later than 90 days prior to the expiration of such funds”); *id.* at H11,429 (directing the USAID Administrator “to provide . . . quarterly obligation reports on Operating Expenses by . . . cost categories” and to “consult . . . on the format of such report”); *id.* at H11,434 (providing “[\$.5 million] for a new initiative to increase transparency, equality, and accountability in the Democratic Republic of the Congo” and requiring “[t]he USAID Administrator . . . [to] consult . . . on the proposed uses of funds for such initiative”); *id.* at H11,436 (requiring “the Secretary of State, in consultation with the USAID Administrator, . . . [to] submit . . . a comprehensive strategy based on various political transition scenarios in Venezuela” with “a 3-year budget detailing anticipated levels of United States assistance”); *id.* (directing that “the USAID transition in Albania should be conditioned upon progress toward” Albanian “[a]ccession to the European Union”); *id.* at H11,437 (directing the USAID Administrator “to suspend the further use of a centralized hiring board to approve hiring actions on a position-by-position basis”).

development funds and the threat that Congress will further regulate future appropriations if the Executive acts against Congress's wishes, the Executive is significantly constrained in the exercise of its delegated development authorities. Agencies like USAID, with lesser clout both within and without the Executive, are particularly sensitive to this threat.<sup>229</sup> For instance, USAID is careful in invoking the President's notwithstanding authorities.<sup>230</sup> As a result, Congress exercises more control over development policy and implementation than statutory authorizations might suggest.

More broadly, Congress's active management of development tells a different story from the conventional narrative of congressional abdication that predominates in foreign relations law. As with the consideration of presidential powers, including development in the analysis of presidential–congressional relations alters conventional thinking on the subject.

### C. THE ROLE OF STATES AND CITIES IN FOREIGN AFFAIRS

Turning the development lens on the role of U.S. states and cities in foreign affairs qualifies recent conventional wisdom as well. As explained more fully in this Section, both the Supreme Court and the Constitution suggest that states and cities have little to no role in foreign affairs. Yet foreign relations law scholars have observed that these subnational actors are actually quite involved, especially when it comes to the *D* of diplomacy. Any direct involvement of states and cities in development, however, appears to be scattered at best.

The Supreme Court has repeatedly rejected a role for U.S. states in foreign affairs. The Court has expressly declared that “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.”<sup>231</sup> Thus, “in respect of our foreign relations generally, state lines disappear,”<sup>232</sup> and “we are but one people, one nation, one power.”<sup>233</sup> The Constitution lends some support to this view, at least when it comes to diplomacy and defense. The Constitution expressly delegates foreign affairs powers to the federal government—such as the power to enter treaties and declare war<sup>234</sup>—while simultaneously prohibiting the states from entering treaties and from entering “any Agreement or Compact” or

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229. Cf. Daugirdas, *supra* note 178, at 543–44, 548–49 (documenting the solicitousness of Treasury officials toward Congress given that a failure to follow congressional instructions would risk future appropriations).

230. See, e.g., Action Memorandum from Kent D. Hill, Assistant Adm'r, USAID, and Arnold Haiman, Acting Gen. Counsel, USAID, to Randall L. Tobias, Adm'r, USAID 4–5 (Apr. 27, 2006), [https://www.usaid.gov/sites/default/files/documents/1868/aapd0606\\_att1.pdf](https://www.usaid.gov/sites/default/files/documents/1868/aapd0606_att1.pdf) [<https://perma.cc/7MT9-RP9E>] (describing USAID's approach to the use of notwithstanding authority); Action Memorandum from James Kunder, Assistant Adm'r, USAID; William Garvelink, Assistant Adm'r, USAID; and John S. Gardner, Gen. Counsel, USAID, to Andrew Natsios, Acting Adm'r, USAID 4 (Feb. 1, 2005), [https://www.usaid.gov/sites/default/files/documents/1868/aapd05\\_09\\_attach1.pdf](https://www.usaid.gov/sites/default/files/documents/1868/aapd05_09_attach1.pdf) [<https://perma.cc/BFF6-SXQH>] (same).

231. *United States v. Pink*, 315 U.S. 203, 233 (1942).

232. *United States v. Belmont*, 301 U.S. 324, 331 (1937).

233. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

234. See U.S. CONST. art. I, § 8, cl. 11 (declare war); *id.* art. II, § 2, cl. 2 (make treaties).



“keep[ing] Troops, or Ships of War in time of Peace,” “without the Consent of Congress.”<sup>235</sup> States may “engage in War” without congressional consent, but only if “actually invaded, or in such imminent Danger as will not admit of delay.”<sup>236</sup>

Notwithstanding these constitutional limitations, foreign relations law scholars have pointed out that states and cities are relatively active in foreign affairs.<sup>237</sup> Collectively, “[t]hey enact laws that affect foreign nationals, send trade missions, engage in cultural exchanges, enact binding and nonbinding provisions on foreign relations issues such as human rights, and undertake (independent of the federal government) to accomplish international objectives such as reduction of greenhouse gases.”<sup>238</sup> They have joined together in international organizations to advocate, coordinate common commitments, and share best practices.<sup>239</sup> They even participate in defense, operating national guards under dual state and federal control.<sup>240</sup>

Although subnational entities participate in diplomacy and defense notwithstanding enumerated constitutional limitations, the Constitution contains no express restrictions on subnational participation in international development. One can easily presume that states and cities share at least some of the security, economic, and humanitarian interests that motivate the United States to provide development aid. For example, they may wish to stem the flow of illegal drugs through alternative livelihood programs, foster export markets through technical assistance aimed at regulatory reform, or assist populations with whom their citizens identify or who simply have compelling needs. Yet states and cities do not engage in direct bilateral development aid in ways that mirror the form or scale of federal development assistance.

Notably, it is not for lack of resources. The 2018 gross domestic product (GDP) of the state of California, for example, exceeded the GDP of international

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235. *Id.* art. I, § 10, cl. 3.

236. *Id.*

237. See, e.g., Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT'L L. 821, 821–22, 826–27 (1989). Members of Congress have also recognized the role of cities in foreign affairs. In June 2019, Representative Ted Lieu introduced a “City and State Diplomacy” bill that would create a State Department Office of Subnational Diplomacy to both encourage and coordinate subnational foreign engagement. See City and State Diplomacy Act, H.R. 3571, 116th Cong. (2019).

238. David H. Moore, *The President's Unconstitutional Treaty-making*, 59 UCLA L. REV. 598, 623–24 (2012); see also *id.* at 624 n.153 (providing sources).

239. See, e.g., C40 CITIES, <https://www.c40.org> [<https://perma.cc/R6JX-WKZS>] (last visited Mar. 11, 2021); GLOBAL PARLIAMENT MAYORS, <https://globalparliamentofmayors.org> [<https://perma.cc/W3TE-UGAV>] (last visited Mar. 11, 2021); UNITED CITIES & LOC. GOV'TS, <https://www.uclg.org/en> [<https://perma.cc/HR6Y-4GXZ>] (last visited Mar. 11, 2021).

240. See, e.g., LAWRENCE KAPP, CONG. RESEARCH SERV., IF10540 DEFENSE PRIMER: RESERVE FORCES (2020) (explaining that, with the exception of the District of Columbia National Guard, “National Guards operate as state or territorial organizations [under gubernatorial direction] most of the time,” but National Guards may “be ordered into federal service” to operate under the direction of the President); see also 10 U.S.C. § 10103 (2018) (describing how National Guards may be called into federal service); 32 U.S.C. § 109 (2018) (recognizing that, beyond a National Guard, a state may “maintain defense forces” that operate within the state’s jurisdiction and that “may not be called, ordered, or drafted into the armed forces”).

development donors such as the United Kingdom, France, and Italy.<sup>241</sup> Similarly, Texas's GDP exceeded that of Canada, and New York's GDP exceeded that of Australia and Spain—all donor countries.<sup>242</sup> Comparing U.S. state GDPs to the GDPs of countries that might receive development assistance is even more dramatic. In 2018, Vermont had the lowest GDP of any state at roughly \$34 billion.<sup>243</sup> Yet Vermont's 2018 GDP exceeded those of forty of the forty-six<sup>244</sup> least developed countries (LDCs).<sup>245</sup>

Notwithstanding the relative wealth of subnational entities in the United States, they appear to engage only in scattered activities that resemble development aid. One significant example of such aid is the recent launch of the City Climate Finance Gap Fund to “support city and local governments facing barriers to financing for climate-smart projects.”<sup>246</sup> Funded primarily by Germany and Luxembourg and “implemented by the World Bank and the European Investment Bank,” the fund was also an initiative not of cities directly but of international organizations of cities such as the Global Covenant of Mayors for Climate and Energy.<sup>247</sup> States, cities, and the organizations they join may likewise provide training and similar capacity building to less-developed localities.<sup>248</sup>

Some U.S. states have entered into agreements with Canadian provinces to facilitate interjurisdictional emergency assistance, including medical, search and

241. See *GDP*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2018&start=1960> [<https://perma.cc/Q5R2-4P9N>] (last visited Mar. 11, 2021) (providing 2018 country GDP data); *Gross Domestic Product by State, Fourth Quarter and Annual 2018*, U.S. BUREAU ECON. ANALYSIS (May 1, 2019), <https://apps.bea.gov/regional/histdata/releases/0519gdpstate/index.cfm> [<https://perma.cc/4TJF-Y6WS>] (providing 2018, fourth-quarter GDP data for U.S. states).

242. See *GDP*, *supra* note 241; *Gross Domestic Product by State, Fourth Quarter and Annual 2018*, *supra* note 241.

243. See *Gross Domestic Product by State, Fourth Quarter and Annual 2018*, *supra* note 241.

244. See *GDP*, *supra* note 241; *Gross Domestic Product by State, Fourth Quarter and Annual 2018*, *supra* note 241. The GDP figures for all but three of these countries are also for 2018; for those three, the figures are from prior years.

245. The United Nations categorizes countries as least developed based on factors other than GDP. See *LDC Identification Criteria & Indicators*, UN DEP'T ECON. & SOC. AFF., <https://perma.cc/7NNY-RU8A> (last visited Mar. 13, 2021) (identifying “Gross national income (GNI) per capita,” “Human Assets,” and “Economic and Environmental Vulnerability” as LDC criteria); *UN List of Least Developed Countries*, UN CONF. ON TRADE & DEV., <https://unctad.org/topic/least-developed-countries/list> [<https://perma.cc/694V-TJA6>] (last visited Mar. 13, 2021). Yet it is telling that Vermont boasts a higher GDP than the majority of these LDCs.

246. Press Release, Global Covenant of Mayors for Climate & Energy, City Climate Finance Gap Fund Launches to Support Climate-Smart Urban Development (Sept. 23, 2020), <https://www.globalcovenantofmayors.org/press/city-climate-finance-gap-fund-launch> [<https://perma.cc/G9SD-SFNW>].

247. *Id.*

248. See, e.g., *Climate Action Planning (CAP) Africa Launch Event and 1st Regional Academy*, C40 CITIES, <https://www.c40.org/events/climate-action-planning-cap-africa-launch-event-and-1st-regional-academy> [<https://perma.cc/F4W5-YA8M>] (last visited Mar. 19, 2021) (describing training efforts to capacitate cities to develop “ambitious, evidence-based climate action plans”).

rescue, and communications support.<sup>249</sup> On one hand, this aid resembles international humanitarian assistance, especially because the assistance may be donated.<sup>250</sup> On the other hand, the obligation to aid is mutual, aid expenses may be reimbursed, and the aid flows between jurisdictions in developed countries.<sup>251</sup>

Localities in the United States may also, in their sister-city relationships, expand beyond cultural exchange to economic development. The Atlanta–Lagos Sister City Commission aimed to increase tourism and support health and educational needs in Lagos Island, Nigeria.<sup>252</sup> A sister-city relationship between Gainesville, Florida, and Qalqilya, Palestinian Territories resulted in collaboration on a video dictionary of American and Palestinian sign languages and in efforts to raise money for a Palestinian deaf school.<sup>253</sup> Whether these sister-city efforts represent city-level development aid is unclear. Sister Cities International was established at the federal level by President Eisenhower and it describes its programs as citizen (rather than state or city) diplomacy.<sup>254</sup> Moreover, projects may receive State Department funding as apparently was the case with the sign language endeavor.<sup>255</sup>

States and municipalities may also act in alignment with international development goals through the management of their pension funds. Public pension funds control extensive assets and can influence corporations' environmental, social, and governance practices through a variety of actions<sup>256</sup>: they can refuse to invest

249. See, e.g., Joint Resolution of Jan. 14, 2013, Pub. L. No. 112-282, 126 Stat. 2486 (granting the consent of Congress to the State and Province Emergency Management Assistance Memorandum of Understanding between the states of Illinois, Indiana, Ohio, Michigan, Minnesota, Montana, North Dakota, Pennsylvania, New York, and Wisconsin, and the Canadian Provinces of Alberta, Manitoba, Ontario, and Saskatchewan); Joint Resolution of Dec. 26, 2007, Pub. L. No. 110-171, 121 Stat. 2467 (granting the consent of Congress to the International Emergency Management Memorandum of Understanding between the states of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont, and the Provinces of New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, and Quebec).

250. See Joint Resolution of Jan. 14, 2013, art. IX, 126 Stat. at 2489–90; Joint Resolution of Dec. 26, 2007, art. IX, 121 Stat. at 2470–71.

251. See Joint Resolution of Jan. 14, 2013, arts. I, IX, 126 Stat. at 2486, 2489–90; Joint Resolution of Dec. 26, 2007, arts. I, IX, 121 Stat. at 2467, 2470–71.

252. See *Lagos Island-Atlanta Partners for Tourism Development*, NATION (Sept. 16, 2017), <https://thenationonlineng.net/lagos-island-atlanta-partners-tourism-development> [<https://perma.cc/C2WZ-7LGY>].

253. See *Stevens Initiative*, SISTER CITIES INT'L, <https://sistercities.org/what-we-do/programs/stevens-initiative> [<https://perma.cc/6XZR-G2HS>] (last visited Mar. 13, 2021); WUFT News, *Deaf School*, VIMEO, <https://vimeo.com/107840359> [<https://perma.cc/JK65-V5JU>] (last visited Mar. 13, 2021).

254. See *About Sister Cities International*, SISTER CITIES INT'L, <https://sistercities.org/about-us> [<https://perma.cc/7LAZ-3ABW>] (last visited Mar. 13, 2021).

255. See *Stevens Initiative*, *supra* note 253 (noting that the Stevens Initiative, which provided the Gainesville grant to Sister Cities International, “is supported by the U.S. Department of State and the Bezos Family Foundation”).

256. See, e.g., David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 VA. L. & BUS. REV. 221, 225 & n.18, 235 (2007) (documenting that in 2005, the assets of more than fifty public pension funds exceeded \$10 billion and that “state and local government pension funds control[led] approximately ten percent of the U.S. equity market”).

in certain companies, such as tobacco companies or companies that do business in repressive regimes; they can affirmatively invest in companies that perform well on environmental and social metrics or that produce beneficial environmental or social goods; and they can submit or support shareholder proposals for improved company practices, such as compliance with international labor standards.<sup>257</sup> Although these and other actions can lead to commendable corporate behavior, they more closely resemble the actions of private investors than of sovereign development donors.<sup>258</sup> Among other things, these efforts, though widespread,<sup>259</sup> tend to target global policy goals without a particular focus on developing countries. Perhaps closer to traditional development, public pensions might influence governments to adopt regulatory reforms that promote sustainable, responsible economic progress. But these efforts also resemble those of private actors who regularly seek to influence governments, and the efforts are not likely to focus solely on developing countries.<sup>260</sup> In short, although states and cities participate in some activities that may be categorized as subnational development aid, they appear to be less directly engaged in those activities than they are in diplomacy and perhaps even in defense.

The broader point is that, whether with regard to the scope of the President's constitutional powers, the relationship between Congress and the President, or the role of subnational actors in foreign affairs, expanding the aperture of foreign relations law to include development yields fresh perspectives. The President's power looks less expansive. Congress shows itself less willing to abdicate. And states and cities appear to engage, but in scattered and sometimes indirect ways.

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257. See *id.* at 236–38, 243. In analyzing divestment from Sudan as a result of the Darfur crisis, the Government Accountability Office noted that “some U.S. states and investment companies” joined certain advocacy groups to encourage companies operating in Sudan “to improve their business practices” by, for example, “fund[ing] humanitarian programs that aid the Sudanese people” or “conduct[ing] human rights assessments of their business operations in Sudan.” U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-742, SUDAN DIVESTMENT: U.S. INVESTORS SOLD ASSETS BUT COULD BENEFIT FROM INCREASED DISCLOSURE REGARDING COMPANIES' TIES TO SUDAN 7, 36 (2010), <https://www.gao.gov/assets/310/305800.pdf> [<https://perma.cc/4PPU-56MM>]. Providing humanitarian assistance is a core feature of what countries do but encouraging private entities to offer that assistance differs from providing the assistance oneself.

258. See, e.g., Hess, *supra* note 256, at 223–25, 251–52 (discussing the broader, though not unlimited, trend toward treating environmental and social issues as corporate governance matters in which shareholders have a stake).

259. See, e.g., Chris Taylor, *Sustainable Investing's Secret Weapon: Public Pensions*, REUTERS (Nov. 12, 2018, 12:52 PM), <https://www.reuters.com/article/us-money-investment-esg/sustainable-investings-secret-weapon-public-pensions-idUSKCN1NH24M> [<https://perma.cc/894J-HEZA>] (noting that “[i]nvesting with a focus on environmental, social and governance issues . . . now amounts to \$12 trillion in the United States,” with much of the recent increase “driven by big institutional investors,” such as public pension funds).

260. See Katharine Jackson, *Pension-Funding the Future: Encouraging the Sustainable and Socially Responsible Development of Securities Markets in Sub-Saharan Africa*, 44 INT'L LAW. 791, 794, 801–04 (2010) (noting the efforts of traditional development actors to build securities markets in Africa and discussing the unique potential of public pensions to encourage regulatory reform to the same end).

#### IV. A RESEARCH AGENDA FOR U.S. FOREIGN RELATIONS LAW

To this point, this Article has focused on demonstrating that U.S. foreign relations law—though an established field that addresses some of the critical questions of our day—has developed with blinders on. The field has focused on two critical, but not comprehensive, aspects of foreign policy: defense and diplomacy. Although development has been a key part of U.S. foreign affairs for more than half a century and is even part of a catchy phrase—the three *Ds*—it has been neglected in U.S. foreign relations law.

Part III established how correcting this omission and considering development qualifies the conventional perspective on key issues in foreign relations law, including the scope of presidential power, the empirical relationship between the President and Congress, and the role of states and cities in foreign affairs. Yet the implications of this Article are broader.

In addition to identifying and correcting a significant area of neglect in U.S. foreign relations law, the Article raises the possibility that U.S. foreign relations law may be incomplete, and indeed skewed, in additional ways. If U.S. foreign relations law could neglect one of the three *Ds* of U.S. foreign policy, what else might be missing? Recognition of the missing *D* calls for additional research into the comprehensiveness and objectiveness of foreign relations law. An emphasis on defense and diplomacy, for example, seems like a recipe, intentional or not, for partiality toward presidential power. This Article provides an opportunity for foreign relations law scholars to reflect on potential additional areas of neglect.

Fortunately, analysis of the missing *D* offers more than this important opportunity. The nature of the missing *D* provides guidance on where additional omissions might be lurking. Development manifests at least three characteristics that may help identify additional areas of research: development is operational, significantly grounded in congressional powers, and of relatively recent provenance. Although these characteristics overlap, each may point toward areas of neglect.

This Part explores how foreign relations law scholarship may advance by expanding to the operational, focusing on congressional powers, and accounting for components of foreign policy that are of more recent prominence. For the most part, this Part stops at suggesting additional areas of research. It takes only one example—trade law—further in order to illustrate how additional research, or at least emphasis, on areas of foreign policy that share characteristics with development may refine the field.

##### A. EXPANDING TO THE OPERATIONAL

Development assistance is highly operational. It involves creating technical programs carried out on the ground, often in remote areas, in cooperation with local individuals to achieve improvements in health, education, agriculture, journalism, government administration, and similar sectors. By contrast, foreign relations law tends to focus on high-level policy decisions—to go to war or order a strike, to enter or withdraw from a treaty, or to enforce international law in U.S.

courts.<sup>261</sup> These decisions are at once consequential and factually easier to access than operational intricacies, and they are closely tied to high-order principles like the constitutional separation of powers.

Foreign relations law's high-level focus can hold true even when it comes to the two *Ds* that foreign relations law has emphasized. With regard to defense, foreign relations law has explored extensively whether and to what extent the authority to use force resides in the President or in Congress.<sup>262</sup> Yet the focus on this high-level question of authority over the use of force neglects the nature of congressional oversight at a more operational level.

For example, Mark Nevitt asserts that Congress maintains active oversight of various administrative aspects of the use of force, including the staffing, training, and equipping of the military,<sup>263</sup> consistent with its constitutional power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”<sup>264</sup> At the same time, he observes that Congress is far less active in overseeing those who control the actual use of force at the operational level.<sup>265</sup> Although Nevitt's observations may buttress the high-level sense that the President has significant control over the use of force, they qualify that conclusion when it comes to some operational matters. In another example, Kristina Daugirdas documents how, contrary to the conventional wisdom, Congress has actively and relatively successfully used legislative instructions, hearings, reporting requirements, and appropriation threats to act through the Executive to influence “day-to-day U.S. participation in the [World] Bank,” even in the face of Executive claims that Congress sometimes overstepped its constitutional bounds in doing so.<sup>266</sup> These

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261. See generally *supra* note 9 and accompanying text (discussing foreign relations law's focus on the distribution of power over foreign affairs).

262. See *supra* note 13 and accompanying text.

263. See Mark Patrick Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 910–11, 929 & n.128, 932, 938–39, 946, 948, 966, 988 (2019) (noting Congress's focus on the administrative military while characterizing it as an abrogation of broader responsibilities); see also Zachary S. Price, *Congress's Power over Military Offices*, 99 TEX. L. REV. 491, 494 (2021) (arguing that Congress has greater “power to structure [military] offices, chains of command, and disciplinary mechanisms” than has been supposed). Discouragingly, Nevitt attributes at least some of Congress's interest in the administrative aspects of the military to the economic benefits military administration may bring to congressional districts. See Nevitt, *supra*, at 966, 968–72.

264. U.S. CONST. art. I, § 8, cl. 14.

265. See Nevitt, *supra* note 263, at 908–09, 911, 913–14, 929–31, 937–39, 944–49, 973, 978. Professor Nevitt labels the part of the military that actually “plan[s] and fight[s] the nation's wars,” and receives less congressional oversight, as “the operational military.” *Id.* at 908–09, 929. He uses the label, “the administrative military,” to describe the portion of the military that provides “personnel management, staffing, recruiting, testing, training, health care, equipping and hardware acquisition” and that is subject to more active congressional oversight. See *id.* at 908, 910, 929 & n.128. His terminology fits poorly with mine, as both the administrative and operational military fit in the operational part of defense in my categorization.

266. See Daugirdas, *supra* note 178, at 518–20, 524–40, 544–54, 561–62. Professor Daugirdas documents this dynamic largely to test assertions about the effects of international organizations on democracy, see *id.* at 517–18, but the organization on which she focuses, the World Bank, is a significant player in international development, providing a helpful supplement to this Article's description of Congress's active role in development.

brief examples suggest that additional research on the operational aspects of foreign policy—even in the realms of defense and diplomacy—may advance our understanding on questions of foreign relations law.<sup>267</sup>

#### B. FOCUSING ON CONGRESSIONAL POWERS

Further research on matters tied closely to congressional powers may also yield new insights.<sup>268</sup> Congress receives extensive foreign affairs powers—indeed, “the lion’s share of enumerated foreign affairs powers”—in the Constitution.<sup>269</sup> As the above analysis of presidential powers reveals, development is more closely tied to these congressional powers than are defense and diplomacy, which rely heavily on presidential powers.<sup>270</sup> Even defense and diplomacy, however, necessarily rely on the appropriations power.<sup>271</sup> Foreign affairs law would benefit from a deeper focus on appropriations law and the level of control Congress maintains through its power of the purse. The experience with development suggests Congress may be more active than the conventional wisdom reflects.<sup>272</sup>

Exploration, or greater emphasis, on other congressional powers may do the same. Consider one—not unfamiliar—example. With regard to Congress’s power to regulate foreign trade,<sup>273</sup> there is significant evidence of congressional abdication.<sup>274</sup> But here, as with development, congressional assertiveness appears as well.<sup>275</sup> Since

267. Indeed, Professor Nevitt also notes the operational military’s expanding role in matters of diplomacy. *See, e.g.*, Nevitt, *supra* note 263, at 907, 909, 912–13, 929–30, 949–53.

268. Interestingly, Professor Daugirdas finds active congressional engagement where there is significant overlap between the work of the World Bank and “Congress’s constitutional authority,” but she concludes that congressional motivation to engage does not turn on such overlap. Daugirdas, *supra* note 178, at 555–56, 555 n.281.

269. David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 997 (2014); *see id.* at 997 n.206 (citing sources).

270. *See supra* Section III.A.1.

271. Indeed, beyond its general appropriations power, Congress is authorized “[t]o raise and support Armies,” albeit only through appropriations of two years or less. U.S. CONST. art. I, § 8, cl. 12. Moreover, even Sidak, who asserts a power in the President “to incur claims against the Treasury,” recognizes that that power is limited to what is “minimally necessary to perform [the President’s] duties and exercise his prerogatives under article II,” leaving at least some room for dependence on appropriations beyond that. Sidak, *supra* note 193, at 1194.

272. *See supra* Section III.B.

273. When it comes to trade, Congress possesses both the authority “[t]o regulate Commerce with foreign Nations,” U.S. CONST. art. I, § 8, cl. 3, and “[t]o lay and collect Taxes, Duties, Imposts and Excises,” *id.* art. I, § 8, cl. 1.

274. *See, e.g.*, Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 597–626, 645–51, 656–59 (2019) (discussing the distribution of trade power between Congress and the President, and emphasizing Congress’s abdication).

275. *See, e.g.*, Kathleen Claussen, *Separation of Trade Law Powers*, 43 YALE J. INT’L L. 315, 318, 343 (2018) (noting that under trade-promotion legislation, “the shift in authority between the branches in trade has tended toward escalated congressional involvement rather than executive dominance” to the point that “the Executive acts in some respects like an agent of Congress in trade lawmaking rather than as a partner”); John Linarelli, *International Trade Relations and Separation of Powers Under the United States Constitution*, 13 DICK. J. INT’L L. 203, 208 (1995) (asserting that “from 1974 to the present, Congress has asserted dominance in international trade matters”).

1975,<sup>276</sup> with some gaps and revisions along the way,<sup>277</sup> Congress has granted the President trade promotion, or fast-track, authority.<sup>278</sup> As some view it, trade promotion authority is an example of Congress punting its foreign affairs role.<sup>279</sup> From another angle, a different narrative emerges—one of Congress adapting to changes in foreign relations to secure its role in foreign trade.<sup>280</sup>

Historically, U.S. trade policy consisted primarily of legislatively enacted tariffs accompanied by bilateral treaties of friendship, commerce, and navigation.<sup>281</sup> Following the disastrous Smoot–Hawley Tariff Act of 1930, which adopted prohibitive tariffs and prompted retaliation that exacerbated the Depression, Congress shifted its approach away from legislation and toward trade agreements.<sup>282</sup> In a significant delegation of power, Congress preapproved tariff levels that the President could adopt in reciprocal agreements.<sup>283</sup> Eventually, international trade relations also changed in ways that favored international agreements, where the President is the primary player,<sup>284</sup> over unilateral legislation; trade negotiations became more multilateral and embraced issues beyond tariffs.<sup>285</sup> Notwithstanding these developments, Congress did not leave trade policy to the President alone through unrestricted treaty making.<sup>286</sup> Yet to achieve its foreign trade goals and retain influence in a treaty-based regime, Congress needed to both facilitate and harness the President’s treaty-making power.<sup>287</sup>

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276. The Trade Act of 1974, the first statute to provide trade promotion authority, was enacted in January 1975. 19 U.S.C. § 2101; see IAN F. FERGUSSON, CONG. RESEARCH SERV., RL33743, TRADE PROMOTION AUTHORITY (TPA) AND THE ROLE OF CONGRESS IN TRADE POLICY 4–5 (2015), <https://fas.org/sgp/crs/misc/RL33743.pdf> [<https://perma.cc/K4AV-L4W2>].

277. For a brief history of trade promotion authority, see, for example, FERGUSSON, *supra* note 276, at 2–8.

278. See, e.g., *id.* at 1. What was known as fast-track authority under the Trade Act of 1974 became trade promotion authority under the Bipartisan Trade Promotion Authority Act of 2002. See IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., R43491, TRADE PROMOTION AUTHORITY: FREQUENTLY ASKED QUESTIONS 3 (2019), <https://fas.org/sgp/crs/misc/R43491.pdf> [<https://perma.cc/SJ6Z-Z86H>].

279. See Meyer & Sitaraman, *supra* note 274, at 607–12, 642–43 (arguing that the advent of fast-track authority was a net loss for congressional power over trade while recognizing the relative assertiveness of Congress’s more recent trade promotion provisions).

280. See *id.* at 606 & n.112 (observing that “many have argued [the 1974 Act] represented a reassertion of congressional prerogatives in trade”).

281. See, e.g., FERGUSSON, *supra* note 276, at 2–3; FERGUSSON & DAVIS, *supra* note 278, at 2; Meyer & Sitaraman, *supra* note 274, at 590–97, 592 n.29.

282. See FERGUSSON, *supra* note 276, at 3; Meyer & Sitaraman, *supra* note 274, at 585–86, 598–612 (discussing factors leading to the shift in trade law from a focus on “domestic economic policy” led by Congress to foreign affairs led by the President).

283. See, e.g., FERGUSSON, *supra* note 276, at 3; Meyer & Sitaraman, *supra* note 274, at 600–01.

284. See, e.g., Claussen, *supra* note 275, at 329–30 (noting the Executive’s prominence in treaty making notwithstanding Congress’s preeminence in “the regulation of foreign commerce”).

285. See, e.g., FERGUSSON, *supra* note 276, at 3–4; FERGUSSON & DAVIS, *supra* note 278, at 2.

286. See, e.g., FERGUSSON, *supra* note 276, at 4 (discussing Congress’s resistance to the Johnson Administration’s inclusion of nontariff barrier matters in trade agreements).

287. See, e.g., RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 reporters’ note 2 (AM. LAW INST. 2018) (citing Article II of the Constitution and other sources in support of “the proposition that the President has exclusive power to negotiate treaties on behalf of the United States”).



The answer: trade promotion authority.<sup>288</sup> Under the most recent iteration, which is relatively assertive,<sup>289</sup> Congress authorizes the President as before to enter trade agreements that reduce tariffs within predetermined ranges.<sup>290</sup> The President must notify Congress that he intends to enter such an agreement<sup>291</sup> but may implement the tariff changes unilaterally through presidential proclamation.<sup>292</sup>

More importantly for present purposes, the President may also enter agreements that reduce tariffs beyond predetermined ranges or that reduce or eliminate nontariff barriers,<sup>293</sup> but such agreements require implementing legislation.<sup>294</sup> To incentivize both the President and other countries to enter these agreements,<sup>295</sup> Congress consents<sup>296</sup> to consider implementing legislation on an expedited time-frame<sup>297</sup> and without amendment.<sup>298</sup> In isolation, these arrangements might register as a win for presidential power. But Congress conditions the President's delegated authority to enter these agreements and Congress's expedited, up-or-down consideration on the President's satisfaction of extensive procedural and substantive conditions.<sup>299</sup> Interestingly, in scope and substance, these conditions resemble those Congress has imposed in the realm of development.

288. See FERGUSSON, *supra* note 276, at 4 (describing how “[c]oncern over presidential encroachment on its legislative authority [over U.S. trade law] prompted Congress to seek a legislative remedy”—ultimately, trade promotion authority).

289. See, e.g., Meyer & Sitaraman, *supra* note 274, at 624–25.

290. See 19 U.S.C. §§ 4202(a)(1)(A), (a)(3)–(5) (2018).

291. *Id.* § 4202(a)(2).

292. See *id.* § 4202(a)(1)(B).

293. See *id.* § 4202(b)(1). Congress not only authorizes the President to enter agreements but also encourages him to enter negotiations “where the President determines that such negotiations are feasible and timely and would benefit the United States.” *Id.* § 4202(d).

294. See *id.* §§ 4202(a)(6), 4205(a)(1)(E)–(F). These agreements are therefore not self-executing. See FERGUSSON & DAVIS, *supra* note 278, at 29. Moreover, Congress rejects any side agreements or understandings the President might try to enter, unless the President timely discloses these to Congress. 19 U.S.C. § 4205(a)(4) (2018).

295. See, e.g., FERGUSSON, *supra* note 276, at 5; FERGUSSON & DAVIS, *supra* note 278, at 23.

296. See 19 U.S.C. § 4202(b)(3) (applying the procedural rules of 19 U.S.C. § 2191 to implementing legislation for relevant trade agreements).

297. See *id.* § 2191(c)(1) (mandating immediate introduction and referral of implementing bills to appropriate committees); § 2191(e)(1) (limiting committee consideration of implementing bills to a maximum of forty-five days and requiring a floor vote fifteen days after a bill leaves committee); § 2191(f)–(g) (privileging and restricting certain motions and setting time limits for debate in the consideration of implementing bills on the floor of both the House of Representatives and the Senate).

298. See *id.* § 2191(d) (“No amendment to an implementing bill . . . shall be in order in either the House of Representatives or the Senate.”).

299. See *id.* § 4202(b)(2) (stating that the President may exercise trade promotion authority to enter trade agreements only if he meets both substantive and procedural conditions); § 4205(a)(1) (stating that agreements the President negotiates may “enter into force with respect to the United States if (and only if) . . . the President” complies with certain notification and reporting requirements).

Substantively, the agreement must advance congressionally approved objectives.<sup>300</sup> Congress has enacted objectives on a host of issues,<sup>301</sup> from agriculture,<sup>302</sup> to labor and the environment,<sup>303</sup> to foreign investment<sup>304</sup> and fisheries.<sup>305</sup> In so doing, Congress provides *ex ante* guidance and guardrails for executive negotiation.

Procedurally, in parallel with the 2020 Appropriations Act covering development, Congress imposes extensive notice-and-consultation requirements that secure congressional access, participation, and oversight before, during, and after negotiations. For example, the President must notify Congress in writing “at least 90 calendar days before initiating negotiations with a country.”<sup>306</sup> As negotiations occur, the Executive must “consult closely and on a timely basis with, and keep [certain congressional committees] fully apprised.”<sup>307</sup> The President must also provide at least ninety-days notice of an intent to enter an agreement,<sup>308</sup> and engage in consultations before actually doing so.<sup>309</sup>

Upon entering the agreement, the President must submit “a draft statement of any administrative action proposed to implement the agreement,” a draft implementing bill, an implementation and enforcement plan, and explanations of how

300. *See id.* § 4202(b)(2); *see also id.* § 4202(b)(1)(A) (allowing the President to enter agreements if he finds that existing trade restrictions “unduly burden[] or restrict[] the foreign trade of the United States” and that an agreement would serve statutory purposes). Although the Executive surely “engage[s] with Congress as the legislature drafts and enacts these objectives into law . . . Congress holds both the pen and the final word.” Claussen, *supra* note 275, at 338.

301. *See* 19 U.S.C. § 4201(a), (b)(1)–(19), (21)–(22) (providing “overall trade negotiating objectives” as well as “principal negotiating objectives” on “trade in goods,” “trade in services,” agricultural trade, foreign investment, intellectual property, digital trade, transnational data flows, regulatory practices, state enterprises, localization requirements, labor, environment, currency, “[f]oreign currency manipulation,” the World Trade Organization, other multilateral trade agreements, transparency in international trade institutions, “dispute settlement and enforcement,” trade remedies, border taxes, “trade in textiles,” rule of law, and fisheries); *see also* FERGUSSON & DAVIS, *supra* note 278, at 4–14 (discussing current trade objectives); 19 U.S.C. § 4204(a)(5) (adding a requirement that the President consider a country’s “implementation of[] its international trade and investment commitments to the United States” “[i]n determining whether to enter into negotiations with [that] country”).

302. 19 U.S.C. § 4201(b)(3).

303. *Id.* § 4201(b)(10).

304. *Id.* § 4201(b)(4).

305. *Id.* § 4201(b)(22).

306. *Id.* § 4204(a)(1)(A).

307. *Id.* § 4203(a)(1)(C)–(D); *see id.* § 4204(a)(1). For notice, consultation, and analysis requirements specific to negotiations on agriculture, fishing, and textiles, *see id.* § 4204(a)(2)–(4).

308. *Id.* § 4205(a)(1)(A).

309. *See id.* § 4204(b)(1)–(2); *see also id.* § 4203(a)(2) (requiring the Executive to consult with certain committees and members before “exchanging notes providing for entry into force of a trade agreement” and to notify them of “measures a trading partner has taken to comply with” the terms of the agreement); § 4204(b)(3) (requiring the President to report to certain committees, at least “180 calendar days before” entering “a trade agreement[,] . . . the range of proposals advanced in the negotiations with respect to that agreement, that may be in the final agreement, and that could require” changes to domestic law regarding trade remedies); § 4205(a)(1)(G) (requiring the President, at least thirty days before entry into force, to notify “Congress that the President has determined that [the trade partner] has taken measures necessary to comply with . . . provisions of the agreement”).

the agreement furthers congressional objectives and U.S. commercial interests.<sup>310</sup> As the agreement is implemented, the Executive is required to “report on the effectiveness of” penalties the United States imposes under the agreement, and both consult and report on enforcement actions the Executive takes.<sup>311</sup> In short, at every stage, the Executive is bound to engage with specific congressional committees or Congress as a whole.

Moreover, Congress has created trade advisory groups in both houses<sup>312</sup> and requires the Executive to consult with these groups during negotiations and prior to entering an agreement.<sup>313</sup> The advisory groups counsel the Executive “regarding the formulation of specific objectives, negotiating strategies and positions, the development of the applicable trade agreements, and compliance and enforcement of the negotiated commitments under the trade agreement.”<sup>314</sup> By majority vote, advisory groups may require a meeting with the President before “or at any other time concerning . . . negotiations.”<sup>315</sup>

If these advisory groups were not enough to secure coordination, Congress has provided that individual members of Congress may be designated as “congressional adviser[s] on trade policy and negotiations.”<sup>316</sup> As with congressional committees, the Executive is obligated to consult with and keep these advisers apprised.<sup>317</sup> In addition, any member of Congress may request a meeting with, and documents from, the Executive on treaty negotiations.<sup>318</sup> In short, through established committees, advisory groups, individual designations, and the rights of all members, Congress has mandated extensive coordination on trade agreements.<sup>319</sup> Notably, Congress has also gone beyond coordination to securing a seat

310. *See id.* § 4204(e) (implementation and enforcement plan); *id.* § 4205(a)(1)(D)(i) (draft of proposed administrative action); § 4205(a)(1)(E) (draft implementing bill); *id.* § 4205(a)(1)(E)(iii), (a)(2)(A)(ii)(I), (II)(aa), (cc) (explanation of how agreement serves congressional objectives and U.S. interests); *see also id.* § 4204(d)(1)–(2) (requiring the President to submit environmental and labor reports); *id.* § 4204(d)(3) (requiring the President to also submit a report concerning labor rights but on a different timeframe). The President must also identify changes to law that the agreement will necessitate and that the implementing legislation will effect. *See id.* § 4205(a)(1)(C), (a)(1)(E), (a)(2)(A)(i). Notably, the implementing bill may only include “such provisions as are strictly necessary or appropriate to implement [the agreement], either repealing or amending existing laws or providing new statutory authority.” *Id.* § 4202(b)(3)(B)(ii). Although not required by statute, it is common for the relevant House and Senate committees to hold hearings on a draft implementing bill before the bill is formally submitted in order to provide feedback to the Executive before expedited consideration of the bill begins. *See FERGUSSON & DAVIS, supra note 278, at 25–26; Claussen, supra note 275, at 335–36.*

311. 19 U.S.C. § 4204(f)(1), (3).

312. *See id.* § 4203(c). These groups are composed of members of Congress but may also include a limited number of congressional personnel. *See id.* § 4203(c)(2)(C).

313. *See id.* § 4203(a)(1)(D) (during negotiations); *id.* § 4204(b)(1)(2) (prior to entering an agreement).

314. *Id.* § 4203(c)(2)(D).

315. *Id.* § 4203(c)(4), 4204(a)(1)(C).

316. *Id.* § 4203(b)(1).

317. *See id.* §§ 4203(b)(2), 4204(a)(1)(B).

318. *See id.* § 4203(a)(1)(A)–(B).

319. Moreover, Congress supplemented statutory requirements for cooperation by requiring the Executive to create written guidelines to enhance coordination with Congress as a whole, 19 U.S.C. § 4203(a)(3), and with congressional advisory groups, *id.* § 4203(c)(3). For these guidelines, see OFFICE

at the negotiating table by requiring that both individual advisers and members of advisory groups “be accredited . . . as . . . delegate[s] and official adviser[s] to the [U.S. trade] delegations.”<sup>320</sup>

Not only are the notification and consultation requirements Congress has imposed extensive, they have teeth. The House and Senate can—individually or together—prevent the application of trade promotion procedures to an implementing bill if the President has failed to comply with notification and consultation requirements.<sup>321</sup> This disapproval process, Congress emphasizes, is subject to each house’s “constitutional right . . . to change [its] rules,” such that Congress may alter or eliminate these procedures through normal rulemaking.<sup>322</sup> Finally, in delegating authority to the President to modify tariff levels and negotiate nontariff agreements, Congress has consistently adopted sunset provisions, requiring congressional renewal of these authorities.<sup>323</sup> The time-limited nature of the delegations incentivizes the President to cooperate with Congress to obtain extensions and renewals. Moments of extension and renewal likewise provide Congress the opportunity to evaluate whether trade promotion authority is meeting congressional objectives.<sup>324</sup>

The extensive ways in which Congress regulates trade promotion authority—from imposing substantive objectives; to securing notice, consultation, and participation; to requiring extension or renewal of delegated authority—paint a picture not of congressional abdication but of harnessing the President’s treaty-making power to achieve congressional trade goals.<sup>325</sup> Granted, this excursion

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OF THE U.S. TRADE REPRESENTATIVE, GUIDELINES FOR CONSULTATION AND ENGAGEMENT (2015), <https://ustr.gov/sites/default/files/USTR%20Guidelines%20for%20Consultation%20and%20Engagement.pdf> [<https://perma.cc/8UML-99CW>].

320. See 19 U.S.C. § 4203(b)(3) (accreditation of individual advisers); *id.* § 4203(c)(2)(C) (accreditation of members of advisory groups).

321. See *id.* § 4205(b)(1) (Congress as a whole); *id.* § 4205(b)(3) (Senate alone); *id.* § 4205(b)(4) (House alone). Similarly, either house may adopt a resolution concluding that “proposed changes to United States trade remedy laws” required by an agreement do not meet congressional objectives, though the impact of such a resolution is unclear. See *id.* § 4204(b)(3)(B); FERGUSSON & DAVIS, *supra* note 278, at 26.

322. 19 U.S.C. § 4205(c)(2); see FERGUSSON & DAVIS, *supra* note 278, at 24, 28 (discussing the same). Indeed, “the House has usually considered implementing bills not under the statutory expedited procedure, but pursuant to special rules reported from the Committee on Rules,” which retain the prohibition on amendments. *Id.* at 28.

323. See, e.g., FERGUSSON, *supra* note 276, at 5–8; FERGUSSON & DAVIS, *supra* note 278, at 3–4. For the sunset provisions that govern current trade promotion authority, see 19 U.S.C. §§ 4202(a)(1)(A), (b)(1)(C), (c). Congress authorized the President to seek an extension of the current authority but empowered either house to prevent such an extension through “an extension disapproval resolution.” *Id.* § 4202(c)(1)(B)(ii); see *id.* § 4202(c)(1), (c)(5). The President sought and obtained an extension in 2018, permitting trade promotion procedures to be used for agreements entered through June 2021. FERGUSSON & DAVIS, *supra* note 278, at 1.

324. Indeed, Congress requires the President, in requesting an extension, to submit a report that details how negotiations pursuant to trade promotion authority have advanced congressional objectives. See 19 U.S.C. § 4202(c)(2)(B).

325. See, e.g., FERGUSSON & DAVIS, *supra* note 278, at 28–29. Meyer and Sitaraman argue that the grant of fast-track authority reduced congressional oversight of trade treaty making because, without fast-track, congressional approval would involve the normal (and more demanding) legislative process.

into trade authority is preliminary, not definitive; for one thing, its focus is more formal than empirical. And it is not entirely new. Yet, importantly, it represents a second example, alongside development, of congressional effort to maintain influence in a key area of foreign policy. More broadly, it illustrates that focusing on Congress's powers, rather than the President's roles in diplomacy and defense, may impact our understanding of the distribution of foreign affairs power, qualifying, at least, the sense that Congress routinely abdicates its role.

### C. UPDATING FOR RECENT COMPONENTS OF FOREIGN POLICY

Exploring aspects of foreign affairs that have emerged more recently might revise our understanding as well. As detailed above, development, unlike defense and diplomacy, was not a key aspect of foreign affairs at the Founding.<sup>326</sup> Development became an official part of U.S. foreign policy in the mid-twentieth century.<sup>327</sup> Foreign relations law's failure in the decades since to conscientiously consider development's implications is the reason for this Article. That failure suggests that other newcomers to foreign affairs may require additional attention as well. Two possible candidates are modern international human rights law and international environmental law, both of which have come into their own since World War II.<sup>328</sup>

United States foreign relations law has unquestionably paid attention to important aspects of international human rights. Recently, for example, it has done so in the context of considering whether the customary international law of human rights is federal common law that federal courts may enforce without congressional authorization.<sup>329</sup> Yet focusing on additional issues—such as Congress's role in contributing to international human rights law or international environmental law through legislation that has preceded, codified, or aligned with international law—may yield refining insights.

Whatever the merits of any specific topic, the general takeaway is that U.S. foreign relations law's emphasis on defense and diplomacy may have resulted in

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See Meyer & Sitaraman, *supra* note 274, at 607–08, 642–44. Although there is strength in this argument, it undervalues the change in international trade relations that elevated treaty making over unilateral action and thereby incentivized Congress to achieve the ends of its trade powers by facilitating treaty making that is consistent with congressional policy preferences and oversight. See *supra* text accompanying notes 285–87.

326. See *supra* Part II.

327. See *supra* note 34 and accompanying text.

328. See, e.g., THOMAS BUERGENTHAL, DINAH SHELTON, DAVID P. STEWART & CARLOS M. VÁZQUEZ, *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 31 (5th ed. 2017) (“Modern international human rights law is largely a post-World War II phenomenon.”); Daniel Bodansky, Jutta Brunnée & Ellen Hey, *International Environmental Law: Mapping the Field*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 1, 3 (Daniel Bodansky et al. eds., 2007) (“International environmental law began to emerge in a significant way . . . only in the late 1960s and 1970s.”). For a critical overview of various approaches to the origins of human rights, see generally Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 *HARV. L. REV.* 2043 (2013) (reviewing JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* (2012)).

329. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *HARV. L. REV.* 815, 817–20 (1997).

neglect toward other aspects of foreign affairs even beyond development. Acknowledgement of the missing *D* thus invites new areas of inquiry.

#### CONCLUSION

United States foreign relations law addresses critical questions concerning the distribution of foreign affairs power, including between the President and Congress and between the nation and the states. To date, foreign relations law has addressed these questions predominantly through the lens of defense and diplomacy. U.S. foreign policy includes a third *D*, however. As this Article demonstrates, focusing on the third *D* of development shifts conventional understandings. As to this *D*, the President's power is less expansive, Congress less submissive, and states and cities arguably less engaged. A focus on development yields a second contribution as well. It suggests new research possibilities for foreign relations law scholars into components of foreign affairs that may share development's characteristics: components that are more operational, more tied to Congress's powers, and of more recent provenance. In that sense, this Article looks not only beyond defense and diplomacy to the missing *D* of development, but beyond development to additional areas of potential neglect in this critical area of law.