



Failing the Cardozo test

Why US foreign assistance legislation needs a fresh start

Summary

If the US wants to modernize its efforts to foster a more stable, prosperous, and democratic world, it needs new foreign assistance legislation designed to tackle the challenges of the 21st century.

This brief looks at how current laws undermine US foreign aid as a strategic tool for fighting poverty today. Drawing from original legal analysis, it argues that foreign aid legislation:

1. Is too large to be used effectively;
2. Is broken into too many laws;
3. Has no clear priorities to guide decision-making;
4. Is often out of date;
5. Authorizes different actors to fulfill the same purposes;
6. Puts the budget process in charge of setting strategic priorities, rather than setting strategic priorities to drive resource decisions.

Oxfam America is calling for ambitious reforms to US foreign assistance—from aid’s legislation, strategy, organizational structure, and implementation, to a substantive rethink of development in the field. Our foreign aid should lead global development efforts, it should put developing states and their citizens in the driver’s seat, and it should strive to get as much value as possible for poor people out of every aid dollar.

The following analysis suggests that tinkering with the laws governing US development assistance will not bring our foreign aid into the 21st century. Instead, President Barack Obama should make new foreign assistance legislation a top foreign policy priority and work with Congress to enact an entirely new Global Development Capacity Act that incorporates and supersedes associated legislation. A new act should re-elevate the importance of global development within US foreign policy and enable it to better respond to the needs of poor countries and the realities of delivering assistance today.

Cover photo: This home, made from recycled USAID (US Agency for International Development) food bags by members of the Rendille tribe in Northern Kenya, sends a message: Aid works best when intended beneficiaries adapt it to meet their own needs. Our aid laws would work better too, if they were designed to help developing states and citizens take more ownership of their development. *Erik Hersman / Oxfam America*

Introduction

In 1924, Justice Benjamin N. Cardozo, one of America's most distinguished jurists, wrote: "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable."¹ In short, Cardozo believed that the law should guide those who make and implement policy. US foreign assistance legislation is neither used nor usable by US policy makers and development professionals. If the US wants to modernize its efforts to foster a more stable, prosperous, and democratic world, it needs new foreign assistance legislation designed to tackle the challenges of the 21st century.

Not all foreign assistance has a purely development or humanitarian purpose, and not all US overseas development investments are governed by foreign assistance legislation (Figure 1).² For the purpose of this report, we understand "foreign assistance legislation" to include all current US laws designed explicitly to guide US policy on "overseas development assistance."³ It does not include all laws that have a development impact such as trade agreements.⁴

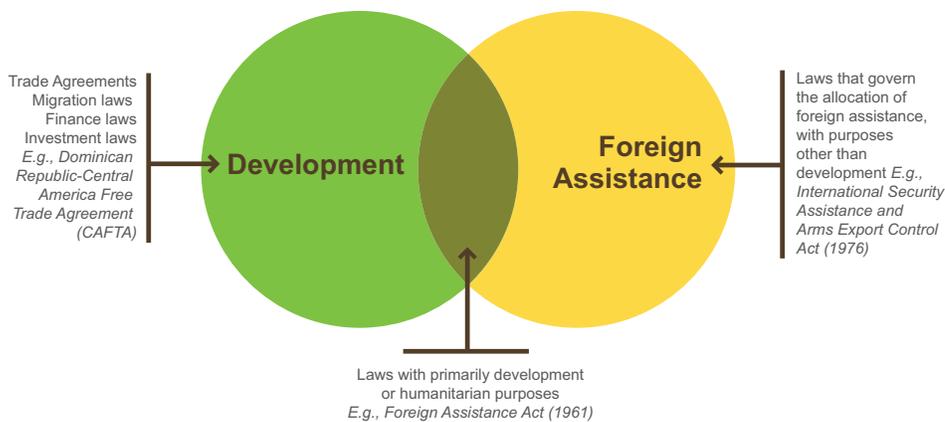


Figure 1
Some, but not all, foreign assistance laws are about development

Drawing from original legal research, this report argues that contents of foreign assistance legislation fail Cardozo's test: they are both unknown and unknowable.

In particular, foreign assistance legislation fails Cardozo's test because of the following:

- 1. Size:** It is too large to use effectively.
- 2. Fragmentation:** It is broken into too many laws.
- 3. Prioritization:** It has no clear priorities to guide decision-making.
- 4. Relevance:** It is often out of date.
- 5. Authority:** It authorizes different actors to fulfill the same purposes.
- 6. Appropriate responsibility:** It lets the budget process drive priorities, rather than setting clear priorities that drive resource decisions.

On its own, each of these problems is not unique to foreign assistance legislation. But few areas of US law face all these problems simultaneously. We know of no other area of law where these shortcomings have such a profound and concrete impact on our foreign policy, undermining US efforts to build a more stable, prosperous, and democratic world.

1. Size

Bigger isn't necessarily better

When Congress passed the Foreign Assistance Act of 1961, lawmakers enacted a 49-page law. Today, foreign assistance laws have grown to unusable proportions (Figure 2). Growth has occurred in three different ways: (1) the 1961 act has grown; (2) instead of amending the Foreign Assistance Act, lawmakers often create new legislation to tackle a priority development challenge; and (3) development policy is increasingly being determined through the budget process, as appropriations laws have been used to make substantive policy.

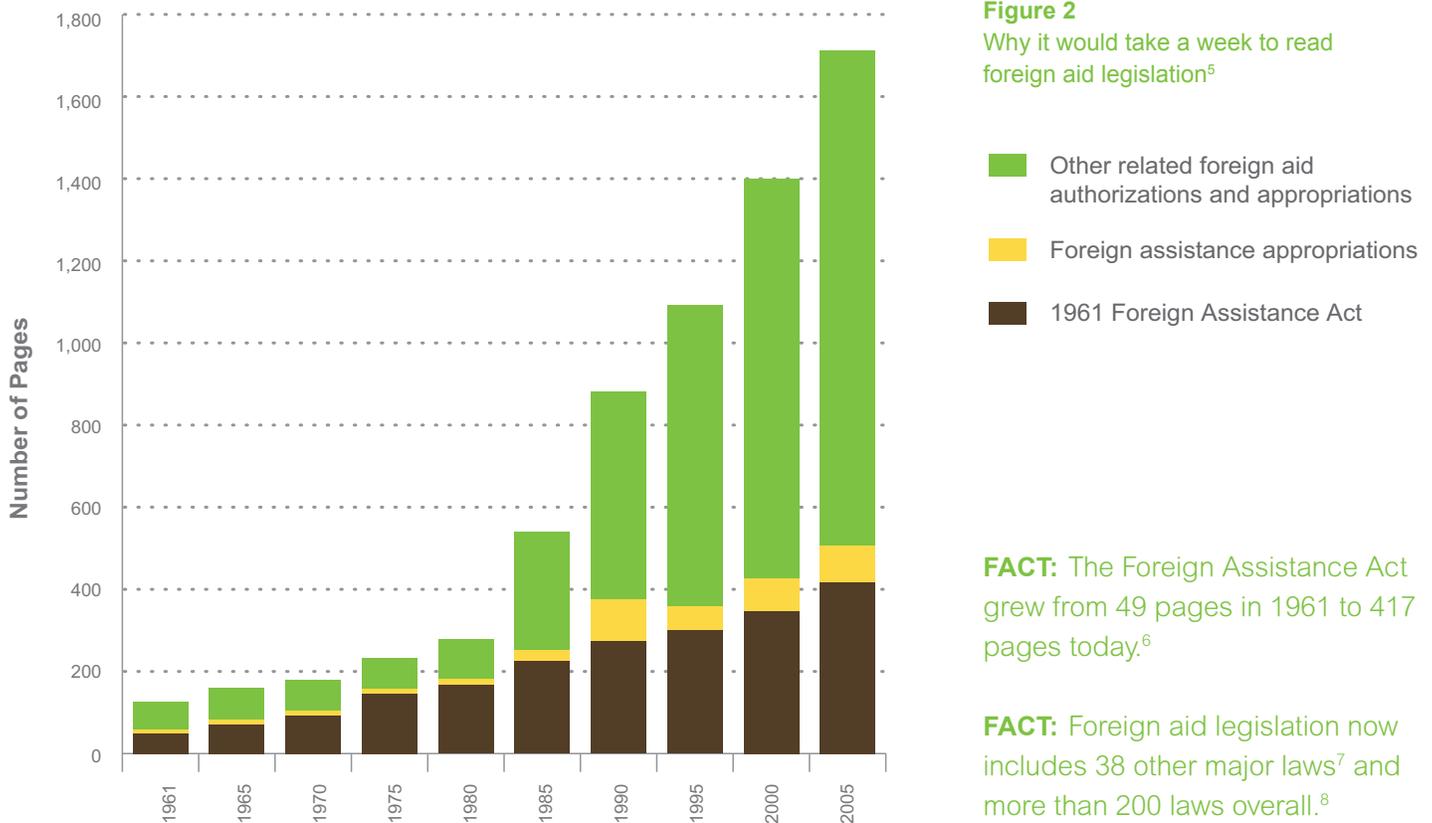


Figure 2

Why it would take a week to read foreign aid legislation⁵

- Other related foreign aid authorizations and appropriations
- Foreign assistance appropriations
- 1961 Foreign Assistance Act

FACT: The Foreign Assistance Act grew from 49 pages in 1961 to 417 pages today.⁶

FACT: Foreign aid legislation now includes 38 other major laws⁷ and more than 200 laws overall.⁸

FACT: For the past 23 years, aid policy has also been increasingly made through appropriations laws.

2. Fragmentation

All the king's horses ...

If foreign assistance legislation had been thoughtfully structured and evolved coherently, it might still be used and usable, despite its size and scope. Over time, however, each succeeding generation of legislators has sought to update portions of the law or to add new laws in an ad hoc fashion. The result is that foreign assistance legislation is now entirely dysfunctional, working at cross-purposes and often addressing the same purpose in multiple pieces of legislation.

1950s	Bretton Woods Agreements Act
	Food for Peace Act (Public Law 480)
	International Finance Corporation Act
	Inter-American Development Bank Act
1960s	International Development Association Act
	Foreign Assistance Act of 1961
	Peace Corps Act
	Migration and Refugee Assistance Act of 1962
	Asian Development Bank Act
	Arms Export Control Act
1970s	Foreign Assistance Act of 1969—Inter-American Foundation
	International Development and Food Assistance Act of 1975
	African Development Fund Act
	International Security Assistance and Arms Export Control Act of 1976
	International Financial Institutions Act of 1977
1980s	International Security Assistance Act of 1979
	International Security and Development Cooperation Act of 1980
	International Security and Development Cooperation Act of 1981
	African Development Bank Act
	African Famine Relief and Recovery Act of 1985
	International Security and Development Cooperation Act of 1985
	Support for East European Democracy (SEED) Act of 1989
1990s	Freedom for Russia & Emerging Eurasian Democracies & Open Markets Support Act of 1992
	South African Democratic Transition Support Act of 1993
	Tropical Forest Conservation Act of 1998
	International Religious Freedom Act of 1998
	Torture Victims Relief Act of 1998
	Silk Road Strategy Act of 1999
2000s	African Growth and Opportunity Act
	Global Aids and Tuberculosis Relief Act of 2000
	Microenterprise for Self-Reliance and International Anti-Corruption Act of 2000
	Famine Prevention and Freedom from Hunger Improvement Act of 2000
	Victims of Trafficking and Violence Protection Act of 2000
	Millennium Challenge Act of 2003
	United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003
	Microenterprise Results and Accountability Act of 2004
	Assistance for Orphans and Other Vulnerable Children in Developing Countries Act of 2005
Senator Paul Simon Water for the Poor Act of 2005	

Figure 3
Current legislation governing US foreign assistance

FACT: The phrase “Notwithstanding any other provision of law” appears at least 252 times in foreign assistance legislation.⁹

FACT: To understand the law on aid for orphans, users must reference seven different pieces of legislation.¹⁰

3. Prioritization

If everything is a priority, nothing is

No policy maker or aid professional can discern US foreign aid priorities from today's legislation. Effective laws articulate their core purposes to drive and frame their implementation and evolution over time. Since the original Foreign Assistance Act articulated four clear priorities in 1961, foreign assistance legislation has become notorious for the sheer number and incoherence of the goals, purposes, and directives it embodies (Figure 4).

FACT: Today's foreign assistance legislation articulates at least 140 broad priorities for what US development should focus upon.¹¹

FACT: There are at least 400 specific directives on how to implement those broad priorities.¹²

Figure 4
Too many priorities and directives

Priorities		Directives	
1. Increase agricultural productivity.	21. Curtail the proliferation of missiles.	<ul style="list-style-type: none"> • Improve rural infrastructure, including roads, water management, and energy facilities. • Ensure that agricultural research accounts for the needs of small farmers. • Improve non formal education methods to improve skills of urban poor people and rural farmers. • Use, to the extent practicable, private services on a contract basis for rural technical assistance. 	
2. Control population growth.	22. Reduce infant mortality.		
3. Reduce unemployment.	23. Promote equitable income distribution.		
4. Combat corruption.	24. Increase literacy.		
5. Assist victims of torture.	25. Promote food production.		
6. Mobilize US universities for research.	26. Support producer-owned cooperatives.		
7. Promote economic or political stability.	27. Promote the participation of women.		
8. Promote private sector.	28. Encourage policy reforms.		
9. Improve food security.	29. Promote open and competitive markets.		
10. Improve primary education.	30. Reduce deforestation.		
11. Help create off-farm employment.	31. Encourage careers in humanitarianism.		
12. Support reconstruction in Iraq.	32. Help stabilize flow of foodstuffs.		
13. Assist farm productivity.	33. Develop system of food reserves.		
14. Increase export of agricultural products.	34. Foster free trade.		
15. Provide foreign food assistance.	35. Promote voluntary population planning.		
16. Improve health care for mothers.	36. Promote immunization.		
17. Prevent, treat, and monitor HIV/AIDS.	37. Reduce incidence of tuberculosis.		
18. Prevent, control, and cure malaria.	38. Encourage regional development efforts.		
19. Help develop sources of energy.	39. Provide debt reduction.		
20. Help protect natural resources.	40. Promote rural development. 		
<i>... Plus 100 others</i>			<i>... Plus 396 others</i>

4. Relevance

An idea for its time

The Foreign Assistance Act also fails to reflect the realities of the world in the 21st century. Many provisions are designed to deal with events and circumstances of decades past, while others remain engraved despite decades of no funding.

In addition to outdated mandates, the act and other foreign assistance legislation contain many provisions for which funding has expired. Some of these provisions were meant to address short-term issues, such as natural disasters. They remain in the law, either because they do not have an explicit expiration date or have not been repealed.

The 1961 Foreign Assistance Act includes the following:

- **Assistance to help Pakistan meet the security and economic burdens created by the Soviet occupation of Afghanistan (1979–89)**
Foreign Assistance Act of 1962, Part III, Ch.1, Sec.620E (last amended in 1986)
- **Humanitarian assistance to refugees of the Soviet-Afghan war**
National Defense Authorization Act for Fiscal Year 1993
- **Negotiations with the Soviet Union regarding limiting deployment of military forces in the Indian Ocean region**
Arms Export Control Act
- **Suspension of trade in agricultural products with the Soviet Union**
Agricultural Trade Suspension Adjustment Act (last amended in 1998)
- **Humanitarian assistance to the Soviet Union**
Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992
- **Assistance to El Salvador, including provisions congratulating President Jose Napoleon Duarte (1984–89) for his progress in bringing peace and reducing human rights violations**
International Security and Development Cooperation Act of 1985
- **Sanctions against the Sandinista government of Nicaragua, in an attempt to force it to hold free and fair elections**
International Security and Development Cooperation Act of 1985
- **Assistance for victims of civil strife in Central America**
Foreign Assistance Act of 1961, Ch.19, p. 214, Sec. 495I

Incoherent laws are one challenge. When those laws empower different agencies to interpret them in the same areas of assistance, clear policy-based decision-making becomes more difficult.

FACT: The Foreign Assistance Act repeatedly authorizes tackling the Soviet threat and addressing civil conflicts in Latin America that ended in the last century.

FACT: The act still addresses disaster relief in Nicaragua, Pakistan, and Italy in the 1970s, as well as assistance to disadvantaged children in Southeast Asia fathered by American soldiers.

5. Authority

Who's at the wheel?

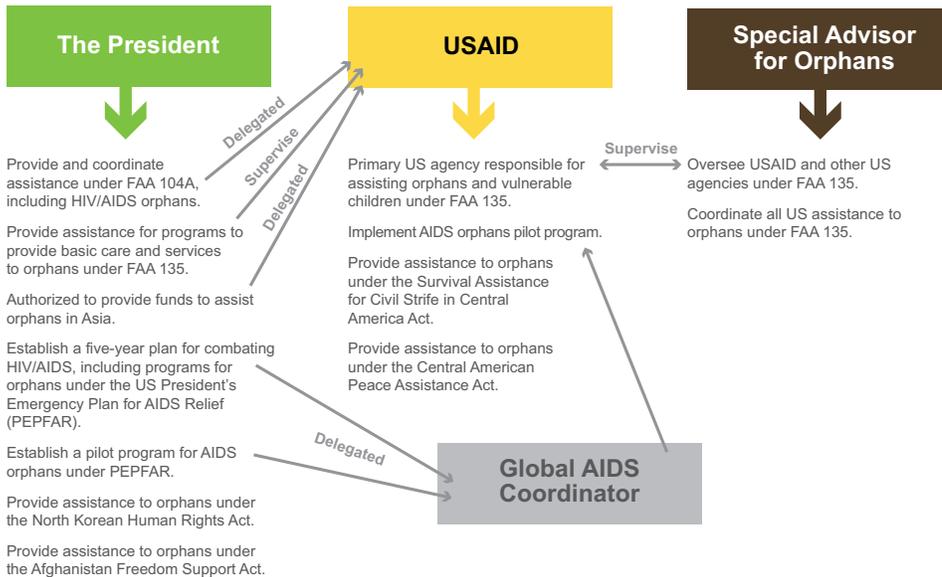


Figure 6

The decision-making in many sectors looks like it does for orphans Responsibilities of some US government entities for overseeing assistance to orphans

FACT: At least six US government agencies have responsibility for combating human trafficking.

FACT: At least seven US government entities, including the president,¹³ USAID (US Agency for International Development) and the Department of State, have responsibility over programs that relate to orphans.

FACT: Even the global HIV/AIDS coordinator, with a mandate to oversee and coordinate all aspects of assistance for HIV/AIDS, must consult with representatives from nine US agencies.¹⁴

6. Appropriate Responsibility

The US Congress divides legislative responsibility between authorizers, who develop policy and provide in-depth oversight, and appropriators, who then decide how much funding to allocate to authorized policies. Yet since 1985, Congress has not reauthorized the Foreign Assistance Act. The result is that development policy decisions are left to appropriators, who essentially set US government development policy by determining annual aid allocations, approving new programs, and on occasion incorporating authorizing text in their spending bills.

Appropriations laws have at various times modified, contradicted, or duplicated other foreign assistance legislation. This means that the user who wants to understand or implement foreign assistance policy must not only read authorizing legislation, but needs to know whether the appropriations laws have enacted provisions that modify, contradict, or duplicate that legislation. The following examples are indicative.¹⁵

FACT: The Foreign Assistance Act has not been reauthorized since 1985, requiring appropriators not just to fund programs but to set policy.

FACT: Ten House appropriations staff are overburdened each year, while the 85 staff working for the House Foreign Affairs Committee (tasked with thinking deeply about US foreign policy) have less influence over US foreign aid.

FACT: Even the Millennium Challenge Act was enacted through an appropriations act.

Figure 7
Modifications, contradictions, and duplications post challenges to Smart Development

	The Foreign Assistance Act (as amended)	Annual appropriations laws
Modifications	No loans made under the Foreign Assistance Act may be forgiven (Sec. 620[r]).	The president can forgive amounts owed to the US through debt restructuring (Sec. 565).
	No local currencies generated under this act can be used to train police or support law enforcement of any foreign government (Sec. 660).	Assistance may be used to strengthen the administration of justice in Latin America, notwithstanding Sec. 660 of the Foreign Assistance Act (Sec. 536).
Contradictions	The president may allow least developed countries (LDCs) to spend interest owed to the US on development priorities, as long as the USAID administrator concurs (Sec. 124).	The president may allow LDCs or sub-Saharan countries to spend interest owed to the USA, as long as they have a structural adjustment facility with the IMF (1989) (Sec. 572).
	Assistance provided under [Sec. 103 of the Foreign Assistance Act] shall be used primarily to increase the productivity and income of the rural poor by alleviating hunger, providing basic services, and creating rural employment (Sec. 103).	Funds appropriated to carry out Sec. 103 of the Foreign Assistance Act may be used to support tropical forestry and energy programs to reduce emissions of greenhouse gases and help tackle global warming (1990) (Sec. 534).
Duplications	No assistance shall be given to governments that support international terrorism, which includes Syria (Sec. 620A).	No assistance shall be given to Syria (1984) (Sec. 507).
	No assistance shall be given to Communist countries, including Cuba and North Korea (Sec. 620[f]).	No assistance shall be given to “certain countries,” including Cuba and North Korea (Sec. 507).
	The Government Accountability Office must submit an annual report to Congress on whether the International Monetary Fund (IMF) practices are consistent with US policies (Sec. 502–504).	Identical language (miscellaneous appropriations 2000, Vol. 1-A, p. 1091–1092).

Conclusions

Current foreign assistance legislation fails Cardozo's test. It is neither known nor knowable. As a consequence, US efforts to fight global poverty and address humanitarian suffering are weakened, its international standing is diminished, and its national interests are compromised.

Foreign assistance programs and policies are crucial US foreign policy tools. The US is becoming increasingly connected to the rest of the world in new and complex ways. American foreign assistance programs have proved to be an indispensable aspect of our engagement with the world.

The lack of clear legislative guidance makes it difficult to strategically prioritize US foreign aid or to articulate those priorities to the American people or the global development community. As policy makers circumvent the increasingly irrelevant Foreign Assistance Act to create new agencies and initiatives, policies become even more convoluted and non strategic.

Tinkering with the act will not bring our foreign aid into the 21st century. We need a new Global Development Capacity Act that addresses today's and tomorrow's challenges and opportunities and helps to restore America's global good standing.

Oxfam makes the following recommendations:

1. President Obama should make a new Global Development Capacity Act one of his top foreign policy priorities in order to re-establish the US as a global leader in the international effort to foster a more stable, prosperous, and democratic world.
2. The Foreign Assistance Act should be repealed, and the new administration should work with Congress to plan, design, and enact an entirely new act in its place that would incorporate and supersede associated legislation.

A new act should accomplish the following:

- Outline a limited number of overall objectives for US foreign assistance programs;
- Focus those objectives exclusively on US global development priorities;
- Consolidate decision-making into a single institutional entity (preferably a cabinet-level Department for Global Development);
- Specify the roles and responsibilities of other cabinet agencies where appropriate;
- Clarify the coordination of oversight responsibilities and functions;
- Ensure that all contradictory, duplicative, and modifying laws are either nullified or made consistent.

3. The new act should be reauthorized at least every four years, supported by a Quadrennial Development Review to ensure our foreign assistance laws and national development strategy are fully integrated.

Additional Resources

Oxfam America has commissioned the following resources from Dechert LLP as a guide to policy makers seeking to pursue reform of the laws governing US foreign assistance. The full set of materials can be found at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.

“A summary of us foreign assistance legislation” (December 2008)

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/summary-of-foreign-assistance-legislation.pdf

“List of 140 goals and purposes in US foreign assistance legislation”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/140-goals-and-purposes.pdf

“List of 400 directives in US foreign assistance legislation”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/400-directives.pdf

“US foreign assistance legislation: Orphans”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/case-study-orphans-dec2008.pdf

“US foreign assistance legislation: Human Trafficking”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/case-study-human-trafficking-dec2008.pdf

“US foreign assistance legislation: HIV/AIDS”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/case-study-hiv-aids-dec2008.pdf

“Foreign assistance legislation enacted via appropriations laws, 1984–1994”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/appropriations-table-1984-1994.pdf

“Foreign assistance legislation enacted via appropriations laws, 1999–2004”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/appropriations-table-1999-2004.pdf

“Foreign assistance legislation enacted via FY 2008 State, Foreign Operations, and Related Programs Act (P.L. 110–161)”

www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis/appropriations-table-2008.pdf

Endnotes

1. Benjamin N. Cardozo, "The growth of the law" (New Haven, CT: Yale University Press, 1924), 3.
2. For a summary and brief description of laws governing foreign assistance, see Dechert LLP (in collaboration with Oxfam America), "A summary of US foreign assistance legislation" (December 2008), available at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.
3. As defined by the Organization for Economic Cooperation and Development, official development assistance consists of flows of aid to developing countries (including via multilateral institutions) that are for the promotion of the economic development and welfare of developing countries and that are concessional and convey a grant element of at least 25 percent. See www.oecd.org/dataoecd/26/14/26415658.pdf.
4. If the US wants a coherent overseas development policy, it needs to make these laws consistent; we charge some countries more in trade tariffs than we give them in aid for economic growth purposes. See "Beyond assistance: The HELP Commission report on foreign assistance reform" (US Commission on Helping to Enhance the Livelihood of People Around the Globe, December 2007), 17. But those laws are beyond the scope of this memo.
5. "Other related foreign aid authorizations and appropriations" refers to laws that authorize and fund foreign assistance but do not amend the 1961 Foreign Assistance Act, or laws that are included in the annual foreign operations appropriations (see Figure 3).
6. See "The Foreign Assistance Act of 1961, as amended (Public Law 87-195)," in Congressional Research Service, "Legislation on foreign relations through 2005" (Washington, DC: US Government Printing Office, January 2006).
7. The 38 additional laws refer to the 25 acts listed under "Acts affecting the Foreign Assistance Act" and the 13 acts under "Acts affecting (but not amending) the Foreign Assistance Act," in Dechert LLP (in collaboration with Oxfam America), "A summary of US foreign assistance legislation" (December 2008), available at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.
8. For a comprehensive list of laws that have been added, see Dechert LLP (in collaboration with Oxfam America), "A summary of US foreign assistance legislation" (December 2008), available at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.
9. Original legal analysis done for Oxfam America by Dechert LLP.
10. See case studies by Dechert LLP and Oxfam America, available at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.
11. See the "List of 140 goals and purposes," with citations, at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.
12. See the "List of 400 directives," with citations to the underlying law, at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.
13. The president may exercise his responsibilities for foreign assistance programs through any executive branch agency. See the Foreign Assistance Act, section 621. In the case of programs impacting orphans, the president has typically delegated his responsibilities to the secretary of state, who in turn has delegated many responsibilities to subordinates. See, for example, Department of State, "Delegation of Authority 293," Federal Register 71, no. 128 (July 5, 2006). Thus, as a practical matter, the president's responsibilities for programs impacting orphans may not conflict with those of other agencies, depending on how the president has chosen to assign his program responsibilities. However, this does not change the fact that the legislation, as drafted, creates conflicts that are only resolved through executive orders and delegations of authority.
14. See case studies by Dechert LLP and Oxfam America, available at www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis.
15. See www.oxfamamerica.org/whatwedo/campaigns/aid_reform/analysis for a more comprehensive table of examples.

Oxfam America is working to increase the effectiveness of US foreign aid by placing the voices and priorities of poor people at the center of aid policy and practice. Through analytical and field research, we bring out the hopes and concerns of intended beneficiaries, implementing partners, aid professionals, other donors, and host governments. Through political advocacy, we ensure that these voices are heard by policy makers who have the power to make US foreign aid more effective in the fight against global poverty.



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