SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Journal of International Law

Volume 46 | Issue 3

2014

Foreign Assistance at Home: Increasing USAID Accountability Through Victim Participation Rights in the Foreign Assistance Act

Shefali Saxena

FOREIGN ASSISTANCE AT HOME: INCREASING USAID ACCOUNTABILITY THROUGH VICTIM PARTICIPATION RIGHTS IN THE FOREIGN ASSISTANCE ACT

Shefali Saxena[*]

The United States Agency for International Development (USAID) has been the chief arm of U.S. foreign assistance, dedicated to sustainable development in developing countries. However, in the aftermath of the Cold War, support for USAID waned, resulting in a loss of autonomy, structural integrity, and overall effectiveness. A troubling consequence of these internal problems has been the misappropriation of USAID funds, where local governments in developing countries have abused these contributions by using them for personal gain at the expense of their citizens' human rights. With reduced capacity and inadequate monitoring mechanisms, USAID has been unable to address these pressing human rights violations. Current victims do not have any means of domestic recourse, and this Note submits that it is USAID's duty to provide some form of redress. This Note proposes that Congress should amend the Foreign Assistance Act to include a private right of action for victims and their representatives to challenge USAID's actions. Such an amendment would be consistent with other U.S. agency practice, and more importantly, would comport with the U.S.' and international community's commitment to addressing human rights abuses.

* B.A. University of Michigan, Ann Arbor; J.D., Case Western Reserve University School of Law

CONTENTS

I. INTRODUCTION

The United States Agency for International Development (USAID) has faced several institutional and organizational problems since its inception in 1961,[1] but recently Human Rights Watch has highlighted an additional, growing concern.[2] USAID funding for projects in developing countries such as Ethiopia[3] and Vietnam[4] has

1. *See* F. Brian Atwood, M. Peter McPherson & Andrew Natsios, *Arrested Development, Making Foreign Aid a More Effective Tool*, 87 FOREIGN AFF. 123, 124 (2008).

2. *See* Maria McFarland Sanchez-Moreno & Naomi Roht-Arriaza, *Deadly Aid*, FOREIGN POL'Y (Aug. 6, 2012), http://www.foreignpolicy.com/articles/2012/08/06/deadly_aid?page=full.

3. HUMAN RIGHTS WATCH, DEVELOPMENT WITHOUT FREEDOM; HOW AID UNDERWRITES REPRESSION IN ETHIOPIA 40–41 (2010), *available at* http://www.hrw.org/reports/2010/10/19/development-without-freedom [hereinafter ETHIOPIA REPORT].

4. HUMAN RIGHTS WATCH, THE REHAB ARCHIPELAGO; FORCED LABOR AND OTHER ABUSES IN DRUG DETENTION CENTERS IN SOUTHERN VIETNAM 26,

been used to fuel egregious human rights abuses, either directly through projects implemented by USAID, or indirectly through politicization of USAID funds by local governments. While several proposals have been made to implement sweeping changes to USAID's structure, including more effective monitoring of USAID project funding, the suggested remedies do not truly address the underlying problems, have not been put into effect, and in any case, will likely take several years to enact.[5] Further, the few reforms that have been implemented—while helpful—do not ultimately target the fundamental issues that have led to human rights violations.[6]

The most alarming aspect of this problem is that there are currently no avenues of redress or accountability for victims of USAID funding.[7] There are no statutory schemes in the U.S. that can provide any form of recognition, let alone remedy, for these victims.[8] Compounding this issue, USAID is not only unaware of the conditions in these countries after funding has been delivered, but it also has inadequate means of rectifying this deficiency. Many proposed solutions center around a complete overhaul of USAID, which would take a significant amount of time and resources, while doing nothing to help current victims. The incremental internal changes now occurring within USAID similarly leave victims without a true remedy. Therefore, a more immediate solution is needed to address these victims' rights, while the underlying structural changes can be set in motion over the next several years.

This Note proposes an alternative solution that involves a limited amendment to USAID's mandate in the Foreign Assistance Act (FAA),[9] rather than a time-intensive reimagining of the entire statute.

30–40 (2011), *available at* http://www.hrw.org/reports/2011/09/07/rehab-archipelago [hereinafter VIETNAM REPORT].

5. *See* Atwood et al., *supra* note 1, at 128 (suggesting that USAID be structurally separated from the State Department); John Waggoner, *Congress Debates US Aid Reforms*, FRONTLINES (USAID, Washington, D.C.), Sept. 2009, at 1, 14 (outlining a proposed bill to reform USAID internally through evaluation centers and increased training).

6. *See* McFarland Sanchez-Moreno & Roht-Arriaza, *supra* note 2 (noting the Obama Administration's initial steps to reforming USAID, including efforts to lengthen funding cycles and alter funding patterns).

7. *See id.* ("Today, no specific mechanisms exist to prevent harm to indigenous people or forcible displacement of local groups in conjunction with economic, agricultural, mining, or infrastructure programs.").

8. None of the discussions on proposed changes to USAID include how to address the immediate impact on victims of USAID funding. *See, e.g.*, Atwood et al., *supra* note 1, at 127; Waggoner, *supra* note 5, at 1, 14.

9. Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified at 22 U.S.C. § 2151 (1961)).

Specifically, it argues that creating a private right of action within the FAA itself is the most effective means of giving victims a voice and an opportunity for redress until USAID can undergo the necessary structural changes that will prevent such abuses in the future. Such a right of action already exists in several U.S. administrative agencies, and Congress should extend that practice to USAID, especially given the nature of the human rights abuses. Further, the idea of victim and public participation in litigation has a long history in both American and international jurisprudence. Additionally, the creation of a private right of action will serve another function for USAID: it will have a monitoring effect so that USAID can become aware of the types of violations that are taking place. By allowing groups and NGOs that have the access and capability of reaching the areas where these violations are occurring to present a case, USAID would be made aware of issues and problems that they otherwise were incapable of realizing. Most importantly, such an amendment to the FAA would provide the only legal recourse for foreign victims of USAID funding, as no other statute or mechanism exists to achieve this purpose—in particular, the Alien Tort Statute (ATS) and Federal Tort Claims Act (FTCA) would not apply.

While the future of U.S. foreign assistance ultimately depends on comprehensive changes in USAID's structure and organization, a limited amendment to the FAA would be more expedient in addressing the immediate problem of human rights violations. However, because it is essentially USAID's institutional weaknesses that lead to the human rights abuses, a thorough assessment of these long-term problems and solutions through institutional reform is necessary to determine why such an amendment is comparably more efficient and effective. Further, the broader changes must also be considered to ultimately improve USAID's effectiveness and prevent further and future human rights abuses.

This Note analyzes the perennial problems afflicting USAID, the resultant human rights abuses, and possible solutions to address these issues. Part II provides the historical background and overview of USAID's institutional problems, as well as an examination of the human rights abuses in Ethiopia and Vietnam. Part III reviews the practice of public and victim participation in U.S. administrative agencies, including issues of standing to challenge administrative agency actions. Part IV looks to the rationale of the Victim Participation Clause in the Rome Statute for the International Criminal Court as guidance for creating similar rights in the FAA. Part V discusses the Alien Tort Statute and its limitations. Part VI briefly notes the limited scope of the Federal Tort Claims Act. Part VII provides an analysis of how public participation doctrine can be applied in the context of USAID and proposes the components of a statutory amendment to the FAA as well as potential long-term

solutions to be considered in addition to the amendment. Part VIII concludes and summarizes the analysis.

II. USAID'S BACKGROUND, PROBLEMS, AND RESULTING HUMAN RIGHTS VIOLATIONS

A. Historical Problems with USAID and the Issue of Aid Effectiveness

USAID is the primary administrative agency that oversees the delivery and implementation of development assistance programs overseas.[10] Congress mandated USAID through the FAA in 1961, and it has remained the principal development arm of the U.S.[11] While the U.S. has the highest disbursement levels of any other donor country,[12] with USAID supporting $17.8 billion in projects in 2013,[13] USAID faces a two-tier problem. The first tier relates to the underlying institutional issues that involve USAID's organization and structure. These fundamental problems lead to the second, more immediate tier of human rights violations that result from the misuse of USAID funding.

The FAA was enacted "[t]o promote the foreign policy, security, and general welfare of the United States by assisting peoples of the world in their efforts toward economic development and internal and external security, and for other purposes."[14] These goals translate into U.S. foreign assistance program initiatives designed to "support U.S. national security and promote economic growth, poverty reduction, and humanitarian relief abroad."[15] During the Cold War, USAID enjoyed autonomy and considerable resources, and was on the whole effective in achieving its stated goals.[16] Specifically, USAID

10. *USAID History*, USAID, http://www.usaid.gov/who-we-are/usaid-history (last updated May 15, 2014).

11. *See id.*; Foreign Assistance Act § 102.

12. *Aid to Poor Countries Slips Further As Governments Tighten Budgets*, OECD (Mar. 4, 2013), http://www.oecd.org/dac/stats/aidtopoorcountriesslipsfurtherasgovernmentstightenbudgets.htm (stating that the U.S. remains the largest donor, contributing a total of $30.5 billion in 2012).

13. *U.S. Agency for International Development*, FOREIGN ASSISTANCE, http://www.foreignassistance.gov/web/Agency_USAID.aspx?FY=2014&tabID=tab_sct_Peace_Disbs&budTab=tab_Bud_Spent (last visited Dec. 30, 2014).

14. Foreign Assistance Act, 75 Stat. at 424.

15. Atwood et al., *supra* note 1, at 124.

16. *See id.* at 125; *see also* Kevin Baron, *Gates: "Congress is part of the problem" in State, USAID Shortfalls*, STRIPES CENTRAL BLOG (Aug. 23, 2010), http://www.stripes.com/blogs/stripes-central/stripes-central-1.8040/gates-congress-is-part-of-the-problem-in-state-usaid-shortfalls-

complemented the foreign influence of the State Department and Pentagon—USAID agents could more effectively address development issues because they had a greater integrated field presence in the target areas.[17] They were able to establish contacts and interactions in more remote cities with civil-society leaders, government officials, local legislative agencies, businessmen, and ministries, ensuring both the effectiveness and sustainability of development programs.[18]

Following the Cold War, however, USAID underwent organizational changes that resulted in a loss of independence and the assumption of a subordinate role.[19] Because USAID was instituted in response to the Cold War, in the period after, several members of Congress no longer believed in its purpose.[20] USAID functions and budget were now under the aegis of the U.S. State Department, which made USAID's agenda secondary to the State Department's.[21] Upon losing its independent authority, USAID "lost staff, programmatic flexibility, and influence with Congress, other government departments, other aid donors, and recipient nations."[22] Because USAID became less effective as a result, multiple splinter agencies with similar development goals were established, none of which were consolidated or overseen by the USAID Administrator. These various groups work on competing or overlapping projects, and with little interaction or communication between them and USAID, foreign assistance projects have suffered from a lack of efficiency and representation; donors and recipients are unclear as to which entity is

1.115680 (according to former U.S. Defense Secretary, Robert Gates, "[USAID] had been a huge player in our success in the Cold War").

17. *See* Atwood et al., *supra* note 1, at 125.

18. *See id.*

19. *See id.* at 125–26; *see also* CLINTON-GORE ADMINISTRATION HISTORY PROJECT: USAID'S ROLE 1993-2001, at 1–2 (2000), *available at* http://www.clintonlibrary.gov/assets/storage/Research%20-%20Digital%20Library/ClintonAdminHistoryProject/81-90/Box%2087/1756250-united-states-agency-international-development-usaid-history-during-clinton-administration.pdf.pdf (describing that after the Cold War, USAID fell prey to declining resources, changing relationships, and structural problems).

20. *See* Roger Bate, *The Trouble with USAID*, 1 AMERICAN INTEREST 113, 114 (2006) (recalling that a vocal opponent of USAID was Senator Jesse Helms who wanted USAID eliminated, opining that foreign aid was like "throwing money down foreign rat holes").

21. *See* Atwood et al., *supra* note 1, at 128; *see also* Bate, *supra* note 20, at 114 (stating that post-Cold War, USAID became accountable to the State Department).

22. Atwood et al., *supra* note 1, at 125; *see also* Baron, *supra* note 16 (citing former Defense Secretary Robert Gates as saying that there were 16,000 USAID employees in 1993 and only 3,000 in 2006).

representing U.S. aid efforts.[23] This "organizational chaos" has led to increased costs of implementation, which in turn delay implementation and reduce impact.[24] In 2006, USAID was fully integrated under the State Department, forcing the USAID Administrator to oversee both the foreign assistance of the State Department, as well as USAID, despite the fact that these two agencies have different agendas and goals. The centralization of USAID's function hindered its ability to reach recipient countries and tailor development programs to their specific needs—the very ability that made USAID effective during the Cold War.[25]

Further, the importance of development aid in the U.S. has been downplayed, which has led to significant budget, staffing, and staff training cuts.[26] Because maintaining a field presence in developing countries is integral to the effective implementation of USAID projects, staffing cuts that result in a reduced field presence are particularly harmful to USAID's effectiveness.[27] Specifically, such a limited connection to the developing countries naturally minimizes USAID's oversight and monitoring capabilities to the effect that human rights abuses occur without USAID's knowledge or accountability. On a deeper level, the resultant loss of trained manpower has effectively changed the foundation of USAID, transforming it "from a creative, proactive, and technically skilled organization focused on implementation to a contracting and grant-making agency."[28] This growing bureaucratization has propelled

23. *See* Atwood et al., *supra* note 1, at 125–26.

24. *Id.* at 126; *see also Lack of Leadership at USAID Limits Effectiveness of U.S. Foreign Assistance*, INTERACTION, (Oct. 26, 2009), http://www.interaction.org/article/lack-leadership-usaid-limits-effectiveness-us-foreign-assistance (last updated Nov. 10, 2009) ("[T]his deficit in leadership has led to a rising trend in transferring development issues to other U.S. government agencies").

25. *See* Atwood et al., *supra* note 1, at 126.

26. *Id.*; Bate, *supra* note 20, at 114 (2006); ANDREW NATSIOS, CTR. FOR GLOBAL DEV., THE CLASH OF THE COUNTER-BUREAUCRACY AND DEVELOPMENT 26–27 (2010), *available at* www.cgdev.org/content/publications/detail/1424271 (describing how the massive staffing cuts slowed down development projects in the field, and left technical experts "little time" to monitor and implement current programs).

27. *Cf.* Bate, *supra* note 20, at 117–18. USAID employs the advice of several U.S. consultants in administering their programs, particularly in the area of global health policy. Commentators have found that "Western consultants are often ineffective because they lack detailed knowledge of local conditions," and many do not visit the program's site. *Id.*

28. Atwood et al., *supra* note 1, at 127.

USAID down a spiral of ineffective policies and reduced flexibility and leverage.[29]

Policymakers have suggested several structural changes that could mitigate many of these problems, though all these recommendations stem from an overhaul of the FAA to restore USAID's autonomy and independence. USAID's mandate has not been substantively amended since 1985.[30] In 2009, former Senator John Kerry, as Chairman of the Senate Foreign Relations Committee, attempted to refashion the FAA to specifically address the organizational, monitoring, and oversight problems that USAID was facing. The draft of the new bill incorporated several long-term solutions including a decentralized structure where USAID would reclaim independent or cabinet-level status, and an evaluation mechanism where USAID could assess a program's social benefits and weaknesses prior to implementation.[31] However, due to budgetary constraints and the low-level priority that is placed on development issues,[32] this reform attempt was killed in committee.[33] Because these reforms were never passed or executed, USAID continues to experience the same problems of ineffectiveness that ultimately have led to human rights abuses.

B. Human Rights Abuses Resulting from Misappropriated USAID Funds

Human Rights Watch (HRW), a nonprofit NGO focusing on reporting human rights violations around the world,[34] recently published two reports based on investigations in Ethiopia and Vietnam exposing various human rights abuses. While the reports found that the national governments in the respective countries are

29. *See id.*; NATSIOS, *supra* note 26, at 26–27.

30. Atwood et al., *supra* note 1, at 130; Waggoner, *supra* note 5, at 14.

31. *See* Foreign Assistance Revitalization and Accountability Act of 2009, S. 1524, 111th Cong. §§ 5, 6 (aiming to amend sections of the original Foreign Assistance Act to involve greater monitoring efforts and impact assessments) (2010); *ADS Help Document: Brief on "Social Soundness Analysis,"* USAID 1, http://www.usaidgems.org/Documents/ADS200HelpDoc_SocialSoundnessAnalysis.doc (last visited Dec. 30, 2014); CONNIE VEILLETTE, CTR. FOR GLOBAL DEV., THE FUTURE OF U.S. AID REFORM: RHETORIC, REALITY, AND RECOMMENDATIONS: A REPORT OF THE RETHINKING U.S. FOREIGN ASSISTANCE PROGRAM 27 (2009).

32. *See* John Norris, *Five Myths About Foreign Aid*, WASH. POST (Apr. 28, 2011), http://articles.washingtonpost.com/2011-04-28/opinions/35231618_1_foreign-aid-foreign-assistance-act-aid-programs (stating that "[f]oreign aid has few domestic allies").

33. VEILLETTE, *supra* note 31, at 27.

34. Human Rights Watch, *Who We Are*, http://www.hrw.org/node/75136 (last visited Dec. 30, 2014).

responsible for these abuses, HRW also discovered that USAID funding has been used to directly cause or facilitate these human rights violations.[35]

1. Ethiopia

As of 2009, USAID was supplying $530.9 million to Ethiopia through the World Bank project entitled the Productive Safety Net Programme (PSNP). Executed in 2005, PSNP was designed to assist Ethiopia with its food shortage by supplying transfers of food or cash to households with no food security through public works, or through direct transfers to those who are unable to work.[36]

According to fifty local residents in Ethiopia where PSNP funds were delivered, the ruling party was using the PSNP money as leverage to gain and maintain political control. Several members of opposition political parties were excluded from the program.[37] USAID funds that were intended for crucial food needs are held hostage by the Ethiopian government unless intended recipients pledge loyalty and support to the ruling party and cease any opposition movements or beliefs.[38] Some locals who attempted to report this abuse to independent investigators or to foreign journalists were detained, and in some cases, the journalists themselves were detained and threatened with deportation.[39]

Moreover, victims suffering from these abuses are disenfranchised and lack domestic avenues of recourse in their home countries. While PSNP provides for a local Appeals Committee and council that are intended to deal with complaints related to the PSNP program, locals attest that these bodies are controlled by the ruling party and often systematically deny or refuse to entertain claims challenging the government's actions and behavior.[40] Beyond the corruption concerns, the appeals structure also suffers from a lack of clarity and efficiency;

35. McFarland Sanchez-Moreno & Roht-Arriaza, *supra* note 2.

36. ETHIOPIA REPORT, *supra* note 3, at 31; *see also* USAID, *Productive Safety Net Program (PSNP)*, http://ethiopia.usaid.gov/programs/feed-future-initiative/projects/productive-safety-net-program-psnp (last updated Jan. 3, 2013).

37. ETHIOPIA REPORT, *supra* note 3, at 40–41.

38. *Id.* at 72; McFarland Sanchez-Moreno & Roht-Arriaza, *supra* note 2; *see also* Jeffrey Gettleman, *Repression is Alleged Before Vote in Ethiopia*, N.Y. TIMES (May 20, 2010), http://www.nytimes.com/2010/05/21/world/africa/21ethiopia.html?pagewanted=all&_r=0.

39. ETHIOPIA REPORT, *supra* note 3, at 43.

40. *See, e.g.*, ETHIOPIA REPORT, *supra* note 3, at 77; Beverly Jones, *Leading Civil Society up the Governance Path: Civil Society as 'Instrument of Democratic Structural Adjustment' –A Case Study from Ethiopia* (Nov. 15, 2008).

an Overseas Development Institute report found that 79 percent of local Ethiopian people did not utilize the Appeals Committee either because they believed there was no one to complain to, or if they did know of the existence of the Committee, they were not aware of the appropriate person to contact.[41]

HRW identifies two primary problems that lead to these abuses. First, due to the repressive nature of the government and remote locations of the areas where the USAID funding is being sent, information and communication are severely hindered, and detection of politicization is difficult. Second, USAID lacks adequate monitoring and evaluation safeguards. A Development Assistance Group report stated that a USAID fact-finding mission in 2009 found no evidence of discrimination in this program, despite widespread testimony that it was occurring.[42] Even other neutral international organizations such as the Overseas Development Institute and the International Food Policy Research Institute reported that PSNP funds were used as a political tool of repression as early as 2006.[43] While some did not find that the problem was pervasive throughout the system, they still encouraged the crucial necessity of long-term transparency efforts to increase effectiveness and detect, correct, and prevent abuses.[44] A donor official of PSNP stated that the politicization of funds was "not a criterion for monitoring" and that he doubted the "rapid response teams would pick it up."[45] HRW proposes solutions to improve monitoring capability, essentially reiterating the need for independent monitoring without the involvement of the Ethiopian government, with the express purpose of detecting politicization risk. It also recommends corrective measures beyond heightened monitoring, which include ways to condition receipt of funding on compliance with human rights standards and other measures.[46]

2. Vietnam

Similarly in Vietnam, HRW discovered that USAID funding has been misused to directly lead to human rights violations. The program at issue is the U.S. President's Emergency Plan for AIDS Relief (PEPFAR), through which nearly $102 million was expected to

41. OVERSEAS DEV. INST., TARGETING ETHIOPIA'S PRODUCTIVE SAFETY NET PROGRAMME (PNSP) 26, 57 (2006), *available at* www.odi.org.uk/resources/docs/3966.pdf; ETHIOPIA REPORT, *supra* note 3, at 77.

42. ETHIOPIA REPORT, *supra* note 3, at 44.

43. *See* OVERSEAS DEV. INST., *supra* note 41, at 50; ETHIOPIA REPORT, *supra* note 3, at 44–45.

44. ETHIOPIA REPORT, *supra* note 3, at 44–45.

45. *Id.* at 76.

46. *Id.* at 9, 78.

be delivered to Vietnam in 2011.[47] One of USAID's aims in this program was to provide training assistance to staff at twenty drug detention centers, including how to conduct HIV and TB screening and care, drug addiction and relapse prevention services, and addiction counseling.[48] Despite these efforts, the centers have been the site of involuntary or arbitrary detention, with no due process or method for appeal, forced labor, poor working conditions, and physical abuse as punishment.[49]

HRW noticed similar problems between Vietnam and the Ethiopia cases; namely, USAID's deficient monitoring and evaluation capacities. While PEPFAR expressly states that programs should be implemented consistent with human rights obligations, and that U.S. law prohibits the use of aid funding to violate workers' rights, USAID's monitoring and evaluating indicators do not include any human rights indicators—rather, they encompass only those relating to staff training procedures.[50] Further, USAID never responded to HRW's requests to obtain more information about the human rights conditions of the drug detention centers.[51] HRW proposes that stricter monitoring and evaluation is necessary to specifically account for human rights abuses and their causes.[52] In addition, as in Ethiopia, detainees in Vietnam were not informed of any process through which they could challenge or appeal detention center decisions, despite the fact that Vietnam does have an administrative appeals ordinance.[53]

C. Limitations in the FAA

The various sections of the FAA reveal in greater depth USAID's purpose, its engagement in several projects, and how it intends to achieve its goals. The statute is replete with provisions expressing Congress' commitment to providing assistance to achieve sustainable development in developing countries. In furtherance of this objective, it enumerates five major principles that USAID intends to uphold, including "the encouragement of development processes in which

47. VIETNAM REPORT, *supra* note 4, at 75; The U.S. President's Emergency Plan for Aids Relief, *Partnership to Fight HIV/AIDS in Vietnam*, USA.GOV, http://www.pepfar.gov/countries/vietnam/index.htm (last visited Dec. 30, 2014).

48. VIETNAM REPORT, *supra* note 4, at 76.

49. *Id.* at 26, 30–40.

50. *Id.* at 84.

51. *Id.*

52. *Id.*

53. *Id.* at 25, 31 & n.84.

individual civil and economic rights are respected and enhanced"[54] and "the promotion of good governance through combating corruption and improving transparency and accountability."[55] Further, it specifies several "mandatory" principles (i.e., indicated through the use of "shall") that various actors must follow, including the USAID Administrator and the President, when implementing any projects. There are many requirements on monitoring,[56] reporting,[57] supporting anti-corruption efforts,[58] and supporting human rights,[59] indicating a pervasive intent to make USAID transparent and accountable, and to comply with international obligations on human rights. However, while these are compulsory, the act does not prescribe any particular method for fulfilling these responsibilities; they read more like hortatory guidelines rather than stipulations. USAID's current structural problems and the existence of human rights abuses confirm the ineffectiveness of these provisions—the situations in Ethiopia and Vietnam are cases where civil and economic rights are disrespected, and where both countries' governments have exhibited corruptive behavior—all in direct contravention of USAID's purpose. Moreover, the FAA contains no provisions allowing a party to challenge or review any projects.

An examination of the two-tier problem exposes the conflict in determining an adequate solution to USAID's problem. The first-level of institutional problems reveal that USAID is in need of complete restructuring and reform, chiefly in the form of a new mandate in the

54. Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 101(3), 75 Stat. 424 (codified at 22 U.S.C. § 2151 (1961)) (citing from the "General Policy" section).

55. *Id.* § 101(5) (citing from the "General Policy" section).

56. *See, e.g.*, *id.* § 104A(d)(4) & (d)(7) (requiring monitoring and evaluation mechanisms for projects combatting HIV/AIDs); § 128(b) (stating that monitoring is necessary to ensure that the intended poor recipients receive loan assistance); § 131 (calling for the USAID Administrator to manage a monitoring system in the Microdevelopment Grant Assistance project).

57. *See, e.g.*, *id.* § 489 (requiring the President to report to Congress on whether the stated goals have been met in the International Narcotics Control project); § 498 (demanding a similar reporting requirement in its Assistance for Independent States of Soviet Union project).

58. *See, e.g.*, *id.* § 129(b)(3) (emphasizing anti-corruption in Foreign Banks projects); § 133 (encouraging "good governance" programs); § 490(b)(2) (obligating the U.S. to consider whether a country has taken measures to prevent corruption prior to engaging in bilateral or multilateral cooperation).

59. *See, e.g.*, *id.* § 502B (reiterating the U.S.' obligations under the U.N. Charter and its general commitment to promoting and respecting human rights).

FAA. However, given the failed attempt to rewrite the FAA in 2009, coupled with declining expertise and staff, it is unlikely that this attempt will be resuscitated soon. The second-level of problems in the form of human rights abuses suggests that USAID needs more staff and enhanced monitoring and enforcement capability—changes that would require a new FAA mandate. Due to this conflict, an alternative solution needs to be offered, one that would not necessarily involve a broad overhaul of the FAA, which would likely take several years. A limited amendment to the FAA, allowing for a recognition of victims' rights and a possible course of legal action in U.S. federal courts would specifically address the issue of human rights without reaching the extensive structural reforms. Because victims have no domestic avenue of legal recourse,[60] coupled with the fact that USAID has grown detached from its intended beneficiaries (and now victims) overseas, Congress must create a connection to these victims through the U.S. court system.

III. PRIVATE RIGHTS OF ACTION, STANDING, AND PUBLIC PARTICIPATION DOCTRINE IN ADMINISTRATIVE AGENCIES

In order to provide USAID victims or their representatives access to U.S. courts, their injury must be a legal harm cognizable in the courts, and then the victims must themselves have actually, personally suffered this harm. The latter requirement, which is tested under standing doctrine, would be particularly difficult to meet in a case involving USAID victims—absent a private right of action—for several reasons: there are numerous potential parties that represent majority rather than minority interests; they are citizens of foreign countries; and resolution of their problems may implicate prudential concerns such as generalized grievances and political question doctrine. The following section explores the mechanics of a private right of action, and how its existence can facilitate or overcome barriers to standing. Additionally, it examines standing doctrine and its expansion in the context of challenges to administrative agencies, showing that the concept of public participation in these cases has been upheld both to vindicate plaintiffs' rights, and to aid or improve agency function. Ultimately, this body of case law serves as a legal basis that supports the idea of USAID victim participation through the creation of a private right of action in the FAA.

A. Statutory Rights and Standing Doctrine

In order to successfully bring a claim in a U.S. court, parties must have both a cause of action, or a "legal harm" that carries entitlement

60. *See* ETHIOPIA REPORT, *supra* note 3, at 77; VIETNAM REPORT, *supra* note 4, at 25, 31 & n.84.

to relief, as well as standing under the U.S. Constitution, which requires "actual harm."[61] Specifically, parties attempting to challenge federal agency action can do so in one of three ways. The first, which will be discussed further in Part C of this section, is parties can raise a claim using Section 702 of the Administrative Procedure Act,[62] which provides a general cause of action to challenge agency decisions where the plaintiff is aggrieved or adversely affected within the meaning of the relevant statute, and where the statute itself is silent on the availability of judicial review.[63] The second is when a particular regulatory scheme contains a specific provision allowing judicial review.[64] Third, if the governing statute of the agency contains a private right of action, then the statute defines a cause of action, and the parties may act through that vehicle.[65] By creating a private right of action to enforce statutory provisions, Congress also effectively creates, or recognizes, a statutory right for which a legal remedy is available if the right is violated.[66] An express private right of action contains the following components: the persons able to bring suit; those who are potentially liable; forum for the suit; and the potential remedy available.[67]

---

61. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 178 (2012) ("To win a federal lawsuit, a plaintiff needs both legal harm (cause of action) and an injury-in-fact . . .); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280–81 (2008). The U.S. Supreme Court also reiterated this point in *Tennessee Electric Power Company v. Tennessee Valley Authority* when it held that while the alleged injury, competition, would occur, it was not the basis of a cause of action because the damage was "not consequent upon the violation of any right recognized by law." 306 U.S. 118, 135–35, 137. (1939).

62. Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 501 et seq.)

63. Regional Mgmt. Corp. v. Legal Servs. Corp., 186 F.3d 457, 461 (4th Cir. 1999); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882–83 (1990).

64. *Legal Servs. Corp.*, 186 F.3d at 467 (Murnaghan, C.J., concurring); Hoefler v. Babbitt, 139 F.3d 726, 728 (9th Cir. 1998).

65. *Legal Servs. Corp.*, 186 F.3d at 461; *Lujan*, 497 U.S. at 882.

66. This proposition has received particular affirmation in the Ninth Circuit Court of Appeals, though these cases have not involved federal agencies. *See, e.g.*, Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014), *petition for cert. filed*, 82 U.S.L.W. 1171 (U.S. May 1, 2014) (No. 13-1339) ("Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right."); Fulfillment Servs., Inc. v. United Parcel Serv., Inc., 528 F.3d 614, 619 (9th Cir. 2008).

67. Logan v. U.S. Bank Nat'l Ass'n, No. CV 09-08950, 2010 WL 1444878, at *7 (C.D. Cal. Apr. 12, 2010), *aff'd* 722 F.3d 1163, 1170 (9th Cir. 2013).

Even if Congress were to create this right, parties would still have to cross the justiciability barrier by meeting the constitutional requirements for standing—they would have to show that they indeed suffered a particularized, redressable injury resulting from a violation of this protected right. Standing is a "threshold determination that a particular plaintiff is entitled to engage the judicial machinery to adjudicate the merits of a dispute involving an otherwise justiciable issue."[68] It consists of two essential components that a plaintiff must overcome to present a case. The first originates from Article III of the Constitution, requiring that the claim is a "case" or "controversy," meaning that the plaintiff must allege at a minimum (1) an injury-in-fact, (2) that is fairly traceable to the defendant's alleged wrongful conduct, and (3) that lends itself to some form of redress.[69] The injury must be actual, "concrete," and particularized in that the injury represents a "minority" interest, not one that appeals generally to the public.[70] However, the U.S. Supreme Court has granted standing when the plaintiff was "among the injured," even if many people were affected by the alleged harm.[71] While this ruling may seem at odds with the Article III requirement, standing was maintained because the injury was still sufficiently personal.

While determining the legal harm for the cause of action and the actual harm for standing purposes may seem like the same inquiry, they are in fact distinct. Standing is necessary, but not sufficient, for a cause of action;[72] there can only be standing if a plaintiff alleges a violation of a legally protected right.[73] Thus, merely having a legal

68. Kevin A. Coyle, Comment, *Standing of Third Parties to Challenge Administrative Agency Actions*, 76 CALIF. L. REV. 1061, 1067–68 (1988).

69. U.S. CONST. art. III, § 2, cl. 1.; Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); *see also* Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004); Hessick, *supra* note 61, at 276; Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885 (1981).

70. Ex Parte Lévitt, 302 U.S. 633 (1937); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220 (1974).

71. *Lujan*, 504 U.S. at 563; *see* Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 208–12 (1972) (recognizing that an individual has a personal interest in living in a racially integrated community, and the denial of that interest is a legally cognizable injury that can serve as the basis for standing).

72. Richard A. Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV. 1, 8–9 (2001).

73. Louis L. Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 256 ("[T]he quest for a legal right on which to ground standing is a tautology, since the grant of standing itself manifests a legal right."); *see* WILLIAM BLACKSTONE 4 COMMENTARIES *23 ("[W]here there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.").

right that has been violated does not necessarily imply that a party has suffered an actual injury for standing purposes, nor does suffering an actual injury indicate a legal harm has been violated or that there is a cause of action. Courts have reaffirmed that legal harms can be congressionally created through private rights of action, holding that Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law"[74] and "create a statutory right or entitlement the alleged deprivation of which can confer standing to use even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute."[75] Courts have curbed this power by ensuring that Congress cannot confer standing by statute; it can only recognize—or "elevate"—de facto legal harms that can form the basis for a subsequent standing determination.[76] Thus, parties alleging violation of statutory rights would still need to meet the Article III requirements by proving they suffered an actual injury beyond the violation of the statutory right.

However, in some instances where the alleged actual injury derived from a statutorily created private right of action, courts have essentially found that the violation of the right itself sufficed as the requisite injury-in-fact for standing. The U.S. Supreme Court has not outright stated that the violation of the statutory right constituted the actual injury; the Court found injury-in-fact based on the consequences of the right being violated. For example, in *FEC v. Akins*,[77] the Court granted standing to a group of voters who claimed they were "aggrieved" by a Federal Election Commission decision that determined a certain committee was not subject to political committee reporting requirements under the Federal Election Campaign Act.[78] The Court held that standing was appropriate because the Act created a right to information, a right otherwise unavailable without the statute, which was violated when the FEC allowed the committee to avoid reporting.[79] While it appears that the

74. *Lujan*, 504 U.S. at 578. An example of such an instance when Congress "elevated" a de facto injury occurred in *Trafficante v. Metro. Life Ins. Co.*, where the court granted standing to two white residents of an apartment complex to challenge the owner's discrimination against black residents because the Civil Rights Act of 1968 created a right to be free from the harmful consequences of discrimination. 409 U.S. 205, 210–11 (1972).

75. Warth v. Seldin, 422 U.S. 490, 514 (1975).

76. *Lujan*, 504 U.S. at 578 (stating that increasing the types of injuries that can confer standing does not mean that the Article III injury requirement can be bypassed); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3 (4th ed. 2003).

77. 524 U.S. 11 (1998).

78. *Id.* at 14–15.

79. *Id.*

Court was suggesting the violation of the right to information was the injury-in-fact, its analysis focused instead on the consequence of the violation—the deprivation of information—and found that to be the actual injury.[80]

Nonetheless, this subtle difference demonstrates that the line between a violation of the statutory right and the actual injury is not always clear. Indeed, as one legal scholar concludes, where private rights of action are involved, the injury-in-fact analysis is "superfluous;" the violation of the right itself is an injury sufficient for standing.[81] Several recent cases in the Ninth and Sixth Circuit Courts of Appeals uphold this view.[82] One of the Ninth Circuit cases, *Robins v. Spokeo, Inc.*, for which a certiorari petition is currently pending, confirmed that the "violation of a statutory right is usually a sufficient injury in fact to confer standing."[83] This conclusion almost suggests that Congress can confer standing when creating private rights of action; however, the Ninth Circuit did recognize limitations on Congress' power to do so. First, it acknowledged that the other Article III requirements, causation and redressability, still apply so that the traditional standing analysis has not been entirely displaced.[84] Second, it reiterated the analysis from a Sixth Circuit case, holding that a plaintiff must still be "among the injured" where

80. *Id.*

81. Hessick, *supra* note 61, at 303–04. Hessick notes, however, that in an effort not to abrogate the injury-in-fact requirement, the Supreme Court has always found some way to insert the traditional analysis, or find some alternative justification, in cases where it would otherwise seem that the violation of a statutory right sufficed for the actual injury. Similarly, others have argued that none of the standing requirements should apply where procedural rights are created via statute. Procedural rights are those that provide an entitlement to have a government agency perform certain process-based or procedural duties, such as preparing an environmental impact statement. *See* Lee & Ellis, *supra* note 61, at 174 & n.21, 175, 191. Justice Scalia stated this view in a footnote from the majority opinion of *Lujan v. Defenders of Wildlife*, essentially finding that Congress can alter some of the Article III standing requirements where procedural rights cases are involved. *See* Lee & Ellis, *supra* note 61, at 191.

82. *See* Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), *petition for cert. filed*, 82 U.S.L.W. 1171 (U.S. May 1, 2014) (No. 13-1339); Fulfillment Servs., Inc. v. United Parcel Serv., Inc., 528 F.3d 614 (9th Cir. 2008); Beaudry v. Telecheck Servs., Inc., 579 F.3d 702 (6th Cir. 2009); In re Carter, 553 F.3d 979 (6th Cir. 2009).

83. *See Spokeo*, 742 F.3d at 412.

84. *Id.* at 414 (asserting that while the two other elements of Article III standing still apply, the analysis "boil[s] down to 'essentially' the injury-in-fact prong").

his statutory rights were violated, and that the injury must be "individual, rather than collective, harm."[85]

The significance of this trend in cases involving private rights of action is that while standing remains a separate concept, courts nonetheless seem to grant standing more readily where a violation of private rights is involved. Naturally, the language of a cause of action is crucial in determining which parties may actually bring suit, and moreover, "the scope of the cause of action determines the scope of the implied statutory right"[86]—meaning the wording of the cause of action defines the nature and extent of the injury for which standing can be conferred. In spite of these variables, a private right of action carries several advantages; namely the recognition of new legal rights, of which the mere violation may allow entry to a court.

In challenges to agency action, there are three formulations or inquiries through which a court can determine whether the particularized injury requirement of Article III has been satisfied. The plaintiff must claim he personally suffered a "legal wrong" as a direct result of agency action, and that the law was specifically designed to prevent that harm;[87] or he falls within the definition of "adversely affected" or "aggrieved party" under the various governing statutes that created the administrative agencies;[88] or with respect to the APA cause of action, his interest falls within the "zone of interests" that the substantive statute seeks to protect.[89] The second means forms the basis for statutory review cases: if the statute created a duty that the agency must perform for the benefit of someone like the plaintiff, and the agency disregards this duty without a sufficient reason, then the

85. *Id.* at 413 (citing *Beaudry*, 579 F.3d at 707); *see also* Scalia, *supra* note 69, at 886, 895 (opining that courts "should not be inclined to assume congressional designation of a 'minority group' so broad that it embraces virtually the entire population").

86. *Spokeo*, 742 F.3d at 413.

87. Scalia, *supra* note 69, at 895.

88. *Id.* at 895; Lee A. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 428 (1974) (explaining that an action brought pursuant to a statute is considered "statutory review" and allows "any party in interest" or "a person aggrieved or adversely affected" to seek review).

89. Scalia, *supra* note 69, at 895; Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154 (1970) (stating that in addition to Article III requirements, the question of standing is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

plaintiff is entitled to relief.[90] These types of cases tend to be more effective when challenging agency action.[91]

The second component of standing consists of "prudential limitations" to standing that the court imposes on itself to foreclose consideration of a claim that otherwise satisfies the Article III standing requirements.[92] These include the general prohibition on the ability of a litigant to raise another person's legal rights (i.e., third-party standing), the rule "barring adjudication of generalized grievances more appropriately addressed in the representative branches" (i.e., separation of powers and political question doctrine), and "the requirement that a plaintiff's complaint falls within the zone of interests protected by the law invoked."[93] As discussed *infra* pages 656–59, a private right of action often preempts any prudential concerns a court may have.

B. Public Interest Representation in U.S. Administrative Agencies

The following cases show the development of the doctrine of standing in the context of federal regulatory agencies (i.e., those regulating commerce, energy, and communication). They expose not just the doctrinal requirements of standing, but also the courts' growing interest in public interest litigation that can ultimately be analogized for agencies such as USAID—cases where the public interest was successfully litigated reveal which components are necessary to create a form of recourse for victims of USAID funding.[94]

Giving citizens of foreign countries and their representatives access to the U.S. judicial system to challenge USAID action may seem outside the province of the courts. In actuality, however, the

90. *See* Albert, *supra* note 88, at 429–30 (describing three cases involving the Interstate Commerce Commission that demonstrate this approach; namely *Chicago Junction Case*, 264 U.S. 258, 267 (1924), wherein standing was granted because the legal injury was one specifically contemplated by statutory mandate).

91. *Cf.* Hessick, *supra* note 61, at 293 ("Although statutes placed duties on administrative agencies, those statutes did not create rights in individuals. Under the legal-interest standard, individuals factually harmed by agency action had no recourse in the courts, and the judiciary was largely unable to address unlawful agency conduct.").

92. Allen v. Wright, 468 U.S. 737, 751 (1984); *see also* Scalia, *supra* note 69, at 885. Prudential limitations are discussed *infra* pp. 656–59.

93. *Allen*, 468 U.S. at 751; Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 12 (2004).

94. In terms of the Article III standing requirements, the focus of this discussion will be on the "injury-in-fact" element—whether plaintiffs have a private legal right that if violated by an agency, would create such an injury. For more information on these other requirements, *see* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 13 (6th ed. 2002).

idea of extending participation rights in agency decisions and judicial review to a wider set of parties and interests dates back to the mid-twentieth century. During that time, courts sought to increase oversight and accountability of agencies, and thus began to take a more expansive view of both participation rights and standing.[95] Before then participation in agency adjudication was extremely restricted—generally only private parties whose liberty or property interests were affected by agency action were allowed to participate.[96] With respect to participation rights, the 1960s and 1970s witnessed a rapid growth of advocacy groups in areas of civil rights, health and safety, and the environment, among others.[97] The courts found that these groups should be entitled to participation rights in agency decision-making, thus contributing to the formation of public policy.[98] Giving a voice to these groups actually served the public interest more effectively than the original closed-door protocols of agency action.[99] The prior model of allowing only private parties whose liberty or property interests were affected by agency action to participate was too restrictive, and did not allow agencies to function in the public's best interest as they had intended.[100] Thus, the involvement of public parties has the practical effect of facilitating certain agency functions; it is the mechanism that creates a liaison between the agency and the public that the agency is designed to serve.

Early cases began developing this expansive doctrine not just by gradually including more types of parties and injuries, but also by

95. *See* PETER L. STRAUSS ET AL., GELHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 305 (11th ed. 2011) ("This restrictive view of the 'relevant' private voices was changed as part of a legal, social and political transformation during the 1960s and 1970s. . . . Government was called upon to take an affirmative role in ensuring social justice and enhancing physical and economic well-being.").

96. *See id.*

97. *See id.*

98. *See id.* at 306 (stating that there was a "new emphasis on empowering otherwise underrepresented voices to participate meaningfully in the crafting of public policy").

99. *See id.* (observing that as the government began to expand their regulatory agendas, "questions were being raised about the ability of the administrative process, as traditionally structured, to in fact discern the 'public interest'").

100. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1759–62 (1975) ("The expansion of the traditional model to afford participation rights in the process of agency decision and judicial review to a wide variety of affected interests must ultimately rest on the premise that such procedural changes will be an effective and workable means of assuring improved agency decisions.").

interpreting the statutory language at issue as encompassing both economic and non-economic injuries as a basis for complaint.[101] A seminal Second Circuit case marking the transition from economic injuries to non-economic injuries and the recognition of the public's rights, *Scenic Hudson Preservation Conference v. Federal Power Commission*,[102] held that nonprofit conservation associations had standing for a claim to prevent implementation of the Federal Power Commission's (FPC) storage hydroelectric project in the Hudson River area, in order to protect the aesthetic, conservational, and recreational purposes of this area. Petitioners raised their claim under Section 313(b) of the Federal Power Act, which is the judicial review portion of the substantive statute creating the FPC.[103]

In deciding that these non-economic interests were protected legal rights, the Court looked to both the language and purpose of this statute, asserting that it is the court's duty "to see to it that the [FPC]'s decisions receive that careful consideration which the statute contemplates."[104] Two key sections informed the Court's decision to recognize the plaintiffs' injuries. The first was the judicial review section under which the claim was brought, which states that "[a]ny party to a proceeding under this chapter *aggrieved* by an order issued by the [FPC] may obtain a review of such order in the United States Court of Appeals. . . ."[105] To determine the meaning of "aggrieved" within the context of the statute, the Court referenced Section 10(a) of the Federal Power Act,[106] which states the conditions that the FPC must follow when instigating a project—including, *inter alia*, that it be "best adapted . . . for other beneficial public uses . . . and recreational and other purposes."[107] Thus, part of the FPC's obligations is to consider "recreational and other purposes" of its projects, and if it neglects this duty, then a party may be "aggrieved" by this inaction, thereby entitling him to judicial review. In finding that the interplay of these two sections essentially created a statutory legal right protecting recreational rights, the Court kept in line with previous decisions involving similar claims under the Federal Power

101. *See* Note, *The Law of Administrative Standing and the Public Right of Intervention*, 1967 WASH. U. L. Q. 416, 423–24 (1967) (stating that generally, only economic interests and electrical interference cases involving the FCC were recognized to accord standing in challenging administrative agencies); Hessick, *supra* note 61, at 289.

102. 354 F.2d 608 (2d Cir. 1965).

103. 16 U.S.C. § 825/(b).

104. 354 F.2d at 612.

105. 16 U.S.C. § 825/(b) (emphasis added); 354 F.2d at 615.

106. 16 U.S.C. § 803(a)(1).

107. *Id.*

Act.[108] Moreover, the Court emphasized the importance of the express statutory language in that it "may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a 'case' or 'controversy.'"[109]

The Second Circuit also contemplated and ultimately rejected the FPC's concern that such an expansion of standing might overburden the agency and hinder its operative efficacy by encouraging "literally thousands" to intervene and seek review in future proceedings.[110] In addition to the fact that litigation is self-limiting through its prohibitive expenses and demands on time, the Federal Power Act nonetheless "creates no absolute right of intervention" because it allows the FPC to retain authority in limiting the parties eligible to intervene or seek review.[111] The expansion of standing can thus protect both the public interest while still preserving the administrative efficiency of a federal agency.

The United States District Court for the District of Columbia followed the public interest approach in *Scenic Hudson* and acknowledged the importance of "audience participation" in *Office of Communication of the United Church of Christ v. Federal*

108. *See, e.g.*, Namekagon Hydro Co. v. Fed. Power Comm'n, 216 F.2d 509, 511–12 (7th Cir. 1954) (recognizing that the public has rights in recreational, historic, and scenic resources under the Federal Power Act, and that recreation is a special right which is part of the "public interest" that must be considered); Washington Dep't of Game v. Fed. Power Comm'n, 207 F.2d 391, 395 n.11 (9th Cir. 1953) (holding a nonprofit organization of students had standing to challenge an FPC dam project that would destroy fish because the "Federal Power Act seeks to protect non-economic as well as economic interests").

109. 354 F.2d at 615–16; *see also Washington Dep't of Game*, 207 F.2d at 398 n.11 (holding that petitioners are denied standing unless they fit into the "aggrieved" category as stated in the Federal Power Act); Reade v. Ewing, 205 F.2d 630, 632 (2d Cir. 1953) (holding that the plaintiff had standing because he was "adversely affected" within the meaning of the statute so that he could challenge orders of the Federal Security Administrator). Moreover, the Court found that the FPC construed "aggrieved party" too narrowly; it observed that standing law is "complicated" and is "more or less determined by the specific circumstances of individual situations" (citing United States *ex rel.* Chapman v. Fed. Power Comm'n, 345 U.S. 153, 156 (1953)).

110. 354 F.2d at 617; *see also* Note, *supra* note 101, at 425–26.

111. 354 F.2d at 617; 16 U.S.C. § 825(g)(a) ("In any proceeding before it, the [FPC], in accordance with such rules and regulations as it may prescribe, *may admit* as a party any interested State, State commission . . . or any other person whose participation in the proceeding may be in the public interest." (emphasis added)); *see* Alston Coal Co. v. Fed. Power Comm'n, 137 F.2d 740, 742 (10th Cir. 1943). (reiterating that intervention under this section is "permissive and rests in the sound discretion of the Commission").

Communications Commission.[112] While this case adopted a similar line of reasoning to earlier non-economic injury cases, it espoused a new doctrine that the right of intervention, which was already vested in competitors and major consumers, was now also vested in "representative groups of the general public."[113] Thus, this case continued the trend of expanding standing to additional parties, deeming them as interested parties also considered within the meaning of a statute. The Appellants in this case—the United Church of Christ and individual residents of Mississippi—filed a petition with the Federal Communications Commission (FCC) to prevent the FCC from renewing the license of a local radio station, WLBT.[114] Appellants claimed that WLBT failed to serve the public interest because it deliberately provided an unbalanced presentation of key issues involving race and religion. They alleged that by increasing the number of commercials and entertainment programming to prevent an opportunity for the discussion of conflicting views on topics of social relevance, WLBT intentionally performed a public disservice.[115] Moreover, the imbalance in programming reflected a broader practice of discrimination and disrespect by minimizing exposure for African-Americans.[116]

Appellants asserted standing before the FCC[117] on three bases: that they were individuals and organizations (1) that were denied a reasonable opportunity to share their viewpoints in violation of an FCC policy called the Fairness Doctrine, (2) that represented almost one half of WLBT's potential audience, who were equally denied rights under the Fairness Doctrine and who were generally discriminated against in WLBT's programs, and (3) that represented the total audience, regardless of race or religion, who were denied fair and balanced programming as required by the Fairness Doctrine.[118] The FCC implemented the Fairness Doctrine in a 1949 report,[119] placing a premium on the "right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own

112. 359 F.2d 994 (D.C. Cir. 1966).

113. Note, *supra* note 101, at 424–25.

114. 359 F.2d at 998.

115. *Id.*

116. *Id.*

117. Note that "standing" in this context means "administrative standing," or standing to bring a claim before an administrative agency, not Article III standing before a court.

118. 359 F.2d at 999.

119. KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES 2 (2011).

particular views on any matter."[120] Essentially, the Fairness Doctrine embodied a public interest standard that licensees must meet.[121]

In contesting Appellants' standing, the FCC argued that Appellants must show "a potential, direct, and substantial injury or adverse effect" resulting from the administrative action under consideration in order to have standing.[122] Because the general listening public does not suffer a particular injury, they cannot have standing; furthermore, granting the public standing would impose heavy administrative burdens. The FCC maintained that the only two recognized grounds for standing were economic injury and electrical interference.[123] The Court, however, refuted this argument, addressing the grounds for standing first. It stated that precedent did not dictate that these are the only two justifications for standing; moreover, where there is a statutory goal of public-interest broadcasting, courts have granted standing when parties are not acting to protect their own private interests, but rather are acting to vindicate public interest.[124]

Specifically, in an earlier case, *NBC v. FCC*,[125] the D.C. Circuit Court held that nonprofit radio stations had standing with the FCC, even though—as nonprofit agencies—they could not show economic injury. The Court reasoned that the statutory goal of public interest broadcasting necessarily recognized nonprofit stations as interested parties, and that a requirement of economic injury would necessarily deny them that interest. Thus the court recognized an alternative injury (electrical interference) as a basis for standing in addition to economic injury. It was ultimately the public interest objective that governed standing, not any particular or enumerated injury.[126]

To further justify its reasoning, the D.C. Circuit appealed to three policy rationales. First, the entire purpose of standing is to provide a

120. 359 F.2d at 999 n.5.

121. Due to political opposition and constitutional issues, the Fairness Doctrine was eliminated in 1987 and officially removed in August 2011. *See* RUANE, *supra* note 119, at 2; Brooks Boliek, *FCC Finally Kills Off Fairness Doctrine*, POLITICO (Aug. 22, 2011 3:22 PM), http://www.politico.com/story/2011/08/fcc-finally-kills-off-fairness-doctrine-061851.

122. 359 F.2d at 1000.

123. *Id.*

124. *Id.* at 1001.

125. 132 F.2d 545 (D.C. Cir. 1942), *aff'd* 319 U.S. 239 (1943).

126. *See* Note, *supra* note 101, at 417 (emphasizing that in *FCC v. Sanders Bros. Radio Station*, the economic injury the radio station would likely suffer was "not itself a relevant issue before the Commission. It was relevant only in that it afforded Sanders standing for the purpose of *litigating the public interest*.").

functional means through which only those parties with a "genuine and legitimate interest" could participate in a proceeding.[127] In this case, the listening audience (and its representatives) had a clear stake in the actions of a broadcast licensee, which by its very nature is intended to serve and respond to the audience's needs. The Supreme Court had previously applied this broader standard of "interest" for standing in multiple other cases involving parties challenging administrative agency actions.[128]

Second, allowing the public to intervene in agency affairs has an additional benefit of facilitating agency functions. While the FCC is the ultimate authority in ensuring that broadcast licensees are serving public interests, it has an enormous number of duties, a wide jurisdiction, and insufficient staffing; it is unfeasible for the FCC to monitor all licensees within its purview.[129] Given these constraints, public participation can mitigate these deficiencies. Public involvement is a type of monitoring mechanism, for "public response is the most reliable test of ideas and performance in broadcasting as in most areas of life . . . The Commission view is that we have traditionally depended on this public reaction rather than on some form of governmental supervision or 'censorship' mechanisms."[130] Incorporating the public into the agency process thus helps the agency perform its statutory obligations. More importantly, the Court recognized that if the agency did not allow public participation, then it is likely the programming bias and discrimination would never have come to the FCC's attention.[131]

The federal courts also played a similar role in public interest litigation: "by providing a public right of intervention to complement the use of the standing cases to direct the discretion of the FCC [they] have further indicated their desire that the Commission utilize its broad discretion to serve the public interest."[132] Moreover, standing can be used as a "vehicle by which courts indicate to regulatory agencies what issues the courts consider relevant to a determination of

127. *United Church*, 359 F.2d at 1002; *see also* Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97, 103 (2d Cir. 1970) (applying the same standard).

128. *United Church*, 359 F.2d at 1001; *see also FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 at 475 (stating that an important element of public interest is to render "best practicable service to the community"); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4, 14 (1942) (same).

129. *United Church*, 359 F.2d at 1003–05.

130. *Id.* at 1003.

131. *Id.* at 1004.

132. Note, *supra* note 101, at 433.

public interest."[133] Granting standing is indicative of what is in the public interest—while the legislature grants administrative agencies enough power to develop their own standards, when the FCC "fail[s] to provide meaningful standards, federal courts turn to standing doctrine as a means of instructing the FCC as to what issues are relevant to its consideration."[134]

Third, administrative agencies should capitalize on the public's proactive interest in intervening in their decisions—by allowing the public to monitor and enforce the quality of broadcasting, agencies assume a more advantageous position: governmental power shifts into the "more detached role of arbiter rather than accuser."[135] Thus, in addition to honoring statutory obligations of serving the public interest, granting standing has more far-reaching effects in the performance of agency functions.

With respect to the FCC's second argument, that allowing public standing would create an unmanageable administrative burden, the Court echoed reasoning from *Scenic Hudson* stating that this potential problem can be corrected by "developing appropriate regulations by statutory rulemaking" and by implementing formal standards to discern which public parties and petitions state legitimate interests.[136] The power to make these rules and standards should be conferred on the FCC, so that it is in a position to control the extent of its burden.[137] The Court also noted that it is unlikely the less stringent standing requirements will overwhelm the FCC because the process of challenging agency action is inherently self-restricting. The costs of these proceedings are excessive enough to exclude many parties who would otherwise wish to participate.[138]

Public participation thus has an important role in administrative agency proceedings: it is sometimes necessary for the agency to achieve it statutory purpose of serving the public interest, and it also assists the agency in performing other crucial functions.

---

133. *Id.* at 430 (asserting that this use of standing doctrine was demonstrated in *United Church*).

134. *Id.* at 430–31.

135. *United Church*, 359 F.2d at 1003.

136. *Id.* at 1005. Even though there are solutions to the administrative burdens, nonetheless the need to vindicate public interest is paramount. As Edmond Cahn astutely asserted, "[s]ome consumers need bread; others need Shakespeare; others need their rightful place in the national society—what they all need is processors of law who will consider the people's needs more significant than administrative convenience." Edmond Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 13 (1963).

137. *United Church*, 359 F.2d at 1005.

138. *Id.* at 1006.

C. Cases Under the Administrative Procedure Act

Other cases falling under the category of public interest litigation include those claims raised under the Administrative Procedure Act (APA),[139] which provides a cause of action for certain challenges to agency decisions. This statute provides, in pertinent part: "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review thereof. . . ."[140] While it is widely accepted that the APA contains a strong presumption in favor of judicial review,[141] it is important to note that not all agency actions fall within the scope of the APA.[142] The APA's use of "legal wrong" implies a wrong that is already "cognizable in the courts," where standing could already exist according to "traditional principles."[143] Further, by incorporating the terms "adversely affected" or "aggrieved" "within the meaning of a relevant statute," the APA is referring to specific statutes that recognize the rights of such parties to sue; thus, a claim under the APA must either be pursuant to some statute that uses those or substantially similar words,[144] or it must be within the "zone of interests" sought to be protected by the statute at issue.[145]

Two major cases brought under the APA, *Sierra Club v. Morton*,[146] where the plaintiffs were not granted standing, and *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,[147] where the petitioners were accorded standing, demonstrate the limitations in the APA's applicability. The Supreme Court in *Sierra Club* clarified that a built-in caveat within the

139. Pub. L. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 501 et seq.).

140. *Id.* § 702 (emphasis added).

141. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967); Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986).

142. Scalia, *supra* note 69, at 887, 889; *see also* Note, *Statutory Preclusion of Judicial Review under the Administrative Procedure Act*, 1976 DUKE L.J. 431, 433–35 (1976) (discussing the limiting effects of the APA).

143. Scalia, *supra* note 69, at 887.

144. *Id.* at 887–89.

145. *See* Assoc. of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 395–96 (explaining that even where a statute makes no specific reference to "aggrieved" persons, one may still bring a claim under APA Section 702 as long as the interest sought to be protected is within the broader zone of interests of the statute).

146. 405 U.S. 727 (1972).

147. 412 U.S. 669 (1973).

language of the APA is that the plaintiff *himself* must be among the injured that have suffered from an agency action. The plaintiff Sierra Club was a membership corporation with a special interest in conservation and preservation of national parks, game refuges, and forests in the U.S.[148] It aimed to challenge the construction of a ski resort and recreation area in a national game refuge and forest, alleging that the project would negatively impact the area's natural beauty and ecology.[149]

However, Sierra Club did not claim that the proposed ski resort would affect the club or its members, or even that the club used the area at all; rather, it was raising the complaint as a "public action" asserting it had a "special interest" in the general preservation of the area, regardless of whether it was personally affected.[150] The Court held that despite broad readings of the APA's requirements in the past,[151] an immutable criterion to standing under the APA is that the party seeking review must be among the injured, even though the Court acknowledged that environmental interests are sufficient types of injuries.[152] Because Sierra Club did not assert personalized injury according to a "relevant" statute as the APA requires, it was beyond the scope of the APA. The Court further distinguished true "public action" cases as those in which Congress created an express statutory protection for the public's interest, where plaintiffs could then obtain judicial review under the APA as "responsible representatives" of the public—even though they did not suffer injuries themselves, they suffered *as* representatives, which satisfied the personalized injury requirement for standing.[153] Ultimately, for an APA action, a plaintiff

148. 405 U.S. at 730.

149. *Id.* at 735.

150. *Id.* at 736.

151. *See, e.g.*, Assoc. of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 154, 156 (1970) (holding that to fall within the scope of the APA, the alleged injury could fall "within the zone of interests to be protected or regulated" by the statutes the agencies allegedly violated); Barlow v. Collins, 397 U.S. 159, 164 (1970) (same); Scalia, *supra* note 69, at 889 (describing the holding in *Data Processing* as expanding the APA's requirement of being "within the meaning of the relevant statute" to "adversely affected or aggrieved in a respect which the statute sought to prevent").

152. *Sierra Club*, 405 U.S. at 734–35.

153. *See, e.g.*, Citizens Comm. for Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970). The Second Circuit held first that claims under the APA were appropriate where the specific statutes made reference to "aggrieved parties," but had either no judicial review process at all or no adequate process. *Id.* at 102. Further, because two statutes granted public interest rights in environmental resources, plaintiffs had standing as "aggrieved parties" within the meaning of the statute even though

must allege harm pursuant to some statute that would include him among "aggrieved" parties, or at least consider his claim as within the zone of interests of the statute.

In contrast, the Court in *SCRAP* granted various environmental groups standing under the APA for a claim alleging that the Interstate Commerce Commission (ICC) had unlawfully imposed a surcharge on freight rates without considering the environmental impact such a tariff would cause on the entire D.C. area.[154] While it may seem that this claim's standing is equally as tenuous as the one in *Sierra Club*, there are two distinguishing aspects between these cases. First, the Interstate Commerce Act contains language stating that upon receiving a complaint, or by its own volition, the ICC may conduct a hearing on the lawfulness of such rates.[155] Thus, for the purposes of APA standing, the plaintiffs used this provision as a basis for their environmental claims, asserting they were "aggrieved" by the surcharge.[156] Second, the *Sierra Club* plaintiffs could not claim that they would be directly harmed by the agency action; however, the groups in *SCRAP* alleged that the widespread environmental impact of the surcharge in the region would necessarily affect them.[157] Moreover, the allegedly adverse effects of federal action in *Sierra Club* would be limited in geographic scope to that particular refuge and to those who specifically used it. Here, on the other hand, there was potential for pervasive environmental injury by affecting the natural resources for the entire area.[158] Thus, in order for a plaintiff to successfully use the APA as a vehicle for his claim, he must still allege a personalized injury and be "aggrieved" (or within the zone of interests) per a specific statute.

---

they were not personally harmed. *Id.* at 105. *See also Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 614 (1965).

154. 412 U.S. 669, 670 (1973).

155. *Id.* at 673 n.2 (quoting Interstate Commerce Act, 49 U.S.C. § 15(7)). While the case does not discuss this explicitly, it is worth noting that the Act also has a clause stating that the ICC may conduct a hearing for "parties aggrieved." 49 U.S.C. §1(2); *see also* Henderson v. United States, 339 U.S. 816 (1950) (holding that an African-American passenger on a train who was denied seating met the conditions for "aggrieved party" under the Interstate Commerce Act and had standing to bring suit against the ICC).

156. In line with previous decisions, the Court acknowledged that non-economic injuries such as environmental or aesthetic concerns are also "deserving of the legal protection through the judicial process." 412 U.S. at 686.

157. *Id.* at 685.

158. *Id.* at 687.

D. Prudential Limitations and Third-Party Standing

The second aspect of standing that is considered in addition to the Article III requirements is that the plaintiff must overcome any judicially-imposed prudential factors, which are "presumptions derived from common-law tradition designed to determine whether a legal right exists."[159] The most commonly invoked prudential concern with administrative agencies is the general prohibition on third-party standing, where a third party asserts a claim on behalf of another injured party.[160] This limitation is derived from two policy rationales. First, adjudicating third-party rights may be unnecessary,[161] and it may even be the case that the injured parties do not want their rights asserted.[162] Second, "third parties themselves usually will be the best proponents of their own rights."[163] Because courts depend on "effective advocacy," they should "construe legal rights only when the most effective advocates of those rights are before them."[164] However, in some cases, third-party standing is allowed in light of "countervailing considerations."[165] There are two such overriding elements that the courts have considered when granting third-party standing. First, the interests of the third-party litigant and the injured party he

159. Scalia, *supra* note 69, at 886.

160. Allen v. Wright, 468 U.S. 737, 751 (1984) (holding that a litigant can generally not raise another person's legal rights); *see also* Warth v. Seldin, 422 U.S. 490, 499, 500 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. . . . Without such limitations . . . essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.").

161. Kerr v. Hickenlooper, 880 F. Supp. 2d 1112, 1140 (D. Colo. 2012) (stating the prudential standing principle that federal courts should "refrain from resolving abstract questions of wide public significance"); *see also* FCC v. Akins, 524 U.S. 11, 23 (1998) (holding that where a large number of people are suffering together, "the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance").

162. Singleton v. Wulff, 428 U.S. 106, 113 (1976); *see also* The Wilderness Soc'y v. Cane Cnty., Utah, 632 F.3d 1162 (10th Cir. 2011) (reiterating the *Singleton* holding).

163. *Singleton*, 428 U.S. at 114.

164. *Id.*

165. *The Wilderness Soc'y*, 632 F.3d at 1172; *Warth*, 422 U.S. at 500–01 (stating that countervailing considerations "may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties").

represents must be "inextricably bound," and the two must have a close relationship.[166] For example, in *Singleton v. Wulff*, the Supreme Court granted standing to two physicians who brought an action on behalf of their patients challenging the constitutionality of a Missouri statute that excluded certain abortions from Medicaid benefits.[167] While recognizing the general ban on third-party standing, the Court considered the relationship between the doctor and patient and found that "[i]f the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit."[168] Because the physicians would receive payment for the excluded abortions if the statute were overturned, they would "enjoy" the right the patients would receive if the statute were deemed unconstitutional. Essentially, this exception maintains third-party standing because both the third-party and the injured party have an interest in the suit, ensuring that there is a proper "case" or "controversy" per Article III.[169]

The second countervailing consideration is that even if there is a close relationship between the litigant and third party, "'some genuine obstacle' to the third party asserting his own rights must exist."[170] This exception was expounded in *Griswold v. Connecticut*, where the Supreme Court held that a doctor had standing to assert claims on behalf of his third-party patients in challenging the constitutionality of a statute that prohibited medical professionals from giving advice to married couples that would prevent conception.[171] In addition to finding that a close relationship existed between the doctor and patient, the Court also recognized that the rights of married couples at issue here were "likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them."[172] Thus, if injured parties face

166. *Singleton*, 428 U.S. at 114–15; Doe v. Bolton, 410 U.S. 179, 188–89 (1973).

167. *Singleton*, 428 U.S. at 114–15.

168. *Id.*

169. *Id.* at 113–14.

170. *The Wilderness Soc'y*, 632 F.3d at 1172 (citing *Singleton*, 428 U.S. at 116).

171. 381 U.S. 479, 481 (1965).

172. *Id.* at 481; *Singleton*, 428 U.S. at 114–15; *see also* Truax v. Raich, 239 U.S. 33, 36 (1915) (holding an employee had standing to assert rights of his employer); Barrows v. Jackson, 346 U.S. 249 (1953) (holding that a white defendant, as a party to a racially-restrictive covenant, had standing to raise rights of African-American purchasers claiming a

obstacles that could be overcome through third-party litigation, then the representative parties are accorded standing.

Eisenstadt v. Baird is a similar case illustrating the two countervailing considerations. The petitioner in that case was a distributor of contraceptives who challenged the constitutionality of a statute that denied unmarried persons access to contraceptives. He was granted standing on behalf of those whose rights were restrained under the statute, even though his rights were not personally restricted under it (i.e., he was able to obtain contraceptives himself), and he was not an authorized distributor under the statute. Even though he lacked the close personal relationship with the injured parties as in *Griswold*, the Supreme Court held that the relationship between the plaintiff and those whose rights he sought to assert was "not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so."[173] Further, the injured parties in this case, unmarried couples, were not subject to prosecution because they could not obtain contraceptives in the first place (unlike the married couples in *Griswold*); thus, they were effectively denied a forum to defend their rights, in which case third-party standing was more appropriate.[174] In certain cases, then, third-party standing can escape prudential limitations, and in fact even be encouraged.

Even though there are exceptional circumstances when third-party standing is allowed, where the legislature determines that a legal right exists through statutory language, the "prudential inquiry is displaced."[175] Moreover, as long as Congress has created a right of action, litigants can "seek relief on the basis of the legal rights and interest of others, and, indeed, may invoke the general public interest in support of their claim."[176] Thus, an explicit private right of action would preempt any prudential concerns a court may raise in denying standing. Standing could then be granted, provided that Article III requirements were also met.[177]

---

violation of equal protection, even though no African-Americans were party to the suit).

173. *Eisenstadt v. Baird*, 405 U.S. 438, 445–46 (1972); *see also* Robert Allen Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599, 631 (1962).

174. 405 U.S. at 445–46; *see also Barrows*, 346 U.S. at 249.

175. Scalia, *supra* note 69, at 886; Warth v. Seldin, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.").

176. *Warth*, 422 U.S. at 500.

177. CHEMERINSKY, *supra* note 76, at 71 ("[T]he Court may interpret statutes authorizing any citizen to sue to expand standing to the maximum

In addition, a private right of action can circumvent other prudential concerns, such as any political considerations that may arise. In *Allen v. Wright*, plaintiff-parents did not have standing to prevent the government from violating the law in granting tax exemptions to racially discriminatory schools.[178] One of the reasons the Court decided against standing was that the parents' injury was not "fairly traceable" to the allegedly wrongful conduct of the IRS.[179] This conclusion is supported by the idea that separation of powers "underlies standing doctrine."[180] If standing were granted in this case, then the federal courts would effectively be "monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary."[181] Therefore, if Congress wants to carve out a role for the judiciary in such actions, it could do so by creating an express right of action in the relevant statutes. Such a solution would provide injured parties or third-party litigants the necessary means of litigation without triggering prudential, separation of powers, and other political concerns.

IV. VICTIM PARTICIPATION IN THE INTERNATIONAL CRIMINAL COURT

The second major analog to a right of public participation comes from international law: the idea of public participation is not just rooted in public interest litigation in U.S. law; it also has a place in international law at the International Criminal Court (ICC). The Rome Statute creating the ICC is unique in that it contains a victim participation clause to allow victims of crimes tried in the ICC to be able to participate in the proceedings.[182] The clause creates a statutory right for victims to "be able to appear before the court and express their views in all stages of the proceedings."[183] It is important to note that while the extent of the ICC's victim participation in

allowed by Article III. In other words, Congress in expressly permitting such citizen suits is seen as abrogating prudential requirements and allowing standing so long as it is constitutionally permissible.").

178. *Allen v. Wright*, 468 U.S. 737 (1984).

179. *Id.* at 753.

180. *Id.* at 759–60.

181. *Id.* at 759–60 (citing Laird v. Tatum, 408 U.S. 1, 15 (1972)).

182. Elisabeth Baumgartner, *Aspects of Victim Participation in the Proceedings of the International Criminal Court*, 90 INT'L REV. OF THE RED CROSS 409, 409 (2008).

183. ICC, *Victims and Witnesses*, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/; Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

judicial proceedings is novel, the concept of victim participation in criminal proceedings is not—a few other countries, such as Spain, provide victims with the right to participate in criminal proceedings as a prosecutor with full prosecutorial rights.[184] Other jurisdictions accord similar rights where they allow victims to act as "subsidiary prosecutors" who can submit evidence; provide input on questions to be asked of the witnesses and defendant; and comment on statements and evidence submitted in the proceedings. In the U.S., Canada, Israel, New Zealand, Ireland, and parts of Australia, victims can partake in criminal proceedings by submitting victim impact statements or opinions.[185] Thus, the ICC is the first to promulgate such extensive victim participation in international judicial proceedings; however, the basis for such a system—the belief that victims have a fundamental right of involvement in criminal proceedings that directly affect them—has long been recognized in several countries.[186]

The international community recognized the important role that a victim could play in ICC proceedings, both within and outside the courtroom, as a "witness" or a "participant." Victims are allowed to, among other things: (1) attend and participate in hearings before the Court; (2) make statements during the opening and closing statements; (3) provide observations to judges while the ICC is deciding whether to proceed with an investigation; (4) present their views to the judges when the ICC is deciding what charges to bring against the accused; and (5) ask questions to a witness, expert, or accused appearing in the Court.[187]

In addition, they may also participate without appearing in court and may send information to the ICC Prosecutor to provide him with details or evidence of crimes the victim believes have been committed.[188] In this way, the ICC allows victims of crimes against

184. Carsten Stahn, et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT'L CRIM. JUST. 219, 223 (2005). There has actually been a growing trend in the international community starting in the 1960s to amend government policies to address victim compensation. *See* Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 INT'L REV. OF THE RED CROSS 441, 442 (2008).

185. Stahn, *supra* note 184, at 223.

186. *See* Jonathan Doak, *Victims' Rights in Criminal Trials: Prospects for Participation*, 32 J.L. & SOC'Y 294, 295–97 (describing schemes for victim participation in England and Ireland).

187. ICC, VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT: A GUIDE FOR THE PARTICIPATION OF VICTIMS IN THE PROCEEDINGS OF THE COURT 13, *available at* https://www.icc-cpi.int/NR/rdonlyres/C029F900-C529-46DB-9080-60D92B25F9D2/282477/160910VPRSBookletEnglish3.pdf.

188. *Id.* at 9.

humanity to seek some form of legal redress and reparations that would not be available in their home countries. Further, allowing victims to report information about crimes is a valuable asset when gathering evidence and can assist the ICC by providing information that the Prosecutor might otherwise not be able to obtain.

Victims are also always entitled to a legal representative who can present their interests to the ICC. The Victims and Witness Unit even assists in finding legal counsel and helps with arranging the representation.[189] Thus, the victim participation scheme is devised so that victims have both a forum and representation to make their claims.

The policy rationales for the ICC Statute's victim participation clause are manifold. First, the inclusion of such a clause has an important symbolic value—the extensive recognition that victims must have access to justice and a right to be made whole, especially because many do not have such avenues within their own countries.[190] A U.N. General Assembly Resolution, *The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, reiterates the importance of this access to justice, demonstrating that victims' rights speak to a value that must be upheld in the international community.[191] Second, the incorporation of victims' perspectives serves an equitable function as well; it helps to keep the proceedings balanced. Victims' interests often diverge from those of the Prosecutor or the states involved, and consideration for victims ensures that the process remains fair and objective.[192] Further, the recognition of victims' rights has two additional far-reaching effects. The first is a practical one: by including and factoring in first-hand accounts and knowledge of the commission of the relevant crimes, thus the victims provide evidentiary value. Victims are in the best position to describe actual events, and this knowledge may be crucial to the Prosecutor when deciding whether to initiate an investigation.

189. *Id.* at 10.

190. *See* WAR CRIMES RESEARCH OFFICE, AM. UNIV. WASHINGTON COLL. OF LAW, VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT 8–9 (2007) (explaining how traditional norms of retributive justice are shifting to incorporate elements of restorative justice); Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315 (Dominic McGoldrick et al. eds., 2004).

191. *See, e.g.*, G.A. Res. 60/147, ¶¶ 1(b), 11(a), 12–14, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); *see also* Stahn, *supra* note 184, at 226.

192. Stahn, *supra* note 184, at 227; *but see* Baumgartner, *supra* note 182, at 415–16 (questioning whether the potential advantages of trying to counter-balance the Prosecutor can actually be met).

The second is that victims' suffering is made known to the international community, which has a significant moral and symbolic effect by providing reconciliation to the aggrieved persons and nations.[193]

Even though the victim participation clause speaks to ideals and values the international community is trying to preserve, there are several logistical and practical problems with the implementation of this idea. A broad and sweeping interpretation of victims' rights could interfere with two bedrock principles of the ICC: the basic functioning of the Court as a judicial institution, and the necessity of impartiality.[194] The ICC (or any court, for that matter) is designed primarily as a judicial institution; it is not equipped to serve as a public forum or claims commission for thousands of victims, each with their own accounts and situations. By allowing the potential influx of victims' into ICC proceedings, the clause imposes heavy administrative burdens on the inner workings of the Court, and effectively delays or halts the Court's proceedings.[195] Moreover, court proceedings are predicated on fairness and expediency, which are basic elements of due process. Victim participation can cause delays, which may prevent the defendant from receiving a fair trial.[196] Even more problematic is that the inclusion of victims in the early stages of the proceeding contradicts the presumption of innocence—the Court may begin to consider (and lean toward) the victims' position without the input from the defense.[197] Additionally, there is a concern that

193. Stahn, *supra* note 184, at 227; *see also* U.N. OFFICE FOR DRUG CONTROL AND CRIME PREVENTION, HANDBOOK ON JUSTICE FOR VICTIMS ON THE USE AND APPLICATION OF THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER 39 (1999).

194. *See* Baumgartner, *supra* note 182, at 415.

195. Stahn, *supra* note 184, at 229; *see also* Christine H. Chung, *Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?*, 6 NW. J. INT'L HUMAN RIGHTS 459, 489 (2008).

196. *See* Chung, *supra* note 195, at 489–91 (arguing that undue delay was precisely the defense's concern in the trial of Thomas Lubanga Dyilo, a DRC militia leader).

197. *See* Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1399 (Antonio Cassese et al. eds., 2002) (warning that there is already a delicate balance between the roles of a prosecutor and defendant, and that the interjection of a third player as the victim may disrupt this balance, causing prejudice to the defendant); Stahn, *supra* note 184, at 227; Chung, *supra* note 195, at 490.

despite the Rome Statute's best intentions, there has been little "meaningful" victim participation in practice.[198]

Notwithstanding these concerns and criticisms, the victim participation clause remains part of the Rome Statute, signifying its importance to the international community. There may be logistical and administrative problems, but the basic notion of victim participation is still upheld.[199]

V. THE ALIEN TORT STATUTE

Perhaps the earliest attempt in U.S. history to recognize the rights of foreigners in U.S. courts is shown through the Alien Tort Clause, the predecessor to the Alien Tort Statute (ATS). The Alien Tort Clause was part of the Judiciary Act of 1789, and it allowed district courts to have jurisdiction over cases where an alien sued only for a violation of the law of nations or a U.S. treaty.[200] The Clause was included to ensure that tort claims based on violations of the law of nations were "cognizable" in federal courts.[201] The root of the ATS' power lies in the Diversity Clause of the U.S. Constitution, which provides the extension of judicial power to cases and controversies between a "State, or the Citizens thereof, and foreign States, Citizens or subjects."[202] Through this clause, the ATS allows a foreign plaintiff to sue American citizens.[203] The primary rationale at the time was national security—Alexander Hamilton expressed in the Federalist Papers that the denial of justice abroad was a real concern for the U.S. federal judiciary because violations of rights abroad could lead to retaliation against the U.S.[204] By providing for an impartial process through the federal judiciary, the ATS could serve as a judicial

198. *See* Chung, *supra* note 195, at 509–14 (citing examples of how only a handful of hundreds of victims' applications to participate were accepted, among other issues).

199. *See* Baumgartner, *supra* note 182, at 440 (arguing that the ICC needs reform and stricter, more defined guidelines, but victim compensation and participation is still a worthy cause); Rauschenbach & Scalia, *supra* note 184, at 459 (same); Chung, *supra* note 195, at 525–36 (proposing several solutions to improve the victim participation scheme, rather than dispense with it altogether).

200. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 587 (2002).

201. Anthony D'Amato, *The Alien Tort Statue and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 64–65 (1988).

202. U.S. CONST. art. III.

203. D'Amato, *supra* note 201, at 65.

204. THE FEDERALIST NO. 15 (Alexander Hamilton).

solution to a potential political problem.[205] While these same security concerns may not exist presently, the U.S. still has an interest in upholding foreigners' rights because the U.S. must preserve the perception that it will deal fairly and impartially with cases having global implications.[206] The origins of the ATS are significant because it shows that since its inception, the U.S. has had a policy of recognizing the rights of foreigners, and that such rights are fundamental in that they stem from the Constitution. The ATS evidences at least some U.S. commitment to rights of foreign citizens.

The existence of the ATS has mostly had symbolic value as very few cases were brought under this Act—in fact, the statute "lay dormant"[207] for nearly 200 years until the landmark *Filártiga v. Peña-Irala* case was heard in the Second Circuit in 1980.[208] That Court held for an expansive reading of the ATS, which provided federal jurisdiction over torts in violation of the law of nations, even if those torts were not recognized in 1789.[209] Specifically, the Court held that torture was a tort recognized under the Act because it violates the law of nations.[210] Because the statute's language only calls for a "violation" of the law of nations to be actionable, any current violation of international law would suffice to create a cause of action in federal court.[211] The Court further held that the ATS was intended to be dynamic so that it could provide a federal remedy for all torts in violation of the law of nations.[212]

However, this extensive interpretation of the ATS was controversial at the time, and has continued to cause conflict among scholars regarding the ATS' proper interpretation.[213] In a decision

205. D'Amato, *supra* note 201, at 65–66 (describing Hamilton's concern that state courts were biased against aliens, and only a federal court could impartially adjudicate cases involving foreigners).

206. *Id.* at 67.

207. Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 112 (2005).

208. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

209. *Id.* at 881.

210. *Id.* at 882.

211. William S. Dodge, *Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 18 HASTINGS INT'L & COMP. L. REV. 221, 222 (1995).

212. *Filártiga*, 630 F.2d at 887–88; *see also* Note, Filártiga v. Peña-Irala: *A New Forum for Violations of International Human Rights*, 30 AM. U. L. REV. 807, 821–22 (1981).

213. *See* Farooq Hassan, Note, *A Conflict of Philosophies: The Filártiga Jurisprudence*, 32 INT'L & COMP. L.Q. 250, 257 (1983) (cautioning, for example, that usage of the ATS may prompt more hostile nations to

following and applying *Filártiga*, Judge Robert Bork wrote in a concurring opinion that the *Filártiga* court construed the ATS too broadly, which ultimately led to a contrasting school of thought for "originalists." He believed that many modern human rights cases could not be brought in federal courts and were not justiciable because the law of nations does not provide an express cause of action, which is generally required in order for claims to be heard in U.S. courts.[214] Further, Judge Bork argued that only the original torts (offenses against ambassadors, safe passage, and piracy),[215] which reflected the law of nations in 1789, provided the requisite cause of action.[216] Thus, because modern torts in violation of the law of nations do not grant an express cause of action, federal courts cannot have jurisdiction under the ATS for these claims. The details and nuances of the differences in the positions between the originalists and those that side with the *Filártiga* majority are beyond the scope of this Note; however, what is significant is the interpretative spread between the two sides. The ATS has remained limited in application, and where it has been applied, courts and scholars are in wide disagreement.[217]

In addition to the disagreement over the latitude of the ATS, there are other restrictions with the ATS' application. Generally, the legal suits have fallen into one of two categories. First, there are claims by foreigners against foreigners, which has been a controversial use of the ATS. For these types of cases, courts suggest that only crimes that "bear resemblance to eighteenth century paradigms" like piracy should be allowed in federal courts.[218] The second type of case is when foreign citizens have sued foreign and American corporations

assert similar jurisdiction over international law claims against foreign visitors, leading to "chaotic or unjust results"); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filártiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 88–89 (1981) (devising a three-part test to determine which rights should be actionable under the ATS, thereby limiting the application of the ATS).

214. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798–823 (D.C. Cir. 1984) (Bork, J., concurring).

215. Kontorovich, *supra* note 207, at 113.

216. *Tel-Oren*, 726 F.2d at 798–823.

217. It is worth noting that Congress did pass the Torture Victim Protection Act in 1992, following Judge Bork's concurring opinion in *Tel-Oren*. Congress specifically included an express cause of action making torture an actionable crime in U.S. federal courts. Due to the egregious and universal nature of torture, Congress wanted to unambiguously carve out an actionable right for certain crimes. *See* Dodge, *supra* note 211, at 238.

218. *See* Kontorovich, *supra* note 207, at 113.

for violating international human rights and environmental standards in their business practices abroad, or for facilitating such violations of foreign governments.[219] Choosing defendants like corporations may have been a strategic choice, as plaintiffs would be more likely to recover damages while also avoiding sovereign immunity challenges, but *Filártiga*'s scope could have allowed for more cases of foreigners against corrupt governments.[220]

In the most recent application of the ATS, the U.S. Supreme Court held in *Sosa v. Alvarez-Machain*[221] that the ATS is a jurisdictional statute, where the only exceptions are the original Blackstone common law offenses.[222] Essentially, the ATS only provides jurisdiction over those historical paradigms envisioned by the First Congress. Unlike the *Filártiga* court, the Supreme Court held that it is not sufficient for the modern tort to be recognized by modern customary international law; "rather, it must violate customary international law in a way that *connects* it to the concerns manifest in the eighteenth century offense describe by Blackstone and contemplated by Congress."[223] The Court established a two-prong test to determine whether a modern international norm comes within the scope of the ATS: (1) the international norm must be near universal in its acceptance, and (2) the conduct it prohibits must be defined with considerable specificity.[224] Thus, despite the ATS' and Congress' best intentions, its application remains limited and controversial. Several types of cases, such as those by foreigners against U.S. agencies, or those involving modern torts, have not—and perhaps cannot—be raised under the ATS. For these foreign plaintiffs, there is still no method of recourse in U.S. federal courts.

The examination of the ATS is crucial in that it shows the statute is limited in scope, controversial, and ill-equipped to deal with the unique challenges that USAID funding raises to the issue of human rights violations. Thus, the confined nature of the ATS supports the fact that there is no current mechanism in place to deal with the types of complaints and grievances felt by victims of misappropriated USAID funds. Further, Judge Bork's assertion that an express cause of action is needed to bring modern violations of international law to

219. *Id.* at 117.

220. *Id.* ("Given the widespread use of torture, murder, and political repression by the governments of the world, the ATS cases represented but a small fraction of what could have been brought under *Filártiga*'s broad construction of the statute.").

221. 542 U.S. 692 (2004).

222. *Id.* at 694.

223. Kontorovich, *supra* note 207, at 121; 542 U.S. at 716.

224. Kontorovich, *supra* note 207, at 121; 542 U.S. at 725.

U.S. courts—confirmed through Congress' subsequent passage of the Torture Victim Protection Act[225]—shows that to avoid ambiguity, an express cause of action is required and needed to ensure certain violations are actionable in U.S. federal courts.

VI. The Federal Tort Claims Act

At first glance, the Federal Tort Claims Act (FTCA)[226] seems like another possible route for private parties to bring a suit against the U.S. in federal district court. The types of actions included under the FTCA are for damage to property, personal injury, or death caused by wrongful acts or omissions of government employees, or those acting on behalf of the U.S., while acting within the scope of their office or employment.[227] The FTCA provides a limited exception to sovereign immunity, which generally forecloses a suit from being brought against a country's government without its consent.[228] Given its narrow scope, the FTCA does not cover agency actions—it only addresses actions taken by specific individuals acting within the course of their employment with the government.[229] Thus, the FTCA is also unavailable as a method of recourse for foreign victims.

VII. Application of Public and Victim Participation Doctrine to USAID

A. Absence of Redress for Victims of Misappropriated USAID Funding

By examining the various types of statutes and cases that have somehow involved public victim participation in court or government proceedings, the primary concern is clear: *there are no current means of legal recourse or redress for victims of misappropriated USAID funds.* However, while this established body of law highlights the problems and inadequacies of the U.S. system in dealing with these types of victims, they also illuminate the path to a solution. First, they show that the notion of public participation is deeply rooted in U.S. history, and is also practiced internationally. Second, while they all support the idea of victim participation, none of the current cases or statutes would support a claim made by a victim of misused USAID funds. USAID has no internal mechanism for grievances or

225. *See supra* note 217 and accompanying text.

226. 28 U.S.C. § 1346 (2011).

227. Kevin E. Lunday, *Federal Tort Claims Act*, 64 GEO. WASH. L. REV. 1254, 1255 (1995); 28 U.S.C. § 1346(b).

228. BLACK'S LAW DICTIONARY 365 (4th ed. 2011); *see also* Thomas A. Varlan, *Defining the Government's Duty under the Federal Tort Claims Act*, 33 VAND. L. REV. 795, 800 (1980).

229. Varlan, *supra* note 228, at 796.

judicial review, and the types of human rights violations do not fit into the usual paradigm of tort cases that have been filed in U.S. federal courts per the ATS or FTCA.[230] For example, while U.S. aid money has helped to fund these violations, the crimes themselves were committed by governments or individuals within the foreign countries;[231] therefore, a traditional criminal liability or negligence analysis would not necessarily implicate USAID or deter such violations in the future. Further, as USAID is a large agency with multiple actors, donors, and political considerations, it would be difficult to prove the necessary elements of a typical tort violation, including the responsible party and causation. Thus, an alternative solution is needed to fill this void.

The APA has so far not been used as a cause of action to challenge USAID agency action. As previously discussed, the APA provides a cause of action where an agency's governing statute either uses terms such as "aggrieved" or "adversely affected," or at least seeks to protect certain rights.[232] In the latter case, the statute has to aim to prevent a particular harm—if a claim arises that that harm has occurred, the APA may provide a cause of action in that case because it falls with the "zone of interests" of the statute.[233] The FAA, however, does not contain such language—there is no explicit reference to "aggrieved" or anything similar,[234] and it does not actively seek to prevent any specific harm or injury.[235] Some may argue that using the APA is a better method of challenging USAID agency action, as it is a pre-existing mechanism and would require

230. *See supra* notes 200–29 and accompanying text.

231. ETHIOPIA REPORT, *supra* note 3, at 40–41; VIETNAM REPORT, *supra* note 4, at 26, 30–40.

232. *See supra* notes 139–58 and accompanying text.

233. *See id.*

234. If a term like "adverse" is used, it is in reference to specific projects, not people affected by them. *See, e.g.*, Foreign Assistance Act of 1961, Pub. L. No. 87-195, § 232(b), 75 Stat. 424 (codified at 22 U.S.C. § 2151 (1961)) (referring to adverse environmental impacts); *id.* § 237 (regarding insurance and financing programs, and possible adverse effects on investment).

235. The FAA does have a section addressing human rights, stating that no funds should be allocated to governments with a history of documented human rights violations. In determining whether this standard is being met, the Senate Committee on Foreign Relations may require proof from the USAID Administrator and terminate assistance if necessary. *See id.* § 116. However, while this safeguard is in place, it does not appear that the FAA actively seeks to protect the rights of victims; it is more that USAID does not wish to aid in the violation of their rights. Thus, the appropriate statutory language does not exist for a claim to be brought via the APA.

fewer changes to the FAA. Several other agencies' statutes already contain references to an "aggrieved party" or something similar,[236] and thus an amendment to the FAA along these lines could model its language based on these. Nonetheless, this Note argues for a more extensive amendment to the FAA through an express private right of action, as this solution avoids ambiguity, addresses prudential concerns, and has a better chance of actually vindicating the interest of victims. The large corpus of public rights cases in U.S. federal courts, as well as the existence of other types of victim participation statutes, can also serve as a guide for statutory amendments to the FAA.

B. Regulatory Agencies as a Model for USAID

While the case law focused on regulatory agencies, not agencies like USAID, they indicated a progression of liberalized standing requirements, ultimately allowing claims against federal agencies from more parties and for new types of injuries. Congress should now reform non-regulatory agencies like USAID in a similar manner as a continuation of this expansive trend. The impetus for this growth was to help federal agencies realize their statutory purpose to serve the public; thus, by incorporating more claims, the courts aid in vindicating that public interest. Because of USAID's unique function, it aims to serve a "public" that resides beyond U.S. borders.[237] Indeed, USAID's stated goal, as reiterated in many provisions of the FAA, is to assist developing countries achieve sustainable development, through, *inter alia*, monitoring, reporting, and commitments against corruption and human rights violations.[238] Thus the notion of "public interest" should expand to those adversely affected by USAID actions, even though they do not live in the U.S.; with that expansion, the federal courts should assume a role to vindicate their interests as well.[239]

---

236. *Compare* Federal Power Act, 16 U.S.C. § 825/(b), *and* Federal Communications Act, 47 U.S.C. § 402(b)(6), *with* Federal Aviation Act, 49 U.S.C. § 1486(a) (allowing "any person disclosing a substantial interest in such order" to obtain review), Interstate Commerce Act, 49 U.S.C. §1(2) (providing for the Interstate Commerce Commission to investigate claims from "parties aggrieved"), National Labor Relations Act, 15 U.S.C. § 77i(a) (preventing labor disputes that would "adversely affect" the rights of the public; Investment Company Act, 15 U.S.C. § 80(a)-42(a) (claiming to eliminate conditions that "adversely affect" the national public interest"); *see also* Note, *supra* note 101, at 430; Albert, *supra* note 88, at 429 n.12.

237. *See* Foreign Assistance Act § 101.

238. *See supra* notes 54–59 and accompanying text.

239. *See* Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1111 (D.C. Cir. 1971) ("We must assess claims that one of the agencies charged with its administration has failed to

The cases discussed in Part III serve several functions and are instructional for amending the FAA and USAID. The case law reveals that an express right of action accomplishes four things: it (1) overrides prudential concerns of third-party standing,[240] (2) avoids any political questions that may otherwise arise,[241] (3) silences issues of governmental immunity, and (4) eases the granting of standing.[242] In order to provide victims of USAID funding with a legal remedy, the FAA should thus contain an express private right of action allowing these victims to challenge USAID agency action. As previously mentioned, this right must specify the persons able to bring suit; those who are potentially liable; forum for a suit; and possible remedies available.[243]

The persons able to bring suit should be those who have been directly harmed by misappropriated USAID funds, as well as third-party groups who have an interest in the litigation and are in a better position to bring suit on behalf of actual victims. The primary concern is that while a cause of action nominally creates an avenue for victims, it is unlikely that victims of USAID funding in inaccessible rural areas of a developing country will have access to the U.S. judicial system. Therefore, the FAA amendment should allow nongovernmental organizations (NGOs) or other groups or corporations to raise a claim on behalf of the victims. *United Church* provides the most useful precedent and guidance in this matter.[244] In that case, the plaintiffs were groups deemed as representatives of the public interest.[245] Similarly, human rights groups or other types of NGOs, through their very mission and function, serve to represent the rights and interests of those citizens in countries where human rights violations are occurring.[246] The *United Church* court also applied a

---

live up to the congressional mandate. Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.").

240. *See supra* notes 159–77 and accompanying text.

241. *See supra* notes 178–81 and accompanying text.

242. *See supra* notes 77–86 and accompanying text.

243. Logan v. U.S. Bank Nat'l Ass'n, No. CV 09-08950, 2010 WL 1444878, at *7 (C.D. Cal. Apr. 12, 2010), *aff'd* 722 F.3d 1163, 1170 (9th Cir. 2013).

244. *See* Note, *supra* note 101, at 425, 433 (maintaining that the public right of intervention adopted in *United Church* will likely be extended to other agencies).

245. Office of Commc'n of United Church of Christ v. FCC, 359 F.2d 994, 1001 (D.C. Cir. 1966).

246. *See, e.g.*, *Mission Statement*, HUMAN RIGHTS WATCH, http://www.hrw.org/about (asserting that they are "dedicated to protecting human rights of people around the world" and committed to

broader view of "genuine and legitimate interest" for the purposes of standing, which should also cover such NGOs—as part of their mission to raise awareness and prevent human rights abuses, they have a genuine and legitimate interest in litigating such claims.

Further, *United Church* recognized that such groups representing the public interest helped the FCC perform its statutory obligations by informing them of the public's concerns. Human rights NGOs can play a similar role—by raising claims of abuses, they not only vindicate the victims' interests, but they simultaneously inform USAID of the problems occurring in the various countries. With USAID's structural problems and reduced staffing, it is not aware of the conditions in the countries once the funding is disbursed. NGOs can serve as a fact-finder and can apprise USAID of these problems, helping both victims and USAID in fulfilling its purpose. HRW, which conducted the two inquiries in Ethiopia and Vietnam, acknowledged the relative inaccessibility of the areas where the violations were occurring. In fact, it was difficult even for them to talk to people affected by the funding or find those who were willing to share their concerns.[247] If an independent organization has difficulty gaining access, then it is unreasonable to expect a large agency like USAID to access or be aware of the conditions in each of the targeted developing areas. Regardless, an NGO like HRW has a better chance of discovering the true conditions in developing nations and of serving as a fact-finding organization that can report on the implementation and effects of USAID funds on the actual citizens of aid countries.[248] In these cases, NGOs would be akin to Commissions of Inquiry that have been used in the U.N. as fact-finding tools.[249] Using NGOs and their

investigating and exposing human rights violations and holding abusers accountable).

247. VIETNAM REPORT, *supra* note 4, at 26, 30–40; ETHIOPIA REPORT, *supra* note 3, at 44–45.

248. With regard to prudential standing concerns, it is possible that NGOs would be granted standing on behalf of such victims even without a private right of action. In line with *Griswold* and *Eisenstadt*, this situation contains countervailing considerations. NGOs like HRW have a relationship with victims tantamount to doctors and patients because victims share confidential information with them. *See* ETHIOPIA REPORT, *supra* note 3, at 6, 43. Further, given the obstacles these victims would face accessing U.S. courts, third-party standing seems both appropriate and preferred. In any case, a private right of action is still the most direct way to ensure access and standing.

249. *See, e.g.*, Philip Alston, *Commissions of Inquiry into Armed Conflict, Breaches of the Laws of War, and Human Rights Abuses: Process, Standards, and Lessons Learned*, 105 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 81, 82 (2011).

accounts from victims is also supported by the policy rationales behind the victim participation clause in the ICC.[250]

Because of this difficulty in accessibility, it is unlikely that USAID would be overburdened by complaints—HRW itself had trouble gaining access and information about victims,[251] so it is even more unlikely that victims themselves will be inundating courts with claims. In any case, USAID could follow the FCC's approach, and implement internal policy guidelines through which it can impose conditions and retain some level of control over which parties can raise claims.[252]

Potentially liable parties should include those who could most effectively implement change, such as the USAID Administrator and the regional mission director overseeing a particular country or area (though they would not personally have to pay damages). The forum would be federal district court; as the FAA is a federal statute, a private right of action therein would give these courts original jurisdiction. Lastly, the remedies should include the possibility of monetary compensation provided by USAID for damages incurred to victims, as well as an order for increased monitoring by mission directors. While wholesale rescission of funding may be ultimately desirable, the political implications of such an action could jeopardize the U.S.' diplomatic, military, or economic efforts in the country at issue. In any case, it is likely beyond the unilateral power of Congress or the courts to interfere with foreign policy on that level without participation of the President and the Executive Office.[253]

C. Future Concerns and Long-Term Changes

Even if the FAA is amended to create a right of action for victims, it will face several challenges in implementation—in addition to actually getting NGOs or victims access to federal courts, there are a number of other jurisdictional, venue, remedy and damages issues that require further exploration.

As discussed previously, creating a cause of action is a short-term solution to bring current human rights violations to light, and to provide some recourse for foreign victims who are adversely affected by USAID funds. However, the true reform must occur within USAID's organization and structure itself. While a statutory right of action deals with the problem, structural reform will prevent the

250. *See supra* notes 190–93 and accompanying text.

251. ETHIOPIA REPORT, *supra* note 3, at 6, 43.

252. *See supra* notes 138–38 and accompanying text.

253. The U.S. President has authority in several matters of foreign affairs. *See* U.S. CONST. art. II, § 2 (providing, among other things, that the President can enter into treaties with the advice and consent of the Senate and appoint ambassadors).

problem from occurring in the first place. Once USAID autonomy is restored, its agenda and budget will be controlled primarily by those devoted to providing aid to developing nations. This in turn will require that development be mainstreamed along with security and diplomacy as part of U.S. foreign policy. If development is recognized as a key component to U.S. foreign policy, USAID will be able to achieve more of its goals and provide the necessary staffing and attention to its projects abroad.

VIII. CONCLUSION

The U.S. has long played a role in the growth and development of developing nations through millions of dollars of funding for various projects. While the U.S. is still a leader in the development cause, a number of internal structural problems has led to mismanagement of the USAID funds in their target countries. These misappropriated funds have been used by foreign governments to withhold basic freedoms from their citizens, as well as violate their fundamental human rights. The ultimate solution lies in preventative measures, where USAID works to fix its internal problems through a complete overhaul of its mandate in the FAA—a solution that will likely take several years, due especially to the current state of the U.S. economy and its budget restraints.

In order to immediately address the needs of victims, a limited amendment to the FAA is a more adequate solution. Such an amendment would create an express cause of action where victims could challenge USAID agency actions—namely, the funding provided for certain projects being used to commit human rights violations. This type of amendment would provide some remedies for the victims where they are unable to receive any in their home countries. Further, it would serve as a mechanism to report the actual conditions in these developing countries. Part of the problem is that USAID (with its reduced field presence) remains unaware of conditions after funding is distributed. With the help of NGOs and statutory recourse, victims would be able to achieve some relief, as well as serve as fact-finders to ultimately help USAID address the many human rights violations that are taking place.