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Carol M. Beach7207 Denton Road
Bethesda, MD 20814

Phone: 301-951-9643

301-951-9648

Cell: 202-365-0202

Fax: 301-951-0340

facsimile transmittal

MARMA FOLEY
To: ~~KATHERINE SCARBY~~ Fax: *202-337-7625*

From: *CAROL* Date: *04/07/98 5/11/98*

Re: *HAC Column* Pages: *Cover + 5*

CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

*Martha - If you haven't seen this yet - I'm
Blinking Thayer you still - but in it -
esp. p. 4 - Sk' for return today -
John -
Carol*

Draft #1

**FIRST LADY HILLARY RODHAM CLINTON
"TALKING IT OVER"/CREATORS SYNDICATE
COLUMN FOR PUBLICATION MAY 12, 1998**

This week, I am in Geneva to celebrate the 50th birthday of the World Health Organization. Founded in 1948, the mandate of this United Nations agency is simple but ambitious: "The attainment by all peoples of the highest possible level of health."

Despite successes, though, such as the eradication of smallpox in 1980, WHO faces new threats to global health each day.

Infectious disease remains the world's leading cause of death. In the last 20 years, we have witnessed the birth of at least 30 new infectious diseases such as Ebola hemorrhagic fever, while, at the same time, older scourges such as cholera, diphtheria, ^{measles} and tuberculosis continue to kill.

Tuberculosis is of particular concern. Declared a global emergency by WHO in 1993, TB is the leading infectious disease killer of adults in the world. Although we have a treatment that works, 1/3 of the world's population is infected and more people will die from TB this year – 2 million – than in any other year in history.

WHO's ambitious TB treatment strategy reminds us of the importance of such an agency. With experts on the ground in every country and a

multilateral mandate, the organization is in a unique position to provide information and technical support across borders, set standards, make epidemiological forecasts and offer treatment guidelines. In less developed countries, it often functions as the equivalent of our FDA, CDC, FEMA, and EPA.

Thanks in large part to WHO's global immunization programs, the world's infant mortality rate has fallen by more than 37 percent. Today, 80 percent of the world's children are protected against six major childhood diseases – diphtheria, whooping cough, tetanus, measles, tuberculosis, and polio, which is on target for elimination by the year 2000.

But, new threats such as HIV/AIDS persist and old ones such as malaria continue to ravage parts of whole nations. For example, malaria causes nearly three million deaths a year and increasing resistance to anti-malarial drugs and insecticides threatens even greater increases.

WHO is working to promote child survival, including the control of HIV/AIDS, malaria, diarrhea, pneumonia and malnutrition among children. In addition, the agency is working to improve maternal and women's health. Every day, at least 1,600 women die of complications from pregnancy and childbirth, and WHO has resolved to cut this number in half by the year 2000.

As the "World Health Report 1998" released just this week notes:

"Women's health is inextricably linked to their status in society. Today the status and well-being of countless millions of women worldwide remain tragically low."

WHO is also tackling problems ranging from tobacco use, cardiovascular disease, the health of street children, and sexually-transmitted disease to encouraging breastfeeding, mental health, occupational health, and the integration of health and human development into public policy.

Just over 50 years ago, the United States spearheaded the creation of the United Nations and its system of agencies, including the World Health Organization. The benefits are tangible – from the treatment of disease to efforts to protect the world from nuclear calamity, humanitarian programs such as caring for refugees, international standards that make the skies safer for travelers and food safer for consumers. And, of course, United Nations forces keep the peace in areas vital to our national interests, from the Balkans to the Persian Gulf, Haiti and the Middle East.

I know that the majority of Americans support the work of the United Nations, particularly when its diplomatic efforts work successfully to avert conflict that may involve U.S. troops. And, I know that the majority of Americans think we should pay our bills.

As I review the benefits Americans enjoy from UN action – such as public health improvements – I am distressed and embarrassed that political maneuvering in Congress has prevented us from paying our past-due bills of more than \$1 billion to the UN and its agencies. Our arrears to the World Health Organization alone are \$39 million. I hope that every American will support this administration as it continues to urge Congress to appropriate these funds – not only to maintain American leadership, but also to ~~strengthen the work of these important organizations.~~

We are living at a time of remarkable global integration. Every day, powerful new forces bring us closer together, chipping away the walls that ~~separate us as people and as nations. As the barriers fall, we are faced with~~ new opportunities, but also with new challenges, including threats ~~to our~~ health, our environment and our national security.

Disease knows no borders. Nor does environmental degradation or terrorism. The real cost of not paying our UN debt is the undermining of American leadership around the world at a time when we should be working in partnership with the United Nations and other countries to meet the global challenges we face as we enter the next ~~century.~~

(828 words)

- 5 -

[This week at the meeting of the World Health Assembly in Geneva, the First Lady will be awarded a World Health Organization Foundation Prize for her outstanding contribution to health development.]

THE WHITE HOUSE

WASHINGTON

February 25, 1997

RECOMMENDED TELEPHONE CALLS

TO: Sen. John Warner (R-VA)
Sen. Wendell Ford (D-KY)

DATE: As soon as possible.
The vote is Tuesday, Feb. 25 at 2:15 pm.

RECOMMENDED BY: John Hilley *John Hilley*
Martha Foley *MCF*

PURPOSE: To seek their support for the bill approving your finding that the delay in funding the international family planning program is harmful to the program.

BACKGROUND: On January 31, you made a finding that the delay in availability of the already-appropriated international family planning funds until July 1, 1997, is harming the program. If Congress agrees with your finding by passage of a joint resolution by February 28th, the funds will be made available on March 1, 1997. As you know, the House approved your finding on February 13 by a vote of 220-209 (with 44 Republicans voting "yes").

Both these Senators voted against the Administration's position on restrictions on the program on several occasions in the last Congress.

While it might therefore seem unlikely that they would vote for the resolution, it is not unreasonable to ask. Several of the Senators who are voting for the resolution have mixed records on abortion. Yesterday, Sen. Gordon Smith (R-OR), who describes himself as pro-

life, announced he would vote for it. In the House, a number of pro-life Members voted for the resolution, most notably Rep. Tony Hall (D-OH). (A copy of his floor statement is attached.) Groups such as CARE, Save the Children and World Vision support release of the funds, and Georgetown University has noted that its USAID-funded natural family planning program would be forced to terminate services to more than 1 million families around the world if the funding date is not advanced. As a result, it is appropriate to ask these Senators to consider voting for the resolution.

TOPICS OF

DISCUSSION:

Talking points attached.

CONTACT PERSON

AND NUMBER:

Sen. John Warner	224-9222
Sen. Wendell Ford	224-4343

DATE OF SUBMISSION: February 25, 1997

ACTION:

So we reconstructed the language at the insistence of Mr. Panetta, even though Mr. Panetta agreed that maybe I was right. But in order to allow the government to continue to operate in order to get the Government running and pass the bill that we had to pass, we agreed to this, knowing it would come back.

So as a result of that, I intend to vote "no" on the request of the President, and I intend to vote "yes" on the Chris Smith amendment.

Ms. PELOSI. Mr. Chairman, I yield 1 minute to the gentleman from Ohio [Mr. SAWYER].

(Mr. SAWYER asked and was given permission to revise and extend his remarks.)

Mr. SAWYER. Mr. Chairman, I rise in strong support of the measure before us.

Rapid population growth and movement are the primary causes of worldwide environmental degradation, dwindling natural resources, urban poverty, malnutrition, and social unrest that in too many cases leads directly to conflict approaching the level of war. At the same time, more than 90 percent of the annual population increase of 100 million people is in the developing world.

This debate is really about giving the people of the world the information and resources that Americans take for granted. As the Houston Chronicle has pointed out, most Americans make responsible and informed choices about when and whether to have children. These are choices that many parents in the developing world do not realize they have.

The number of people added to the world's population each year is increasing, especially in the world's poorest countries that are least equipped to deal with this growth. It is in our national interest and in the global interest to support voluntary international family planning. Efforts to slow population growth, elevate the status of women, reduce poverty, and promote sustainable development will lead to a more stable world.

Ms. PELOSI. Mr. Chairman I yield myself 1½ minutes.

Mr. Chairman, I would just like to make some points of clarification because I think there is some confusion among Members about certain points.

Let me make it clear the President's resolution does not subsidize, promote, allow, perform, or in any way condone abortion.

Second of all, there is no more money in the Smith resolution. The money is the same in the Smith resolution as it is in the President's proposal. The money is the same.

Third of all, I once again want to call to our colleagues' attention that all I have said first about this resolution not promoting or having anything to do with abortion is a matter of U.S. law according to the Helms amendment.

I have the provisions for our colleagues to see, blown up on a bulletin

board or in handouts, on the very statutes; and also I have for them the safeguards to prove and demonstrate how this law is implemented.

In closing I want to say one thing, and I say this with the greatest respect for the gentleman from Alabama [Mr. CALLAHAN], the chair of our subcommittee on which I am ranking. The President has acted in good faith on this issue. He entered into an agreement, he entered into an agreement which called for less money, delayed the funding, in order to be able to have this House vote at this time up or down, to accept his certification that this delay in funding, et cetera, was a hindrance to promoting our international family planning goals.

In further proof of the President's good faith, I call to our attention a statement by the President in May 1996 where he accepted the Congress' request to strike from legislation, provisions that would have allowed the President to go forth with this spending with his own certification and without a vote of Congress. Congress said, we put that in by mistake; the President said, okay, I will take it out and then we will proceed.

So I urge our colleagues to look carefully at these provisions which safeguard any ideals that they have about abortion, but also uphold our principle of promoting family planning internationally.

Mr. Chairman, I yield the remainder of our time to the gentleman from Ohio [Mr. HALL], whose credentials are unsurpassed in the area of child survival. He truly lives and acts by the words of the gospel of Matthew, rendering to the least of our brethren as if he were rendering to God.

(Mr. HALL of Ohio asked and was given permission to revise and extend his remarks.)

Mr. HALL of Ohio. Mr. Chairman, I want to thank the gentlewoman from California [Ms. PELOSI] for yielding this time to me and for her very kind remarks.

There is probably nobody more pro-life in the Democratic Party than I am. If my voting record is not 100 percent, then it has got to be pretty close. I was the author of the conscience clause on abortion which was included in the Democratic platform, and I spoke of that issue at the convention.

I feel myself in a position today that is unusual for me, for I find myself opposing the views of the pro-life position. I support Mexico City policy, but I believe that the pro-life forces have gone too far in their effort to make the release of funds a pro-life issue, and this vote would hurt millions of women and children. Because of massive cuts to international family planning and very restrictive language that has held up other funds related to it, the pro-life forces have caused great damage, in my opinion, to poor communities all over the world.

I am for family planning, which is prenatal care and education to women,

and breast-feeding and proper nutrition, and spacing of children and other child survival activities. I am against abortion. And there is a difference between family planning and abortion, but sometimes around here we do not separate the two of them from the discussion.

In quoting a letter from CARE and Save the Children, they have again stated current law, and I quote: "In keeping with the Helms amendment, no U.S. funds are used to pay for abortion, nor do our organizations use private money to pay for abortions." That is the law and has been for some time.

World Vision, an organization that I have great respect for, is for releasing these funds. World Vision is a Christian organization, and they are pro-life.

□ 1230

I have traveled with them in many parts of the world to visit the poor, I have seen their work, and I have always been very inspired. When they speak on this issue, I listen.

Along with CARE, Save the Children, World Vision, they wrote many of us, and I am quoting from a letter that they wrote to me:

Based upon our knowledge and operational experience, we can assure you that this is not an ideological or partisan issue, but a serious health concern for women, children and families. In addition to more maternal and child deaths, reduced access to family planning services will result in more unintended pregnancies, leading to more, rather than fewer, abortions. By voting to release already limited family planning funds, you will be voting to prevent more of these tragedies from happening.

I agree with them. In our effort to legislate around here, sometimes we become extreme and we become purists, and we hurt the people we are trying to help. This should not be an issue between pro-choice and pro-life forces. Rather, this is an issue of justice and fairness, in my opinion. Vote "yes" on this resolution.

Mr. LIVINGSTON. Mr. Chairman, if I could inquire, am I correct that there is no more time other than the time that remains to my side?

The CHAIRMAN. The gentleman from Louisiana has 12 minutes remaining; the gentlewoman from California has yielded the balance of her time to the gentleman from Ohio, and that time has expired, so the gentleman from Louisiana has 12 minutes remaining.

Ms. PELOSI. Mr. Chairman, will the gentleman yield?

Mr. LIVINGSTON. I yield to the gentlewoman from California.

Ms. PELOSI. Mr. Chairman, could I inquire, do we have any more time left?

The CHAIRMAN. The Chair was in error. The gentlewoman from California has 30 seconds remaining and the gentleman from Louisiana has 12 minutes remaining.

Mr. LIVINGSTON. Mr. Chairman, I reserve the right to close and would certainly ask the gentlewoman to expend her time.

TALKING POINTS

- I just wanted to talk with you for a moment about the vote today concerning the U.S. international population assistance program.
- It is imperative that you vote to allow the release of this funding in March. USAID's family planning program is a vital part of U.S. development programs, assisting millions of women and men to plan the size of their families and preventing hundreds of thousands of maternal and child deaths each year, while reducing abortions.
- I want you to know that a vote to approve this resolution WILL NOT increase the amount of funds that we will spend on international family planning. These funds were appropriated last year and held up in the budget negotiations.
- This vote is not about promoting abortion. USAID is prohibited by law from using funds for abortion or motivating anyone to seek an abortion. In fact, if U.S. funds are delayed until July, there will be an increased incidence of unintended pregnancy and abortion.

Martha
Only new news is that
he heard that Armer may
not let POTUS vote go first
if that's the case it would
be a clear violation
of the rule &
I should
prohibit
any of will
of R Sp
of J



Pres-ford - The
Smith

middle class and vote
for rule of POTUS
100% -
if gives some Demo
Some cover - good?
no interlocking rule

February 6, 1987

MEMORANDUM FOR ERSKINE BOWLES

FROM: MARTHA FOLEY *ref*
SUBJECT: RETURN CALL TO REP. HOBSON (R-OH)

I understand that Rep. Hobson (R-OH) has a call into you that you wish to return.

I spoke to Rep. Hobson this morning.

He is basically seeking reassurance that the White House is working hard on the upcoming vote on international family planning. I gave him that assurance, but it would be significant that he hear it from you.

Here are some of our recent activities that you can mention:

- (1) the President issued a very strong statement on the importance of this vote last Friday;
- (2) in the last 10 days, WH/AID/State have talked to about 70 House offices and 55 Senate offices, and we are targeting about another 35 House offices (including both Republicans and Democrats);
- (3) we have been conducting daily (sometimes twice daily) conference calls with senior AID and State Dept legislative affairs officials, to coordinate efforts;
- (4) we sent a large information packet on the vote to all House and Senate offices last week;
- (5) we are working closely with Gephardt's and Daschle's offices on the issue;
- (6) I met yesterday with about 9 House Democrats who will be whipping the vote and will meet with them again today at the Democratic retreat; and
- (7) administration staff have been attending the meetings of the bipartisan House staff group working on this issue.

I am also attaching my January 16th memo to you on this issue.

THE WHITE HOUSE

WASHINGTON

January 16, 1997

MEMORANDUM FOR ERSKINE BOWLES

FROM: JOHN HILLEY *1H*
MARTHA FOLEY *mf*

SUBJECT: UPCOMING HOUSE AND SENATE VOTES ON INTERNATIONAL
FAMILY PLANNING ASSISTANCE FUNDING

From 1984 to 1993, the Reagan and Bush Administrations implemented the "Mexico City policy," which prohibited USAID assistance to non-governmental organizations that performed or promoted abortions even if non-USAID funds were used for the abortion-related activities.

On January 22, 1993, President Clinton overturned the policy by issuance of a memorandum to USAID.

The House version of the Fiscal Year 1997 Foreign Operations appropriations bill included very objectionable language relating to the Mexico City policy. We advised the Congress that if the language were included in the final bill, the President's senior advisers would recommend that the bill be vetoed.

The House language -- and the Senate and White House opposition to it -- resulted in a deadlock that was not resolved until the final negotiations on the omnibus FY 1997 appropriations bill in late September, 1996.

The enacted language was the product of personal, extensive negotiations between Chief of Staff Panetta and the Speaker and Majority Leader of the House.

The final bill dropped the Mexico City language and increased population assistance funding over the FY 1996 level. It provided that none of the funds could be obligated before July 1, 1997, but required the President to notify the Congress by February 1 on the impact of the delayed obligation. If the President finds there is a negative impact and if the Congress adopts a joint resolution of approval by February 28, funds could be obligated on March 1. The bill provides special procedures to ensure floor action in each House on the resolution by that date.

There has been intensive work by White House, State Department and USAID staff on the Presidential finding and accompanying

documentation. The report will be ready for transmittal to the Congress shortly.

The draft report finds that the delayed obligation will result in the suspension or termination of family planning service delivery and supporting activities in at least 17 bilateral and worldwide programs, resulting in hundreds of thousands of additional births, more maternal and infant deaths, and more abortions. The report uses very conservative assumptions in reaching these conclusions.

It is clear that the vote will be the focus of intense interest and activity by both pro-choice and pro-life groups, and that pro-life groups will seek to make this a vote about Mexico City policy, rather than a technical vote on funding availability.

Very preliminary vote counts suggest that the vote is likely to be close in each House. There appears at this time to be a better chance of passage in the Senate than in the House.

This office is working closely with the legislative affairs offices at USAID and the State Department. USAID believes that Rep. James Greenwood (R-PA), who is close to the Speaker and who has worked with him in the past on family planning issues, will lead the effort in support of the joint resolution, and Sen. Olympia Snowe (R-ME) is a likely leader on the Senate side. We hope that Rep. Obey, who is generally pro-life but supports international family planning assistance, and Sen. Leahy, who is the ranking Democrat on the Foreign Operations Subcommittee, will be our Democratic leaders.

We are convening a meeting today of the press staff of the White House, State Department and USAID to advise us on the release of the report.

THE WHITE HOUSE

WASHINGTON

December 19, 1997

MEMORANDUM FOR ERSKINE BOWLES AND JOHN HILLEY

FROM: MARTHA FOLEY *mf*

SUBJECT: UPDATE ON DEVELOPMENTS ON MEXICO CITY ISSUE

I want to update you on two developments related to the Mexico City issue. First is a summary of the response from Brian Atwood to your inquiry regarding expenditures on lobbying by USAID population assistance recipients. Second is an update on recent activities initiated by the State Department on the Mexico City issue.

The Atwood memo provides three estimates on the lobbying expenditures, based on informal discussions with 10 leading grantees. The low estimate for direct lobbying abroad ("actively promoting legislative changes") is \$75,000 annually. The mid-range estimate for activities that "raise concerns about access to abortion" is "less than \$400,000." The high estimate, intended to be congruent with very broad, anti-lobbying report language informally proposed by key House Republicans, would be "\$10 million or more annually." The memo also estimates that groups that perform abortions with their own funds spend "under \$1 million" annually for that purpose.

Wendy Sherman convened a meeting of key representatives from State, USAID, the White House, NSC and Treasury this week, and there was a follow-up meeting later in the week. There is ongoing work to identify opportunities for principals and others to address both the Mexico City issue and the problems with the Republicans' linking that issue to UN arrears, State Department reorganization and IMF funding, and to refine the message.

In addition, a policy group within USAID and State is developing some options for Secretary Albright to review. Some of the major options they are considering include the following:

- (1) prohibit funding to organizations that use their own funds to lobby for abortion (under a limited definition of lobbying) if they receive at least some specified, non-minimal level of federal funds;

- (2) prohibit funding to organizations that use their own funds to lobby and that are found by foreign governments to be doing so illegally;

(3) the same option as number 2, above, except that it would apply to the performance of abortions rather than lobbying;

(4) allow US funding to UNFPA if the President determines it will promote voluntarism and reduce abortion; and

(5) options related to re-emphasizing abortion reduction and to having an independent review of the USAID population program and associated issues, such as fungibility.

It is not clear at this time which of these options might secure a majority in the House. In addition, we need to remember that any option acceptable to one side could produce opposition on the other side that could jeopardize the underlying bill on UN arrears, IMF funding and State Department reorganization.

Once State and USAID have completed their review of options, I would suggest that we have a meeting to discuss them before serious outreach on the Hill begins.

FAX TRANSMISSION

To: Martha Foley
Office of Legislative Affairs
The White House

From: Craig Lasher
Population Action International

Subject: Letter to the President on India Sanctions

Date: July 2, 1998

Attached is a copy of a letter that Population Action International sent to the President urging him to grant a humanitarian exemption from nuclear nonproliferation sanctions for U.S.-funded voluntary family planning and reproductive health programs in India.

Please do not hesitate to call me at (202) 659-1833 if you have any questions.



*Population Action
International*

June 2, 1998

William H. Draper, Jr.

National and
Honorary Chair
1965-1974

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Constance Spahn

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Thomas H. Roberts, Jr.
Ian Rosenfeld
Ed T. Sai
Bel V. Sawhill
Otto M. Spangler
Ner Boyd Staats
Noah L. Towell
Eph C. Wheeler
William D. Zabel

The President

The White House

Washington, D.C. 20500

Dear Mr. President:

On behalf of individuals and organizations committed to global population stabilization, I write to you concerning your decision to impose sanctions on India as a result of that nation's recent nuclear weapons tests. While we fully support your action, we strongly urge you to include vital family planning and reproductive health programs administered by the U.S. Agency for International Development in the list of activities that can be exempted from those sanctions on humanitarian grounds.

The decision by Indian officials to conduct nuclear weapons tests is a matter of grave concern to us, and the imposition of sanctions is required and appropriate. But as a matter of principle, we believe that poor Indian families, who are the beneficiaries of USAID-funded humanitarian and development activities, should not be punished for the transgressions of their government.

India will overtake China to become the most populous country in the world early in the next century, and its population will reach the one billion mark by the year 2000. The ability of India to achieve sustainable development and to reduce poverty depends greatly on its success in reducing its population growth rate. The success or failure of India in dealing with its staggering array of economic and social problems will have significant future implications for both regional and global political stability.

USAID is playing a major role in efforts to address the demographic challenges in India by broadening access to quality family planning and reproductive health services and by supporting improvements in the status of women in Uttar Pradesh, India's most populous state with 140 million people.

Initiated in fiscal year 1995, USAID-funded population initiatives are just beginning to deliver the intended results. In the pilot areas, contraceptive usage has reportedly increased from 16 to 36 percent in three years with all of the attendant health benefits for women and families. Expanded family planning is helping to address the high incidence of infant and child mortality and

improving pregnancy outcomes for both women and their children. It would be tragic if the progress that has been achieved so far is jeopardized by the abrupt termination of U.S. financial and technical assistance.

PAI deeply appreciates your ongoing support for U.S. leadership in the field of sustainable development and humanitarian assistance but understands that other important foreign policy considerations are involved in any decisions on sanctions. We earnestly hope that you and your advisors will choose to classify voluntary family planning and reproductive health programs as humanitarian assistance—along with other essential poverty alleviation, hunger reduction, disease prevention, and primary health care activities—and will issue a broad exemption from sanctions for all of these lifesaving initiatives.

Sincerely yours,

Constance Spahn
Constance Spahn
National Chair

Amy Coen
Amy Coen
President

cc: The Vice President
The Hon. Madeleine Albright
The Hon. Samuel Berger
The Hon. J. Brian Atwood
The Hon. Julia Taft

**FAX TRANSMITTAL COVER LETTER**

Please deliver the following pages to:

Name: Martha Foley

Company: The White House - Legislative Affairs

Phone: _____

Fax: 202-456-2271 Code: 22

Total number of pages, including this cover sheet: 4

From: Sarah Craven - 202 326-8713

Date: OCTOBER 1ST Faxed by (initials): _____

Comments/Message: _____

Martha - This letter went to the
President this morning. Please let
me know if I can provide any
additional information. Sarah Craven

If you do not receive all the pages as indicated, please call 202/326-8700.

October 1, 1998

The President
The White House
Washington, D.C., 20500

Dear Mr. President:

In the next few weeks, critical negotiations will occur over the Fiscal Year 1999 Foreign Operations appropriations bill. While we recognize that this legislation includes many contentious issues, we are writing to express our particular concern over certain provisions in the House version of the bill that would prohibit a U.S. contribution to the United Nations Population Fund (UNFPA).

As you know, UNFPA is the largest internationally funded source of population assistance to developing countries. It operates in 150 countries, complementing the bilateral assistance provided by the United States and other governments. UNFPA provides voluntary family planning services, maternal and child health care, and sexually-transmitted disease prevention, including HIV/AIDS, to countries where cuts in overall USAID funding have resulted in a reduction of bilateral population assistance. UNFPA does not provide abortion services nor does it promote abortion as a method of family planning.

The explicit prohibition of a U.S. contribution to UNFPA contained in the House-passed bill reflects concerns about UNFPA's initiation of a new program in China. No one would condone China's human rights record. However, we firmly believe that denying all funding to UNFPA as a result of its China program would be counterproductive. UNFPA's primary objective in China is to demonstrate to the Chinese government that a voluntary, non-coercive, human rights-based approach to family planning is the best means to achieve effective reproductive health programs. In negotiating its new China program, UNFPA insisted that the Chinese authorities agree to abolish all quotas and targets in the 32 counties where UNFPA will operate. Moreover, UNFPA and the Chinese have agreed to outside independent monitoring of the new program. This new UNFPA program represents our best hope for positive change in China.

It is important to note that current U.S. law already prohibits U.S. funds from being spent in China. Over the past five years, UNFPA has taken the highly unusual step – at the request of the United States – of segregating the U.S. contribution and providing accounting information that irrefutably demonstrates that no U.S. taxpayer funds are used in China. In addition, U.S. funds can not be used to allow additional funds to be spent in China because the UNFPA program allocation for China (\$20 million over 4 years) is set in the project documentation and cannot be changed.

Cutting off all U.S. support for UNFPA would have significant global consequences. Such a cut would result in a nine-percent reduction in UNFPA's available funding for critical programs in the 150 countries where UNFPA currently serves. Moreover, UNFPA and many nations look to the United States for its leadership in international family planning. The United States should not jeopardize UNFPA's important and effective work in other parts of the world because of concerns over the conduct of the Chinese government.

As always, we are appreciative of your leadership on behalf of the world's women and their families. Your continued support for international population assistance and the critical work of UNFPA during the coming weeks is essential.

Sincerely yours,

Jeannie I. Rosoff
President
Alan Guttmacher Institute

Jodi Jacobsen & Lori Heise
Co-Directors
Center for Health and Gender Equity

Dr. Nils Daulaire
President and CEO
Global Health Council – NCIH

Joel Lamstein
President
John Snow, Inc

Marcia Greenberger
Co-President
National Women's Law Center

Amy Coen
President
Population Action International

Margaret Catley-Carlson
President
The Population Council

Janet Benshoof
President
Center for Reproductive Law & Policy

Jill Sheffield
President
Family Care International

Adrienne Germain
President
International Women's Health Coalition

Dan Beard
Senior Vice President
National Audubon Society

Gloria Feldt
President
Planned Parenthood Federation of America

David J. Andrews
President
Population Communications International

Werner Fornos
President
The Population Institute

Rev. Carlton Veazey
President and CEO
Religious Coalition for
Reproductive Choice

Carl Pope
Executive Director
Sierra Club

Peggy Curlin
President
The Centre for Development and
Population Activities (CEDPA)

Mim Kelber
Interim President
Women's Environment and
Development Organization

Peter Kostmayer
President
Zero Population Growth

FAX TRANSMISSION

To: Martha Foley
Office of Legislative Affairs
The White House
456-6220

From: Craig Lasher
Population Action International

Subject: Copy of a Letter to House-Senate Conferees on the Global Gag Rule

Date: September 30, 1998

Attached is a copy of a letter mailed today to likely House and Senate conferees on the foreign operations appropriations bill opposing the inclusion of the global gag rule provision in the omnibus spending bill. The letter urges the conferees to reject the global gag rule and to support the Senate position on family planning, free speech, and democracy.

The 46 organizational signatories on the letter represent a broad cross-section of groups and have been drawn from the public health, civil liberties, women's rights, religious, population, and environmental communities.

Please do not hesitate to call me at (202) 659-1833 if you have any questions.

September 29, 1998

The Honorable Bob Livingston
Chairman
House Appropriations Committee
Capitol H-218
Washington, D.C. 20515

Dear Chairman Livingston:

We, the undersigned, represent millions of Americans who care deeply about the United States' international obligations and responsibilities. Many of our organizations work overseas, in partnership with the U.S. government, as well as with U.N. agencies, to further worldwide humanitarian goals and U.S. interests. We strongly support the United States meeting its full financial obligations to the United Nations. Earlier this year, however, we wrote to the president and, regretfully, urged him to veto H.R. 1757, the Foreign Affairs Reform Act—whenever he receives it—because of the global gag rule provision that would severely undermine a core principle of U.S. foreign policy.

As you begin deliberations to resolve the differences between the House and Senate-passed versions of the FY 1999 foreign aid appropriations bill, we must point out to you that the **House-passed "gag rule" restriction affecting international family planning assistance in this bill is even more onerous than the one contained in H.R. 1757.** This new version would, by force of law in the statute itself, define "lobbying" far more broadly than any existing understanding of the term. Under H.R. 1757, the same definition would apply but it is contained in the "statement of managers" rather than the statutory language.

The measure's restrictions on freedom of speech are unacceptable as a matter of principle and policy because it is intended to muzzle private, nonprofit, nongovernmental organizations in other countries. As a condition of eligibility for receiving U.S. family planning funds, foreign NGOs—**using their own non-U.S. funds**—would be barred not only from "overt" lobbying but also from sponsoring "conferences or workshops on the alleged defects of the abortion laws, as well as drafting and distribution of materials or public statements calling attention to such alleged defects."

Secretary of State Albright said it best at a Congressional hearing earlier this year: It is a "gag rule. . . that would punish organizations for engaging in the democratic process in foreign countries and for engaging in legal activities that would be protected by the First Amendment if carried out in the United States."

This policy violates democratic principles and would be firmly rejected as unconstitutional if applied in the United States. It is not a policy that should be foisted on other nations. Many of our organizations have direct experiences with the implementation of public health programs in the United States and overseas.

The facts are:

- USAID resources do not fund abortions;
- Levels of funding approved by Congress for family planning have been cut drastically since 1995; and
- The practical impact of the global gag rule is enormous.

Proponents claim the gag rule will have little effect. This is simply not true.

If a family planning organization in Bolivia is receiving U.S. support for its programs and, for example, published a paper noting that Bolivia has the highest maternal mortality rate in all of Latin America, largely as the result of illegal, unsafe, botched abortions, it would amount to drafting a paper "calling attention" to "defects" in Bolivia's abortion law.

If the head of a group receiving U.S. aid that offers only natural-method family planning gave a radio interview urging opposition to her country's plan to liberalize its abortion law, she would be violating the ban on a "public statement."

In South Africa, where safe, legal abortions were available to white women but beyond the reach of most black women under apartheid, President Nelson Mandela in 1996 asked Dr. Helen Randera-Rees, director of the Planned Parenthood Association of South Africa (PPASA), for her help. He wanted to draft a law easing such administrative hurdles as a requirement for approval by two doctors, one of whom must have been in practice for at least four years. She helped to draft that law, and it was enacted. Under the pending U.S. measure, PPASA would have lost its U.S. support because Dr. Randera-Rees responded to Mandela's request.

And most recently, in Mexico, a national debate on reforming the law on abortion is occurring. NGOs in Mexico—where 1500 maternal deaths are attributed to illegal abortion annually—would be disqualified from U.S. family planning aid if they dare to participate in the national debate. Even Guadalajara's Cardinal Juan Sandoval commented that, while he does not wish to see the law changed, "it's good to raise the discussion. We are in a democratic society..." (*Boston Globe*, July 29, 1998). The debate is going on in Mexico, among Mexicans with non-U.S. funds.

We believe that the bill as enacted would lead to more, not fewer, abortions worldwide, because it would cut \$44 million in funding for family planning, which has proved repeatedly to be the single most effective means of reducing the number of abortions.

The measure imposes a minority American political position on other nations' private organizations, rather than letting them decide what is best for their own country. It tramples upon those countries' medical standards, their political practices and their right to decide their own futures, and it drastically narrows the reproductive health options available to hundreds of millions of women.

Some of us who have signed this letter are pro-choice while others take no position on the question of abortion, but we all stand firmly behind family planning, safe motherhood, free speech, and maternal and child health programs.

Equally important, we are Americans who take very seriously our country's deeply held democratic values. The pending measure directly contradicts the most basic of those values: free speech, access to the political process and the right to petition the government for a redress of grievances. The global gag rule turns its back on 222 years of U.S. history and the Universal Declaration of Human Rights.

For these reasons, we urge you to reject the gag rule and support the Senate position on family planning, free speech and democracy.

Sincerely yours,

James Wagoner
President
Advocates for Youth

Sandy Bernard
President
American Association of University
Women

Richard A. Levinson, M.D.
Associate Executive Director for
Programs and Policy
American Public Health Association

Peter D. Bell
President
CARE

Janet Benshoof
President
Center for Reproductive Law and
Policy

Nan Aron
President
Alliance For Justice

Laura W. Murphy
Director, Washington National Office
American Civil Liberties Union

Amy E. Pollack, M.D., M.P.H.
President
AVSC International

Frances Kissling
President
Catholics For a Free Choice

Peggy Curlin
President
Centre for Development and
Population Activities

Jill Sheffield
President
Family Care International

Nils Daulaire, M.D.
President & CEO
Global Health Council—NCIH

Marcia Townsend
Deputy Regional Director
International Planned Parenthood
Federation—Western Hemisphere
Region

Phyllis T. Piotrow
Professor and Director
Center for Communication Programs
Johns Hopkins School of Public Health

Catherine Crone Coburn
President
Management Sciences for Health

Joan E. Bertin
Executive Director
National Coalition Against Censorship

Nan Rich
National President
National Council of Jewish Women

Patricia Ireland
President
National Organization for Women

Judith L. Lichtman
President
National Partnership for Women
and Families

Eleanor Smeal
President
Feminist Majority

Jill Merrick
Director of Communications & Public
Policy
International Center for Research on
Women

Adrienne Germain
President
International Women's Health
Coalition

Joel Lamstein
President
John Snow, Inc.

Kate Michelman
President
National Abortion and Reproductive
Rights Action League

The Reverend Joan Brown Campbell
General Secretary
National Council of Churches

Judith M. DeSarno
President & CEO
National Family Planning and
Reproductive Health Association

Kathryn Rodgers
Executive Director
NOW Legal Defense & Education
Fund

Marcia Greenberger
Co-President
National Women's Law Center

Helen Rodriguez-Trias, M.D.
Co-Director
Pacific Institute for Women's Health

Carole Shields
President
People For The American Way

Amy Coen
President
Population Action International

David J. Andrews
President
Population Communications
International

The Reverend Elenora Giddings Ivory
Director
Presbyterian Church (U.S.A.),
Washington Office

The Reverend Carlton W. Veazey
President and CEO
Religious Coalition for Reproductive
Choice

Jeannie I. Rosoff
President
The Alan Guttmacher Institute

Dr. Thom White Wolf Fassett
General Secretary
General Board of Church & Society
United Methodist Church

Prema Mathai-Davis
CEO
YWCA of the U.S.A.

Daniel E. Pellegroni
President
Pathfinder International

Gloria Feldt
President
Planned Parenthood Federation
of America

Margaret Cadley Carlson
President
Population Council

Richard Frank
President
Population Services International

Gordon W. Perkin, M.D.
President
Program for Appropriate Technology
in Health

Carl Pope
Executive Director
Sierra Club

Warren Leon
Deputy Director for Programs
Union of Concerned Scientists

Mim Kelber
Interim President
Women's Environment and
Development Organization

Peter Kostmayer
President
Zero Population Growth

THE WHITE HOUSE

WASHINGTON

January 24, 1997

MEMORANDUM TO: MELANNE VERVEER
NICOLE RABNER
MARTHA FOLEY
BETSY MYERS
LISA ROSS
JULIA MOFFETT
LYNN HOGAN
JILL BUCKLEY
ANN KITTLAUS
TONY GAMBINO

FROM: ANN LEWIS

Attached you will find the action plan we discussed at yesterday's meeting for the release of the Presidential Finding to the Congress on International Family Planning Funding. Evan Ryan will be following up with everyone. If there are any adjustments to be made to the action plan, Evan may be reached at 456-6751. Thank you.

Presidential Finding to the Congress on International Family Planning Funding
Communications Strategy Options

- | | |
|---|------------------------------|
| 1. Mailing of transcripts of VPOTUS and FLOTUS 1/22 speeches
with cover letter from HRC - contact: Melanne Verveer | Betsy Myers
Lisa Ross |
| 2. Talking Points for use by working groups | Martha Foley
Jill Buckley |
| 3. Monitor Rockefeller Foundation Report | Nicole Rabner |
| 4. Work with bipartisan Members of Congress, including receiving
report from POTUS | Martha Foley
Jill Buckley |
| 5. Transmit report with letter and/or press release
Preferred timing: 1/31 afternoon | Martha Foley
Jill Buckley |
| 6. Options for HRC involvement:- pre or post-report conference call
(w/ Beijing network)
- speaking role
- meeting | Melanne Verveer |
| 7. Closed press, pre-report meeting with legislative representatives
Preferred timing: 1/31 morning | Lynn Hogan
Betsy Myers |
| 8. Editorial boards: Mailing - 1/22 speeches
HRC Bolivia column
Possible POTUS statement re: report | Ann Kittlaus |
| 9. Other options: Conference call or meeting with Brian Atwood
Possible contact with Secretary Albright | Ann Kittlaus |



U.S. Agency for International Development
Bureau for Legislative & Public Affairs

Facsimile Message

From: Dottie Rayburn
Tel. No.: 647-8190

Fax No.: (202) 647-8321

Subject: new paper on Mexico City Gag Rule

<u>AGENCY</u>	<u>CONTACT</u>	<u>PHONE</u>	<u>FAX</u>
WH/LEG	Martha Foley	456-6797	456-2271
WH/LEG	Al Maldon	456-6620	456-2604
NSC	Will Davis	456-9171	456-9170
OMB	Janet Piller/ Mike Casella	395-4605	395-5770
STATE	Meg Donovan	x71048	x72762
STATE	Bernadette Allen	x78043	x79667/or x72504

Message:

We recently completed this longer paper on the Mexico City Gag Rule. It adds many examples to a previous short document we did on the topic that was in our briefing folder. Wanted to make sure you had our latest information.

-Peter Belden/Dottie Rayburn

Number of pages in message (including this cover): 7



U.S. AGENCY FOR
INTERNATIONAL
DEVELOPMENT

THE HARMFUL IMPACT OF THE MEXICO CITY GAG RULE ON USAID INTERNATIONAL FAMILY PLANNING PROGRAMS

Representative Chris Smith (R-NJ) has proposed an amendment that would add unnecessary, burdensome, and damaging restrictions to longstanding laws that *already prohibit use of U.S. international population funds for abortions or abortion-related lobbying*.¹ A similar amendment is being proposed in the Senate. Both amendments -- the equivalent of a global "gag rule" -- would reimpose a version of the "Mexico City" policy in effect under the Reagan and Bush administrations. The gag rule would end all family planning assistance to host country nongovernmental organizations (NGOs) that are involved in certain abortion-related activities with their own funds.²

If enacted, the gag rule would cause many NGOs to become ineligible for assistance -- decimating the very family planning programs that are doing the most to prevent abortions and save the lives of women and children.³ Implementation of the amendment would have extremely harmful consequences, including:

- Tremendous increases in the number of unintended pregnancies, unsafe abortions, and maternal and child deaths.
- Forcing USAID to impose prohibitions on the freedom of speech and association of NGOs overseas that would be unconstitutional if applied in the United States.

Supporters of the gag rule want to deny *family planning* funds to foreign private organizations, arguing that use of family planning assistance allows these organizations to "free up" other sources of funds for abortion services or advocacy, even where abortion is legal. In making this "funds are fungible" argument, supporters of the gag rule single out family planning. Yet the logic of the argument would imply that USAID would also have to end child survival and other health and development assistance to many private organizations.

The Mexico City gag rule would increase unsafe abortions and maternal and child deaths

Supporters of the gag rule compare its enactment to introduction of the similar "Mexico City" policy by the Reagan administration in 1984. Legislating this gag rule now, however, would have a much more far-reaching impact on family planning and health programs -- the very programs that have been demonstrated to play a critical role in preventing abortions, increasing child survival, and reducing maternal deaths.

Over the past decade, critical changes have occurred in the range and characteristics of countries receiving U.S. assistance as well as in the roles of NGOs within countries. For example, the U.S. now provides support to programs in many countries in Eastern Europe and the former Soviet Union, where abortion is legal but where couples desperately need greater access to contraception.

- In Russia, Eastern Europe, and the Central Asian Republics, the gag rule could limit or remove the contraceptive options that many women view as their only alternative to abortion. USAID cooperating agencies have been working with private organizations not only to improve their own services but to provide training and other technical assistance in family planning to the public sector. The importance of this work in increasing use of contraception and bringing down abortion rates has been documented. USAID-assisted clinics in Kazakhstan, for example, showed a 59 percent increase in contraceptive users from 1993 to 1994, and a 41 percent decline in abortions. Under the gag rule, private organizations would have to choose either to lose U.S. assistance or give up their legal rights to provide abortions or to advise on policies and regulations affecting abortion.

In addition, as compared to a decade ago, far more NGOs would be unable or unwilling to accept the prohibitions of the gag rule in order to be eligible for U.S. assistance, thus limiting options for working with effective family planning providers. Changes in the prevailing views of host countries on abortion issues and the increased involvement of NGOs in these issues would make it impossible to implement the new restrictions without doing severe damage to family planning efforts. Nearly 180 governments agreed in 1994 at the global population and development conference in Cairo that abortion policy is a matter for each country to decide and that where abortion is legal, it should be safe.⁴

- Of countries receiving USAID population assistance for which information is available, 32 countries permit abortion under broader circumstances than would be permitted under the gag rule, including fetal defects and women's health.⁵
- Another 22 countries allow abortion under the same or narrower circumstances than those permitted by the gag rule.⁶ In many of these countries, however, abortion laws are currently a matter of internal national debate involving medical associations, women's health groups, health care providers, religious groups, and others.

By disqualifying many NGOs in a large number of developing countries, the gag rule would create a major barrier to expanding access to and quality of family planning services.

NGOs often serve as key sources of family planning information and services where the public sector is weak. The effects of the gag rule would extend beyond NGOs and the clients they directly serve, as NGOs also provide technical leadership essential to upgrading both public and private sector services. For instance:

- The Smith amendment would terminate U.S. support to the International Planned Parenthood Federation (IPPF), a private multilateral organization with national affiliates in over 150 countries. IPPF affiliates serve 10 million couples annually

with family planning and related health services, and over a hundred million more with information. In many settings, these affiliates are the only source of services for couples who want to prevent unintended pregnancies or transmission of HIV infection. Less than one percent of IPPF's resources are used annually for abortion services, and IPPF does not promote abortion as a method of family planning. (Planned Parenthood Federation of America and affiliates in the developed world do not receive financial support from IPPF.)

- **The Family Planning Association of India (FPAI)** receives USAID funding and is one of the few private sector groups offering quality, clinical family planning services, directly serving over a million couples annually. FPAI also provides legal abortions with private funds. Losing U.S. assistance would stop services to thousands of FPAI's clients.

In addition, USAID is planning a new health program in one of the large Indian states that would be supported by both child survival and population funds. Under the program, women and children would be able to receive child health services and family planning. In the same state, FPAI is currently the major supplier of oral rehydration salts, condoms, and pills for children. If NGOs and private hospitals were excluded from the new program as a result of the gag rule, the entire effort would be undermined, depriving women and children of vitally needed services.

- In Ethiopia, where abortion complications account for an estimated 50 percent of maternal deaths, twenty percent of all family planning services in the country are provided by two NGOs that would be likely to lose their USAID funding if the gag rule were enacted.
- U.S. -supported research to improve quality of care in family planning is often carried out in collaboration with NGOs. In Africa, close to ten percent of USAID's service delivery research program is carried out with national family planning associations in Kenya, Zimbabwe, and Zambia. This vital research may have to be terminated under the Smith amendment because of these associations' commitment to women's health in countries where abortion is legal for health and other reasons.

Ironically, while not affecting most abortion providers, the gag rule would do great damage to NGO family planning and related health efforts. Its provisions would not apply to governments and therefore to public hospitals or clinics, nor could the gag rule affect those private, often clandestine and unsafe, providers who do not receive direct or indirect U.S. assistance. In countries where abortion is illegal, and even in countries where it is legal, an estimated 20 million women annually resort to unsafe "back-alley" abortions because of fear of other people knowing about their abortion or lack of access to safe public or private providers. The World Health Organization estimates that 75,000 women die annually and hundreds of thousands more suffer severe complications as a result of unsafe abortions.

The gag rule would increase unsafe abortions, because it would target the few NGOs which provide safe, legal abortions, compelling these NGOs either to terminate the services or forgo U.S. assistance for the family planning component of their activities.

Excluding these NGOs would make it even more difficult to provide women who have had abortions with contraceptive counselling and services -- creating a greater likelihood of repeat abortions. Rather, it could be argued, USAID and other family planning donors should work with the NGOs to strengthen their contraceptive services and to help their clients who have had abortions to avoid future abortions. Yet it would be virtually impossible to reach these women under the gag rule, which would only allow funding of family planning programs in clinics where abortion is not provided.

The Mexico City gag rule would impose prohibitions on the speech and activities of NGOs

If enacted, the Mexico City gag rule would force USAID to restrict the free speech of organizations based in our host countries in the developing world -- a standard that would be unconstitutional if implemented in the United States or with U.S. organizations working overseas. The gag rule would have a chilling effect on the speech and activities of health professionals working in all USAID-funded NGOs providing family planning services. To remain eligible for funding, staff -- including medical personnel -- in these organizations would have to limit what they could say or do to avoid violating the broad gag rule provision prohibiting "any activity or effort" to change a country's abortion laws or regulations. Thus, the language goes beyond the earlier "Mexico City" policy restrictions, which prevented "lobbying," a more narrowly defined set of activities. The gag rule language suggests that a doctor speaking on behalf of a private medical center receiving U.S. funds could be prevented from advising his or her government on ways to make abortion safer, even in those countries where abortion is legal.

The Mexico City gag rule relies on faulty logic and unfairly singles out family planning

The gag rule would apply only to the *family planning* funds provided to host country NGOs, denying these funds to organizations involved in certain abortion-related activities. Supporters of the gag rule argue that U.S. family planning funds enable these organizations to "free up" other sources of funds for abortions services or advocacy, even where abortion is legal.

To use the "fungibility" justification to widen the restrictions beyond population assistance, however, as the gag rule's supporters recognize, would end child survival and other health and development assistance to many private organizations.

- In the words of Peter Bell, President of CARE, "I do think it is interesting...that people focus on the presumed fungibility of funds between family planning and abortion. And, of course, the same could be said with regard to other kinds of health care services as well....If the U.S. government supports childhood immunizations for a health center, could that same health center be saving funds it could then transfer for abortions? This is never ending. And I don't know why family planning is singled out here. It must be because family planning is the target."

Conclusion

Safe, voluntary family planning programs prevent unintended pregnancies, unsafe abortions, and maternal and infant deaths. Reducing the incidence of abortion and improving maternal and child health are goals we all share. To achieve these goals, we must not encumber family planning funds with restrictions that are unnecessary, damaging to the health of women and children, and contrary to American values of free speech and democracy.

* * * * *

1. See "Safeguards to Assure USAID Funds are not used for Prohibited Abortion-Related Activities," briefing paper prepared by USAID, February 1997.

A "wall of separation" already exists between family planning and abortion in USAID programs. Since the enactment of the Helms Amendment in 1973, the USAID population program has been legally proscribed from supporting or encouraging abortion as a method of family planning. Specifically, as a matter of longstanding law and policy of this and previous Administrations, USAID funds cannot be used:

- to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to have an abortion.
- to lobby for or against abortion.
- to purchase or distribute commodities or equipment for the purpose of inducing abortions as a method of family planning.
- to support any biomedical research which relates, in whole, or in part, to methods of, or the performance of abortions as a method of family planning.

Strict procedures assure that no USAID funds are used for abortion, including legally binding contracts with organizations receiving funds, close technical monitoring, and regular financial audits by nationally recognized accounting firms.

2. Key provisions of the Smith amendment include: "(1) **Performance of Abortions** -- (a)...no funds appropriated for population planning activities or other population assistance may be made available for any foreign private, nongovernmental, or multilateral organization until the organization certifies that it will not, during the period for which the funds are made available, perform abortions in any foreign country, except where the life of the mother would be endangered if the pregnancy were carried to term or in cases of forcible rape or incest; (b) Paragraph (a) may not be construed to apply to the treatment of injuries or illnesses caused by legal or illegal abortions or to assistance provided directly to the government of a country. (2) **Lobbying Activities** -- (a)...no funds (as above)...until the organization certifies that it will not, during the period for which the funds are made available,...engage in any activity or effort to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited...."

3. See "The Role of Family Planning in Preventing Abortion," briefing paper prepared by USAID, August 1996.

4. "Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe." Programme of Action Adopted at the International Conference on Population and Development, Cairo, 5-13 September, 1994, Paragraph 8.25.

5. Abortion is permitted under circumstances broader than the Mexico City gag rule in a number of USAID-recipient countries, including: Albania, Belarus, Caucasus, Kazakhstan, Kyrgyzstan, Moldova, Romania, Russia, South Africa, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, India, Zambia, Bolivia, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Jamaica, Jordan, Kenya, Morocco, Peru, Tanzania, Uganda, and Zimbabwe.

6. Abortion in the following countries is legally permitted in cases of rape or incest, or, in a few cases, only to save the life of the woman: Brazil, Mexico, Bangladesh, Benin, Cambodia, Cote d'Ivoire, Dominican Republic, Guatemala, Haiti, Honduras, Indonesia, Madagascar, Malawi, Mali, Mozambique, Nepal, Nicaragua, Niger, Nigeria, Paraguay, Philippines, and Senegal.

* * * * *

This briefing paper was prepared by the Center for Population, Health and Nutrition, U.S. Agency for International Development, July 1997. For further information, please contact Dianne Sherman (703-875-4693) or Peter Belden (703-875-4775) in the Office of Population.

MEMORANDUM

To: Martha Foley—White House Senior Legislative Counsel
Shelley Peterson—Associate Counsel to the President
Joseph Crapa—USAID LPA Bureau
Dottie Rayburn—USAID LPA Bureau
Pat Ramsey—USAID Office of the General Counsel
Duff Gillespie—USAID PHN Center
Margaret Neuse—USAID Office of Population
Margaret Pollack—State Department PRM Bureau

From: Terri Bartlett, Lisa Moreno & Craig Lasher
Population Action International

Subject: Legal Analysis of the “Constitutionality” Argument

Date: April 25, 2000

In preparation for efforts by international family planning supporters to block renewal of the global gag rule restrictions, attorneys from Wilmer, Cutler & Pickering were asked to objectively examine the accuracy of the claim that such restrictions on the free speech rights of foreign organizations would be unconstitutional if applied to U.S. domestic groups. Attached is their *pro bono* legal analysis that confirms the validity of that line of argument.

Specifically, the attorneys reviewed one of the congressional findings contained in the Global Democracy Promotion Act of 2000 (H.R. 4211), introduced on April 6th. Their analysis states that the case law supports the finding’s assertion that limiting the ability of U.S.-based organizations to participate in the democratic process as a condition for receiving federal funds would be unconstitutional.

I hope you find the memorandum informative and useful.

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.
WASHINGTON, D.C. 20037-1420

TELEPHONE (202) 663-6000
FACSIMILE (202) 663-6363

WASHINGTON
BALTIMORE
NEW YORK
LONDON
BRUSSELS
BERLIN

MEMORANDUM

TO: Craig Lasher, Population Action International

FROM: Bob Stack, Stephanie Evans, Susan Franck

DATE: April 13, 2000

RE: Constitutional Analysis of Proposed Congressional Finding on Federal Funding Restrictions on U.S. Non-governmental Organizations

Population Action International (PAI) has requested a constitutional analysis of the following proposed Congressional finding for proposed legislation regarding federal funding of U.S.-based nongovernmental organizations (DNGOs):

(3) Limiting eligibility for U.S. development and humanitarian assistance upon the willingness of a foreign nongovernmental organization to forgo its right to use its own funds to address, within the democratic process, a particular issue affecting the citizens of its own country . . . would violate the U.S. Constitution if applied to U.S.-based organizations.

Based on our research, the proposed Congressional finding is correct and is supported by case law as it relates to unconstitutional restrictions on DNGOs. It is clear that if a federal funding policy requires a DNGO to forgo its right to use its own funds to address a particular issue, e.g., abortion, affecting U.S. citizens in order to receive federal funding or assistance, that federal funding policy is unconstitutional. We note, however, that a federal funding policy that completely prohibits federal funding to foreign based nongovernmental organizations (FNGOs) that use their own funds for abortion related activities is constitutional and that the funding policy need not treat FNGOs and DNGOs similarly. Planned Parenthood Fed'n of America v. AID, 915 F.2d 59 (2d Cir. 1990); DKT Memorial Fund Ltd. v. AID, 887 F.2d 275 (D.C. Cir. 1989).

Executive Summary

Question and Answer

The proposed Congressional finding raises the following question:

Is it unconstitutional for the federal government to impose the following restriction on DNGOs' exercise of their rights to free speech and lobbying: in order to receive federal funds, DNGOs may not use their own funds to address, within the democratic process, a particular issue affecting the citizens of the United States?

The short answer to the question is as follows:

- It is clear that it is unconstitutional for the federal government to prohibit DNGOs from using their private funds to exercise their constitutional rights to free speech and lobbying in order to obtain federal funding. FCC v. League of Women Voters of California, 468 U.S. 364 (1984); Planned Parenthood of Central and Northern Arizona, 789 F.2d 1348 (9th Cir.), *aff'd mem. sub nom. Babbitt v. Planned Parenthood of Central and Northern Arizona*, 479 U.S. 925 (1986) (referred to herein as "Arizona"); Planned Parenthood Ass'n of Chicago Area v. Kempiners, 568 F. Supp. 1490 (N.D. Ill. 1983) (referred to herein as "Kempiners").
- If the federal government requires that, in order to obtain federal funding, DNGOs must keep their private funds segregated from federal funds and must not use those federal funds for activities prohibited by the funding policy, that policy is likely to be constitutional. Rust v. Sullivan, 500 U.S. 173 (1991). Courts have held that segregation of funds is constitutional because there exists an adequate alternative channel for exercising constitutional rights to free speech and lobbying.
- If the funding policy discriminates among various viewpoints, the funding policy may also be found unconstitutional. Velazquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999), petition for cert. filed 68 U.S.L.W. 3263 (U.S. Oct. 6, 1999) (No. 99-604), petition for cert. filed 68 U.S.L.W. 3391 (U.S. Dec. 6, 1999) (No. 99-960). For example, if the intent of the funding policy is to suppress "dangerous ideas" such as speech to overthrow the government, Speiser v. Randall, 357 U.S. 513 (1958), or to "discourage challenges to the status quo," Velazquez, the funding policy is more likely to be unconstitutional. It may be difficult to establish viewpoint discrimination in the family planning context; however, a federal funding policy that restricts funds for certain family planning viewpoints, such as a view to change an existing governmental policy regarding abortion, may constitute prohibited viewpoint discrimination.

- Courts have found constitutional a federal funding policy that completely prohibits FNGOs from using their own funds for abortion related activities. In addition, at least one court has specifically found that a federal funding policy need not treat FNGOs and DNGOs similarly. Planned Parenthood Fed'n of America v. AID; DKT Memorial Fund Ltd. v. AID.

Summary of Constitutional Analysis -- Refusal to Subsidize or Unconstitutional Burden

We will send you a more detailed memorandum shortly of our analysis of the relevant constitutional cases. For your convenience, we summarize the main points of that analysis below.

Whether a restriction on federal funding to DNGOs is constitutional will depend on the characterization of the restriction as (1) a mere refusal by the government to subsidize the exercise of a constitutional right, or (2) a penalty designed impede the exercise of a constitutional right (also known as an unconstitutional burden).

If the restriction is characterized as a mere refusal by the government to subsidize the exercise of a constitutional right, the legislation in question will be subject to a rational relation standard. Under that standard, the restriction must be rationally related to a legitimate government policy. With that characterization, the courts have consistently held that the legislation in question is constitutional. Rust v. Sullivan; Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

If the restriction is characterized as a penalty designed to impede the exercise of a constitutional right, the legislation in question will be subject a strict scrutiny standard. Under that standard, the legislation is unconstitutional unless the government shows that the restriction is the least restrictive means available to serve a compelling interest. With that characterization, the courts have consistently held that the legislation being challenged is unconstitutional. FCC v. League of Women Voters of California; Perry v. Sindermann, 408 U.S. 593 (1972).

The difficulty, of course, is determining the proper characterization. Case law clearly supports PAI's position that the restriction on DNGOs -- that they cannot receive federal funding if they use their private funds to address a particular issue (e.g., abortion) that affects U.S. citizens -- is a penalty designed to impede DNGOs' constitutional rights of free speech and lobbying. See, e.g., FCC v. League of Women Voters of California (holding unconstitutional a statute that forbids any noncommercial educational broadcasting station that receives a grant to engage in editorializing); Legal Aid Society of Hawaii v. Legal Servs. Corp., 145 F.3d 1017 (9th Cir. 1998) (holding that statute forbidding the use of government funds for attempts to influence legislation did not create an unconstitutional condition, provided that the restrictions only apply to government funds and not private funds); Arizona (striking down an Arizona statute that denied federal as well as state funds to family planning non-governmental organizations that performed or promoted abortion); Kempiners (holding unconstitutional a statute that prohibited applicants engaged in abortion counseling or referral services from receiving grants under another state program).

We note, however, that courts have found constitutional a federal funding policy that completely prohibits federal funding to FNGOs that use their own funds to perform or promote abortion and that the federal funding policy need not treat similarly FNGOs and DNGOs. The funding policy in question did not violate the DNGOs' exercise of their constitutionally protected rights of free speech, association or privacy. Planned Parenthood Fed'n of America v. AID, 915 F.2d at 64 (finding that the wisdom of, and motivation behind, the policy of denying all federal funds to FNGOs that use their own funds for abortion related activities are non-justiciable issues); DKT Memorial Fund Ltd. v. AID, 887 F.2d at 292 (finding that a federal funding policy as applied to domestic entities need not be applied similarly to foreign entities). Accordingly, a federal funding policy that is unconstitutional as applied to DNGOs may be constitutional as applied to FNGOs.

WILMER, CUTLER & PICKERING

2445 M STREET, N.W.

WASHINGTON, D. C. 20037-1420

TELEPHONE (202) 663-6000

FACSIMILE (202) 663-6363

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**DETAILED MEMORANDUM
RE
CONSTITUTIONAL ANALYSIS OF
PROPOSED CONGRESSIONAL FINDING**

TO: Craig Lasher, Population Action International

FROM: Bob Stack, Stephanie Evans, Susan D. Franck

DATE: April 13, 2000

RE: Constitutional Analysis of Proposed Congressional Finding on Federal Funding Restrictions on U.S. Non-governmental Organizations

Whether legislation that places restrictions on federal funding is constitutional depends upon whether a court characterizes such a restriction as: (1) a denial of a subsidy used to make a simple policy choice, or (2) a penalty or otherwise unconstitutional condition that requires one to abandon a fundamental right in order to receive government funds. If the court holds that the restriction is a refusal to subsidize, the legislation imposing the restriction must be rationally related to a legitimate government objective. If the court holds that the restriction burdens the exercise of constitutional rights, the legislation must advance a compelling government interest in the least restrictive way available.

We believe that the proposed Congressional finding is a correct statement of U.S. Constitutional Law.¹ The proposed finding states:

Limiting eligibility for United States development and humanitarian assistance upon the willingness of a foreign non-governmental organization to forgo its right to use its own funds to address, within the democratic process, a particular issue affecting the citizens of its own country directly undermines a key goal of United States foreign policy and would violate the United States Constitution if applied to United States-based organizations.

¹ Not admitted in D.C.

¹ We note, however, that a federal funding policy that completely prohibits federal funding to foreign non-governmental organizations ("FNGOs") that use their own funds for abortion related activities is constitutional and that the funding policy need not treat FNGOs and domestic non-governmental organizations ("DNGOs") similarly. Planned Parenthood v. AID, 915 F.2d 59 (2d Cir. 1990); DKT Mem'l Fund Ltd. v. AID, 887 F.2d 275 (D.C. Cir. 1989).

A. An Inappropriate Burden on the Freedom of Speech May Render A Congressional Funding Decision an “Unconstitutional Condition.”

The government “may not deny a benefit to a person on the basis that infringes his constitutionally protected interests -- especially, his interest of freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.”² Congress may, however, “burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression.”³

If Congress were to condition funding upon the abandonment of First Amendment rights or leave no adequate alternative channel for expressive activities, such a funding restriction would be unconstitutional. The paradigm case for this proposition is FCC v. League of Women Voters of California, 468 U.S. 364 (1984). In that case, the Public Broadcasting Act prohibited a noncommercial education broadcasting station from receiving a grant if it engaged in editorializing.⁴ The Supreme Court held this prohibition was an unconstitutional condition on the receipt of public funds.⁵ The Court explained that because the noncommercial stations received only 1% of their income from the federal government and grantees were “absolutely barred from all editorializing,” there was an unconstitutional condition because stations were “barred from using even wholly private funds to finance [their] editorial activity.”⁶ Similar to the broadcasters who were forbidden to editorialize in any manner if they wished to receive government funding in League of Women Voters, wholesale denial of funding to DNGOs who engage in lobbying with private funds would be an impermissible penalty upon the exercise of First Amendment rights.

In the family planning context, various Supreme Court decisions contain dicta strongly suggesting that if entities are completely deprived of government benefits because they exercise a fundamental right with non-governmental funds, such conditions would constitute an unconstitutional penalty.⁷ In addition, two other cases have specifically held that state statutes forbidding the disbursement of government funds (because DNGOs provide abortion counseling) unconstitutionally burden First Amendment rights. In Planned Parenthood v. Arizona, the Ninth Circuit struck down an Arizona statute that denied state funds to any family planning DNGO that

² Perry v. Sinderman, 408 U.S. 593, 597 (1972).

³ Velazquez v. Legal Servs. Corp., 164 F.3d 757, 766 (2d Cir. 1999), petition for cert. filed 68 U.S.L.W. 3263 (U.S. Oct. 6, 1999) (No. 99-604), petition for cert. filed 68 U.S.L.W. 3391 (U.S. Dec. 6, 1999) (No. 99-960).

⁴ FCC v. League of Women Voters of Calif., 468 U.S. 364, 371 n.7 (1984).

⁵ Id. at 402.

⁶ Id. at 400.

⁷ See Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) (explaining that “a substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion. This would be analogous to Sherbert v. Verner”); Mahe v. Roe, 432 U.S. 464, 474-75 n.8 (1977) (stating that if a state “denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits” there might be a stronger analogy to Shapiro and Memorial Hospital and the funding restriction would be more likely to be unconstitutional).

performed or promoted abortion as a method of family planning.⁸ The court found that the applicable portion of the statute was “a penalty designed to chill the constitutional rights to provide abortions.”⁹ Although Arizona could require segregation of funds to ensure that state funds would not be used for abortion related services, the court held Arizona could not prohibit non-state funds from being used for abortion related services.¹⁰

In Planned Parenthood v. Kempiners, the Northern District of Illinois held a statute unconstitutional that prohibited applicants engaged in abortion counseling or referral services from receiving grants under another state program relating to problem pregnancies.¹¹ In making this determination, the court relied on the opinion of Judge Cudahy, which explained that the statute prohibiting grants to nonprofits providing abortion counseling was facially unconstitutional.¹² Judge Cudahy specifically explained that because a DNGO would be denied benefits “solely because of its privately funded activities . . . [t]his kind of wholesale deprivation penalizes the agency for exercising its first amendment right to counsel for abortion.”¹³ Put another way, although it is appropriate for Congress to ensure that its own speech activities are clearly conveyed with Congressional funds,¹⁴ Congress cannot require DNGOs to abandon their own speech activities funded with their privately collected money.

Other cases consider whether government activity forces an entity or individual into a “Hobson’s Choice”¹⁵ of having to either give up funding or renounce a First Amendment

⁸ The unconstitutional statutory provision in this case provided that: “No state money may be spent by the department of economic security by contract, grant or otherwise, on abortions, abortion procedures, counseling for abortion referrals . . . No state money, other than money for comprehensive medical and dental care and the developmentally disabled, may be given by the department of economic security by contract, grant or otherwise to agencies or entities which offer abortions, abortion procedure, counseling for abortion procedures or abortion referrals . . .” Planned Parenthood of Central and Northern Ariz. v. Arizona, 789 F.2d 1348, 1349 (9th Cir.) aff’d mem. sub nom., Babbit v. Planned Parenthood of Central and Northern Ariz., 479 U.S. 925 (1986).

⁹ Arizona, 789 F.2d at 1350.

¹⁰ We note that the U.S. Supreme Court affirmed the Ninth Circuit’s decision in a summary memorandum, which is significant in its binding effect on lower courts, even though, such a summary affirmance memorandum does not completely preclude the U.S. Supreme Court from revisiting the issue in certain circumstances. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 215-21 (7th ed. 1993).

¹¹ Planned Parenthood Ass’n of Chicago Area v. Kempiners, 568 F. Supp. 1490, 1495 (N.D. Ill. 1983). The statute at issue in that case provided that the Illinois Department of Public Health “may make grants to nonprofit agencies and organizations which do not refer or counsel for abortion . . .” Planned Parenthood Ass’n of Chicago Area v. Kempiners, 700 F.2d 1115, 1117 (7th Cir. 1983) (per curium).

¹² Planned Parenthood Ass’n of Chicago, 700 F.2d at 1123-25 (Cudahy, J.).

¹³ Id. at 1124; see also Legal Aid Soc’y of Haw. V. Legal Servs. Corp., 145 F.3d 1017 (9th Cir. 1998) (holding that a statute forbidding the use of government funds for attempts to influence legislation did not create an unconstitutional condition, provided that the restrictions only apply to government funds and not private funds).

¹⁴ See Regents of Univ. of Wis. System v. Southworth, 2000 WL293217, *7-11 (U.S. Mar. 22, 2000) (explaining that the government often uses its funds to advocate its own policies); Buckley v. Valeo, 424 U.S. 1, 92-93 (1976) (per curium) (explaining that the government program providing subsidies to Presidential candidates is based upon the idea that the program “is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion in the electoral process, goals vital to self-governing people.”).

¹⁵ See DKT Mem’l Fund Ltd. v. AID, 887 F.2d 275, 302-03 (D.C. Cir. 1989) (Bader Ginsburg, J., dissenting in part) (explaining that the real issue is “may AID, in full view of the predictable effect on domestic NGOs like DKT, and compatibly with constitutional constraints, put foreign NGOs to Hobson’s choice.”).

freedom.¹⁶ For example, in Speiser v. Randall, 357 U.S. 513, 515 (1958), in order to receive a tax exemption, California required veterans to certify that “I do not advocate the overthrow of the Government of the United States or the State of California . . . nor advocate the support of a foreign Government against the United States in event of hostilities.” Noting that the requirement is “frankly aimed at the suppression of dangerous ideas,” the Court ultimately held the taxation program was an unconstitutional condition on the receipt of a public benefit.¹⁷ The government cannot create a funding choice that manipulates out of existence the guarantees of freedom of speech and association embedded in the Constitution of the United States.¹⁸ Similarly, the government cannot limit eligibility for federal funds by requiring a DNGO to certify that it will not engage in public policy debates with non-governmental funds.

Together, these cases provide strong precedent for the proposition that the government cannot limit eligibility for government funds upon the wholesale abandonment of First Amendment activity paid for with private funds. It would, therefore, be unconstitutional for the government to require DNGOs to forego their speech and lobbying activities paid for with private funding in order to obtain additional government grants or contracts.

B. Congress Can Require Institutional Separation Between Actions Taken With Public and Private Funds.

It is clear that a funding policy is unconstitutional if it conditions receipt of funds upon the prohibition of DNGOs to use their private funds for constitutionally protected activities. A funding policy that segregates private funds from government funds to ensure government funds are used for permissible activities, however, is likely to be constitutional.

Because Congress is not required to subsidize lobbying or speech,¹⁹ it can place specific

¹⁶ For example, the Supreme Court determined durational residence requirements for the receipt of public benefits was unconstitutional because they penalized the exercise of a constitutional right to interstate travel. Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Shapiro v. Thompson, 394 U.S. 618 (1969). Other cases followed this receipt of government benefits analogy. In Sherbert v. Verner, 374 U.S. 398, 405-06 (1963), the Court held that a state may not withhold all unemployment compensation benefits from a claimant who would otherwise be eligible for such benefits but for the fact that she was unwilling to work one day per week on her Sabbath. In Perry, 408 U.S. at 597, the Court decided that a public benefit may not be denied to a person on the basis that infringes on his constitutional right to free speech. In particular, a professor could not be denied the equivalent of tenure at a public university merely because he had publicly criticized the policies of the college administration. Id. at 594-95, 598; see also Board of County Comm’rs of Wabaunsee County v. Umbehr, 518 U.S. 668, (1996) (explaining that the First Amendment protects government contractors from termination in retaliation for their exercise of freedom of speech).

¹⁷ Speiser, 357 U.S. at 519, 528-29.

¹⁸ Frost & Frost Trucking Co. v. Railroad Comm’n, 371 U.S. 583, 594 (1926).

¹⁹ The Supreme Court usually holds the government does not have to provide a subsidy or fund DNGOs who engage in lobbying efforts or general categories of speech. For example, in Buckley v. Vallo, 424 U.S. at 94-95, Congress provided financial subsidies for some, but not all, candidates for political office. The Court reasoned that the funding law did not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of her choice. The inability, if any, of minor-party candidates to wage effective campaigns did not derive from lack of public funding but their inability to raise private contributions. Therefore, the choice of Congress to only provide funds to major candidates did not create an unconstitutional condition on the First Amendment. Id. at 97-104.

restrictions on how DNGOs use government-funds -- even when these conditions are related to lobbying or speech. Specifically, Congress can require: (1) that federal and private monies are not commingled, (2) that federal funds support federally-desired activities, and (3) that no federal funds are allocated to activities that are not preferred according to governmental policy choices.²⁰ For example, it is not an unconstitutional condition to require “program integrity” through the establishment of affiliate organizations.²¹ Congress can require that, if a DNGO receives federal funds under specified conditions, the DNGO must have a separate, independent entity that engages in prohibited activity with its private funds. “Program Integrity” requirements that have been found constitutional in the past include: the creation of an entirely distinct corporate entity,²² separate accounting and/or timekeeping records,²³ separate physical facilities,²⁴ separate personnel,²⁵ separate advertising or other means of identification,²⁶ separate promotional literature,²⁷ and the government funded entity did not subsidize the privately funded affiliate.²⁸

Whether the federal government can require institutional integrity between a DNGO’s use of federal and private funds has been addressed most recently in cases involving the

²⁰ DKT Mem’l Fund Ltd., 887 F.2d at 292-94, determined that, without more, a decision of the Executive not to fund FNGOs by sub-grant or direct grant did not infringe a DNGO’s right of association or speech. Under the facts of this case, a DNGO receiving an AID grant must certify that it will not furnish assistance for family planning under the grant to a FNGO that performs or actively promotes abortion as a method of family planning. *Id.* at 278. There was a strong dissent in this case, however, by then Judge Ruth Bader Ginsburg arguing that the condition created by AID is actually an unconstitutional condition because it is “designed to entice away DKT’s audience and allies.” *Id.* at 301 (Bader Ginsburg, J., dissenting in part).

Similarly, in Planned Parenthood v. AID, 915 F.2d 59, 61 (2d Cir. 1990), the court examined an AID policy which required that, prior to receiving federal funds, an entity must certify that it (1) does not perform or actively promote abortion as a method of family planning in AID-recipient countries and (2) does not provide financial support to any other foreign nongovernmental organization that conducts such activities. The Second Circuit held that this certification was constitutional because the plaintiffs “may use their own funds to pursue whatever abortion-related activities they wish in foreign countries.” *Id.* at 63-64. The court also explained there was no unconstitutional condition because entities are not forced to choose between a public benefit and right to freedom of speech, and the certification requirement goes “no further than necessary to implement an otherwise nonjusticiable decision limiting the class of beneficiaries of foreign aid.” *Id.* at 64-65.

²¹ See Rust v. Sullivan, 500 U.S. 173, 196-98 (1991) (determining that where program received federal funds under Title X but forbade abortion advocacy and counseling there was no unconstitutional condition because grantees were not prohibited from engaging in advocacy outside of the Title X program sufficiently separate from the Title X program); League of Women Voters, 468 U.S. at 400 (explaining in dicta that if Congress permitted stations to establish affiliate organizations which could use the station’s facilities to editorialize with nonfederal funds, such a mechanism would be constitutionally valid); Taxation with Representation, 461 U.S. at 551, 553 (holding that IRS provision granting tax exemption to nonprofit organizations that did not engage in “substantial” lobbying activities was constitutional since it was not intended to suppress any ideas and there could be a separate corporate structure for the lobbying and non-lobbying arms of the institution).

²² Rust, 500 U.S. at 198; Taxation with Representation, 461 U.S. at 552-53 (Blackmun J., concurring); Legal Aid Soc’y of Haw. v. Legal Servs. Corp., 145 F.3d 1017, 1028 (9th Cir. 1998).

²³ Rust, 500 U.S. at 180 (citing 42 C.F.R. § 59.9); Legal Aid Soc’y of Haw., 145 F.3d at 1025 (citing 45 C.F.R. § 1610.8(a)).

²⁴ Rust, 500 U.S. at 180 (citing 42 C.F.R. § 59.9); Legal Aid Soc’y of Haw., 145 F.3d at 1025 (citing 45 C.F.R. § 1610.8(a)).

²⁵ Rust, 500 U.S. at 180 (citing 42 C.F.R. § 59.9); Legal Aid Soc’y of Haw., 145 F.3d at 1025 (citing 45 C.F.R. § 1610.8(a)).

²⁶ Rust, 500 U.S. at 180 (citing 42 C.F.R. § 59.9); Legal Aid Soc’y of Haw., 145 F.3d at 1025 (citing 45 C.F.R. § 1610.8(a)).

²⁷ Rust, 500 U.S. at 180 (citing 42 C.F.R. § 59.9).

²⁸ Rust, 500 U.S. at 198; Taxation with Representation, 461 U.S. at 544.

restriction of funding for legal aid services. These cases have held that, provided that the legal aid society has alternative methods for lobbying through a separate affiliate that is not connected with the government-funded organization, the funding restrictions do not create an unconstitutional burden on First Amendment Rights.²⁹ Therefore, if Congress required a family planning entity to have institutional independence between the lobbying and non-lobbying wings of its organization in order to receive government funds, this is probably constitutional.

C. If Congressional Funding Discriminates Among Various Viewpoints and is Not Based Upon an "Acceptable Neutral Principle," the Funding Provision May Be Unconstitutional.

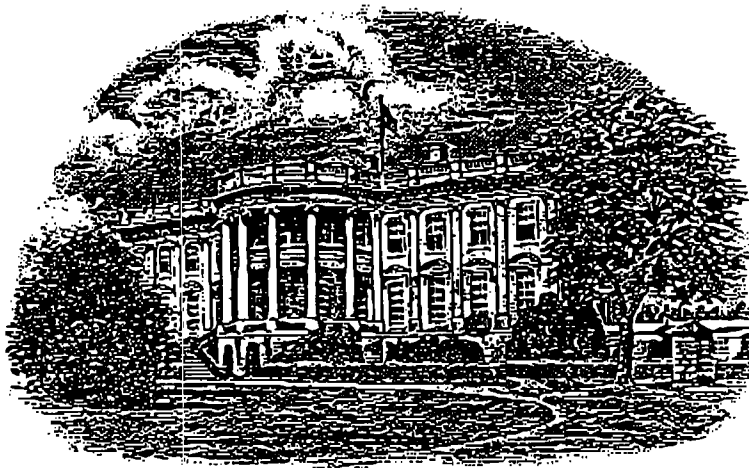
As a final point, we note the possibility that, based on more recent cases, the U.S. Supreme Court might be more willing to find that a federal funding policy discriminates upon the basis of the viewpoint expressed through the speech.³⁰ For example, in the family planning context, a funding policy that specifically prohibits federal funding for a view to change an existing governmental policy regarding abortion may be unconstitutional. The success of this argument -- that a federal funding policy is unconstitutional because of viewpoint discrimination -- will depend on distinguishing Rust v. Sullivan, 500 U.S. at 193.

²⁹ In Legal Aid Society of Hawaii, 145 F.3d at 1029 n.1, former Justice White (sitting by designation) held that statute forbidding the use of government funds for attempts to influence legislation, regulations or executive orders did not create an unconstitutional condition on first amendment rights -- provided that the restrictions only apply to government funds. Former Justice White determined that the statute was valid for various reasons. First, a recipient is not compelled to receive a government grant. Id. at 1028. Second, legal aid lawyers who also wish to engage in lobbying are not prohibited from doing so outside their normal jobs with unrestricted organizations -- and any restriction on lobbying on the job is purely a function of the attorney's choice to work at legal aid. Id. at 1029. Third, the government restrictions only govern recipients of legal aid funds. "If a recipient wishes to engage in prohibited activities, it remains free to use private funds to finance these activities if it complies with the separation requirements" set down by regulation. Id. at 1028.

A case from the Second Circuit analyzed the same restrictions on legal aid services. Velazquez, 164 F.3d at 766-68, held generally that statute restricting the services (both legal representation and lobbying activity) did not violate the First Amendment -- and that program integrity requirements do not impermissibly burden the First Amendment -- particularly since there were adequate alternative channels for protected expression. The Velazquez court expressly determined that the provisions restricting lobbying were constitutional -- because they were "based upon subject matter, not viewpoint." Id. at 768. The court specifically discussed legislation that restricts legal aid grantees from "attempting to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body." Id.

³⁰ Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 834-35 (1995); Velazquez v. Legal Servs. Corp., 164 F.3d 757 (2d Cir. 1999) cert. granted 68 U.S.L.W. 3263 (U.S. Apr. 3, 2000) (No. 99-603) and 68 U.S.L.W. 3391 (U.S. Apr. 3, 2000) (No. 99-960).

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United States Department of State

Washington, D.C. 20520

October 4, 1999

SENSITIVE BUT UNCLASSIFIED

TO: H - Susan Jacobs

FROM: L/FO - Bill Kissinger 

SUBJECT: Possible Revisions to the Greenwood Language

You asked me to propose some revisions to the Greenwood language (attached) that would make it appear "tougher" without making it too "tough." Below I have suggested a two possible revisions. The first only creates the appearance of being tougher; the second option is "tougher" in the sense that it would be a somewhat bitter pill for the Administration to accept. These options are not mutually exclusive; they could be combined. I have not yet shared this with White House Counsel as you suggested. I wanted to get your reactions first.

Option 1: The "Looks Tough Only" Revision

Insert a new section (a)(1) that provides as follows:

"(1) it will not use such funds to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortions."
[Existing (a)(1)-(4) would need to be renumbered accordingly.]

Revise section (a)(2) as follows:

(2) it will use such funds that are made available for funding planning services to ~~reduce the incidence of~~ to prevent abortion as a method of family planning;

Explanation: The first revision adds only an additional certification requirement. Existing law already prohibits USG funds from being used to pay for abortions. FAA section 104(f)(1). Thus, this revision only requires organizations to certify they will not do that which is already prohibited.

The second revision also makes the Greenwood language look tougher without substantively imposing additional restrictions. In interagency discussions that included AID almost two years ago, we concluded language along these lines was acceptable given the definition AID would provide to the phrase "prevent abortion as a method of family planning." [The agency would adopt the interpretation that providing information on other alternatives "prevents abortion as a method of family planning."]

Option 2: The "Slightly Bitter Pill" Revision

Insert a new section (a)(5) that provides as follows:

"(5) it will not have a substantial part of its activities involve carrying on propaganda, or otherwise attempting, to influence legislation with respect to abortion."

Explanation: This language is intended to be comparable to the restriction that exists on lobbying activity by domestic tax exempt organizations under 26 U.S.C. section 501(c)(3). This restriction was seriously considered as a revision to toughen the Gilman-Pelosi language in January 1998.

This approach was never floated on the Hill because there appeared no serious prospect of it going anywhere. There were, however, serious concerns about pursuing this approach. On the upside, this approach would preserve funding for most, if not all, organizations because even the largest organizations receiving funds spend only a de minimis amount on lobbying. By looking to a definition of lobbying based on existing US law, it is readily understandable by Congress and U.S. organizations and limited in scope.

The downsides associated with this approach are based on more general principles. It would codify the principle that abortion rights as defined under law are somehow different from other reproductive rights and that it is appropriate to limit NGO participation in the democratic process. It was also argued that it would set a precedent that the Administration acknowledges that what NGO's do with privately raised funds may be punished, something that is contrary to the President's policy as articulated in 1993. There were also concerns that the language, even with the 501(c)(3) gloss, would be ambiguous to recipients to US funds.

Attachment

SENSITIVE BUT UNCLASSIFIED