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Possible Legislative Options

The following suggests various options that might be considered in addition to Gilman-Pelosi and the various permutations previously developed.

1. Lobbying

"Lobbying" appears to be at the center of the controversy, with Smith and his supporters asserting that USG funds support international NGO's "lobbying" to change their local laws with respect to abortion. The issue might be resolved by reaching a compromise on the definition of "lobbying." If the scope of "lobbying" could be defined sufficiently narrowly, a compromise could be struck that accepted the Smith language with respect to such activities. Various possible compromise definitions would be as follows:

- Narrow Definition: Limit Lobbying to the "Buttonholing" Paradigm;
- Alternative Narrow Definition: Limit Lobbying to Grassroots Organizing around Specific Legislation but Allow "Buttonholing";
- Moderately Narrow Definition: Limit Lobbying to "Buttonholing" and Grassroots Organizing;
- Broad Definition that Prohibits Lobbying and Certain Forms of Advocacy.

Draft statutory language for each of these possible compromise approaches is contained in a separate paper entitled "Alternative Lobbying Language."

2. Disclosure of "Lobbying" Activity

Enact legislation patterned after the Lobbying Disclosure Act, 2 U.S.C. 1601, that would require "lobbying" activity be disclosed.

3. Phase-out "Lobbying" Activity

Enact legislation under which current grants would be conditioned on NGO's pledging to end "lobbying" by the end of a particular time frame, e.g., three years. During this time, impacted recipients could either cease such activities

or spin them off to a 501(c)(4)-type organization. This approach could include penalties for organizations that continued to "lobby," including refunding past USG receipts, penalties and/or debarment. It might also include funding/assistance to facilitate transitioning such activities to other organizations.

4. Fiscal Incentives Applicable But Not Specific to "Lobbying"

Various compromises could be struck that would encourage, but not compel, NGO's to stop providing abortions or "lobbying" on the issue.

a. Dollar for Dollar Reduction in Funding

Funding could be reduced on a dollar for dollar basis for the provision of abortion services and/or for "lobbying" on the issue of abortion. One approach along these lines might be to enact legislation that mirrors section 307 of the Foreign Assistance Act of 1961, as amended. This provision requires funding to certain programs of International Organizations be reduced by the proportionate share that such programs would devote resources to particular pariah states, e.g., Burma, Iraq, North Korea.

A similar approach might be adopted with respect to NGO's that perform or "lobby" on abortion. AID would gather information from each recipient of USG funds on the proportionate amount of their budgets dedicated to such activities and reduce the USG contribution proportionately.

b. Incentive Plans

Financial incentives could be created to encourage organizations to reduce their level of activity with respect to the provision of abortion and/or "lobbying" on the issue. Under this approach, NGO's would receive a bonus in addition to their customary funding in the event they cease/reduce such activities.

This assumes an overall increase in appropriations. Alternatively, a lower base would be guaranteed to NGO's in order to stay within anticipated appropriations. Depending on how such a program were structured, the bonus might bring recipients up to or beyond existing funding.

5. Affirmative Steps to Prevent Abortion

Enact legislation that discourages abortion. This might be accomplished in any of the following ways:

a. Reverse the Language of Gilman-Pelosi

The optics of Gilman-Pelosi might be improved by reversing its order so that it would read: "or to organizations that utilize these funds to prevent abortion as a method of family planning and do not promote abortion as a method of family planning."¹ Similar changes would be made to the second part of Gilman-Pelosi (that modifies the lobbying ban) as well.

b. Reporting Requirements

Require recipients of USG funds to report on the steps they undertook to "prevent abortion as a method of family planning."

c. Require Counseling On the Issue of Abortion

Current law requires that NGO's providing sterilization services using USG funding ensure that the individual has voluntarily come to the treatment facility and has given an informed consent to the procedure. 48 C.F.R. § 752.7016. Informed consent is defined to include voluntary assent after being advised of:

the surgical procedures to be followed, the attendant discomforts and risks, the benefits to be expected, the availability of alternative methods of family planning, the purpose of the operation and its irreversibility, and the fact that the consent can be withdrawn at any time prior to the operation.

Id. It does not appear that there are similar counseling requirements prior to the performance of abortion -- presumably because abortions are not paid for with USG funds

¹ As originally drafted, the first portion of Gilman-Pelosi reads "or to organizations that do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning."

except in the limited circumstances of rape, incest or where the mother's life is in danger. One compromise might be to require that NGO's provide such counseling in advance of any abortions (even when using their own funds to carry out the procedure).

6. Enact Smith Restrictions with Double Waiver

Accede to the Smith language, preferably by appropriations rather than authorization law, but include a provision for a Presidential waiver on both providing abortion as well as "lobbying" on the issue ("a double waiver").

**7. Enact Smith Restrictions with Single Waiver
(for Lobbying Only)**

Enact Smith language into law with waiver only for lobbying. Absent enactment of Gilman-Pelosi, this would make organizations that provide abortion services ineligible for USG funds.

8. Metering

Return to previous metering regimes.

9. Audit Programs

Establish by law or executive order a requirement for USAID to retain a well-known, independent accounting firm to conduct an in-depth analysis of the issues raised in the on-going international population program debate, i.e. fungibility of USG funding.

10. Target Specific Organizations As Ineligible for Funding

Cut off organizations that seem to be at the center of the controversy, e.g., International Planned Parenthood Federation and/or UNFPA, in order to protect the rest of the program.

11. Voluntary Commitments by Organizations That They will Cease "Lobbying" Efforts

Seek a voluntary commitment from USG fund grantees that they will not engage in any lobbying activities.

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United States Department of State

Bureau of Population, Refugees, and Migration

Washington, D.C. 20520-5824

INFORMATION MEMORANDUM

(SENSITIVE BUT UNCLASSIFIED)

December 18, 1997

TO: The Secretary

THRU: C - Ambassador Sherman
USAID - Brian Atwood

FROM: PRM - Julia V. Taft *Julia Taft*

SUBJECT: Policy Options on International Population Assistance

The IMF, UN arrears, reorganization of the foreign affairs agencies and international population assistance are all important foreign policy priorities for this Administration. In the 105th Congress, the House of Representatives held national security hostage by strategically linking these separate but critical issues. Redressing this shortsighted Congressional action will require a major push by the entire Administration, both in public articulations of the issue as well as in the development of a legislative resolution.

Based on the meeting chaired by White House Chief of Staff Erskine Bowles last week, representatives from State and USAID, with limited input from NGOs, recommend a two-tiered approach in seeking a resolution of the current appropriations impasse. First, we recommend that the Administration wage a full-scale public affairs campaign on funding the IMF and UN, de-linking these issues from international population assistance, preserving the integrity of the population assistance program and using current world events to focus on just how important these commitments are. The public affairs bureaus of State, USAID, Treasury and NSC are all working together in crafting this strategy. We are also developing a public affairs strategy to tell our story as to why family planning is important and exactly why the President was not willing to abandon his principles.

We recommend a second tier effort to develop and, if necessary, eventually offer legislative and Executive solutions that will provide political cover to sufficient members of the House while doing the least violence to either existing programs or the Administration's policy commitments on international family planning. To that end, we have developed a series of options.

that conceptually address previously stated Congressional concerns (Tab 2).

From this comprehensive listing of options, we have selected a set of the least onerous proposals to meet Congressional concerns. This set is attached as Tab 1. The specific proposals noted therein could be proposed individually, in combination of two or more, or as a "package", depending on which issues emerge as the most critical and how much compromise is required of the Executive Branch.

Briefly stated, the policy options speak to four elements which reflect Congressional concerns. The first addresses what appears to be the primary concern of Representative Chris Smith (R-N.J.) and others: that USAID funds support lobbying on the issue of abortion (notwithstanding the existing ban on the use of USG funds for lobbying). Our recommended proposal is legislation that imposes the same lobbying limitations on USAID grant recipients that are placed on domestic 501(c)(3) nonprofit organizations in exchange for their tax-exempt status, i.e., that they not "have a substantial part of their activities involve carrying on propaganda or otherwise attempting to influence legislation." While our proposal would focus only on abortion, it could be viewed as a possible first step down the proverbial slippery slope towards further restrictions on what organizations do or say with their own funds (which is at the heart of the Administration's rejection of the so-called Mexico City policy). In addition, we propose that such organizations be ineligible for funding if they are found to lobby illegally on abortion.

Second, we propose a similar prohibition on funding to organizations that illegally perform abortion illegally. Although this proposal does not directly respond to Rep. Smith's assertion that USAID funds free up existing funds for organizations to perform abortion, it dispels any assertion that the United States is subsidizing organizations that are violating local abortion laws.

Third, we propose language to address Congressional opposition to funding for the United Nations Population Fund (UNFPA) in the event it begins family planning programs in China.

Fourth, we propose the inclusion of legislative language underscoring that it is the Administration's policy to reduce the demand for abortion by funding expanded and improved family planning services.

Finally, we propose that USAID retain an independent audit firm to conduct an in-depth analysis of the agency's program. This audit should reveal that USAID funds are not indirectly subsidizing abortion and/or lobbying.

As previously stated, these proposals represent the least onerous way to address continuing Congressional concerns. They also provide political cover for crucial swing votes while being protective of existing policy priorities and programs. It should be noted, however, that these concessions will not be enough to satisfy Rep. Smith and his allies and will not end the perennial conflict over this subject. In fact, our willingness to make these concessions may backfire or indicate to Smith what he will perceive to be a weakness of our commitment to the President's principles. As noted in Tab 2, there are other more burdensome policy options available to the Administration, but many of these options would undercut the Administration's promise to stand behind its international family planning program commitments.

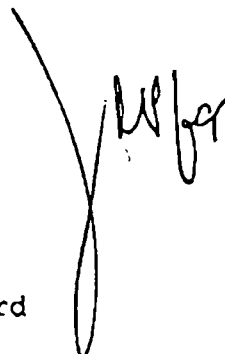
Attachments:

- Tab 1 - Recommended International Population Assistance Policy Options
- Tab 2 - Comprehensive Analysis of All Policy Options
- Tab 3 - Memo from Administrator Atwood to Chief of Staff Erskine Bowles.
- Tab 4 - Letter from Speaker Gingrich to the President

Info Memo to S: Policy Options (Pop Aid)
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USAID/G/PHN/POP/P&E: EStarbird



Attachment 1:**Recommended International Population Assistance Policy Options**

The legislative options set forth below represent the collaborative efforts of State and USAID with limited input from NGOs. The goal of advancing one or more of these options would be to win support on the Hill while doing the least violence to the Administration's policy commitments on international family planning.

Each of the items below is drawn from Tab 2 and represents the least onerous response to the arguments raised by Congressional opponents. Although each carries at least some negative consequences for Administration principles and programs, they are significantly less damaging than the Smith Amendment, which includes restrictions more severe than those rejected by the President when he overturned the so-called Mexico City policy. Depending on how negotiations with the Hill proceed, some or all of these options could be put forward as a legislative compromise.

The pros and cons of each option are presented in Tab 2, along with the pros and cons of other less desirable options. (Parenthetical reference for each item refers to its placement in Tab 2.)

- Prohibit funding to foreign non-governmental organizations that "lobby" for abortion using U.S. tax-code treatment of 501(c)(3) organizations as a model in combination with a reasonable threshold based on the amount of federal funds received. (Option 1-A)
- Prohibit funding to any foreign non-governmental organization that, using its own funds, lobbies on the issue of abortion and is found by national authorities to have done so illegally. (Option 1-B)
- Prohibit funding to any foreign non-governmental organization that is found by national authorities to perform abortions illegally. (Option 2-A)
- Establish affirmative language in law that if UNFPA has a program in China, U.S. funding will continue if the President determines that the program promotes voluntarism and reduces abortion. (Option 3-A)
- Establish by Administrative action or legislative language an explicit strategic objective in USAID's family planning assistance program oriented towards the reduction of the demand for abortion. (Option 4-A)

- Establish by Administration directive a requirement for USAID to retain a well-known, independent audit firm to conduct an in-depth analysis of the issues raised in the on-going debate surrounding the U.S. international population program. (Option 4-B)

Attachment 2: Comprehensive Analysis of All Policy Options

Introduction and Background

The IMF, UN arrears, reorganization of the foreign affairs agencies and international population assistance are all important foreign policy priorities for this Administration. In the 105th Congress, the House of Representatives held national security hostage by strategically linking these separate but critical issues. One school of thought is that the House Leadership may be too locked into its promise to Mr. Smith and the House Pro-Life Caucus that the abortion and foreign-policy issues will remain linked "in perpetuity". However, if the Administration makes a major push to highlight how this shortsighted Congressional action jeopardizes U.S. global leadership in terms of the UN and IMF, and couples this with a legislative strategy with respect to international family planning, it may be possible to find a resolution --- or at least to isolate the extremists and appeal to (or provide sufficient cover to) more moderate Members in order to forge an agreement.

At the core of the debate is the fundamental difference between the Administration's strong support for international family planning and free speech as opposed to Rep. Smith and his supporters who seek to condition U.S. family planning assistance by placing unnecessary and excessively broad restrictions on the program. One aspect of the debate is the charge leveled by Congressional critics of international family planning that USAID funding enables organizations to become more active in the provision of abortion and abortion-related services than they might otherwise be in the absence of such funds. The second is that such funds enable these organizations to become intensely involved in lobbying to legalize abortion.

Both aspects of the debate proceed from the allegation that any type of support to international family planning organizations, through a process of "fungibility", frees up resources to carry out such campaigns. Thus, although existing law precludes USAID funds from being used to lobby or perform abortions (except in cases of rape, incest or the life of the mother), critics contend that the fungible nature of money allows foreign non-governmental organizations (NGOs) to use their own funds to perform abortion, lobby to make it (more) available, or to do both. Moreover, the critics contend that organizations that engage in either of these activities (lobbying or performance) are given enhanced legitimacy because they carry the imprimatur of the USG by the virtue of receiving U.S. federal funds.

One goal of the legislative options discussed below is to meet the "fungibility" argument head on. If this perception can be altered, the core criticism of USAID's program would be

undermined. In fact, USG programs reduce the frequency of abortion by providing the means to avoid unwanted, mistimed pregnancies. The last two options discussed below would highlight this essential fact.

Approach: We suggest a two-tiered approach. First, we recommend that the Administration wage a full-scale campaign focused on funding international organizations and preserving population assistance. Second, we outline a series of new options and modifications of previously considered options. This two-tiered approach set forth below represents the collaborative efforts of State and USAID with limited input from NGOs.

Tier I: Administration-wide, full-scale campaign focused on funding international organizations and preserving U.S. population assistance.

Initially, the question of population funding for FY98 should be regarded as decided and not as a subject to be revisited in connection with the funding of UN arrears and the IMF. It is critical that the President and the Secretary, among others, make forceful public statements in support of the essential functions of both organizations in light of current world events, as the President did in his press conference on 12/16/97.

In addition, the Administration must emphasize that international population assistance prevents abortion. We must stress the critical importance of unrestricted population funding to our foreign policy objectives, emphasizing that the issues of funding international institutions and U.S. population assistance are not linked. The PRM-proposed speech by the Secretary to the American Academy for the Advancement of Science in early 1998 may be an opportunity to make this public pronouncement as are the Secretary's testimonies before Congress in the defense of the Presidents' FY 1999 budget submission.

Tier II: Legislative/Executive options that address concerns of Rep. Chris Smith and others about U.S. population policy.

Despite any of the above efforts by the Administration to raise the level of debate and de-link the issues, Congressional opponents are likely to insist that additional abortion-related restrictions be included in any supplemental legislation.

In the 105th Congress, Rep. Smith introduced a legislative amendment that went far beyond the original "Mexico City" restrictions imposed under Presidents Reagan and Bush.¹ Smith's language embraces three restrictive elements:

¹ The original Mexico City restrictions were issued as a White House policy statement at the UN Conference on International Population in 1984. They prohibited population funds for foreign non-governmental

1. A prohibition on foreign organizations using their private funds to "lobby" to alter abortion laws;
2. A prohibition on foreign organizations using their private funds to perform abortion; and
3. A prohibition on funding of UNFPA unless the President certifies that UNFPA has terminated all activities in China.

The first and second proposed restrictions are inconsistent with the Administration's policy and have been rejected. A heavy price for this position has already been paid over the past three years with the imposition of unprecedented and damaging delays and monthly metering of population funds. Ideally, any negotiations with the Hill should seek to assure the ending of this burden on the program.

Below we have identified legislative and Executive approaches that would, to some degree, meet each of the concerns raised by Rep. Smith and others with the least damage to the Administration's objectives. The options under each heading are all potential solutions, arranged in order of preference, ranging from the most to the least acceptable. It bears noting that in many instances the less acceptable options would impose high political costs.

We recognize that none of the options, either alone or in combination, will fully satisfy Rep. Smith and his allies and will not end the perennial conflict over this subject. In fact, our willingness to make these concessions may backfire or indicate to Smith what he will perceive to be weakness of our commitment to the President's principles. Rep. Smith aside, however, our belief is that some combination of these options could provide sufficient political cover for swing members of the House and Senate to produce a satisfactory resolution.

organizations (NGOs) that "performed or actively promoted abortion as a method of family planning" with funding from any source. The Smith amendment would differ in several ways: (1) It would be imposed in statute rather than an Administration policy and could not be implemented with the same kind of Executive discretion as the 1984 policy. (2) It has broad language to describe prohibited activities, including "any activity or effort" to alter laws, policies or regulations relating to abortion, whereas Mexico City restrictions were applied specifically to "lobbying" (undefined) or "conducting a public information campaign." (3) The Smith Amendment would apply to "multilateral" organizations, presumably UNFPA, as well as all foreign NGOs receiving USAID contracts or grants, whereas the Mexico City policy was applied only to foreign NGOs receiving grants (including the International Planned Parenthood Federation).

1. POSSIBLE RESPONSES TO A PROHIBITION ON FOREIGN NON-GOVERNMENTAL ORGANIZATIONS USING THEIR PRIVATE FUNDS TO "LOBBY" TO ALTER ABORTION LAWS.

Lobbying currently appears to be the principal concern of the House leadership (rather than organizations' actual performance of abortions).² Addressing this issue directly may win support from the House leadership and move the issue away from Rep. Smith's language. Important matters of principle are involved, however, as conditioning U.S. funds to restrict foreign NGOs from lobbying with private funds could be seen as limiting their free speech, interfering with the democratic process in the country, and the U.S. intervening in a country's internal affairs. It could also be viewed as "Mexico City" in a different form since it does limit what foreign NGOs can do with their own money. There could also be some loss in the leadership role that the U.S. has assumed in the international population community under the Clinton Administration, as well as a chilling effect on foreign NGOs legal activities.

The issue is further complicated by competing definitions of the term "lobby". The Smith amendment speaks of lobbying expansively and includes "any activity or effort to alter the laws or government policies of any foreign country concerning the circumstances under which abortion is permitted, regulated or prohibited." Under this broad construction, organizing or even attending a conference where abortion is discussed one might constitute "lobbying", and in fact, the House Republicans proposed language to ensure that such activities were covered.

The options outlined below are premised on a narrower and more traditional view of lobbying, e.g. buttonholing a legislator. Thus, none of these options goes as far as Rep. Smith and other like-minded individuals would want.

Option 1-A:

Prohibit funding to foreign non-governmental organizations that "lobby" for abortion using U.S. tax-code treatment of 501(c)(3) organizations as a model in combination with a reasonable threshold based on the amount of federal funds received. (Option 1-A)

Pros:

- This is based on an approach to dealing with lobbying by non-profit organizations in the U.S. who receive tax-exempt status. It does not prohibit lobbying altogether but applies only when a substantial part of an organization's activities involves lobbying. The restriction could be justified as an

² See Speaker Gingrich letter to President Clinton (11/13/97) (Tab 4)

effort to preserve U.S. support to organizations which use most of their other resources for family planning purposes and not abortion lobbying.

- Preserves funding for most, if not all, organizations because even the large organizations receiving funds spend only a de minimis amount on lobbying.³
- Uses a definition of lobbying based on existing U.S. law governing 501(c)(3) organizations that is both readily understandable by Congress and U.S. organizations and limited in scope.

Cons:

- Codifies the principle that abortion rights are somehow different from other reproductive rights (i.e., it is okay to lobby for the elimination of female genital mutilation but not on the risks of unsafe abortion), and of appropriateness of limiting NGO participation in the democratic process.
- Would contribute to the "chilling effect" on debate concerning abortion policy in developing countries because organizations will not understand the nuances of U.S. law and will act conservatively, conceivably not engaging in appropriate advocacy efforts.
- Acknowledges that what NGOs do with privately-raised funds is fair game (precisely opposite of the President's statement in 1993.)
- May risk cutting off USAID support to the International Planned Parenthood Federation (IPPF) and its affiliates if they decide to reject U.S. funding as a matter of principle, resulting in the loss of USAID support for the affiliated organizations that serve over 10 million couples with service in 140 countries.
- Because of the difficulty and ambiguity in applying the language, USAID may be vulnerable to lawsuits by disgruntled grant applicants.
- Congress could amend the term "lobby" to include advocacy activities, such as having or attending meetings where abortion is discussed.
- If the threshold were removed, there is a danger of having a provision that would be difficult or impossible to implement and monitor for the many small foreign NGO grantees and sub-grantees supported by USAID.

³ For example, local affiliates of the International Planned Parenthood Federation (IPPF), one of the largest organizations in the field are estimated to spend less than \$75,000 per year on lobbying (out of total expenditures by local affiliates of \$60 million). As noted above, however, one of the battles is the scope of the term. Conservatives on this issue draw the term⁸ broadly so as to encompass advocacy in addition to lobbying. Use of the 501(c)(3) language cleaves closely to the traditional model of lobbying.

- Ignores the differing context in which the 501(c)(3) status arises, i.e., to confer tax exempt status on domestic organizations. This model likely does not have an analogue in developing countries.

Option 1-B:

Prohibit funding to any foreign non-governmental organization that, using its own funds, lobbies on the issue of abortion and is found by national authorities to have done so illegally.

Pros:

- Respects national sovereignty.
- Likely preserves funding for most, if not all, organizations.
- Establishes the principle that the U.S. does not want to support any organizations promoting access to abortion through illegal methods.

Cons:

- Unlikely to address the major concerns of supporters of Smith Amendment-type restrictions who want to prevent all lobbying, legal or not.⁴
- Would penalize organizations trying to communicate about abortion issues in countries that prohibit or restrict free speech and/or other democratic processes.
- Ambiguity on what exactly it means to "lobby" and what would constitute a violation.

Option 1-C:

Prohibit funding to any foreign non-governmental organization that, using its own funds, is found by national authorities to have engaged in an illegal 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.

Pro:

- More closely mirrors Smith language but requires host government law enforcement action as the triggering mechanism for cutting off funding thereby allowing local activities consistent with national laws.

Cons:

⁴ For this reason, we propose that options 1-A and 1-B be combined, thereby meeting the concern at least part way. (Option 1-A addresses lawful lobbying.)

- Subject to abuse or manipulation by national authorities, particularly in oppressive or undemocratic countries.
- Potentially ambiguous (e.g., a pro-choice parade that is cited for not having a parade permit).

Option 1-D:

A dollar-for-dollar reduction of funding for foreign non-governmental organizations that use their private funds to lobby to alter abortion laws.

Pros:

- Would have de minimis effect on existing programs due to very limited budgets actually devoted to lobbying on changes in abortion laws.⁵
- Would be a concession and would not make organizations entirely ineligible for U.S. population assistance.

Cons:

- More than any of the above options, this one symbolically suggests any lobbying is inappropriate and punishes the organization accordingly.
- High administrative burden associated with identifying the portion of an organization's budget that is devoted to lobbying on abortion and reducing the funding accordingly.
- Ambiguity on what exactly it means to "lobby" and what would constitute a violation.

Option 1-E:

Omit Smith Amendment-type language, but prohibit certain organizations from receiving U.S. funds, such as the International Planned Parenthood Federation (and/or other targeted foreign organizations).

Pros:

- IPPF is a key target of the anti-abortion groups; this option would therefore represent a political victory for conservatives that might make it attractive.
- Support for individual family planning associations would continue, as occurred under the Mexico City policy, but without intruding on their privately funded activity.

Cons:

- Singling out IPPF would be seen as "caving in" by family planning supporters in the international community and the

⁵ See Memo from Administrator Atwood to E. Bowles (Tab 3); see also note 3.

U.S., particularly Planned Parenthood Federation of America (PPFA) and its local state affiliates.

- If other organizations were also to be defunded, drawing the line would be difficult.
- Effective providers of family planning information or services could be defunded both now and in the future given the tendency to reenact the prior year's appropriations language.

Option 1-F:

No funding to foreign non-governmental organizations that lobby using private resources in countries where abortion (as a method of family planning) is illegal.

Pros:

- Is a limited gag order, but would affect fewer countries than the Smith Amendment restrictions. This would only cover countries where the law on abortion is proscribed except in circumstances involving rape, incest or health of the mother.

Cons:

- This is contrary to current Administration policy as it curtails free speech in such countries as Nigeria or Mali where we are actively trying to promote democracy, as well as countries in Latin America and the Middle East.
- Abortion is still heavily restricted in most developing countries, but it is also increasingly on the policy agenda. Thus, this would have the same problems as the Smith Amendment language, resulting in termination of support to groups that are effective family planning providers and are attempting to influence national democratic processes.
- Although affecting fewer countries, these are the ones where it is more likely that there will be lobbying with respect to abortion.

2. POSSIBLE RESPONSES TO A PROHIBITION ON FOREIGN NON GOVERNMENTAL ORGANIZATIONS USING THEIR PRIVATE FUNDS TO PERFORM ABORTIONS.

This has traditionally been the heart of Smith Amendment restrictions, although the ban on lobbying has supplanted the issue somewhat. These options seek to meet the concerns of Congressional opponents that USAID funds are indirectly being used to support abortion. (Existing law prohibits the direct use of such funds.) None of the options suggested below, however, addresses the fungibility issue head on. To do so requires a solution of the sort advocated by Rep. Smith, a step the Administration is unwilling to take. Our hope is that these options create the right atmospherics for a compromise.

Option 2-A:

Prohibit funding to any foreign non-governmental organization that is found by national authorities to perform abortions illegally.

Pros:

- Demonstrates that the U.S. does not subsidize organizations that are violating local law.
- If no other Smith Amendment restrictions were incorporated, it would maintain U.S. support for organizations performing legal abortions with private funds.

Cons:

- Could be subject to abuse given the ambiguous legal status of abortion in some developing countries that have antiquated laws in place, do not enforce existing abortion laws, or that officially sanction different interpretations of existing laws to allow abortions.

Option 2-B:

Prohibit funding to foreign non-governmental organizations involved in performance of abortion with private funds, with provision for Presidential waiver.

Pros:

- Appears to give something to both sides, codifying part of the Smith Amendment into law while giving the President the opportunity to waive enforcement. Although enactment of this provision into law could be construed as a political loss, the waiver authority would preserve the ability to continue existing programs.

Cons:

- Family planning and abortion rights supporters may see incorporation of the Smith language into law as a major defeat even though it would not impede programs (assuming a pro-choice Administration). Given the tendency to reenact the prior year's appropriation language, would likely make Smith language a permanent feature of USG law.
- May not be sufficient. In the 105th Congress, the House offered language that codified a prohibition on performance with a Presidential waiver. This was rejected by the Administration.⁶ Rep. Smith has since said that he would no longer find a waiver acceptable. (Others in Congress, however, may feel otherwise.)

⁶ Albeit other language included in this offer was equally unacceptable if not more so, e.g. \$356 million funding cap, extremely restrictive lobbying language, etc.

Option 2-C:

Prohibit funding for any activities or organizations in countries where abortion (as a method of family planning) is legal.

E.g., "No population planning funds may be used to assist activities in countries where abortion is legal as a method of family planning."

Pros:

- Such an amendment would distance the United States from the whole issue by taking the U.S. out of countries where abortion as a method of family planning is legal.

Cons:

- Would result in more rather than fewer abortions.
- Would cut off U.S. population assistance in countries that need contraceptive services most to avoid widespread use of abortion as a method of family planning, such as Russia and other former Soviet republics, South Africa, India and Bangladesh as well as in other countries where abortion is allowed as a health measure or under circumstances other than rape, incest, or danger to the life of the woman.

3. POSSIBLE RESPONSES TO A PROHIBITION OF FUNDING TO UNFPA UNLESS THE PRESIDENT CERTIFIES THAT UNFPA HAS TERMINATED ALL ACTIVITIES IN CHINA.

Option 3-A:

Establish affirmative language in law that if UNFPA has a program in China, U.S. funding will continue if the President determines that the program promotes voluntarism and reduces abortion.

Pros:

- UNFPA is making real efforts to work with the Chinese on reducing their reliance on abortion and eliminating coercive practices in China's population program. U.S. policy should encourage such positive policies and programs.

Cons:

- Likely to draw political heat from both parties given concerns on the Hill about human rights abuses in China.

Option 3-B:**Eliminate funding to UNFPA****Pros:**

- UNFPA funding is frequently a Congressional sore point given UNFPA's anticipated re-initiation of their China program.
- Preventing UNFPA from receiving U.S. funds may be a bargaining chip.

Cons:

- Although Congressional opponents may not view this as a huge concession on the part of the Administration, the population and women's NGOs will.

4. POSSIBLE ADDITIONAL RESPONSES TO ALLEVIATE OPPONENTS' CONCERNS REGARDING "FUNGIBILITY" AND PROGRAM OBJECTIVES.

These are legislative or Executive fixes that could be offered to assist in reshaping the political debate and provide additional credibility and clarification regarding USAID's family planning program priorities. In addition, Option 4-B provides the one viable approach identified so far that meets the "fungibility" argument regarding abortion. In concept, it is meant to expose the faulty premise of the argument by revealing that facts do not support it and, hopefully, dispels it once and for all.

Option 4-A:

Establish by Administration action or legislative language an explicit strategic objective in USAID's family planning assistance program oriented towards the reduction of the demand for abortion

E.g., "A primary and explicit objective of population planning funds is to reduce the demand for abortion and abortion-related maternal morbidity and mortality through expanded and improved family planning services and other measures such as treatment of complications from unsafe abortion."

Pros:

- This is a cost-free statement of what USAID's programs already do, but might strike a chord with swing votes.
- This kind of provision could appeal to those who generally support the family planning program but who oppose abortion.
- Would put the Administration in an offensive rather than defensive posture on abortion policy.

Cons:

- By putting this language into play, conservative members of Congress may seize the opportunity to refocus USAID's program to emphasize primarily abstinence, natural family planning, "pregnancy crisis" counseling, etc. This runs a risk of further stigmatizing abortion while not effectively offering women real alternatives.

Option 4-B:

Establish by Administration directive a requirement for USAID to retain a well-known, independent audit firm to conduct an in-depth analysis of the issues raised in the on-going debate surrounding the U.S. international population program.

Pros:

- Would provide independent analysis and approval of USAID's monitoring and compliance with current abortion restrictions.
- Could serve to dispel some Members' assertions regarding "fungibility" of program resources.
- Would provide greater assurance to individuals concerned that recipients of USAID funds are not in full compliance with current funding restrictions.
- Represents a proactive, bold response to diverse Congressional concerns.

Cons:

- Would be a new, significant and expensive additional burden for USAID.
- Would take time to develop and implement this study.
- Could provide a new mechanism for family planning opponents to attack USAID.

STATE/USAID LIST OF MEXICO CITY OPTIONS

(* = option recommended by State/USAID staff)

Lobbying on Abortion:

Prohibit funding to foreign NGOs that "lobby" for abortion using US tax-code treatment of 501(c)(3) organizations as a model in combination with a reasonable threshold based on the amount of federal funds received. (1-A)*

Prohibit funding to any foreign NGO that, using its own funds, lobbies on the issue of abortion and is found by national authorities to have done so illegally. (1-B)*

Prohibit funding to any foreign NGO that, using its own funds, is found by national authorities to have engaged in an illegal 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. (1-C)

A dollar-for-dollar reduction of funding for foreign NGOs that use their private funds to lobby to alter abortion laws. (1-D)

Omit Smith-type language, but prohibit certain organizations from receiving U.S. funds, such as IPPF (and/or other targeted foreign organizations). (1-E)

No funding to foreign NGOs that lobby using private resources in countries where abortion (as a method of family planning) is illegal. (1-F)

Performing abortion:

Prohibit funding to any foreign NGO that is found by national authorities to perform abortions illegally. (2-A)*

Prohibit funding to any foreign NGOs involved in performance of abortion with private funds, with provision for presidential waiver. (2-B)

Prohibit funding for any activities or organizations in countries where abortion (as a method of family planning) is legal. (2-C)

UNFPA:

Establish affirmative language in law that if UNFPA has a program in China, U.S. funding will continue if the President determines that the program promotes voluntarism and reduces abortion. (3-A)*

Eliminate funding to UNFPA. (3-B)

General Concerns About Fungibility and Program Objectives:

Establish by Administration action or legislative language an explicit strategic objective in USAID's family planning assistance program oriented towards the reduction of the demand for abortion. (4-A)*

Establish by Administration directive a requirement for USAID to retain a well-known, independent audit firm to conduct an in-depth analysis of the issues raised in the on-going debate surrounding the U.S. international population program. (4-B)*

1 p.m.
1/19
draft

Population Legislation Policy Options January 19, 1998

Representative Chris Smith (R - N.J.) and others have proposed legislative proposals on U.S. Population Assistance (commonly referred to as the Smith language) that:

1. Prohibits funding for UNFPA unless the President certifies that UNFPA has terminated all activities in China and,
2. Makes foreign and multilateral organizations ineligible for funding unless they certify that they will not use their own funds to:
 - "lobby" to alter abortion laws;
 - perform abortion.

As Smith and his allies seem more willing to accept a Presidential waiver on the performance of abortion, the Administration's efforts should focus on addressing "lobbying." UNFPA is a moot point in light of the recent UNFPA Executive Board decision to begin such activities.

The attached six options seek to break the current impasse by addressing the lobbying issue in ways that should not interfere with existing programs or the Administration's publicly stated commitment to ensure that abortion remains safe, legal, and rare. However, each of the options carries significant downsides, including in some cases (options 1, 2, and 4), limitations or the risk of limitations on the ability of individuals and/or organizations to express their views on public policy issues relating to abortion.

The options are as follows:

Option 1: Use 501(c)(3)-type tax code restrictions to limit lobbying activities.

Option 2: Resurrect Gilman-Pelosi

Option 3: Enact Smith restrictions with Presidential waivers.

Option 4: Voluntary statement by foreign NGOs that they will not lobby on abortion for one year.

Option 5: Provide incentive/bonus to foreign NGOs that agree not to lobby on abortion.

Option 6: Return to FY97 Appropriations language with second vote.

* It bears noting that UNFPA's China program will be conducted in regions where the practices leading to Congressional opposition are no longer practiced. Thus, the *raison d'être* for prohibiting such funding no longer exists. However, we will have to work hard, if we want to ensure future funding for UNFPA.

Option 1:

Prohibit funding to foreign non-governmental organizations for which a substantial part of their activities are aimed at influencing legislation on abortion using section 501(c)(3) of the U.S. tax code as a model. This option would have a funding threshold to ensure that any administrative burdens associated with this option not apply to micrograntees. (See Annex 1 for exemplar legislative language.)

Pros:

- This option draws from the restrictions placed on non-profit organizations in the U.S. that receive tax-exempt status. Those restrictions do not prohibit lobbying activity so long as "a substantial part of the organization's activities are not aimed at attempting to influence legislation." The restriction could be justified as an effort to preserve U.S. support to organizations which use most of their own resources for family planning purposes and not abortion lobbying. (Existing law already bans the use of federal funds for lobbying.)
- Uses a definition of lobbying based on existing U.S. law governing 501(c)(3) organizations that is both readily understandable by Congress and U.S. organizations and limited in scope.¹ (i.e., what we apply overseas is what we practice here in the U.S.)
- Preserves funding for most, if not all, organizations because even the large organizations receiving funds spend only a de minimis amount on lobbying.²

Cons:

- Codifies the principle that abortion rights as defined under law are somehow different from other reproductive rights (i.e., it is okay to lobby for the elimination of female genital mutilation (FGM) but not on the risks of unsafe abortion), and that it is appropriate to limit NGO participation in the democratic process.

¹ The scope of what activities constitute attempting to influence legislation are set out in regulations promulgated under 26 U.S.C. § 501(c)(3). These include:

- a) contacting or urging the public to contact members of a legislative body for the purpose of proposing, supporting or opposing legislation;
- b) advocating the adoption or rejection of legislation.

26 C.F.R. 1.501(c)(3) - 1(c)(3)(ii).

² For example, local affiliates of the International Planned Parenthood Federation (IPPF), one of the largest organizations in the field, are estimated to spend less than \$75,000 per year in attempting to influence legislation (out of total expenditures by local affiliates of \$60 million). It bears noting that Rep. Smith and others construe "lobbying" more broadly than the definition contained in the tax code. They draw the term to encompass advocacy efforts (such as outreach efforts to the public).

- Treasury is concerned about the precedent of using 501(c)(3) in a content specific manner (the tax code limits non-profit efforts to influence legislation on any topic) because it might prompt Congress to do the same thing domestically. In light of this concern, Treasury would prefer to see a broader ban on lobbying, i.e. one that is not limited just to the topic of abortion.
- Would contribute to the "chilling effect" on debate concerning abortion policy in developing countries because organizations will not understand the nuances of U.S. law and may act conservatively, conceivably not engaging in appropriate and perhaps legally permissible advocacy efforts.
- Acknowledges that what NGOs do with privately-raised funds may be punished (contrary to the President's policy as articulated in 1993.)
- Because of the difficulty and ambiguity in applying the language, USAID may be vulnerable to lawsuits by disgruntled grant applicants.
- Congress could amend the phrase "influencing legislation" to include advocacy activities, such as having or attending meetings where abortion is discussed (which the House has previously done in a proposed Committee report and which the Administration flat-out rejected last November).
- Ignores the differing context in which the 501(c)(3) status arises, i.e., to confer tax exempt status which is an indirect subsidy to domestic organizations. This model likely does not have an analogue in developing countries.
- If the threshold were removed, there is a danger of having a provision that would be difficult or impossible to implement and monitor for many small foreign NGO grantees and sub-grantees supported by USAID.

Set-up

Option 2: Gilman-Pelosi Amendment to Smith

Accept the Smith language, but with Gilman-Pelosi Amendment that adds language that funding would be available to organizations that "do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning;" defunding of UNFPA if there is a new China program, with the transfer of these funds to U.S. bilateral population programs.

Pros:

- Consistent with International Conference on Population and Development (ICPD) language. Emphasizes our commitment to prevent the need for abortion.
- Could help in maintaining funding for organizations currently supported by USAID.
- Came within 5 votes of winning in the House (however we may have lost additional votes due to attrition since September).

Cons:

- Minor
fine
or*
- ~~Difficult to implement and interpret~~ and would probably result in lawsuits. The Justice Department believes that the provision ~~might~~ ^{could} be challenged by both pro-choice and anti-choice groups, that either group would ultimately be able to obtain standing in court and projects that there is a 10-30% risk that a Court would rule against the Administration. If that were to occur, this option would impose severe restrictions on USAID's program and result in a major setback to the Administration's policies vis-a-vis abortion. (See Annex 2 for analysis of Gilman-Pelosi.)
 - Given the tendency to reenact the prior year's appropriation language, would likely make Smith language a permanent feature of USG law.
 - Rejected in House vote, despite Administration support (albeit not conveyed by the most senior levels, i.e., the Secretary or the President).
 - Some conservative members were willing to support the Gilman-Pelosi language because the inherent ambiguity in language might be interpreted by a court as Smith-type restrictions. Slight changes to the legislative language could minimize this risk, but would likely reduce conservative Congressional support. Suggestions for modification of Gilman-Pelosi language to make it more acceptable to family planning supporters (such as "do not encourage abortion as a substitute for contraception") are likely to be rejected.³

³ We understand that Rep. Pelosi is interested in modifying her original language to make it more attractive to conservative Democrats. We have not seen any specific language.

Option 3:

Prohibit funding to foreign non-governmental organizations that use their own funds to perform abortion or to "lobby" to alter abortion laws, with provision for presidential waiver.⁴

Pros:

- Appears to give something to both sides, codifying the Smith Amendment into law while giving the President the opportunity to waive enforcement. Although enactment of these provisions into law could be construed as a political loss, the waiver authority would preserve the ability to continue existing programs. And the President would say in signing the bill into law that he was doing so in light of the waiver authority and his immediate intent to exercise it.
- This was compromise language presented by the Senate to bring agreement between the House and the Administration. The groups have told us this would be acceptable language, if absolutely necessary.

Cons:

- The Smith Amendment is inconsistent with the Administration's policy and has been continually rejected.
- Family planning and abortion rights supporters would expect the President to veto Smith-type restrictions and would see incorporation of them into law as a major defeat even though it would not impede programs (assuming a pro-choice Administration).
- Given the tendency to reenact the prior year's appropriation language, would likely make Smith language a permanent feature of USG law.
- May not be sufficient. In the 105th Congress, the House offered language that codified a prohibition on performance with a partial presidential waiver. This was rejected by the Administration.⁵ Rep. Smith has since said that he would no longer find a waiver acceptable. (Others in Congress, however, may feel different.)

⁴ When the double-waiver was proposed in the U.S. Senate, it included a higher overall funding level of \$435 million with a \$25 million penalty for each waiver invoked (i.e. \$410 million if one waiver invoked; \$385 if both waivers invoked.) Even if both waivers were invoked, the bottom line would have been the eventual 1997 appropriation level (albeit, with none of the other devastating restrictions – e.g., metering or delays).

⁵ Albeit other language included in this offer was equally unacceptable if not more so, e.g. \$356 million funding cap, extremely restrictive lobbying language, etc.

Option 4:

A voluntary statement by USAID-funded foreign non-governmental organizations that they will not "lobby" for changes in abortion laws for the period of one year.

Pros:

- Would not affect existing programs if there is no penalty for organizations that refuse to comply.

Cons:

- Too weak to be acceptable.
- Provision is anti-democratic and runs counter to the Administration's stated objectives to support democracy and free speech.
- Potential negative backlash from family planning and other advocacy groups who will view this as the functional equivalent of Smith-type restrictions.
- After one-year, Rep. Smith will demand that the "voluntary" statement be codified into law.

No interest NSG will accept it.

Option 5:

Provide bonus/incentive to foreign non-governmental organizations who do not "lobby" on abortion.

Pros:

- Would not cut-off funding to any existing USAID grantees.

Cons:

- Contrary to stated Administration policy. By implication, this option suggests that the USG believes that there is something inherently wrong with an organization, using its own resources, seeking to influence its own government and that an organization should be penalized for engaging in democratic activity.
- This rewards organizations for rejecting the decision that President Clinton made by overturning the "Mexico City" policy, which enabled groups to lobby or perform abortion with their private funds.
- This would require an extensive monitoring effort.
- This is unrealistic unless Congress appropriates additional money to award bonuses or incentives. With no new money, USAID would have to make cuts to everyone's program in order to reward those who comply with the restrictions. In essence, if an organization agreed not to lobby, it would receive its "normal" allotment of funds. If an organization did lobby, it would be penalized.

From
can
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with

Option 6:

Accept a return to FY97 Appropriations language which would provide for a delay in the release of 1999 international population assistance funds until July, monthly metering of funds, a Presidential determination of whether the delay has a detrimental impact on the program, and a Congressional vote releasing funds based on the Presidential determination.

Pros:

- Returns to a formula that both sides had accepted in the past.

Cons:

- This would result in a lack of credibility for the Administration. In making the 1997 Presidential determination, the Administration went to great lengths to state that the delay in funds would be a hardship to the population assistance program. Moreover, Congressional supporters of population assistance, who carried the water in 1997, would be extremely reluctant to re-fight this battle.
- This option by itself is not sufficient and will not appease Representative Smith as evidenced by the FY98 appropriations process. Even if the Administration wins a second vote on the detrimental impact of a delay, it doesn't resolve or address Smith's concerns regarding lobbying or performance of abortion.

Annex 2: Analysis of Gilman-Pelosi

Analysis of Gilman-Pelosi turns on the phrase "abortion as a method of family planning." Since 1973, this phrase has been used in section 104(f) of the Foreign Assistance Act (commonly referred to as the Helms amendment) and comparable restrictions in annual appropriation acts to prevent, with limited exceptions, US funds from being used to pay for abortions. Although AID has not formally defined the phrase under these statutes, its administrative practice has been understood to mean abortion for any reason other than to save the life of the woman or in the case of rape or incest. The litigation risk associated with Gilman-Pelosi is that it depends on a different interpretation of this phrase in the context of how organizations spend their own funds.

Beginning in 1984, the Mexico City policy established by President Reagan, and continued by President Bush, precluded funding to organizations that could not certify that they did not provide or promote abortion as "a method of family planning." In implementing this policy, AID defined this term to mean:

[abortions] for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions following rape or incest (since abortion under these circumstances is not a family planning act).

AID Contract §752.7016(d)(10) (circa 1986).

In other words, AID formally extended the Helms restrictions placed on how US funds are spent to how AID funded organizations spent their own funds. Thus, organizations that performed or promoted abortions (*even using their own funds*) in circumstances other than the limited circumstances noted were unable to provide the required certification and, therefore, ineligible for US funding under the Mexico City policy. One of President Clinton's first acts in office was to issue an executive order discontinuing this policy.

Last term Representative Smith introduced language that would enact this policy into law. His proposed legislation would require all recipients of US funding to certify that they would not perform abortions or engage in any activities to alter the existing laws or policies on abortion while receiving US funds. The Smith amendment did not use the term "abortion as a method of family planning," but referred specifically to the circumstances under the Mexico City policy in which abortion was permissible.

Gilman-Pelosi creates a loophole to the certification requirement by exempting organizations that "do not promote abortion as a method of family planning."¹ This is

¹ The plain text below represents the Smith language; the bold text reflects the language that Gilman-Pelosi adds to the Smith language:

where the definition of the phrase "abortion as a method family planning" becomes critical.

If the Smith language, as modified by Gilman-Pelosi, were enacted, AID would draft regulations that defines the phrase to mean *in this context* as "a substitute for contraception." Thus, if a woman sought an abortion from a clinic that was partially US funded, under such regulations, the clinic could use nonfederal funds to terminate the pregnancy so long as it could demonstrate that its policy and practice did not hold abortion out as a substitute for contraception.

In other words, AID's regulations would impose a very narrow definition of what it means to "promote abortion as a method of family planning."²

(h) RESTRICTION ON ASSISTANCE TO FOREIGN ORGANIZATIONS THAT PERFORM OR ACTIVELY PROMOTE ABORTIONS --

(1) PERFORMANCE OF ABORTIONS --

(A) Notwithstanding section 614 of this Act or any other provision, 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) Subparagraph (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 or to organizations that do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning.

(2) LOBBYING ACTIVITIES --

(A) Notwithstanding section 614 of this Act or any other provision of law, no funds appropriated for population planning activities or other population assistance may be 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, violate the laws of any foreign country concerning the circumstances under which abortion is permitted regulated or prohibited, or (except in the case of organizations that do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning) 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.

² There is a reasonable explanation for this narrow definition. When couples engage in family planning, they do not consider abortion as one of their options -- abortion is only considered when a traditional family planning options -- e.g., contraceptive devices -- has failed. Thus, AID's regulations would be aimed at organizations that promote abortion in this unorthodox manner.

The problem with this approach:

This approach depends on the legal principle set out in Rust v. Sullivan³ and other Supreme Court decisions that the Executive Branch is entitled to judicial deference when the terms of a statute are ambiguous. So long as the President's interpretation is a reasonable reading of the words chosen by Congress and does not conflict with clear legislative history, courts will defer. Here, the Administration would have to demonstrate that the words "promote abortion as a method of family planning" can reasonably be read to mean "promote abortion as a substitute for contraception."

As noted in footnote ²~~3~~, there is a reasonable explanation for this interpretation. Although not free from doubt, a court would likely agree.

However, there is a risk -- Justice estimates somewhere between 10 to 30% -- that a Court would disagree and find AID's regulation arbitrary and capricious in light of the differing definition given to the phrase "abortion as a method of family planning" elsewhere in the statute. As noted, current US law prohibits the use of US funds for "the performance of abortions as a method of family planning."⁴ In this context, the Administration uses a broad definition of the phrase so that US funds only pay for abortion in the event the mother's life is in jeopardy or the pregnancy is the result of rape or incest.

A court might conclude that Congress understood the phrase "abortion as a method of family planning" to mean one thing, not two, and that both historically and currently it gave the phrase the same broad definition, not the narrow definition that AID would create administratively in the context of how foreign nongovernmental organizations spend their own funds.

In addition, this strategy assumes that there will be no significant legislative history that undermines AID's interpretation. If such contrary legislative history were developed, the Administration would not be able to implement Gilman-Pelosi in the fashion contemplated.

In either event, the result would be to cut off organizations that provide abortion on demand and impose a complete gag order on organizations that engage in any activities to alter the laws or government policies regarding the circumstances under which abortion is permitted or prohibited. The Administration has made clear it would not accept either

In reality, this is a null set. No organizations that AID funds promotes abortion as a substitute for contraception. Instead they offer it on demand, but promote contraception to avoid situations where it will be necessary.

³ 500 U.S. 173, 184-86 (1991).

⁴ See, e.g., Foreign Operations Appropriations Act of 1998, §518.

situation. This, however, would be the outcome if the litigation were resolved adversely or contrary legislative history were developed.

Doc. #45545

Annex 1: Exemplar Legislative Language Incorporating 501(c)(3) Option
(using the portion of the Smith Amendment addressing lobbying)

(2) LOBBYING ACTIVITIES. - (A) Notwithstanding section 614 of the Foreign Assistance Act of 1961, as amended, or any other provision of law, no funds appropriated or otherwise made available in this Act 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, violate the laws of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited, **and will not have a substantial part of its activities involve carrying on propaganda or otherwise attempting to influence legislation with respect to abortion.**

[bold language strikes: "or engage in any activity or effort to alter the laws or government policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited."]

Statement of Managers Revision

Substantial activity or effort attempting to influence legislation with respect to abortion.
The language is intended to be comparable to restrictions that exist on lobbying activity by tax exempt organizations under 26 U.S.C. § 501(c)(3).

OPTIONS

Pros

Cons

Current law

\$385m; monthly metering; no delays; no other restrictions

- Everybody agreed to it;
- We can live under metering as opposed to delay and metering;
- Stick by our principles.
- Difficult battle;
- Doesn't show willingness to compromise;
- Run risk of losing UN arrears, etc.

Gilman-Pelosi

Funding would be made available to organizations which "do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning"; defunding of UNFPA if there is a new China program with the transfer of those funds to USAID.

- Consistent with ICPD lang.;
- Not MC.
- Definitional ambiguity;
- Difficult to implement;
- Hurts UNFPA;
- Keeps MC lobbying restrictions.

Modified Gilman-Pelosi (modified by us, but not presented)

Change "promote" to "encourage"; change first reference to "family planning" to "contraception"; delete second "as a method of family planning"; a modified withholding for UNFPA, starting first with current law, double withholding, fifty percent withholding.

- Defines FP more narrowly;
- Saves some funding for UNFPA.
- Still ambiguous.

New Modified Gilman-Pelosi

(We understand that Rep. Pelosi is interested in modifying her original language to make it more attractive to conservative Democrats. We have not seen any specific language.)

Senate

\$435m; Mexico City language; double waiver; \$25m penalty for each waiver invoked (i.e., \$410m if one waiver invoked; \$385m if both waivers invoked.)

- Higher Senate \$ level;
- Even if both waivers invoked, bottom line would be House mark;
- Face saving for some.
- Puts MC into law;
- House won't accept.

House

\$356m for all population-related accounts (e.g., would include UNFPA, UNICEF, child-survival, etc.); waiver only for performance of abortion; draconian Statement of Managers defining lobbying to include attending meetings and/or conferences where abortion is discussed.

- Smith would back off (for time being?)
- Worse than MC;
- Puts more onerous restrictions on lobbying;
- Use of waiver could put POTUS in difficult position.

Modified House (modified by us, but not presented)

Add at end of lobbying section (section 2(A)), delete "or engage in any activity or effort to alter the laws or government policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited" and replace with "and will not have a substantial part of its activities involve carrying on propaganda or otherwise attempting to influence legislation with respect to abortion or participate in, or intervene in, any political campaign with respect to abortion"; delete Statement of Managers provision.

- Would preserve funding for organizations that are doing these activities as part of but not the majority of their activities;
- Makes it consistent with 501(c)3 restrictions.

- Reporting requirements unwieldy or impossible for small indigenous NGOs;
- Huge administrative burdens on USAID.

Callahan Compromise

MC language on performance of abortion; ties the certification on lobbying activities to ensure that the organization does not violate national laws "concerning the circumstances under which abortion is permitted, regulated, or prohibited, or engage in any activity or effort in a foreign country to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited"; provides language that says in the absence of the certifications, funds available for that organization "shall not exceed 50 percent" of the funds made available to the organization during FY95 (i.e., if the organization did not receive funds in FY95, they would have to meet the certification requirements); monthly metering for the first four months.

- Consistent with principles since it would tie those principles with what is legal in a country;
- assures full funding to groups which allow it to apply.

- Huge administrative burden;
- Anti-democratic for post-1995 groups;
- Codifies MC.

IPPF

Draft language that restricts and/or withholds funding to IPPF and its affiliates along the following:

- Congressional Notification (CN)
- \$ for \$ withholding (for performance of abortion; for lobbying; for both)
- total withholding

- Gets to the heart of Rep. Smith's concerns
- IPPF was only organization directly affected under MC (although other organizations experienced "chilling effect".)

- Essentially gives in on MC principles;
- Other orgs. may wonder if they are next to be singled out;
- Politically domestically difficult.

OTHER OPTIONS

-- Rewrite Mexico City, either:

- as legislation
- as Administration policy

Elements:

-- consistency with ICPD Program of Action re sovereignty (i.e., it is up to the government to decide which organizations can/can't operate in that country), reproductive health/reproductive rights definitions

-- family planning saves lives

-- focus of our assistance and that of those organizations which we fund should be preventing abortion (Para 8.25: "In no case should abortion be promoted as a method of family planning"; all governments and relevant IO's and NGO's are urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion"; "reduce the recourse to abortion through expanded and improved family planning services"; "every attempt should be made to eliminate the need for abortion"; "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")

-- use other ICPD abortion language (unsafe abortion, reduce deaths and morbidity from unsafe abortion, unsafe abortion is a major threat to health and lives of women)

Pros: -- define our agenda as opposed to being reactive;
-- take the upper hand.

Cons: -- may upset Congress more than it helps.

1/19/98
3:30 p.m.

Population Legislation Policy Options January 19, 1998

Representative Chris Smith (R - N.J.) and others have proposed legislative proposals on U.S. Population Assistance (commonly referred to as the Smith language) that:

1. Prohibits funding for UNFPA unless the President certifies that UNFPA has terminated all activities in China and,
2. Makes foreign and multilateral organizations ineligible for funding unless they certify that they will not use their own funds to:
 - perform abortion;
 - "lobby" to alter abortion laws.

As Smith and his allies seem more willing to accept a Presidential waiver on the performance of abortion, the Administration's efforts should focus on addressing "lobbying." UNFPA is a moot point in light of the recent UNFPA Executive Board decision to begin such activities.

The attached six options seek to break the current impasse by addressing the lobbying issue in ways that should not interfere with existing programs or the Administration's publicly stated commitment to ensure that abortion remains safe, legal, and rare. However, each of the options carries significant downsides, including, in some cases (options A, B, and D), limitations or the risk of limitations on the ability of individuals and/or organizations to express their views on public policy issues relating to abortion.

The options are as follows:

Option A: Resurrect Gilman-Pelosi.

Option B: Use 501(c)(3)-type tax code restrictions to limit lobbying activities.

Option C: Enact Smith restrictions with Presidential waivers.

Option D: Voluntary statement by foreign NGOs that they will not lobby on abortion for one year.

Option E: Provide incentive/bonus to foreign NGOs that agree not to lobby on abortion.

Option F: Return to FY97 Appropriations language with second vote.

* It bears noting that UNFPA's China program will be conducted in provinces where the practices leading to Congressional opposition will no longer be practiced. Thus, the *raison d'être* for prohibiting such funding no longer exists. However, we will have to work hard if we want to ensure future funding for UNFPA.

Option A: Gilman-Pelosi Amendment to Smith

Accept the Smith language, but with Gilman-Pelosi Amendment that adds language that funding would be available to organizations that "do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning;" defunding of UNFPA if there is a new China program, with the transfer of these funds to U.S. bilateral population programs.

Pros:

- Consistent with International Conference on Population and Development (ICPD) language. Emphasizes our commitment to prevent the need for abortion.
- Could help in maintaining funding for organizations currently supported by USAID.
- Came within 5 votes of winning in the House (however we may have lost additional votes due to attrition since September).
- Does not impose any restrictions on lobbying or the performance of abortion.

Cons:

- Could result in lawsuits. The Justice Department believes that the provision could be challenged. DOJ has suggested that there is a risk -- ranging from minimal to 30% -- that a Court would rule against the Administration. If this were to occur, a possible outcome would be to impose severe restrictions on USAID's program and result in a major setback to the Administration's policies vis-a-vis abortion. (See Annex 1 for analysis of Gilman-Pelosi.)
- Given the tendency to reenact the prior year's appropriation language, would likely make Smith language a permanent feature of USG law.
- Rejected in House vote, despite Administration support (albeit not conveyed by the most senior levels, i.e., the Secretary or the President).
- Some conservative members were willing to support the Gilman-Pelosi language because the inherent ambiguity in language might be interpreted by a court as Smith-type restrictions. Slight changes to the legislative language could minimize this risk, but would likely reduce conservative Congressional support. Suggestions for modification of Gilman-Pelosi language to make it more acceptable to family planning supporters (such as "do not encourage abortion as a substitute for contraception") are likely to be rejected.

Option B: 501(c)(3) Tax Code-Type Lobbying Restrictions

Prohibit funding to foreign non-governmental organizations for which a substantial part of their activities are aimed at influencing legislation on abortion using section 501(c)(3) of the U.S. tax code as a model. This option would have a funding threshold to ensure that any administrative burdens associated with this option not apply to micrograntees. (See Annex 2 for exemplar legislative language.)

Pros:

- This option draws from the restrictions placed on non-profit organizations in the U.S. that receive tax-exempt status. Those restrictions do not prohibit lobbying activity so long as "a substantial part of the organization's activities are not aimed at attempting to influence legislation." The restriction could be justified as an effort to preserve U.S. support to organizations which use most of their own resources for family planning purposes and not abortion lobbying. (Existing law already bans the use of federal funds for lobbying.)
- Uses a definition of lobbying based on existing U.S. law governing 501(c)(3) organizations that is both readily understandable by Congress and U.S. organizations (i.e., what we apply overseas is what we practice here in the U.S.) and limited in scope.¹
- Preserves funding for most, if not all, organizations because even the large organizations receiving funds spend only a de minimis amount on lobbying.²
- May encourage organizations to spin off lobbying operations.

¹ The scope of what activities constitute attempting to influence legislation are set out in regulations promulgated under 26 U.S.C. § 501(c)(3). These include:

a) contacting or urging the public to contact members of a legislative body for the purpose of proposing, supporting or opposing legislation;

b) advocating the adoption or rejection of legislation.

26 C.F.R. 1.501(c)(3) - 1(c)(3)(ii).

² For example, local affiliates of the International Planned Parenthood Federation (IPPF), one of the largest organizations in the field, are estimated to spend less than \$75,000 per year in attempting to influence legislation (out of total expenditures by local affiliates of \$60 million). It bears noting that Rep. Smith and others construe "lobbying" more broadly than the definition contained in the tax code. They draw the term to encompass advocacy efforts (such as outreach efforts to the public).

Cons (Option B):

- Codifies the principle that abortion rights as defined under law are somehow different from other reproductive rights (i.e., it is okay to lobby for the elimination of female genital mutilation but not on the risks of unsafe abortion), and that it is appropriate to limit NGO participation in the democratic process.
- Treasury is concerned about the precedent of using 501(c)(3) in a content specific manner (the tax code limits non-profit efforts to influence legislation on any topic) because it might prompt Congress to do the same thing domestically. In light of this concern, Treasury would prefer to see a broader ban on lobbying, i.e., one that is not limited just to the topic of abortion.
- Would contribute to the "chilling effect" on debate concerning abortion policy in developing countries because organizations will not understand the nuances of U.S. law and may act conservatively, conceivably not engaging in appropriate and perhaps legally permissible advocacy efforts.
- Sets a precedent that the Administration acknowledges that what NGOs do with privately-raised funds may be punished (contrary to the President's policy as articulated in 1993).
- Because of the difficulty and ambiguity in applying the language, could result in lawsuits.
- Congress could amend the phrase "influencing legislation" to include advocacy activities, such as having or attending meetings where abortion is discussed (which the House has previously done and which the Administration rejected last November).
- Ignores the differing context in which the 501(c)(3) status arises, i.e., to confer tax exempt status which is an indirect subsidy to domestic organizations. This model likely does not have an analogue in developing countries.
- If the threshold were removed, there is a danger of having a provision that would be difficult or impossible to implement and monitor for many small foreign NGO grantees and sub-grantees supported by USAID.
- Will be difficult to implement given ambiguity of what constitutes a "substantial part" of activities.

Option C: Enact Smith Restrictions with Presidential Waivers

Prohibit funding to foreign non-governmental organizations that use their own funds to perform abortion or to "lobby" to alter abortion laws, with provision for presidential waiver.³

Pros:

- Appears to give something to both sides, codifying the Smith Amendment into law while giving the President the opportunity to waive enforcement. Although enactment of these provisions into law could be construed as a political loss, the waiver authority would preserve the ability to continue existing programs. The President would say in signing the bill into law that he was doing so in light of the waiver authority and his immediate intent to exercise it.
- This was compromise language presented by the Senate to bring agreement between the House and the Administration. The NGOs have told us this would be acceptable language, if absolutely necessary.

Cons:

- The Smith Amendment is inconsistent with the Administration's policy and has been continually rejected.
- Family planning and abortion rights supporters would expect the President to veto Smith-type restrictions and would see incorporation of them into law as a major defeat even though it would not impede programs (assuming a pro-choice Administration).
- Given the tendency to reenact the prior year's appropriation language, would likely make Smith language a permanent feature of USG law.
- May not be sufficient. When Senate offered this language in the 105th Congress, it was rejected by the House.
- The House offered language that codified a prohibition on performance with a partial presidential waiver. This was rejected by the Administration.⁴ Rep. Smith has since said that he would no longer find a waiver acceptable. (Others in Congress, however, may feel differently.)

³ When the double-waiver was proposed in the U.S. Senate, it included a higher overall funding level of \$435 million with a \$25 million penalty for each waiver invoked (i.e. \$410 million if one waiver invoked; \$385 if both waivers invoked.) Even if both waivers were invoked, the bottom line would have been the eventual 1997 appropriation level (albeit, with none of the other devastating restrictions — e.g., metering or delays).

⁴ Albeit other language included in this offer was equally unacceptable if not more so, e.g. \$356 million funding cap, extremely restrictive lobbying language, etc.

Option D: Voluntary Statement by NGOs

A voluntary statement by USAID-funded foreign non-governmental organizations that they will not "lobby" for changes in abortion laws for the period of one year.

Pros:

- Would not affect existing programs if there is no penalty for organizations that refuse to comply.

Cons:

- Too weak to be acceptable to Smith and others.
- No indication that NGOs would agree to this.
- Potential negative backlash from family planning and other advocacy groups who will view this as the functional equivalent of Smith-type restrictions.
- After one-year, if not before, Rep. Smith will demand that the "voluntary" statement be codified into law.

Option E: Incentive for NGOs

Provide bonus/incentive to foreign non-governmental organizations who do not "lobby" on abortion.

Pros:

- Would not cut-off funding to any existing USAID grantees.
- Would encourage organizations to spin off lobbying operations.

Cons:

- Contrary to stated Administration policy. By implication, this option suggests that the USG believes that there is something inherently wrong with an organization, using its own resources, seeking to influence its own government and that an organization should be penalized for engaging in democratic activity.
- This rewards organizations for rejecting the decision that President Clinton made by overturning the "Mexico City" policy, which enabled groups to lobby or perform abortion with their private funds.
- This would require an extensive monitoring effort.
- This is unrealistic unless Congress appropriates additional money to award bonuses or incentives. With no new money, USAID would have to make cuts to everyone's program in order to reward those who comply with the restrictions. In essence, if an organization agreed not to lobby, it would receive its "normal" allotment of funds. If an organization did lobby, it would be penalized.

Option F: Return to FY97 Approps Language with Second Vote

Accept a return to FY97 Appropriations language which would provide for a delay in the release of 1999 international population assistance funds until July, monthly metering of funds, a Presidential determination of whether the delay has a detrimental impact on the program, and a Congressional vote releasing funds based on the Presidential determination.

Pros:

- Returns to a formula that both sides had accepted in the past.

Cons:

- This would result in a lack of credibility for the Administration. In making the 1997 Presidential determination, the Administration went to great lengths to state that the delay in funds would be a hardship to the population assistance program. Moreover, Congressional supporters of population assistance, who carried the water in 1997, would be extremely reluctant to re-fight this battle.
- This option by itself is not sufficient and will not appease Representative Smith as evidenced by the FY98 appropriations process. Even if the Administration wins a second vote on the detrimental impact of a delay, it doesn't resolve or address Smith's concerns regarding lobbying or performance of abortion.

Population Legislation Policy Options

Representative Chris Smith (R - N.J.) and others have proposed legislative proposals on U.S. Population Assistance (commonly referred to as the Smith language) that:

1. Prohibits funding for UNFPA unless the President certifies that UNFPA has terminated all activities in China and,
2. Makes foreign and multilateral organizations ineligible for funding unless they certify that they will not use their own funds to:
 - perform abortion;
 - “lobby” to alter abortion laws.

As Smith and his allies seem more willing to accept a Presidential waiver on the performance of abortion, the Administration’s efforts should focus on addressing “lobbying.” UNFPA is a moot point in light of the recent UNFPA Executive Board decision to begin such activities.

The attached six options seek to break the current impasse by addressing the lobbying issue in ways that should not interfere with existing programs or the Administration’s publicly stated commitment to ensure that abortion remains safe, legal, and rare. However, each of the options carries significant downsides, including, in some cases (options A, B, and D), limitations or the risk of limitations on the ability of individuals and/or organizations to express their views on public policy issues relating to abortion.

The options are as follows:

Option A: Resurrect Gilman-Pelosi.

Option A *plus*: Enhanced Gilman-Pelosi (with four versions)

Option B: Use 501(c)(3)-type tax code restrictions to limit lobbying activities.

Option C: Enact Smith restrictions with Presidential waivers.

Option D: Voluntary statement by foreign NGOs that they will not lobby on abortion for one year.

Option E: Provide incentive/bonus to foreign NGOs that agree not to lobby on abortion.

Option F: Return to FY97 Appropriations language with second vote.

* It bears noting that UNFPA’s China program will be conducted in provinces where the practices leading to Congressional opposition will no longer be practiced. Thus, the *raison d’etre* for prohibiting such funding no longer exists. However, we will have to work hard if we want to ensure future funding for UNFPA.

OPTION A: GILMAN-PELOSI AMENDMENT TO SMITH

Accept the Smith language, but with Gilman-Pelosi Amendment that adds language that funding would be available to organizations that "do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning;" defunding of UNFPA if there is a new China program, with the transfer of these funds to U.S. bilateral population programs.

Pros:

- Consistent with International Conference on Population and Development (ICPD) language. Emphasizes our commitment to prevent the need for abortion.
- Could help in maintaining funding for organizations currently supported by USAID.
- Came within 5 votes of winning in the House (however we may have lost additional votes due to attrition since September).
- Does not impose any restrictions on lobbying or the performance of abortion.

Cons:

- Could result in lawsuits. The Justice Department believes that the provision could be challenged. DOJ has suggested that there is a risk -- ranging from minimal to 30% -- that a Court would rule against the Administration. If this were to occur, a possible outcome would be to impose severe restrictions on USAID's program and result in a major setback to the Administration's policies vis-a-vis abortion. (See Annex 1 for analysis of Gilman-Pelosi.)
- Given the tendency to reenact the prior year's appropriation language, would likely make Smith language a permanent feature of USG law.
- Rejected in House vote, despite Administration support (albeit not conveyed by the most senior levels, i.e., the Secretary or the President).

OPTION A PLUS: ENHANCED GILMAN-PELOSI

Introductory Note on Options A(1) through A(4)

Options A(1) through A(4) all modify the Smith/Gilman-Pelosi proposal in ways that might make the underlying approach more attractive. These sub-options each impose additional terms that may be appealing to conservative votes. Options A(1) and A(2) impose relatively minimal burdens. Options A(3) and A(4) impose somewhat more significant burdens but may win more support. All four options are subject to the same pros and cons set forth in Option A. Only the pros and cons specifically associated with these sub-options are set forth below.¹

Option A(1): Modified Gilman-Pelosi Amendment to Smith (Optics Approach)

Accept the Smith language together with Gilman-Pelosi, but with modifications that would: 1) make UNFPA ineligible for funding unless it complies with the Smith language and make UNFPA ineligible for the Gilman-Pelosi exception; and, 2) require that organizations that are exempted from the Smith language certification requirement certify that they will not promote abortion as a method of family planning and utilize funds to prevent abortion as a method of family planning. (See Annex 2 for exemplar language.)

Distinguished from Option A: As noted in Annex 1, Gilman-Pelosi creates an exception to the certification requirement contained in the Smith language. This exception would allow organizations to receive assistance even if they provide abortion on demand or seek to alter the laws on abortion (so long as they use their own funds in carrying out either activity). This option would narrow the exception so as to exclude UNFPA. As a result, UNFPA would be obliged to provide the certification called for by the Smith language and would be subject to the lobbying prohibition.

In addition, this option adds a certification requirement to foreign non-governmental organizations that are exempted from the Smith language certification. This certification, however, would only require that the organization not violate the policy promulgated by AID under Gilman-Pelosi.

¹ It was suggested that L focus its efforts on developing slight language changes to Gilman-Pelosi that might make the proposal more appealing to conservative votes -- even if such changes were purely optical. L is reluctant to do so given the nature of Gilman-Pelosi and the basis of its appeal to conservatives votes. Gilman-Pelosi appeals to some conservatives because it creates a litigation risk that a Court will reject the Administration's intended implementation of the language and hamper the Administration's ability to implement its abortion policy. (See Annex 1.) Making even slight language changes -- at least those that would attract conservative votes -- could further increase those litigation risks. Given the negative outcomes associated with that risk, we have instead suggested options that do not inject further ambiguity/litigation risk into the Gilman-Pelosi /Smith proposal.

Pros:

- Largely symbolic in nature; places no additional burdens on existing programs while allowing Congress to argue that additional burdens are placed on UNFPA and AID grantees. (We call this the optics measure because we did not view it as having any negative impact. However, UNFPA may engage in advocacy efforts that arguably may fall within the scope of the Smith prohibition on lobbying.)

Cons:

- Likely not enough to garner conservative votes.

**Option A(2): Modified Gilman-Pelosi Amendment to Smith
(Authorization Approach)**

Accept the Smith language together with Gilman-Pelosi as is (or with the changes noted in Option A(1)) but offer this language as an authorization bill rather than as an appropriations bill.

Distinguished from Option A: By offering it in an authorization bill, it would likely become permanent law, something that would be appealing to conservative votes.

Pros:

- Adds relatively little additional burden not already created by Option A but would be very appealing to conservative House members by making it essentially a permanent feature of foreign operations bills given the inability of Congress to pass regularly authorization bills.

Cons:

- Given the litigation risk associated with Gilman-Pelosi (see Annex 1), this option increases the likelihood that if successfully challenged by a conservative group, the Administration (and subsequent administrations) would be severely restricted in their ability to provide funding to organizations that provide abortion on demand or engage in activities to change the law on abortion (even when using their own funds). See Annex 1 (re litigation rights).
- If the restriction is included in an annual appropriation, the President could veto the bill in a subsequent year if the Administration is unable to successfully defend litigation challenging its interpretation of Gilman-Pelosi. It would be much more difficult to amend an authorization act.

**Option A(3): Modified Gilman-Pelosi Amendment to Smith
(501(c)(3) Hybrid Approach)**

Accept the Smith language together with Gilman-Pelosi but import the 501(c)(3) modified to operate in a manner similar to the narcotics certification legislation. Under this option, proposed legislation would provide that not more than 50% of the funds available for population assistance may be obligated before March 1. To obligate the remainder, the President would be required to determine and report to Congress that foreign nongovernmental organizations, which receive population assistance, do not in the aggregate have “a substantial part of their activities involve carrying on propaganda, or otherwise attempting, to influence legislation” with respect to abortion.²

This option might also provide the President authority to waive the requirement for determination if he finds it in the national interest to do so.

It might further include a fifteen day delay during which Congress would have the authority to pass a joint resolution to disapprove the waiver or determination (depending on the approach selected by the President).

Distinguished from Option A: As noted this option blends elements of both Options A and B together and imposes a limited lobbying limitation.

Pros:

- Addresses one of the major concerns expressed by Representative Smith and his allies, namely that USAID is funding organizations that engage in lobbying on the issue of abortion.
- Provides a new approach to the problem that may be appealing to conservative votes while staying largely within the confines of Gilman-Pelosi.
- Given what we know about the practices of AID grantees and subgrantees, this restriction will not threaten any programs. See Option B pros and cons.
- The waiver provision, if included, allows further protection to existing programs.

Cons:

- Subject to the same cons identified in Option B -- administrative burden and slippery slope argument that this option endorses the concept that lobbying one's government is bad.

² As noted in Option B, this language is drawn from the tax code provision limiting the ability of tax exempt 501(c)(3) organizations to lobby or otherwise influence legislation.

**Option A(4): Modified Gilman-Pelosi Amendment to Smith
(501(c)(3) Hybrid with Specific Agreement Language)**

Identical to Option A(3) but with an additional provision that states in statutory language that agreements granting or subgranting U.S. population funds to foreign organizations must specifically include the provision that “Each agreement will be terminated if a substantial part of the organization’s activities involve carrying on propaganda, or otherwise attempting, to influence legislation with respect to abortion.”

Distinguished from Option A: Adds a further element to Option A(3) that would apply on an organization-specific basis. (Option A(3) above only imposes a requirement on the President to determine whether in the aggregate organizations are lobbying.)

Pros:

- Addresses one of the major concerns expressed by Representative Smith and his allies, namely that USAID is funding organizations that engage in lobbying on the issue of abortion.
- Looks tough.
- Provides a new approach to the problem that may be appealing to conservative votes while staying largely within the confines of Gilman-Pelosi.
- Given what we know about the practices of AID grantees and subgrantees, this restriction will not threaten any programs. See Option B.

Cons:

- Subject to the same cons identified in Option B and in Option A(3) above.

OPTION B: 501(C)(3) TAX CODE-TYPE LOBBYING RESTRICTIONS

Prohibit funding to foreign non-governmental organizations for which a substantial part of their activities are aimed at influencing legislation on abortion using section 501(c)(3) of the U.S. tax code as a model. This option would have a funding threshold to ensure that any administrative burdens associated with this option not apply to micrograntees. (See Annex 2 for exemplar legislative language.)

Pros:

- This option draws from the restrictions placed on non-profit organizations in the U.S. that receive tax-exempt status. Those restrictions do not prohibit lobbying activity so long as “a substantial part of the organization’s activities are not aimed at attempting to influence legislation.” The restriction could be justified as an effort to preserve U.S. support to organizations which use most of their own resources for family planning purposes and not abortion lobbying. (Existing law already bans the use of federal funds for lobbying.)
- Uses a definition of lobbying based on existing U.S. law governing 501(c)(3) organizations that is both readily understandable by Congress and U.S. organizations (i.e., what we apply overseas is what we practice here in the U.S.) and limited in scope.³
- Preserves funding for most, if not all, organizations because even the large organizations receiving funds spend only a de minimis amount on lobbying.⁴
- May encourage organizations to spin off lobbying operations.
- Unlike Gilman-Pelosi, this option does not carry a litigation risk that the entire population assistance program will be jeopardized.

³ The scope of what activities constitute attempting to influence legislation are set out in regulations promulgated under 26 U.S.C. § 501(c)(3). These include:

- a) contacting or urging the public to contact members of a legislative body for the purpose of proposing, supporting or opposing legislation;
- b) advocating the adoption or rejection of legislation.

26 C.F.R. 1.501(c)(3) - 1(c)(3)(ii).

⁴ For example, local affiliates of the International Planned Parenthood Federation (IPPF), one of the largest organizations in the field, are estimated to spend less than \$75,000 per year in attempting to influence legislation (out of total expenditures by local affiliates of \$60 million). It bears noting that Rep. Smith and others construe “lobbying” more broadly than the definition contained in the tax code. They draw the term to encompass advocacy efforts (such as outreach efforts to the public).

Cons (Option B):

- Codifies the principle that abortion rights as defined under law are somehow different from other reproductive rights (i.e., it is okay to lobby for the elimination of female genital mutilation but not on the risks of unsafe abortion), and that it is appropriate to limit NGO participation in the democratic process.
- Treasury is concerned about the precedent of using 501(c)(3) in a content specific manner (the tax code limits non-profit efforts to influence legislation on any topic) because it might prompt Congress to do the same thing domestically. In light of this concern, Treasury would prefer to see a broader ban on lobbying, i.e., one that is not limited just to the topic of abortion.
- Would contribute to the "chilling effect" on debate concerning abortion policy in developing countries because organizations will not understand the nuances of U.S. law and may act conservatively, conceivably not engaging in appropriate and perhaps legally permissible advocacy efforts.
- Sets a precedent that the Administration acknowledges that what NGOs do with privately-raised funds may be punished (contrary to the President's policy as articulated in 1993).
- Because of the difficulty and ambiguity in applying the language, could result in lawsuits.
- Congress could amend the phrase "influencing legislation" to include advocacy activities, such as having or attending meetings where abortion is discussed (which the House has previously done and which the Administration rejected last November).
- Ignores the differing context in which the 501(c)(3) status arises, *i.e.*, to confer tax exempt status which is an indirect subsidy to domestic organizations. This model likely does not have an analogue in developing countries.
- If the threshold were removed, there is a danger of having a provision that would be difficult or impossible to implement and monitor for many small foreign NGO grantees and sub-grantees supported by USAID.
- Will be difficult to implement given ambiguity of what constitutes a "substantial part" of activities.

OPTION C: ENACT SMITH RESTRICTIONS WITH PRESIDENTIAL WAIVERS

Prohibit funding to foreign non-governmental organizations that use their own funds to perform abortion or to “lobby” to alter abortion laws, with provision for presidential waiver for either activity.⁵

Pros:

- Appears to give something to both sides, codifying the Smith Amendment into law while giving the President the opportunity to waive enforcement. Although enactment of these provisions into law could be construed as a political loss, the waiver authority would preserve the ability to continue existing programs. The President would say in signing the bill into law that he was doing so in light of the waiver authority and his immediate intent to exercise it.
- This was compromise language presented by the Senate to bring agreement between the House and the Administration. The NGOs have told us this would be acceptable language, if absolutely necessary.

Cons:

- The Smith Amendment is inconsistent with the Administration’s policy and has been continually rejected.
- Family planning and abortion rights supporters would expect the President to veto Smith-type restrictions and would see incorporation of them into law as a major defeat even though it would not impede programs (assuming a pro-choice Administration).
- Given the tendency to reenact the prior year’s appropriation language, would likely make Smith language a permanent feature of USG law.
- May not be sufficient. When Senate offered this language in the 105th Congress, it was rejected by the House.
- The House offered language that codified a prohibition on performance with a partial presidential waiver. This was rejected by the Administration.⁶ Rep. Smith has since said that he would no longer find a waiver acceptable. (Others in Congress, however, may feel differently.)

⁵ When the double-waiver was proposed in the U.S. Senate, it included a higher overall funding level of \$435 million with a \$25 million penalty for each waiver invoked (i.e. \$410 million if one waiver invoked; \$385 if both waivers invoked.) Even if both waivers were invoked, the bottom line would have been the eventual 1997 appropriation level (albeit, with none of the other devastating restrictions – e.g., metering or delays).

⁶ Albeit other language included in this offer was equally unacceptable if not more so, e.g. \$356 million funding cap, extremely restrictive lobbying language, etc.

OPTION D: VOLUNTARY STATEMENT BY NGO'S

A voluntary statement by USAID-funded foreign non-governmental organizations that they will not “lobby” for changes in abortion laws for the period of one year.

Pros:

- Would not affect existing programs if there is no penalty for organizations that refuse to comply.

Cons:

- Too weak to be acceptable to Smith and others.
- No indication that NGOs would agree to this.
- Potential negative backlash from family planning and other advocacy groups who will view this as the functional equivalent of Smith-type restrictions.
- After one-year, if not before, Rep. Smith will demand that the “voluntary” statement be codified into law.

OPTION E: INCENTIVE FOR NGO'S

Provide bonus/incentive above current levels of funding to foreign non-governmental organizations who do not “lobby” on abortion. (This is premised on House leadership support for increased funding levels.)

Pros:

- Would not cut-off funding to any existing USAID grantees.
- Would encourage organizations to spin off lobbying operations.

Cons:

- This option suggests that the USG believes that there is something inherently wrong with an organization, using its own resources, seeking to influence its own government and that an organization should be penalized for engaging in democratic activity.
- This rewards organizations for rejecting the decision that President Clinton made by overturning the “Mexico City” policy, which enabled groups to lobby or perform abortion with their private funds.
- Given increased Congressional scrutiny, this could require an extensive monitoring effort.
- Given pressures to balance the budget, Congressional support for higher levels of funding would undoubtedly force us to make cuts elsewhere.

OPTION F: RETURN TO FY97 APPROPS LANGUAGE WITH SECOND VOTE

Accept a return to FY97 Appropriations language which would provide for a delay in the release of 1999 international population assistance funds until July, monthly metering of funds, a Presidential determination of whether the delay has a detrimental impact on the program, and a Congressional vote releasing funds based on the Presidential determination.

Pros:

- Returns to a formula that both sides had accepted in the past.

Cons:

- Owing to attrition in the House, a positive vote will be harder to win.
- This option by itself is not sufficient and will not appease Representative Smith as evidenced by the FY98 appropriations process. Even if the Administration wins a second vote on the detrimental impact of a delay, it doesn't resolve or address Smith's concerns regarding lobbying or performance of abortion.

Annex 1: Analysis of Gilman-Pelosi

Analysis of Gilman-Pelosi turns on the phrase “abortion as a method of family planning.” This phrase has been used in section 104(f) of the Foreign Assistance Act (commonly referred to as the Helms amendment) and comparable restrictions in annual appropriation acts to prevent, with limited exceptions, US funds from being used to pay for abortions. Although AID has not formally defined the phrase under these statutes, its administrative practice has been understood to mean abortion for any reason other than to save the life of the woman or in the case of rape or incest. The litigation risk associated with Gilman-Pelosi is that this proposal depends on using a different interpretation of the phrase in the context of how organizations spend their own funds.

Beginning in 1984, the Mexico City policy established by President Reagan, and continued by President Bush, precluded funding to organizations that could not certify that they did not provide or promote abortion as “a method of family planning.” In implementing this policy, AID defined this term to mean:

[abortions] for the purpose of spacing births. This includes, but is not limited to, abortions performed for the physical or mental health of the mother but does not include abortions performed if the life of the mother would be endangered if the fetus were carried to term or abortions following rape or incest (since abortion under these circumstances is not a family planning act).

AID Grantee Contract §752.7016(d)(10) (circa 1986).

In other words, AID formally extended the Helms restrictions on how US funds are spent to how AID funded organizations spent their own funds. Thus, under the Mexico City policy, organizations that performed or promoted abortions in circumstances other than the limited circumstances noted (*even when using their own funds to do so*) were unable to provide the required certification and, therefore, were ineligible for US funding. One of President Clinton’s first acts in office was to issue an executive order discontinuing this policy.

Last term Representative Smith introduced language that would enact this policy into law. His proposed legislation would require all recipients of US funding to certify that they would not perform abortions or engage in any activities to alter the existing laws or policies on abortion while receiving US funds. The Smith amendment did not use the term “abortion as a method of family planning,” but referred specifically to the circumstances under the Mexico City policy in which abortion was permissible.

Gilman-Pelosi creates a exception to the certification requirement by exempting organizations that “do not promote abortion as a method of family planning.”¹ This is where the definition of the phrase “abortion as a method family planning” becomes critical.

If the Smith language, as modified by Gilman-Pelosi, were enacted, AID would draft regulations that defines the phrase to mean *in this context* as “a substitute for contraception.” Thus, if a woman sought an abortion from a clinic that was partially US funded, under such regulations, the clinic could use nonfederal funds to terminate the pregnancy so long as it could demonstrate that its policy and practice did not hold abortion out as a substitute for contraception.

¹ The plain text below represents the Smith language; the bold text reflects the language that Gilman-Pelosi adds to the Smith language:

(h) RESTRICTION ON ASSISTANCE TO FOREIGN ORGANIZATIONS THAT PERFORM OR ACTIVELY PROMOTE ABORTIONS --

(1) PERFORMANCE OF ABORTIONS --

(A) Notwithstanding section 614 of this Act or any other provision, 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) Subparagraph (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 **or to organizations that do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning.**

(2) LOBBYING ACTIVITIES --

(A) Notwithstanding section 614 of this Act or any other provision of law, no funds appropriated for population planning activities or other population assistance may be 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, violate the laws of any foreign country concerning the circumstances under which abortion is permitted regulated or prohibited, or **(except in the case of organizations that do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning)** 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.

In other words, AID's regulations would impose a narrow definition of what it means to "promote abortion as a method of family planning."²

The problem with this approach:

This approach depends on the legal principle set out in Rust v. Sullivan³ and other Supreme Court decisions that the Executive Branch is entitled to judicial deference when the terms of a statute are ambiguous. So long as the President's interpretation is a reasonable reading of the words chosen by Congress and does not conflict with clear legislative history, courts will defer. Here, the Administration would have to demonstrate that the words "promote abortion as a method of family planning" can reasonably be read to mean "promote abortion as a substitute for contraception."

As noted in footnote 2, there is a reasonable explanation for this interpretation. Although not free from doubt, a court would likely agree. Indeed in Rust itself, the Court found these specific words -- "abortion as a method of family planning" -- were susceptible to a differing interpretation and deferred to the Executive.

However, there is a risk -- estimated by various individuals at Justice from minimal to 30% -- that a Court would disagree and find AID's regulation arbitrary and capricious in light of the differing definition given to the phrase "abortion as a method of family planning" elsewhere in the statute. As noted, current US law prohibits the use of US funds for "the performance of abortions as a method of family planning."⁴ In this context, the Administration uses a **broad definition** of the phrase so that US funds only pay for abortion in the event the mother's life is in jeopardy or the pregnancy is the result of rape or incest.

A court might conclude that Congress understood the phrase "abortion as a method of family planning" to mean one thing, not two, and that both historically and currently it gave the phrase the same broad definition, not the **narrow definition** that AID would create administratively in the context of how foreign nongovernmental organizations spend their own funds.

² There is a reasonable explanation for this narrow definition. Contraception, not abortion, is ordinarily the means promoted in planning the size of families. Organizations which do not "promote" the use of abortion in its policies as a substitute for contraception do not "promote abortion as a method of family planning" even if they recognize a woman's right to choose safe, legal abortion if the woman's family planning is not successful. As a result, AID's regulations would only target organizations that promote abortion in a highly unorthodox manner. In reality, this is a null set. No organizations that AID funds promote abortion as a substitute for contraception.

³ 500 U.S. 173, 184-86 (1991).

⁴ See, e.g., Foreign Operations Appropriations Act of 1998, §518.

In addition, this strategy assumes that there will be no significant legislative history that undermines AID's interpretation. If such contrary legislative history were developed, the Administration would not be able to implement Gilman-Pelosi in the fashion contemplated.

In either event, the result would be to cut off organizations that provide abortion on demand and impose a complete gag order on organizations that engage in any activities to alter the laws or government policies regarding the circumstances under which abortion is permitted or prohibited. The Administration has made clear it would not accept either situation. This, however, would be the outcome if the litigation were resolved adversely or contrary legislative history were developed.

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Annex 2: Exemplar Legislative Language for Option A(1)

The plain text below represents the Smith language. The bold text reflects the language that Gilman-Pelosi adds to the Smith language. The underscored bold text reflects proposed further revision to Gilman-Pelosi under Option A(1):

(h) RESTRICTION ON ASSISTANCE TO FOREIGN ORGANIZATIONS THAT PERFORM OR ACTIVELY PROMOTE ABORTIONS --

(1) PERFORMANCE OF ABORTIONS --

(A) Notwithstanding section 614 of this Act or any other provision, 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) Subparagraph (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 or to **any foreign private, nongovernmental organizations that do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning.**

(C) **No funds appropriated for population planning activities or other population assistance may be made available for any foreign private, nongovernmental organization not otherwise subject to Subparagraph (A) until the organization certifies that it will not, during the period for which the funds are made available, promote abortion as a method of family planning and that it will utilize these funds to prevent abortion as a method of family planning**

(2) LOBBYING ACTIVITIES --

(A) Notwithstanding section 614 of this Act or any other provision of law, no funds appropriated for population planning activities or other population assistance may be 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, violate the laws of any foreign country concerning the circumstances under which abortion is permitted regulated or prohibited, or **(except in the case of any foreign private, nongovernmental organizations that do not promote abortion as a method of family planning and that utilize these funds to prevent abortion as a method of family planning)** 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.

Annex 3: Exemplar Legislative Language Incorporating 501(c)(3) Option (Revised)
(using the portion of the Smith Amendment addressing lobbying)

(2) LOBBYING ACTIVITIES. - (A) Notwithstanding section 614 of the Foreign Assistance Act of 1961, as amended, or any other provision of law, no funds appropriated or otherwise made available in this Act 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, violate the laws of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited, **and will not have a substantial part of its activities involve carrying on propaganda, or otherwise attempting, to influence legislation with respect to abortion.**

[bold language strikes: “or engage in any activity or effort to alter the laws or government policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited.”]

Statement of Managers Revision

Substantial activity or effort attempting to influence legislation with respect to abortion.
The language is intended to be comparable to restrictions that exist on lobbying activity by tax exempt organizations under 26 U.S.C. § 501(c)(3).