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AGAINST THE WILL OF THE PEOPLE, AT HOME AND ABROAD: *PRESIDENT OBAMA EXPECTED TO REPEAL MEXICO CITY POLICY*

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INTRODUCTION

Originally announced in 1984 by President Ronald Reagan, the Mexico City Policy prohibits foreign non-governmental organizations (FNGOs) from receiving federal funds if such FNGOs "perform or actively promote abortion as a method of family planning."[1] Thus far, the fate of this important pro-life measure has proven to be inextricably linked to the political persuasions of the individual occupying the Oval Office. Remaining in effect under both President Reagan and President George H.W. Bush, the policy was rescinded under President Bill Clinton, re-implemented under President George W. Bush, and now threatens to be rescinded yet again by President Barack Obama. If the new President makes good on his promise to repeal the Mexico City Policy today, Americans can count on even more of their tax dollars being used to promote abortion – this time, overseas.

HISTORICAL AND STATUTORY FRAMEWORK

The Foreign Assistance Act of 1961 (FAA), 22 U.S.C. § 2151 *et seq.* (2008), authorizes the President to "furnish assistance, on such terms and conditions as he may determine, for voluntary population planning." 22 U.S.C. § 2151b(b). Under a subsequently enacted amendment to the FAA, however, the President does not have unbridled discretion in furnishing such assistance. Enacted in 1973, the Helms Amendment

> prohibits use of USAID or international funds to pay for 'the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions; . . . the performance of involuntary sterilizations as a method of family planning or to coerce or provide any financial incentive to any person to undergo sterilizations; . . . any biomedical research which relates, in whole or in

[1] USAID, USAID's Family Planning Guiding Principles and U.S. Legislative and Policy Requirements, http://www.usaid.gov/our_work/global_health/pop/restrictions.html (last visited Jan. 21, 2009).

> part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.'[2]

At the 1984 United Nations International Conference on Population in Mexico City, the United States announced that it would begin imposing additional restrictions on its disbursement of family planning funds to foreign nations and FNGOs. In its Policy Statement, the United States declared the following:

> The United Nations Declaration of the Rights of the Child (1959) calls for legal protection for children before birth as well as after birth. *In keeping with this obligation, the United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations.* With regard to the United Nations Fund for Population Activities (UNFPA), the U.S. will insist that no part of its contribution be used for abortion. The U.S. will also call for concrete assurances that the UNFPA is not engaged in, or does not provide funding for, abortion or coercive family planning programs; if such assurances are not forthcoming, the U.S. will redirect the amount of its contribution to other, non-UNFPA, family planning programs.
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> In addition, when efforts to lower population growth are deemed advisable, U.S. policy considers it imperative that such efforts respect the religious beliefs and culture of each society, and the right of couples to determine the size of their own families. Accordingly, the U.S. will not provide family planning funds to any nation which engages in forcible coercion to achieve population growth objectives.[3]

Accordingly, USAID, to whom allocation of FAA family planning funds has been delegated,[4] incorporated the so-called "Standard Clause into its family planning assistance agreements and contracts."[5] The Standard Clause essentially conditions receipt of USAID funds on an FNGO's written certification that it will not "perform or actively promote abortion as a method of family planning in AID-recipient countries or provide financial support to other [FNGOs] that conduct such activities."[6] Importantly, the Standard Clause prohibits an FNGO from using *any* funding,

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[2] Ctr. for Reprod. Law & Pol'y v. Bush, 2001 U.S. Dist. LEXIS 10903, No. 01 Civ. 4986, *10 (S.D.N.Y July 31, 2001) (quoting the Helms Amendment, 22 U.S.C. § 2151b(f)).

[3] Policy Statement of the United States of America at the United Nations International Conference on Population (2nd Session, Aug. 1984), *available at* http://www.populationaction.org/Publications/Reports/Global_Gag_Rule_Restrictions/MexicoCityPolicy1984.pdf.

[4] *Ctr. for Reprod. Law & Policy*, 2001 U.S. Dist LEXIS 10903 at **10-11.

[5] *Id.* at *13 (citing Planned Parenthood Fed. of. Am. v. AID, 1990 U.S. Dist. LEXIS 2430, No. 8/Civ. 0248, at **1-2 (S.D.N.Y. Mar. 7, 1990)).

[6] *Planned Parenthood Fed. of Am.*, 1990 U.S. Dist. LEXIS 2430 at **4-5.

private or otherwise, to perform abortions or to promote the practice as a viable method of family planning.[7]

On January 22, 1993, the twentieth anniversary of *Roe v. Wade* and a mere two days after he had taken the presidential oath of office, President Clinton repealed the Mexico City Policy, thus permitting "FNGO recipients of USAID funds . . . to use non-USAID funds to provide abortion services and lobby for abortion law reform."[8] On January 22, 2001, President George W. Bush reinstated the Mexico City Policy. In 2003, he extended the policy to include "voluntary population planning assistance provided by the Department of State," but excluded from it any assistance dedicated solely to HIV/AIDS activities.[9] Finally, the policy does not apply to FNGOs that (a) provide abortions performed as a result of rape or incest or when the life of the mother is endangered,[10] or (b) treat injuries or illnesses caused by abortions.[11]

CURRENT CONTROVERSY

Mexico City Policy opponents argue that the policy cripples women around the world in the "battle" for their reproductive rights.[12] In light of the Standard Clause's prohibition on the use of USAID funds by organizations that perform or actively promote abortion, opponents say that

> the Mexico City Policy forces the most competent and affordable private family planning providers to close their abortion services or become ineligible for USAID funding. In these situations, opponents argue, the policy compels women seeking an induced abortion to use government services that often offer lower quality of care, or to use private providers not supported by USAID, who, after inducing abortion, are often unable to follow up with family planning counseling and an adequate choice of contraceptives.[13]

In October of 2007, the House Committee on Foreign Affairs held a hearing on the impact of the Mexico City Policy (dubbed the "Global Gag Rule" by its opponents) on family planning and reproductive health and rights.[14] Dr. Jean Kagia, who was born in rural Kenya and has served as

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[7] *See* Richard P. Cincotta and Barbara B. Crane, *The Mexico City Policy on U.S. Family Planning Assistance*, SCIENCE, Oct. 19, 2001, at 525.
[8] *Ctr. for Reprod. Law & Pol'y*, 2001 U.S. Dist LEXIS 10903 at **14-15.
[9] USAID, USAID's Family Planning Guiding Principles and U.S. Legislative and Policy Requirements, http://www.usaid.gov/our_work/global_health/pop/restrictions.html (last visited Jan. 21, 2009).
[10] *Ctr. for Reprod. Law & Pol'y*, 2001 U.S. Dist. LEXIS 10903 at **16-17.
[11] USAID, USAID: Statement by the White House Press Secretary, on the Restoration of the Mexico City Policy, http://www.usaid.gov/white_house_statement.html (last visited Jan. 21, 2009).
[12] U.S. House of Representatives, House Committee on Foreign Affairs, Opening statement by Chairman Lantos at hearing, *The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health*, http://foreignaffairs.house.gov/press_display.asp?id=444 (last visited Jan. 21, 2009).
[13] Cincotta and Crane, *supra* note 7.
[14] U.S. House of Representatives, House Committee on Foreign Affairs, Committee Hearing Information, *The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health*, http://foreign affairs.house.gov/hearing_notice.asp?id=919 (last visited Jan. 22, 2009).

an obstetrician/gynecologist there for over 25 years,[15] was the only pro-life witness to testify at the hearing.[16] Dr. Kagia, who also serves as Chairman of the Protecting Life Movement of Kenya, testified that the Mexico City Policy had not adversely affected family planning or women's health in Kenya.[17] When pressed for the reason for that fact, Dr. Kagia explained that "the Kenyan government applies over 60 percent of family planning services for the country free of charge. 60 percent is given by faith-based organizations and . . . 10 percent is [given by] private organizations, private hospitals, NGOs, private doctors, and all that."[18] She further explained that the country produces thirty doctors per year and that most of those doctors are deployed to rural areas to improve health services there.[19] Importantly, Dr. Kagia stated that the FNGOs

> that have been affected by the Mexico City policy do not seem to be conversant with the social, cultural and religious practices of the African woman. In order to attempt to reduce maternal mortality, one has to propose remedies that do not conflict with her social-cultural and religious practices; otherwise they will be met with a lot of resistance. Remedies need to take into account the realities and faith of the African woman and not focus only on family planning (when she is not assured of the survival of her children or if she does not have consent from the husband) or abortion (which not only risk[s] her health and the life of the unborn baby but would also make her go against her faith and conscience).[20]

Dr. Kagia noted that this is supported by opinion polls in Kenya regarding the legalization of abortion: "Even though abortions occur, the number of people – including women – who said 'NO' to legal abortion were 81% in 2003, 86% in 2004 (Steadman Research Group) and 85% in 2007."[21] In light of those numbers, Dr. Kagia asked why Congress wanted to "fund organizations that work against the will of the majority of the people of democratic countries."[22] She concluded her testimony by stating that "the promotion of and effort to legalise abortion in Africa is a foreign agenda and a form of recolonisation."[23]

CONCLUSION

The Mexico City Policy is absolutely crucial to preventing the use of *American* taxpayer dollars for the performance and promotion of abortion and abortion-related activities (such as biomedical research and sterilization) in foreign nations. Contrary to what some may believe, the policy does not reduce family planning funding overseas nor does it cripple women in their fight

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[15] Prepared Testimony of Dr. Jean Kagia before the House Committee on Foreign Affairs on The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health, Oct. 31, 2007, *available at* http://foreignaffairs.house.gov/110/kag103107.htm.
[16] *See* U.S. House of Representatives, *supra* note 14.
[17] Rep. Tom Lantos Holds a Hearing on Family Planning Aid, POLITICAL TRANSCRIPT WIRE, Nov. 2, 2007.
[18] *Id.*
[19] *Id.*
[20] Prepared Testimony of Dr. Jean Kagia before the House Committee on Foreign Affairs on The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health, Oct. 31, 2007, *available at* http://foreignaffairs.house.gov/110/kag103107.htm.
[21] *Id.*
[22] *Id.*
[23] *Id.*

for reproductive rights. The Mexico City Policy merely ensures that federal funds are not used to promote a practice that many Americans find repugnant and that many foreign nations still oppose. Importantly, while the Helms Amendment would continue to prohibit USAID funds from being used to directly pay for abortions, since USAID grants are fungible, the Mexico City Policy is necessary to prevent "indirect U.S. support of abortion services and lobbying activities seeking to overturn abortion laws of foreign governments."[24]

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[24] Cincotta and Crane, *supra* note 7.