ONE HUNDRED TENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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June 29, 2007

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

In April 2005, I wrote you to express my concern that federal aid programs had begun conditioning grants to U.S.-based groups on the signing of organization-wide pledges against prostitution. I was concerned that this was both unconstitutional and bad policy that could interfere with efforts to stop the spread of AIDS in countries where outreach to prostitutes is a key component of prevention. Although I requested documents related to your Department's support of the pledge requirement and repeated this request in a July 2005 letter, you failed to provide them.

I have recently obtained a document indicating that in 2003 the Justice Department told Congress that enacting the pledge requirement would be a mistake because "it raises serious First Amendment concerns and may not withstand judicial scrutiny."

This is not what your Department advised the Department of Health and Human Services in 2004, when it opined that such requirements could in fact be applied to U.S. groups because "there are reasonable arguments to support their constitutionality." Since there has not been any significant change in the case law in this area, it appears that political considerations, rather than objective legal analysis, led to this reversal.

The implementing agencies are currently developing new guidelines for this provision, affording a welcome opportunity to change course. I am writing to urge you to affirm your initial interpretation and to advise the Administration to implement policies that respect both the constitutional rights and public health responsibilities of grantees. In addition, I request a full explanation of the shift in your Department's interpretation, including all related documents and internal and external correspondence.

Background

At issue is a restriction on the free speech of organizations that receive U.S. global AIDS or anti-trafficking funding.

Since the enactment of the AIDS and Anti-Trafficking Acts of 2003, both U.S. and foreign grantees have been prohibited from spending U.S. funds to promote, support, or advocate "the legalization or practice of prostitution."[1] This is a constitutional restriction on the actual use of U.S. funds. However, a different provision in each law also requires that recipients have organization-wide positions against prostitution.[2] In effect, this provision puts limitations on what an organization can advocate with private funds, not just those it receives from the government.

Initially, this provision was not applied to U.S.-based groups. However, a September 2004 Department of Justice letter to the Department of Health and Human Services advised that the pledge could indeed be applied to U.S. organizations:

> I understand that earlier this year the Department of Health and Human Services (HHS) asked the Department of Justice (DOJ) whether HHS could implement certain provisions of the [Trafficking Victims Protection Reauthorization Act] and of the AIDS Act. At that time, I understand that DOJ gave its tentative advice that the so-called "organization

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[1] The Trafficking Victims Protection Reauthorization Act provides: "No funds made available to carry out this division ... may be used to promote, support, or advocate the legalization or practice of prostitution." Pub. L. No. 108-193 (2003) §7(7). The AIDS Act provides: "No funds made available to carry out this Act ... may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." Pub. L. No. 108-25 (2003) §301(e).

[2] The Trafficking Act provides: "No funds made available to carry out this division, or any amendment made by this division, may be used to implement any program that targets victims of severe forms of trafficking in persons described in section 103(8)(A) of this Act through any organization that has not stated in either a grant application, a grant agreement, or both, that it does not promote, support, or advocate the legalization or practice of prostitution. The preceding sentence shall not apply to organizations that provide services to individuals solely after they are no longer engaged in activities that resulted from such victims being trafficked." Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193 (2003) §7(7). The AIDS Act provides: "No funds made available to carry out this Act, or any amendment made by this Act, may be used to provide assistance to any group or organization that does not have a policy explicitly opposing prostitution and sex trafficking." United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25 (2003) §301(f).

> restrictions" set forth in [the Acts] could, under the Constitution, be applied only to foreign organizations acting overseas. We have reviewed the matter further and we are withdrawing that tentative advice. [3]

The letter then asserted that because "there are reasonable arguments to support their constitutionality," the requirements could be applied to U.S. groups.[4] The letter also assured the agency that the Justice Department would defend the requirements against any challenges.

In April 2005 and again in July 2005, I wrote to you questioning the constitutionality and public health implications of this new position.[5] Many groups working to address the causes and consequences of prostitution are concerned that the pledge requirement increases stigmatization and hinders outreach; and there is international public health consensus that effective outreach to marginalized populations is crucial to HIV prevention.[6]

In my letters, I requested that you send me any opinion letters or other documents detailing the Department's prior interpretation of the provisions' constitutionality. You have failed to provide these documents.

The September 2003 Letter from DOJ to Congress

A document I have recently obtained may explain why you did not wish to make the Justice Department's earlier interpretation public. It shows that your Department was so concerned about the pledge requirement that during consideration of the anti-trafficking bill, it recommended that that the provision be eliminated entirely.

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[3] Letter from Acting Assistant Attorney General Daniel Levin to Alex M. Azar, General Counsel, Department of Health and Human Services (Sept. 20, 2004) (attached).

[4] *Id.*

[5] Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales (Apr. 13, 2005); Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales (July 15, 2005).

[6] Letter from Over 200 Organizations to President Bush (May 18, 2005) (online at www.genderhealth.org/pubs/20050518LTR.pdf). In a 2004 article in the medical journal *The Lancet*, over 100 religious, political, public health and scientific leaders urged the international community "to unite around an inclusive evidence-based approach to slow the spread of sexually transmitted HIV." Within such an approach, they wrote that "[t]he identification and direct involvement of most-at-risk and marginalized populations is crucial." D. Halperin, et al, *The Time Has Come for Common Ground in Preventing Sexual Transmission of HIV*, The Lancet, 913-914 (Nov. 27, 2004).

In a September 2003 letter sent to then-Chairman of the House Judiciary Committee James Sensenbrenner, Assistant Attorney General William E. Moschella wrote about the pledge provision:

> [W]e do think that it raises serious First Amendment concerns and may not withstand judicial scrutiny. We therefore recommend that this provision be struck from the bill.[7]

Noting that the government may constitutionally place restrictions on how organizations use U.S. funds, he then described why restrictions on how an organization uses its own, separate funds are of questionable constitutionality:

> There is substantial doubt ... as to whether the Federal Government may restrict a domestic grant recipient participating in a Federal anti-trafficking program from using its own private, segregated funds to promote, support, or advocate the legalization or practice of prostitution, even if such a restriction applies only to those grant recipients providing assistance to victims of severe forms of trafficking. *See Rust,* 500 U.S. at 197; *FCC v. League of Women Voters*, 468 U.S. 364, 399-401 (1984). As a result, because this provision of H.R. 2620 would, in effect, prevent any organization receiving Federal funds to implement a program targeting victims of severe forms of trafficking from using its own private funds to promote, support, or advocate the legalization or practice of prostitution, we believe that there is serious doubt as to whether that provision would survive judicial scrutiny if challenged in court. In particular, we note that the prohibition on grant recipients using their own private, segregated funds to promote the legalization of prostitution, as opposed to the practice of prostitution, would be particularly vulnerable to legal challenge.[8]

To my knowledge, there have been no Supreme Court cases or other judicial decisions since Mr. Moschella's letter that would affect the legal analysis he provided to Congress. This suggests that the Department's change in its legal position was driven by political considerations, not legal ones.

Forthcoming Agency Guidelines

There is a possibility that these constitutional issues could be addressed in the near future. The Department of Justice recently told a federal court that the government plans to establish guidelines for the global AIDS program that maintain the anti-prostitution pledge requirement, but permit organizations to have "separate affiliates" that will not be required to have such a

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[7] Letter from Assistant Attorney General William E. Moschella to Rep. James Sensenbrenner (Sept. 24, 2003) (attached).

[8] *Id.*

policy.[9] This could represent a welcome change in the application of the law if the affiliate requirements truly provide sufficient alternative channels for expression. However, the Department told the court that these policies will be based on the affiliate requirements for Legal Services Corporation grantees. This type of requirement would require organizations to set up legally and physically separate affiliates, with separate staff, in order to use private funds to speak freely about prostitution and AIDS.[10]

The questionable constitutionality of the pledge as applied to U.S. groups calls into question the validity of such restrictive requirements. It could also unduly burden the cooperating agencies participating in our programs and introduce wasteful duplication of costs. This is of particular concern because many funding recipients operate in multiple countries, and registering separate entities in each may be difficult or impossible.

Less restrictive frameworks — such as those the Administration has endorsed and applied to faith-based groups — are available. The Administration has stated that as long as faith-based grantees ensure that no federal funds are spent on inherently religious activities and that federally funded activities are conducted either at a different time or in a different place than any privately funded, religious activities, no government funding or endorsement of religious activities will occur.[11] This model should be used in the global AIDS and trafficking programs. It would serve U.S. policy interests while respecting the constitutional rights of U.S. groups and the public health missions of all organizations.

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[9] Letter from U.S. Attorney Michael J. Garcia to the Honorable Catherine O'Hagan Wolfe, Clerk of the Court, U.S. Court of Appeals for the Second Circuit (June 8, 2007) (online at www.brennancenter.org/dynamic/subpages/download_file_49138.pdf).

[10] *Legal Services Corporation; Program Integrity of Recipient* (45 C.F.R. § 1610.8). Such restrictions have been documented as extremely burdensome on Legal Services Corporation-funded organizations. Some have had to spend significant sums running duplicate offices instead of providing more services; others, unable to meet the strict requirements, have been unable to serve those low-income clients who are not eligible for LSC-funded services. Brennan Center for Justice, *Why We Need to Fix the Legal Services Restriction on State, Local, and Private Money* (Mar. 14, 2007) (online at www.brennancenter.org/dynamic/subpages/download_file_48195.pdf).

[11] Executive Order No. 13279; White House Office of Faith-Based & Community Initiatives, *Guidance to Faith-Based and Community Organizations on Partnering With the Federal Government* (2002) (online at http://www.whitehouse.gov/government/fbci/guidance_document_01-06.pdf).

Conclusion

There are both significant public health and constitutional reasons for a change in policy. The Administration's pledge requirement, whether applied to U.S. or foreign groups, can have a chilling effect on HIV prevention efforts by hindering outreach to an already marginalized population. Public debate is vital for efforts to reduce stigma, increase access to health services, and provide economic alternatives. And at least in the case of U.S. groups, the pledge requirement unconstitutionally interferes with what the organizations can say with their own funds.

The forthcoming guidelines provide an important opportunity for you and the relevant agencies to address these serious problems. I urge you to recommend minimally restrictive guidelines that respect both the constitutional rights of U.S. groups and the important public health goals of all recipient organizations.

I also request that you provide by July 12 a full explanation of your Department's change in stance, as well as all documents, including internal or external correspondence, related to the Department's position on the pledge requirement.

The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X. An attachment to this letter provides additional information about how to respond to the Committee's request.

I would appreciate your cooperation in this matter. Please provide answers to the questions above and the requested materials to the Committee by July 13, 2007. If you have any questions regarding this letter, please contact Naomi Seiler of the Committee staff at (202) 225-5056.

Sincerely,

Henry A. Waxman
Chairman

Enclosures

cc: Tom Davis
Ranking Minority Member