

THE SECRETARY OF STATE

WASHINGTON

July 21, 2002

Dear Mr. Chairman:

The Foreign Operations, Export Financing and Related Programs Appropriations Act for fiscal year 2002, Pub. L. 107-115 ("Act"), like every foreign operations appropriations act since 1985, provides that "none of the funds made available in this Act . . . may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization." Subject to this funding restriction (known as the "Kemp-Kasten amendment"), the Act appropriates "not more than \$34,000,000" for the United Nations Population Fund ("UNFPA").

I continue to believe that the full \$34 million appropriated by the Congress should be used for the purpose of family planning and reproductive health care as originally envisaged. Accordingly, we propose to apply the full \$34 million to USAID's Child Survival and Health Program Fund. However, pursuant to a delegation of authority by the President, I have concluded that, in light of the Kemp-Kasten amendment, no funds made available by the Act may be provided to UNFPA at this time. The enclosed analysis provides further information about the basis for my decision. In coming to this conclusion, I relied on information available to me, including briefings supplied by UNFPA, Chinese law, the State Department's annual human rights reports, and the report of a three-member independent assessment team that traveled to the PRC in May 2002 at my request to assess the situation and assist in my determination of whether the Kemp-Kasten Amendment precluded further funding of UNFPA.

The Honorable

Patrick J. Leahy, Chairman,
Subcommittee on Foreign Operations,
Committee on Appropriations
United States Senate.

The issue of abortion divides many Americans of good will. If there is a single principle that unifies Americans with conflicting views on the subject, it is the conviction that no woman should be forced to have an abortion. The Kemp-Kasten amendment reflects this value by prohibiting the use of foreign assistance appropriations for any organization that supports or participates in the management of a program of coercive abortion. Regrettably, the PRC has in place a regime of severe penalties on women who have unapproved births. This regime plainly operates to coerce pregnant women to have abortions in order to avoid the penalties and therefore amounts to a "program of coercive abortion." Regardless of the modest size of UNFPA's budget in China or any benefits its programs provide, UNFPA's support of, and involvement in, China's population-planning activities allows the Chinese government to implement more effectively its program of coercive abortion. Therefore, it is not permissible to continue funding UNFPA at this time. If Chinese laws and practices were changed so that UNFPA's activities did not support a program of coercive abortion, or if UNFPA were to change the program implementation for its funding so that it did not support a program of coercive abortions, I would be prepared to consider funding UNFPA in the future.

The Administration attaches great importance to our international leadership role in supporting voluntary family planning activities. For that reason, we are preparing to take the steps, including consulting with the Congress, that would be necessary to apply the full \$34 million appropriated by Congress to USAID's Child Survival and Health Program Fund to be used for family planning and reproductive health care activities. We are looking to fund programs in a number of countries, based upon the greatest need for assistance.

Sincerely,



Colin L. Powell

Enclosures:

- Tab A - Analysis of Determination, Kemp-Kasten Amendment
- Tab B - Report of the China UNFPA Independent Assessment Team

**Analysis of Determination that Kemp-Kasten Amendment
Precludes Further Funding to UNFPA under Pub. L. 107-115**

In recent months, the State Department has renewed its examination of whether further funding of UNFPA out of funds appropriated under Pub. L. 107-115 is precluded by the Kemp-Kasten restriction in that statute. It relied on information including briefings supplied by UNFPA, Chinese law, the State Department's annual human rights reports, and the report of a three-member independent assessment team that traveled to the PRC in May 2002 at the Secretary's request to assess the situation and assist in the determination of whether the Kemp-Kasten amendment precluded further funding of UNFPA. The team, which was headed by former Ambassador William A. Brown, spent 14 days in China, from May 13-26, for extensive visits to five of the 32 counties supported by UNFPA. The team's mandate was to present factual findings on UNFPA's association or participation with population-planning activities in China.

The team found no evidence that UNFPA has "knowingly supported or participated in the management of a program of coercive abortion or involuntary sterilization in the PRC." The team found that, notwithstanding some relaxation in the 32 counties in which UNFPA is involved, the population programs of the PRC "retain coercive elements in law and in practice." The team noted a system of extremely high fines and penalties imposed on families that exceed the number of children per family approved by the government. In this connection, even if UNFPA did not "knowingly" support or participate in such a program, that does not mean that the Kemp-Kasten restriction would not be triggered, since that restriction does not rest on a finding of legal intent to fund the coercive program. The restriction is triggered if the recipient "supports or participates in the management or a program of coercive abortion" (or involuntary sterilization).

The team's finding that China's population practices retain coercive elements in law and in practice is consistent with other information available to the Department, such as materials and briefings supplied by UNFPA, Chinese law, and the State Department's annual human rights reports. The PRC has a longstanding and draconian program of controlling birth rates, including imposing crushing fines on parents who deviate from the number of children viewed as appropriate by the State. A

"program of coercive abortion" includes penalties charged by governmental authorities under color of law that have the purpose or effect of forcing mothers to have abortions to avoid the penalties.

The PRC Government publicly establishes and enforces detailed planned-birth policies, with "legal births" distinguished from "out-of-plan births." Fines on "out-of-plan" births are typically severe "social compensation fees." For example, the laws in one of the counties in which UNFPA operates expressly provide that "[t]he birth of a child which violates government family planning policy will result in the levying of a fee of two to three times the annual income of both respective involved parties"; that "continuation of births in violation of government family planning will result in the redoubling of fees"; and that the "amount of the penalty will be firmly set, and any difficulties in the collection of the fee or exceeding of the time limit for payment will result in an additional penalty." Reflecting this same policy, documents posted in PRC State Family Planning Commission Offices in the 32 counties in which UNFPA operates state merely that it is forbidden "to prevent *legal births* on the grounds of fulfilling the population plan" (emphasis added) and thus convey the clear message that it is not forbidden for government workers to seek to prevent out-of-plan births.

The PRC government has recently confirmed these kinds of policies on a national basis. On December 29, 2001, the Standing Committee of the Ninth National People's Congress adopted a new national "Population and Family Planning Law of the People's Republic of China" which takes effect on September 1, 2002. This law reflects and reinforces the strict rules in the PRC that lead to coercion, including the "social compensation fees" and disciplinary measures on couples who violate the state-prescribed number of children. The law, which will become effective on September 1, 2002, includes population control quotas (Article 11) and fines ("premiums") for violating the one-child law (Article 41 ("bringing up children in society")).

The PRC's coercive law and practices amount to a "program of coercive abortion" and are an integral part of the comprehensive population-control program that PRC officials at all levels of government work to advance. Regardless of the size of UNFPA's budget in China or any benefits its programs provide, UNFPA's support of, and involvement in, China's population-planning activities allows the Chinese government to implement more effectively its program of coercive abortion.

UNFPA provides millions of dollars in financial support for PRC family-planning activities in the 32 counties in which it operates. These outlays include expenditures for equipment such as computers and data-processing equipment designed to strengthen management capacity at the county level, surgical and other medical equipment and project vehicles. Although such equipment has legitimate uses, it also facilitates the imposition of social compensation fees and the performance of abortions on those women who are coerced by the social compensation fees to undergo abortions that they would otherwise not undergo. For example, recent testimony of a former planned-birth officer makes clear that something as seemingly innocuous as data-processing equipment is used to establish a database record of all women of child-bearing age in an area and to trigger the issuance of "birth-not-allowed" notices and the imposition of social compensation fees. Not only has UNFPA failed to ensure that its support does not facilitate these practices; it also has failed to deploy the resources necessary even to monitor this issue. In the context of the PRC, supplying equipment to the very agencies that employ coercive practices amounts to support or participation in the management of the program.

UNFPA participates in other ways in the management of the relevant PRC county field offices that propagate the government's distinction between legal births and out-of-plan births. It takes credit for posted documents that note that it is forbidden "to prevent legal births" - thus bearing partial responsibility for disseminating a message that it is not forbidden for government employees to prevent out-of-plan births. More generally, UNFPA is helping improve the administration of the local family planning offices that are administering the very social compensation fees and other penalties that are effectively coercing women to have abortions.

Arguments can be made that UNFPA is undertaking good-faith educational and other efforts to improve the lives of the people of the PRC and assist them in family planning decisions. Even if this is the case, it does not provide a sufficient basis to furnish funding under Kemp-Kasten. Kemp-Kasten instead precludes further funding of that organization since it is supporting or participating in the management of a "program of coercive abortion."

Overview of History of Kemp-Kasten and UNFPA

The Kemp-Kasten Amendment

The legislative provision known as the "Kemp-Kasten Amendment" was first included in the FY 1985 Foreign Operations, Export Financing and Related Programs Appropriations Acts. This provision states that funds appropriated under the authority of that act may not be provided to "any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization." Kemp-Kasten has been subsequently enacted annually in the Foreign Operations appropriations bill.

Kemp-Kasten Delegation of Authority

The authority to make the presidential determination provided for in Kemp-Kasten was delegated by the President in 1985 to the USAID Administrator as funding for UNFPA was appropriated in a USAID-managed account. UNFPA is now funded out of the Department's International Organizations and Programs account. The President delegated authority to implement Kemp-Kasten to the Secretary of State in 1995, and the delegation was also included in an amendment to E.O. 12163 in 1999.

1985 Kemp-Kasten Determination

In 1985, USAID Administrator Peter McPherson determined not to obligate funds to UNFPA because of his conclusion that "UNFPA is participating in the management of a program of coercive abortion and involuntary sterilization in the People's Republic of China." In reaching his conclusion, McPherson relied upon Congressman Kemp's views, which were published separately from the 1985 report accompanying the Supplemental Appropriations Act¹⁽¹⁾, in which he stated that assistance to an organization that engages in the following types of activities, in a country where there is coercive abortion or involuntary sterilization in the country's population program, was intended to be proscribed by the amendment: collection and analysis of demographic information necessary for such a program; training of the

¹⁽¹⁾ House Report No. 99-142, p. 232.

individuals who plan, manage and carry out such a program; and education and publicity about such programs.^{2[2]}

The U.S. did not contribute to UNFPA during fiscal years 1986 through 1992. During this period, USAID concluded that the China population program and UNFPA's activity there did not change sufficiently enough to warrant a resumption of USG support for UNFPA.

1993 Kemp-Kasten Determination

In July 1993, USAID Administrator Brian Atwood determined that Kemp-Kasten did not preclude funding UNFPA. Specifically, the legal analysis prepared by USAID found that there was not a direct link between UNFPA's program in China and coercive abortion and involuntary sterilization.

In support of the Administrator's determination, the USAID General Counsel's Office stated that "it would be reasonable to require evidence that the organization knowingly and intentionally provides direct support for, or helps to manage, people or agencies who are clearly engaged in coercive abortion or involuntary sterilization." The General Counsel's Office also stated that nothing in the Kemp-Kasten language "requires the prohibition to be applied to an organization for which there has been no evidence of direct involvement in abortion or coercion in any way and which provides almost exactly the same kind of general management assistance to many countries throughout the world."

Consequently, the U.S. contributed to UNFPA during fiscal years 93-95, subject to the conditions that U.S. funds would be maintained in a segregated account, none of which could be used in China, and UNFPA would provide documentation demonstrating where UNFPA uses U.S. funds. UNFPA's program in China ended in December 1995 allowing full U.S. funding to UNFPA without application of the above restrictions in FY 1996 and FY 1997.

^{2[2]} Although the Administrator noted that a USAID study had concluded that UNFPA "does not include coercive abortion or involuntary sterilization in its own programs in China," he found that (1) UNFPA did provide assistance to China in the general areas described by Rep. Kemp and (2) that China's implementation of its one-child policy set in place a program for population control which resulted in abuses, including coerced abortion and involuntary sterilization. He concluded that there was "no alternative but to bar further obligation of funds" in FY 1985 to UNFPA.

New UNFPA Program - 1998

In February 1998, the UNFPA Executive Board (of which the U.S. is a member) approved a new program for China. This new program took UNFPA about two years to negotiate with Chinese officials. As a prerequisite for any assistance from UNFPA, the 32 counties in China where UNFPA operates are required to formally suspend or remove birth quotas and targets. Chinese authorities also agreed to permit monitoring access and oversight by the UNFPA Executive Board, U.S. diplomatic staff in China, and independent observers to assess the voluntary nature of family planning activities in the UNFPA program counties. The program's stated objective is to demonstrate that a voluntary, non-coercive approach to family planning can be effective in promoting sustainable population growth. The program states that it emphasizes informed and expanded choice of contraceptive methods (beyond the two methods most currently available in China - sterilization and IUDs), improved quality of care, and women's economic empowerment.

Recent funding

Subsequent to UNFPA resuming operations in China, the U.S. funded UNFPA in FY 1998, under the same restrictions as were applied in fiscal years 93-95 (i.e., U.S. funding kept in a separate account, none of which could be spent in China, etc.). Congress and the Clinton Administration agreed that UNFPA would not be funded in FY 1999 in exchange for the Mexico City language not being enacted into law. Funding resumed in FY 2000 pursuant to a bipartisan funding arrangement requiring the annual amount UNFPA spends in China be withheld from the annual U.S. contribution (that requirement remained in place in FY 2001 legislation but was subsequently removed in the FY 2002 legislation).

The Bush Administration decided on February 8, 2001, to fund UNFPA in FY 2001, pursuant to a legal requirement that the U.S. contribution would be reduced by the amount that UNFPA spends in China. The State Department also provided UNFPA with an additional \$600,000 in November 2001 from the Emergency Refugee and Migration Assistance (ERMA) fund in response to the October 2001 United Nations Donor Update for Afghanistan. No further funds have since been provided to UNFPA.

Court Challenges to Kemp-Kasten Determinations

The differing 1985 and 1993 Kemp-Kasten determinations by USAID Administrators McPherson and Atwood were each challenged in U.S. federal courts. In both cases, courts did not uphold the challenges. In Population Institute v. McPherson, the U.S. Court of Appeals for the District of Columbia Circuit noted "the special deference that should be accorded the executive in those activities that impinge on foreign affairs." 797 F.2d 1062, 1070 (D.C. Cir. 1986); see id. at 1069 (strongly suggesting that the executive branch's factual determinations regarding China's programs are not reviewable by the judiciary). The court ruled that the AID Administrator's explanation how the UNFPA assistance "allow[ed] the Chinese to more effectively implement . . . their program of coercive abortion" reflected "a thoroughly reasonable view of the [Kemp-Kasten] amendment's meaning." Id. at 1073.

In contrast, in Smith v. Atwood, the U.S. District Court for the District of Columbia ruled that a congressman's challenge to the AID Administrator's decision to fund UNFPA activities in China was moot. 845 F. Supp. 911, 915 (D.D.C. 1994). There, the congressman had challenged a determination by the AID Administrator that "only 'clear evidence' of knowing and intentional direct funding or support by UNFPA" would trigger Kemp-Kasten. The court stated, "It is quite clear that such a standard is in no way contemplated by the Kemp/Kasten amendment." Id. When the Administrator then advised the court that Kemp-Kasten was not "'triggered by activities which are unintentional or remote, or which only indirectly or marginally relate to a program of coercive abortion,'" the court determined that the congressman's challenge was moot. At the same time, the court stated that it was "not entirely satisfied" with the wording of the clarification of the Administrator's and that it "believe[d] that the Kemp-Kasten amendment would bar the provision of any funds to an organization that participates to any extent in a program of 'coercive abortion or involuntary sterilization.'" Id. at 915 n.4.