



Legislative Bulletin.....July 24, 2008

Contents:

H. Res. —Providing for the consideration of the Senate Amendment to H.R. 5501, the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008.

Order of Business: H. Res. _____, is scheduled to be considered Thursday, July 24, 2008, under a closed rule, which makes no amendments in order and denies a Republican Motion to Recommit.

Background: On April 2, 2008, the House passed H.R. 5501, the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008 (also known as PEPFAR), by a vote of [308-116](#). Conservatives expressed numerous concerns with the legislation that came before the House for a vote in April. Some of those concerns remain, notwithstanding the Senate substituted bill text (now considered as the final bill text). To read more about the House passed version (H.R. 5501) please see this RSC [legislative bulletin](#), and for more information on the broader concerns with the PEPFAR legislation, see this RSC [policy brief](#).

The Senate bill includes a substitute for the House passed language, making numerous changes and amendments to the House bill. The major changes are addressed in the summary below.

Summary of Senate Amendments and Changes to H.R. 5501:

Increased Spending for Domestic Indian Programs

The Senate bill retains the \$50 billion authorization for PEPFAR while also increasing spending for domestic Indian (Native American) programs by \$2 billion. A Senate amendment, sponsored by Senator Kyl (R-AZ) and Senator Thune (R-SD), authorizes \$2 billion (out of the total \$50 billion intended for AIDS relief) to be put into a fund for domestic Indian programs. The intention is for the fund to serve as an additional resource of federal dollars to pay for Indian law enforcement projects, health programs, and water projects. This amendment (in section 601 of the bill text) does not appropriate funds to the Indian Health Service, but rather authorizes increased spending for numerous domestic Indian programs. A subsequent bill would be necessary to appropriate money for the Indian safety, health and water programs.

Funds are authorized for the following law enforcement programs:

- \$370 million for construction, rehabilitation, and replacement of federal Indian detention facilities (through the Department of Justice);
- \$30 million to investigate and prosecute crimes in Indian country;
- \$310 million for the Bureau of Indian Affairs Public Safety and Justice Account, which funds tribal police and courts;
- \$30 million to be used by the Office of Justice Programs for Indian and Alaska Native programs; and
- \$10 million for cross deputization or other cooperative agreements between state or local governments and Indian tribes. This provision may be of concern for Members from non-reservation states, such as Oklahoma, as cross deputization subsidies may be problematic because they encourage tribes to expand their jurisdiction into law enforcement areas outside of tribal lands.

The amendment authorizes \$1 billion (50 percent of the total fund) to implement Indian water supply projects approved by Congress (including construction, planning, etc).

The amendment also authorizes a total of \$250 million for Indian health programs including contract health services; construction, rehabilitation, and replacement of Indian health facilities; and domestic and community sanitation facilities serving members of Indian tribes. As these are currently existing programs within the Indian Health Service (IHS), this money should be subject to the Hyde amendment. According to the White House, funds authorized under section 601 of the Senate bill, and appropriated in another vehicle, will retain the pro-life protections currently applicable to the Indian Health Service.

Repeal of the HIV Visa Ban

The Senate bill repeals a 1987 U.S visa ban on people with HIV. In 1987, Congress instituted a ban which prohibited travel and immigration to the U.S. for people infected with HIV. The U.S. is one of twelve countries to have such a ban in place—other countries which still institute a ban include Sudan, Saudi Arabia, Libya, and Russia. According to Associated Press reports, HIV-infected foreigners, students and tourists are allowed to apply for permission to visit for a short period of time, though such waivers are difficult to come by. Additionally, permanent residency is often impossible to for them to acquire.

According to Senator Sessions, repealing the ban could cost more than \$80 million over ten years. CBO estimates that 4,300 immigrants with HIV/AIDS would enter the U.S. annually by 2013. In total, CBO estimates that providing benefits to those immigrants and their children would increase spending by \$3 million from 2010-2013 and \$83 million over the 2010-2018 period. To offset this cost, the Senate bill proposes to raise the fee charged to foreign visa applicants by \$1 in the next two years and \$2 thereafter. Currently, visa fees are \$140.

Treatment Floor

Lack of a treatment floor drew concern from many conservatives, among those being that the lack of a prescriptive treatment floor leaves the program open to increased fraud and abuse.

After a concerted effort on the part of Senate conservatives, the Senate bill includes a treatment floor requiring that “more than half” of bilateral AIDS funding be spent on life saving medical care (including anti-retroviral drugs, medical monitoring, etc). As you may recall, the House version of the bill did not contain a treatment floor or language to tie PEPFAR funding increases to increases in lifesaving drug treatments. Furthermore, this provision takes into account the annual decrease in the cost-to-treat, ensuring that while the cost of anti-retroviral drugs decreases, the amount of drugs dispensed increases. The Senate amendment also includes a target for the number of people to receive anti-retroviral drugs (significantly above the current effort) and requires that the target be in direct proportion to the funding increases each year. Note: While anti-retroviral drugs are not a cure, they do prevent people from becoming ill for many years, increasing the lifespan of HIV infected individuals and vastly improving quality of life.

Cost Sharing

Senator Gregg (R-NH) offered an amendment, which was accepted by the Senate on voice vote, to encourage the inclusion of cost sharing agreements and transition strategies among compacts and framework agreements. The amendment would require that countries receiving assistance comply with Section 110 of the Foreign Assistance Act, which states: “No assistance shall be furnished by the United States Government to a country under sections 103 through 106 of this Act until the country provides assurances to the President, and the President is satisfied, that such country provide at least 25 per centum of the costs of the entire program, project, or activity with respect to which such assistance is to be furnished, except that such costs borne by such country may be provided on an ‘in-kind’ basis.” The intent and predicted outcome of this amendment is to ensure that each government receiving aid under the bill will play an active role in the HIV prevention and treatment programs in their country, so as to ensure positive outcomes.

Prohibition on Funding Wealthy Countries

Some conservatives expressed concern that the House bill encouraged expansion of PEPFAR beyond the poorest and neediest countries in Africa and the Caribbean to countries such as Russia, China and India, including countries that have their own nuclear programs and space exploration programs. The Senate amendments addressed this concern by incorporating language that would prevent funding of rich countries like Russia, China, and India. In addition, the Senate bill strikes language which prioritizes funding for rich countries with small HIV epidemics (as opposed to generalized epidemics).

Global Fund Accountability

Many conservatives expressed concerns that the House bill contained no enforcement mechanisms for Global Fund accountability, which could render the few PEPFAR

accountability provisions ineffective. Senator Vitter (R-LA) sponsored an amendment to create an Inspector General for the Global Fund to fight AIDS, Tuberculosis and Malaria (the Global Fund). According to the Vitter amendment, the Inspector General will be charged with conducting and supervising audits and investigations of contributions by the U.S. to the Global Fund. The Vitter amendment also provides that U.S. contributions to the Global Fund may be withheld if the Global Fund does not comply with certain transparency requirements in the bill—specifically, 20 percent of annual expenditures would be withheld if oversight goals are not met. While this amendment moves in the right direction, some conservatives may still have concerns regarding the accountability and transparency of the Global Fund. More information on the Global Fund can be found in [this RSC document](#).

Abstinence and Fidelity Activities

Some conservatives expressed concern that the House language regarding the “meaningful and equitable” inclusion of abstinence and fidelity programs in prevention programs could allow too much room for interpretation by a Coordinator who may not support pro-abstinence and pro-fidelity programs in the future. The Senate amendment clarifies that 50 percent of funding for prevention of HIV must be used **only on** abstinence and fidelity activities. The Senate provision is stronger than the House provision, and has received stronger support from conservative organizations concerned that the House language would not have protected abstinence education effectively.

Family Planning Language

The House bill passed in April included language that suggested that PEPFAR should focus on providing HIV/AIDS education and testing through existing family planning programs without integrating family planning into HIV/AIDS programs. References to family planning *were* included in the House bill, but only in the context of family planning done through organizations that are “supported by US government” (which should ensure that such programs are covered under the Mexico City Policy). The Mexico City Policy (MCP) is an administrative policy that prohibits US funding from going to any foreign nongovernmental organizations that performs and/or promotes abortion. The Senate bill strikes all “family planning” language from the bill, making it similar to the original 2003 authorization of the PEPFAR program, and different from the House passed version which included “family planning” language.

In addition, the Senate bill does not apply any statutory language similar to the Mexico City Policy to require that organizations providing HIV/AIDS care with PEPFAR funds agree that they will not promote or perform abortions as a method of family planning. Note: The House version of the bill also did not contain such statutory language.

Conscience Clause

The Senate bill strengthens the conscience clause to include programs that provide care to people with HIV/AIDS, in addition to prevention and treatment services. The previous House version of the bill had excluded this category of service.

Conservative Concerns That Still Exist:

- **\$50 billion reauthorization; \$35 billion above original 2003 PEPFAR authorization.** Some African non-governmental organizations (NGOs) have asked that the U.S. not grant such a large increase in funding because of capacity issues—some organizations do not have the infrastructure to support such funding, meaning that much of the funding could be misspent. According to the House Committee on Foreign Affairs Republican Staff, while not a precise measurement, an indication of NGO over-capacity may be found during 2005-2006, when assistance commitments grew from \$4.3 billion in 2005 to \$5.6 billion in 2006, while actual disbursements grew at a much slower rate, from \$3.5 billion to \$3.9 billion. Furthermore, the Global Fund to Fight AIDS has yet to identify qualified proposals that would absorb the resources that it already has, resulting in a Fund surplus of nearly \$1.3 billion after paying for all anticipated new grants and renewals over the coming year.
- **\$2 billion increase in authorization for domestic Indian programs.** This increase in funding represents a diversion of PEPFAR spending into unrelated domestic programs.

Furthermore, grant management by the Department of Justice (DOJ) has been identified as a major challenge by the Office of Inspector General (OIG). According to the bill, \$400 million will be authorized to the DOJ for numerous Indian law enforcement projects. Over 375 audits by the OIG have resulted in significant findings associated with money lost to waste, fraud, and abuse. A recent audit found that:

- 80 percent of the expired grants were still not closed out;
- 79 percent of closed grants had failed to close in a timely manner (within 6 months of grant end date);
- Grantees were allowed to access funds more than 90 days after the grant end date (in violation of DOJ regulations); and
- Unused grant funds for expired grants had either not been returned to the treasury or transferred to other DOJ programs.

Some may argue that while these programs may be important to fund, they should not be attached to an unrelated spending bill outside of the jurisdiction of the relevant committees.

- The Kemp-Kasten anti-coercion law is not applied to Global Fund monies, effectively allowing programs such as the United Nations Population Fund (UNFPA) to continue receiving funds through the Global Fund. The Kemp-Kasten amendment prohibits giving U.S. “population assistance” funds 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.”

- The bill does not apply any statutory language similar to the Mexico City Policy to require that organizations providing HIV/AIDS care with PEPFAR funds agree that they will not promote or perform abortions as a method of family planning. As you may recall, in 2003, the President issued a memorandum stating, without explanation, that the MCP does not apply to PEPFAR.
- The bill doubles the U.S. contribution to the UN-affiliated Global Fund to Fight HIV/AIDS, Tuberculosis and Malaria to \$2 billion a year. However, the U.S. only has one vote on the Global Fund, despite contributing over a quarter of the budget. The Fund operates programs not bound by U.S. laws on abortion, needle exchange, prostitution/trafficking policy, and others.
- The bill greatly expands the scope of PEPFAR, and leads to numerous jurisdictional concerns regarding PEPFAR's funding for research and other similar activities. For example, the bill inserts an authorization for tuberculosis vaccine research, which diverts foreign aid money from life-saving medical treatment to biomedical research. In addition, the reauthorization would require PEPFAR to support U.S. universities which are working on food safety issues, diverting funds from life-saving treatment to further subsidize U.S. universities.
- The bill would provide assistance for treatment of other diseases not covered by the bill currently (for example, other sexually transmitted infections). Treating such diseases does not prevent the spread of HIV/AIDS.
- The bill does not contain a dedicated funding stream for mother-to-child transmission prevention, which has proven to be a key prevention mechanism in many countries. Some conservatives may be concerned that this would leave mother-to-child prevention programs to go ignored and under-funded. As was noted in the RSC Policy Brief on PEPFAR released in early February, a [recent article](#) suggests that there are organizations encouraging HIV infected women in Africa to seek abortion as an option for their pregnancy. By not including a dedicated funding stream (especially in the midst of such large funding increases) to address mother-to-child transmission prevention, this trend could, undesirably, be promoted.
- Some conservatives may be concerned that the bill extends treatment to concentrated epidemics, going beyond the intended treatment of generalized epidemics. According to the Heritage Foundation,

The bill has been directed primarily at sub-Saharan Africa, both in the President's rhetoric and in the design of the law. Africa was the original focus because of its generalized HIV/AIDS epidemic. Generalized means that the epidemic (defined as when the average infected person is likely to infect more than one other person) reaches the general population. Many countries have a concentrated HIV/AIDS epidemic; i.e., one that is concentrated among those in particular subpopulations who engage in high-risk behaviors--intravenous drug users who share needles, prostitutes, and men who have sex with men--but does not reach the population at large. Other than a few small countries around the Caribbean such as Haiti, the Bahamas, and perhaps Guyana, the only

countries to have experienced generalized epidemics are in sub-Saharan Africa.

The original law was an emergency commitment to help those countries with generalized epidemics. As President Bush explained, there was “a severe and urgent crisis” in “whole countries in Africa.” The goal of the President’s “Emergency Plan for AIDS Relief” was “to turn the tide against AIDS in the most afflicted nations of Africa and the Caribbean.” The program was not intended as a generic program to fight AIDS wherever it might be found, but as a targeted program to “turn the tide” against a particular humanitarian crisis.

In another example of mission creep, the House bill expands the scope of the initiative to include Europe, Asia, Latin America, and any country in which HIV infection rates are high among the subpopulations of prostitutes, drug users, and men having sex with men. These regions do not have the same battle with a generalized AIDS epidemic as do the original focus countries in sub-Saharan Africa and the Caribbean.

Committee Action: H. Res. _____ has yet to be introduced.

Administration Position: A formal Statement of Administration Policy has not yet been released, but sources indicate the White House is likely to support the legislation.

Cost to Taxpayers: While no CBO scores exists for H. Res. _____, H.R. 5501 authorized \$50 billion over 5 years at roughly \$10 billion a year. According to CBO, implementing H.R. 5501 would cost \$1.5 billion in 2009 and \$35 billion over the 2009-2013 period, assuming appropriation of the authorized amounts. CBO is estimating the expenditure at between \$13 and \$14 billion less than the authorized amount. This CBO estimate of \$35 billion over the 2009-2013 period is \$5 billion higher than the President’s request. CBO further estimates that the amounts would not be fully spent until 2018—five years beyond the period covered by this bill.

Does the Bill Expand the Size and Scope of the Federal Government? Yes, the bill significantly increases authorizations, and expands the authority of programs that are part of the original PEPFAR initiative.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? No.

Does the Bill Comply with House Rules Regarding Earmarks/Limited Tax Benefits/Limited Tariff Benefits? While no House Report exists for H. Res. _____, the Committee on Foreign Affairs, in [House Report 110-546](#), asserted that, “H.R. 5501 does not include any earmarks, and does not include limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.”

Constitutional Authority: While no House Report exists for H. Res. _____, the Committee on Foreign Affairs, in [House Report 110-546](#), cited general constitutional authority in Article I, section 8 of the U.S. Constitution.

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