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Enhancing Human Security: U.S. Policies and Their Health Impact on Women in Sub-Saharan Africa

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ENHANCING HUMAN SECURITY: U.S. POLICIES AND THEIR HEALTH IMPACT ON WOMEN IN SUB-SAHARAN AFRICA

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Bush administration policies are constraining women's access to vital HIV/AIDS, family planning and other public health programs in the developing world and are undermining best practices, particularly in sub-Saharan Africa. These policies are a barrier to women's security and development and have contributed to declines in maternal and child health and access to health care generally. As a result, increases in birth rates and maternal mortality rates are reversing the hard-won decreases of recent decades. These policies also have diverted vital funding away from the implementation of effective HIV/AIDS and health strategies and successful multilateral initiatives like the Global Fund to Fight AIDS, Tuberculosis, and Malaria (Global Fund) and have distracted public attention away from health programs benefitting women.

The following is an overview of policies that the Bush administration is utilizing to push its ideological agenda in the health sector in the developing world. First is the Mexico City Policy which applies to U.S. family planning funding. Second is the President's Emergency Plan for AIDS Relief which applies to U.S. HIV/AIDS funding. Third is a list of recent U.S. Agency for International Development policy directives further constraining health programming while favoring funding to Bush administration supporters and faith-based organizations, even those without experience in the health sector specifically or development generally.

I. THE MEXICO CITY POLICY

President Bush reinstated the Mexico City Policy on January 22, 2001, his second day of office. The policy was created during the

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Reagan administration and named for the conference where it was first introduced.[1] It prohibits U.S. Agency for International Development (USAID) family planning funding from going to foreign non-governmental organizations (NGOs) that use funding from any source, including their own to:

- Provide counseling and referral for abortion.
- Perform abortions in cases not involving a threat to the life of the woman, rape, or incest.
- Advocate making abortion legal or more available in their country.

The prohibitions in the Mexico City Policy do not apply to U.S. organizations; however, their programs are profoundly affected because they are required to enforce the restriction on foreign NGOs receiving U.S. family planning assistance. This results in the exclusion of many capable foreign NGOs from partnerships with U.S. NGOs, fragmenting the local delivery infrastructure and wasting funds to recreate sources of public health delivery for both foreign and U.S. NGOs. The Mexico City Policy also imposes restrictions on the independence and free expression of foreign NGOs which, as a result, must constrain their advice or services to patients or lose vital funding sources.[2]

The Mexico City Policy has resulted in the closure of health clinics in sub-Saharan Africa. In many rural and underserved areas, these clinics are the only source of affordable primary health care. In addition to reproductive health services and counseling, the clinics also provide prenatal and postnatal obstetric care, HIV/AIDS voluntary counseling and testing, management of sexually transmitted infections, pharmaceutical and laboratory services, maternal and child health services, pap smears, minor surgery and well-baby services. In 2001, in Kenya, the two leading reproductive health organizations, Marie Stopes International Kenya and the Family Planning Association of Kenya, refused to accede to the terms of the Mexico City Policy. The organizations lost all U.S. family planning funding and were forced to

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1. Memorandum for the Acting Administrator of the U.S. Agency for International Development: Restoration of the Mexico City Policy, 66 Fed. Reg. 17,303 (Mar. 28, 2001) [hereinafter USAID Memo].

2. *See id.*; POPULATION ACTION INT'L, WHAT YOU NEED TO KNOW ABOUT THE GLOBAL GAG RULE AND U.S. HIV/AIDS ASSISTANCE (2001), *available at* http://www.populationaction.org/resources/publications/globalgagrule/GagRule_AIDS/GGRandHIV-AIDSbrochure.pdf. *See also* Julia L. Ernst, Laura Katzive & Erica Smock, *The Global Pattern of U.S. Initiatives Curtaining Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 774-75 (2004).

close clinics when other donors were unable to make up the budget shortfall.[3] Thousands of people, primarily women and children, were left with little or no access to health care. Similarly, in Zambia, the country's largest family planning provider, Planned Parenthood Association of Zambia, lost its U.S. funding when it rejected the terms of the Mexico City Policy and subsequently lost 26 out of 68 staff members and had to narrow its range of services.[4]

By crippling these countries' reproductive health care providers, the Mexico City Policy has undermined HIV/AIDS prevention efforts as well. Funding shortages have also decreased community-based distribution programs, which affects the supply chain for HIV/AIDS drugs.[5] Given that HIV/AIDS in Africa is primarily transmitted via heterosexual sex, a crucial link exists between basic sexual and reproductive health care and HIV/AIDS. Family planning providers thus play a key role in HIV prevention.

Finally, despite the Mexico City Policy's goal to eliminate abortion worldwide, access to family planning and contraception have been shown to prevent unintended pregnancies and thus reduce abortions. After the reinstatement of the Mexico City Policy, lack of access to reproductive health services has led to an increase in unsafe abortions, a major pubic health threat that disproportionately affects women under twenty-five and contributes to high maternal mortality rates.[6] Successful HIV prevention and public health care have been handicapped because of the Mexico City Policy and the Bush administration's hostility towards contraception, condoms and abortion.[7]

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3. THE GLOBAL GAG RULE PROJECT, ACCESS DENIED: THE IMPACT OF THE GLOBAL GAG RULE IN KENYA (2006), *available at* http://www.globalgagrule.org/pdfs/case_studies/GGRcase_kenya_2006.pdf.

4. THE GLOBAL GAG RULE PROJECT, ACCESS DENIED: THE IMPACT OF THE GLOBAL GAG RULE IN ZAMBIA (2006), *available at* http://www.globalgagrule.org/pdfs/case_studies/GGRcase_Zambia_2006.pdf.

5. U.S. government funding for family planning during the Bush Administration has decreased each year. Global Health Council, Public Policy Update: News from Washington, D.C., http://www.globalhealth.org/view_top.php3?id=48 (last visited Apr. 12, 2007). In his Fiscal Year 2008 budget submission President Bush is proposing to cut funding for family planning programs by 25%. *Id.*

6. *See* THE GLOBAL GAG RULE PROJECT, *supra* note 3.

7. *See id.*; *see also* Don Hinrichsen, *Ladies, You Have No Choice*, WORLD WATCH, Mar.-Apr. 2004, at 29. *See also* Ernst, Katzive & Smock, *supra* note 2, at 752-95; *see also* Francoise Girard, *Global Implications of U.S. Domestic and International Policies on Sexuality* (INT'L WORKING GROUP FOR SEXUALITY AND SOCIAL POLICY WORKING PAPER NO. 1, 2004), *available at* http://www.mailman.hs.columbia.edu/cgsh/IWGSSPWorkingPaper1English.pdf.

II. THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF

The President's Emergency Plan for AIDS Relief (PEPFAR) was announced by President Bush in his 2003 State of the Union address and enacted when Congress passed the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003.[8] PEPFAR intended to provide fifteen billion dollars over five years (2004-2008) for AIDS-related services in fifteen countries: twelve in Africa, two in the Caribbean and one in Asia.[9]

Women represent the majority of those infected with HIV worldwide and sixty percent of those infected in sub-Saharan Africa, where the world's highest prevalence rates occur. Each year almost two million Africans die of AIDS, while more than three million become infected.[10] Unprotected heterosexual sex is the single most important factor in the spread of HIV worldwide. In sub-Saharan Africa, eighty percent of new infections are the result of unprotected sex, often within marriage.[11] Recent data indicate that the rate of new infections is spreading fastest among young women and adolescent

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8. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, 22 U.S.C. §§ 7601-7682 (2003).

9. OFFICE OF THE U.S GLOBAL AIDS COORDINATOR, THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF: U.S. FIVE-YEAR GLOBAL HIV/AIDS STRATEGY (2004), *available at* http://www.state.gov/documents/organization/29831.pdf. The countries are Botswana, Mozambique, Namibia, South Africa, Zambia, Ethiopia, Kenya, Rwanda, Tanzania, Uganda, Ivory Coast, Nigeria, Guyana, Haiti and Vietnam. In order to administer the funds, the administration created the Office of the U.S. Global AIDS Coordinator (OGAC) housed in the U.S. Department of State, and named Randall Tobias, the former CEO of the Eli Lilly pharmaceutical company, as director. Mr. Tobias was confirmed as USAID Administrator in March, 2006. USAID Biography of Randall Tobias, http://www.usaid.gov/about_usaid/bios/bio_rtobias.html (last visited Feb. 12, 2007). Mark Dybul currently serves as U.S. Global AIDS Coordinator. *See* About PEPFAR, http://www.pepfar.gov/about/ (last visited Apr. 14, 2007).

10. COUNCIL ON FOREIGN RELATIONS, MORE THAN HUMANITARIANISM: A STRATEGIC U.S. APPROACH TOWARD AFRICA 62-63 (2006). Approximately 10% of the world population lives in sub-Saharan Africa, but the region is home to approximately 64% of the world population living with HIV. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS, 2006 REPORT ON THE GLOBAL AIDS EPIDEMIC 15 (2006), *available at* http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp [hereinafter UNAIDS 2006 REPORT]. Seventy-seven percent of all women living with HIV reside in sub-Saharan Africa. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS & W.H.O., AIDS EPIDEMIC UPDATE: DECEMBER 2005 2 (2005), *available at* http://www.unaids.org/epi/2005/doc/EPIupdate2005_pdf_en/epi-update2005_en.pdf.

11. Press Release, Center for Health and Gender Equity, New Analysis Shows U.S. Global AIDS Policy Further Undermining HIV Prevention in Sub-Saharan Africa (Dec. 14, 2005), *available at* http://www.genderhealth.org/pubs /PR20051214.pdf [hereinafter HIV Prevention Press Release]; *see also* UNAIDS 2006 REPORT, *supra* note 10.

girls, who are 2.5 times more likely to become infected with HIV than young men.[12] Women living in poverty across the region are under extreme pressure to have sex for economic or cultural reasons, forced into early marriages (with potentially unfaithful partners) or into sexual relationships to support themselves or their families.[13]

Compounding this, women found to have HIV are often blamed for bringing the virus into the home and are abandoned by their families. Unequal property and inheritance rights also reduce women's security, which can lead them to endure abusive relationships, be left homeless when their husband dies of an AIDS-related disease and face, for themselves and their children, a nearly-guaranteed death sentence from AIDS.[14]

The Bush administration's fifteen billion dollar PEPFAR initiative to combat AIDS, although primarily directed at Africa, does not respond to the realities facing the women of Africa who represent both the majority of those already infected and those who are most likely to become infected. Instead, it rewards two key political supporters of the Bush administration: the pharmaceutical industry and Christian conservatives.

The pharmaceutical industry benefits from PEPFAR because the lion's share of funding under the initiative is designated for AIDS treatment, rather than prevention, and the treatment budget goes to purchase antiretroviral drugs from U.S. pharmaceutical companies.[15] Only twenty percent of PEPFAR funding is allocated to prevention despite the millions of new infections that occur each year. And the prevention budget has been offered up to Christian conservatives and

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12. Zosia Kmietowicz, *Women Are Being Let Down in Efforts to Stem HIV/AIDS*, 328 BRIT. MED. J. 305, 305 (2004), *available at* http://www.bmj.com/cgi/reprint/328/7435/305. "The highest rates of new infection are among those ages 15 to 24 and among married women in their twenties and thirties." HIV Prevention Press Release, *supra* note 11.

13. Editorial, *Abstinence and AIDS*, BOSTON GLOBE, Dec. 1, 2006, at A18; *see also* Sarah Bosely, *Gates Breaks Ranks with Attack on US AIDS Policy: Billionaire Says Focus on Abstinence has Failed: Call for More Rights for Women and Sex Workers*, GUARDIAN (LONDON), Aug. 15, 2006, at 16.

14. Kmietowicz, *supra* note 12. The ABC prevention strategy (A for Abstinence, B for Be faithful, and C for use a Condom), much touted by the Bush administration, raises concerns for Dr. Peter Piot, executive director of the UN program on HIV/AIDS. "We are deeply concerned that women's issues are still very marginal when it comes to responses to AIDS in the world . . . . Because of their lack of social and economic power, many women and girls are unable to negotiate relationships based on abstinence, faithfulness, and the use of condoms." *Id.* "The enduring contribution of gender inequalities, including economic inequality and gender violence, to women's vulnerability to HIV is incontrovertible." David Wilson, *Partner Reduction and the Prevention of HIV/AIDS*, 328 BRIT. MED. J. 848 (2004), *available at* http://www.bmj.com/cgi/reprint/328/7444/848.

15. COUNCIL ON FOREIGN RELATIONS, *supra* note 10, at 65.

their faith-based organizations. PEPFAR requires that one-third of all prevention funding go to abstinence and faithfulness programs, but in practice this requirement or earmark is routinely exceeded due to pressure from the Bush administration.[16] Historically effective comprehensive approaches, which included condom provision, have largely been replaced by programs favored, and run, by conservative Christian supporters of President Bush.[17] PEPFAR and the prevention earmark have opened the floodgates of federal funding to faith-based organizations, even those with no development or public health experience.[18] PEPFAR has reduced funding for condom procurement and distribution and limited condom provision only to certain high-risk groups, rather than the general population of sexually active individuals.[19]

PEPFAR represents a dramatic shift in U.S. HIV/AIDS policy – away from prevention and toward treatment, and away from science-based approaches and toward ideologically-motivated programs.[20] In the midst of the AIDS pandemic decimating Africa, the Bush

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16. In Nigeria nearly seventy percent of PEPFAR prevention funds have gone to abstinence-until marriage programs. In Tanzania, the newest prevention grant dedicates ninety-five percent to abstinence and faithfulness programs for youth aged 15 to 24. Bosley, *supra* note 13. *See also* HIV Prevention Press Release, *supra* note 11. "New guidance by the Office of the Global AIDS Coordinator (OGAC) . . . requires that two-thirds of all funding for prevention of sexual transmission in fiscal year 2006 be spent on abstinence and faithfulness programs." *Id. See also* Farah Stockman et al., *Bush Brings Faith to Foreign Aid*, BOSTON GLOBE, Oct. 8, 2006, at A1.

17. *Id.* Despite scientific evidence confirming that condoms are a highly effective form of HIV prevention, condoms are out of favor in the Bush administration to appease religious conservatives. CTR. FOR DISEASE CONTROL AND PREVENTION, FACT SHEET FOR PUBLIC HEALTH PERSONNEL: MALE LATEX CONDOMS AND SEXUALLY TRANSMITTED DISEASES (2003), *available at* http://www.cdc.gov/nchstp/od/condoms.pdf; W.H.O., EFFECTIVENESS OF MALE LATEX CONDOMS IN PROTECTING AGAINST PREGNANCY AND SEXUALLY TRANSMITTED INFECTIONS (2000), *available at* http://www.who.int/mediacentre/factsheets/fs243/en/. *See also* Girard, *supra* note 7.

18. Stockman et al., supra note 16. "President Bush has almost doubled the percentage of U.S. foreign-aid dollars going to faith-based groups...according to a Globe survey of government data. And in seeking to help such groups obtain more contracts, Bush has systematically eliminated or weakened rules designed to enforce the separation of church and state." *Id.*

19. HIV Prevention Press Release, *supra* note 11. A 2006 GAO report states that the Bush administration's "AIDS initiative is emphasizing sexual abstinence and fidelity more than Congress has intended, and that focus is undermining prevention efforts in poor countries . . . ." Rita Beamish, *Bush Administration $15 Billion AIDS Plan Questioned*, ASSOCIATED PRESS, Apr. 4, 2006, *available at* http://www.truthout.org/cgi-bin/artman/exec/view.cgi/59/18879.

20. Over the previous fifteen years, the U.S. approach had been almost entirely prevention-oriented. COUNCIL ON FOREIGN RELATIONS, *supra* note 10, at 65-66. *See* Editorial, *Shackles on the AIDS Program*, N.Y. TIMES, Apr. 4, 2007 at A14.

administration has chosen to abandon the effective, comprehensive strategies of transmission education, voluntary counseling and testing, and the provision of condoms, in favor of unproven abstinence and faithfulness strategies that are largely irrelevant in a context where the majority of women and girls are already married, have unfaithful partners, or have little sexual bargaining power.[21]

Further, PEPFAR is a unilateral, single donor approach that undervalues the vital integration of U.S. efforts with other donors and host governments and downgrades U.S. interest in and funding for multilateral financing instruments such as the Global Fund. There is also continued confusion over how U.S. procurement of medications for treatment will be coordinated with those of the Global Fund and other donors. PEPFAR's requirement that treatment medications be FDA — rather than World Health Organization — approved, and thus to date only available from U.S. pharmaceutical companies, dramatically increases costs, therefore reducing the number of people reached.[22] When the head of AIDS research at Brown University medical school visited Africa as part of an Institute of Medicine PEPFAR oversight panel, doctors complained to him that they could buy three times as much medicine if PEPFAR accepted WHO approvals.[23] A Council on Foreign Relations Independent Task Force warns, "With no clear plan yet in place for how the administration will deliver low-cost generic medications reliably, safely, and in adequate volumes," it is hard to determine how PEPFAR's targets for expanded treatment will be met.[24]

PEPFAR's divisive policies have resulted in battles between groups with differing perspectives over prevention and have

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21. *See* Kmietowicz, *supra* note 12.

> Programs that promote abstinence-only-until-marriage have not . . . been shown to be effective at doing that in the United States, much less in other parts of the world. Moreover, abstinence-only messages have been shown to reduce contraceptive (including condom) use among sexually active adolescents, putting them at risk of pregnancy and sexually transmitted infections, including HIV. In contrast, there is evidence that young people who receive comprehensive sexuality education become sexually active later, and are more likely to use contraceptives when they do.

Girard, *supra* note 7, at 11.

22. Donald G. McNeil, Jr., *Audit Finds Bush's AIDS Effort Limited by Restrictions,* N.Y. TIMES, Mar. 31, 2007, at A12; *see also* INST. OF MED. OF THE NAT'L ACAD., PEPFAR IMPLEMENTATION: PROGRESS & PROMISE (2007), *available at* www.iom.edu/CMS/3783/24770/41804.aspx [hereinafter IOM Report]; *see also* Donald G. McNeil, Jr., *Audit Finds Bush's AIDS Effort Limited by Restrictions*, N.Y. TIMES, Mar. 31, 2007, at A12.

23. *Id.*

24. COUNCIL ON FOREIGN RELATIONS, *supra* note 10, at 68-71.

embittered other donors. When Uganda faced a dire shortage of condoms, Stephen Lewis, U.N. special envoy for AIDS in Africa said, "There is no question in my mind that the condom crisis in Uganda is being driven and exacerbated by PEPFAR and by the extreme policies that the administration in the United States is now pursuing in the emphasis on abstinence."[25]

In April 2006, a U.S. General Accounting Office (GAO) report on PEPFAR found that the prevention earmark (requiring one-third of prevention funds be used for abstinence and faithfulness programs) is undermining and diverting funds from effective AIDS education and prevention.[26] In addition, it found that OGAC is applying the abstinence earmark to a larger pot of money than required by law, further reducing the flexibility of program managers in the field.[27] In March 2007, the Institute of Medicine, the U.S.'s most prestigious medical advisory panel — which is required by PEPFAR's authorizing legislation to oversee the program — reported that PEPFAR's effectiveness is seriously hampered by restrictions imposed by the Bush administration and Congress, especially the abstinence and faithfulness prevention earmark and the requirement for separate FDA approval of AIDS drugs that the WHO has already approved. It also recommended that PEPFAR focus much more on prevention than treatment "otherwise, the epidemic will never end."[28]

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25. Lawrence K. Altman, *U.S. Blamed for Condom Shortage in Fighting AIDS in Uganda*, N.Y. Times, Aug. 30, 2005, at A4. *Uganda Denies Condom Shortage*, MONDAY DEVELOPMENTS (InterAction, Washington, D.C.), Sept. 12, 2005 at 3. *See* COUNCIL ON FOREIGN RELATIONS, *supra* note 10, at 71-72; Editorial, *The Missing Condoms*, N.Y. TIMES, Sept. 4, 2005, at 9.

26. Gen. Accounting Office, GAO-06-395, GLOBAL HEALTH: SPENDING REQUIREMENT PRESENTS CHALLENGES FOR ALLOCATING PREVENTION FUNDING UNDER THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF (2006) [hereinafter GAO Report]; Doug Ireland, *Bush's Other Losing War: AIDS*, TOMPAINE.COM, Dec. 1, 2006, Rita Beamish, http://www.tompaine.com/articles/2006/12/01bushes-other-losing-war-aids.php; *Bush Administration $15 Billion AIDS Plan Questioned*, ASSOCIATED PRESS, Apr. 4, 2006, *available at* http://www.truthout.org/cgi-bin/artman/exec/view.cgi/59/18879.

27. HIV Prevention Press Release, *supra* note 11, Apr. 4, 2006 (summarizing key findings of the GAO report). *See also*, GAO REPORT, *supra* note 26.

28. McNeil, *supra* note 22 (quoting Dr. Jaime Sepulveda, the panel chairman; *see also* IOM REPORT, *supra* note 22.

III. RECENT USAID POLICY DIRECTIVES APPLIED TO RECIPIENTS OF HIV/AIDS OR OTHER HEALTH FUNDING

A. Prohibition on Requirement of Prior USAID Experience

In October 2003, under the guise of broadening competition and ensuring low cost prices, USAID enacted a policy that served to open up federal funding to faith-based organizations, even those with no prior experience in development or with USAID funding assistance. The policy states, "Over the years, in efforts to identify highly qualified and responsive recipients . . . solicitation documents have begun to reflect increasingly restrictive minimum qualification and evaluation factors for award."[29] One of these factors is the requirement of "prior USAID experience" for minimal qualification.[30] "While the need for familiarity with the type of work typically executed through USAID instruments is understood, the agency must be careful to avoid requirements that are unduly restrictive and are contrary to the agency's commitment to promoting competition."[31]

The policy allows faith-based organizations to be deemed competitive for federal funding based on factors other than prior USAID experience or development know-how. The policy reinforced the mission of USAID's new Center for Faith-Based and Community Initiatives Office created by President Bush in 2002.[32] The Center's stated goal is to create a level playing field for faith-based groups to compete for USAID programs and to increase their access to and knowledge of U.S. Government funding sources. Another focus of the Center is to educate USAID/Washington and field staff about the critical role faith-based organizations play in meeting development objectives.[33] The Center's own mandate makes clear that it was created to give faith-based organizations a leg up to federal funds and to lobby career development professionals about how critical faith-based groups' work is to development. The Policy alters established

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29. USAID Office of Acquisition & Assistance, AAPD 03-10, Prohibition on Requirement for Prior USAID-Specific Experience in Evaluation Criteria for Award of Agency Acquisition & Assistance (A&A) Instruments (Oct. 31, 2003), *available at* www.usaid.gov/business/business _opportunities /cib/pdf/aapd03-10.pdf.

30. *Id.* at 2.

31. *Id.*

32. *See* BUREAU FOR POLICY AND PROGRAM COORDINATION, STATUS OF PRESIDENTIAL INITIATIVES FY 2004 16 (2005), *available at* http://www.usaid.gov/about_usaid/presidential_initiative/status_fy04.pdf.

33. *Id.* at 17.

procurement policies in order to reward Bush administration supporters. In the public health arena such politically-motivated programs divert funding away from effective projects that provide vital or life-saving services, adversely affecting women in the developing world who depend on these services.

B. Federal Funding to Faith-Based Organizations

On June 29, 2004, USAID issued a policy directive to implement President Bush's Executive Order requiring "equal protection of the laws for faith-based and community organizations."[34]

The policy applies to all USAID funding sources and states:

> [f]aith-based and other community organizations must be able to compete on an equal footing for Federal financial assistance . . . . No organization may be discriminated against on the basis of religious character or affiliation in the administration or distribution of Federal financial assistance. . . . Faith-based organizations may not be required as a condition of Federal assistance to sacrifice their independence, autonomy, expression, or religious character. . . . Among other things, faith-based organizations may use their facilities to provide social services supported by USAID, without removing or altering religious art, icons, scriptures, or other symbols from these facilities. In addition, a faith-based organization may retain religious terms in its name, select its board members on a religious basis, and include religious references in its mission statements and . . . governing documents.[35]

This represents a dramatic shift in policy, blurring the separation of church and state required by the Constitution. For decades, U.S. policy has sought to avoid intermingling government

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34. USAID, Office of Acquisition & Assistance, AAPD 04-08, Ensuring Equal Opportunity for Faith-Based and Community Organizations (June 29, 2004), *available at* www.usaid.gov/business/ business_opportunities/cib/pdf/aapd04_08.pdf [hereinafter AAPD 04-08]. For an overview of Bush Administration funding to faith-based organizations for U.S. health programs, *see* Thomas Edsall, *Grants Flow to Bush Allies on Social Issues: Federal Programs Direct At Least $157 Million*, WASH. POST, Mar. 22, 2006, at A1; *see also* Stockman, *supra* note 16.

35. AAPD 04-08 *supra* note 34, at 2.

programs and religious proselytizing. The aim is to both abide by the Constitution's prohibition against a state religion and to ensure that aid recipients are able to access assistance even if they don't share the religion of the provider. This policy alters the longstanding practice that groups preach religion in one space and run government programs in another. It allows groups to schedule prayers or religious services immediately before or after dispensing taxpayer-funded aid. The administration rejected efforts to require groups to inform beneficiaries that they don't have to attend religious services to get aid. Instead of a requirement, groups are merely encouraged to make clear that recipients don't have to participate in religious activities.[36]

In addition, the Executive Order and USAID policy directive require that USAID provide data to the Office of Management and Budget to ensure there is no discrimination against faith-based organizations in federally-financed programs. Thus, U.S. taxpayer funds are being used to calculate the number of grants USAID makes to faith-based organizations in order to demonstrate that it is providing them with an ample number.

Taken together, these two policy directives ensure that faith-based organizations may receive special treatment; they may compete for federal funding despite their religious activities, they do not need to demonstrate prior USAID or development experience, and USAID must provide them with a sufficient number of grants or face charges of discrimination. As noted above, the resulting waste that these programs represent adversely impacts women, who rely on these public health programs for life-saving services.

C. Certification Opposing Prostitution

In June 2005, USAID issued a policy directive, AAPD 05-04, requiring all organizations receiving funds under the $15 billion PEPFAR program[37] to sign a certification opposing prostitution and sex trafficking.[38] This directive is significant because it replaced a 2004 policy on the same subject that only applied to foreign NGOs and

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36. *See* Stockman, *supra* note 16; *see also* Michael Kranish, *Religious Right Wields Clout Secular Groups Losing Funding Amid Pressure*, BOSTON GLOBE, Oct. 9, 2007, at A1.

37. USAID, Office of Acquisition & Assistance, AAPD 05-04, Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking (June 9, 2005), *available at* www.usaid.gov/business/businessopportunities/cib/pdf/aapd05_04.pdf [hereinafter AAPD 05-04].

38. *Id.* at 2-6.

thereby extended the requirement to U.S. organizations. The 2004 policy had specifically stated that this certification requirement could not be applied to U.S. organizations because the Department of Justice had determined that it would be unconstitutional.[39] The 2005 policy enacted the Department of Justice Office of Legal Counsel's new opinion that "there are reasonable arguments to support [the] constitutionality" of the requirement.[40] The change of position by the Department of Justice reversed court precedent and long-standing USAID policy and practice that the First Amendment rights of U.S. organizations could not be restricted in this way.[41] Thus the directive forced the Bush administration's ideology regarding prostitution and sex trafficking onto U.S. organizations. It was seen as a test to gauge public reaction and thus determine whether it would be possible to extend the Mexico City policy to U.S. organizations. The reaction to AAPD 05-04 was overwhelming. Many U.S. organizations objected and a group of them brought suit and won[42] against USAID, arguing that AAPD 05-04 violates their First and Fifth Amendment rights in three ways:

> a) it is unconstitutionally vague; b) it requires grantees to adopt as their own organization-wide policy the ideologically-motivated position of the [U.S.] government regarding sex work, and c) it imposes an

39. Foreign NGOs are not entitled to U.S. Constitutional protections because they are not U.S. entities.

40. Letter from Daniel Levin, Acting Assistant Attorney General to Alex M. Azar II, General Counsel of the Dep't of Health and Human Servs., to U.S. Dep't of Justice Office of Legal Counsel (Sept. 20, 2004), *available at* http://www.genderhealth.org/ pubs/DOJto HHS.pdf.

41. Speiser v. Randall, 357 U.S. 513 (1958); Fed. Commc'ns v. League of Women Voters, 468 U.S. 346 (1984); Rust v. Sullivan, 500 U.S. 173 (1991).

42. Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev. Numerous NGOs provided amicus briefs in support of the suit against USAID. On May 9, 2006, the U.S. District Court for the Southern District of New York ruled that the AAPD 05-04 certification requirement violated the First Amendment rights of two plaintiff organizations, Alliance for Open Society International (AOSI) and Pathfinder International, by restricting their privately funded speech and by forcing them to adopt the government's viewpoint in order to remain eligible for funds. Open Society Institute, *Judge Rules in Favor of AOSI, Says USAID Pledge Rule Is Unconstitutional*, May 9, 2006, *available at* http://www.soros.org/initiatives/health /focus/sharp/news/pledge_20060509. Despite this decision, USAID did not withdraw or amend AAPD 05-04. USAID has applied the decision to plaintiffs AOSI and Pathfinder, not to other recipient U.S. organizations. In August 2006 the government appealed the U.S. District Court's decision. The U.S. Court of Appeals for the Second Circuit will hear the case on appeal. *See* Brennan Center for Justice at NYU School of Law, *AOSI v. USAID: Challenging Global AIDS Funding Restrictions*, http://www.brennancenter.org/stack_detail.asp?key=102 &subkey=8348 (last visited Apr. 14, 2007).

> absolute bar on grantees using their own, non-government funding to engage in speech activities.[43]

AAPD 05-04 constrains the provision of public health funds to women of the developing world. First, the policy rescinds previous funding requirements to utilize a multi-sectoral approach to HIV/AIDS prevention.[44] The previous requirements had been put in place by advocates of a science-based approach, while the single-sector (abstinence-only) approach was championed by religious-based advocates. Contrary to past USAID practice and scientific evidence regarding effectiveness, the government could now fund narrow, ideologically-driven programs utilizing abstinence-only methods rather than a broader approach that includes health education, condoms, and voluntary counseling and testing. In fact, the policy gives organizations permission to ignore the Bush administration's own much-touted ABC approach, a shorthand for promoting Abstinence, Being faithful and using Condoms, and focus only, for example, on abstinence training.

Second, the policy prohibits recipients from promoting the legalization or practice of prostitution or sex trafficking.[45] This does not sound overly restrictive on its face. Very few organizations promote the legalization of prostitution. However, the prohibition on promoting the *practice* of prostitution leaves room for an overly-broad interpretation that could compromise any project that includes sex workers. Despite numerous requests for guidance, none has been offered.

Because sex workers are a primary vector of HIV/AIDS transmission, they play a vital role in HIV prevention programs. By requiring NGOs to issue statements that condemn sex work, the policy acts to further stigmatize sex workers. It exacerbates the difficulty of helping them protect their health and the health of others, undermines efforts to encourage healthier means of employment and ignores the social and economic vulnerability that drives people into sex work. Further, the lack of guidance on what constitutes promoting prostitution has created a chilling effect on HIV/AIDS programming

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43. Compl. filed on behalf of the Alliance for Open Soc'y Int'l Inc. at 1-2, Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F.Supp.2d 222 (S.D.N.Y. 2006). *See also* DKT Int'l Inc. v. U.S. Agency for Int'l Dev., 477 F.3d 758 (D.C. Cir. 2007).

44. AAPD 05-04, *supra* note 37, at 2.

45. *Id.*

that relates in any way to sex workers.[46] Does providing health care promote prostitution? Does teaching them English, clothing them, or feeding their children promote prostitution? Such questions have not, to date, been clarified. Furthermore, recipients face a historically aggressive USAID Inspector General that may impose both civil and criminal liability for inadvertent transgressions. This administration has devoted additional resources and efforts to detecting and punishing noncompliance.

Third, the policy requires recipients to certify that they oppose prostitution and sex trafficking.[47] U.S. recipients argue that this requirement violates their First Amendment rights because it requires, as a precondition to funding, that an organization confirm that it adheres to a certain set of beliefs and may not have a differing view on the subject, in any country context, for any reason. Like the Mexico City Policy, this requirement serves to constrain an organization, and now a U.S. organization, from taking certain actions, even with its own money. Further, it requires a statement of principle or belief that the organization does not support prostitution.

A certification requirement of this magnitude creates a burden on recipients that was meant to be addressed by the Paperwork Reduction Act.[48] USAID should have announced the new certification requirements in the Federal Register, assessed the paperwork burden, and allowed the public a period for comment. However, in this case, USAID chose to impose this policy on U.S. organizations without affording them the opportunity for assessment or comment. USAID utilized an "emergency" exception that allows a policy to be imposed without notice in the Federal Register and without notice to the public.[49] It used a similar emergency exception when re-imposing the Mexico City Policy in 2001.

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46. GLOBAL HEALTH COUNCIL, POLICY BRIEF: ANTI-PROSTITUTION POLICY REQUIREMENT (2006) *available at* http://www.globalhealth.org/images/pdf/publications/app_requirement_brief.pdf. Prostitutes are a primary vector for HIV transmission because prostitutes have a high number of partners, thus heightening the risk of infection. *See* James Shelton, et al., *Partner Reduction is Crucial for Balanced "ABC" Approach to HIV Prevention*, 328 BRIT. MED. J. 891-93 (2004), *available at* http://www.bmj.com/cgi/reprint/328/7444/891.

47. AAPD 05-04, *supra* note 37, at 6.

48. Paperwork Reduction Act, 44 U.S.C. 3501 et seq. (2006).

49. Memorandum from Joanne Paskar, USAID, to David Rostker, Office of Mgmt. & Budget (Apr. 20, 2005) (on file with author). The Memorandum justifies the emergency exception, stating that "[b]ased on the experience of collecting the certification forms under the previous Certification requirements [for non U.S. NGOs], there is no indication that the recordkeeping and reporting burden is excessive." *Id.* at 1-2. On the contrary, many NGOs had raised the excessiveness issue with USAID. Another justification cited is that "a waiver of the

IV. CONCLUSION

The Bush administration's ideological agenda in the health sector increasingly and disproportionately hurts women, which is especially tragic in sub-Saharan Africa where the greatest needs exist. A return to an adherence to best practices in the provision of U.S. assistance and U.S. leadership in the international health sector can reverse this trend. These best practices include:

- Proven, comprehensive, science-based HIV/AIDS prevention strategies, including reproductive health education and services, transmission education, voluntary counseling and testing, and the provision of condoms;
- Programs and approaches that take into consideration the underlying gender equity realities in Africa and that support women's property and ownership rights, reproductive rights, and girls' education programs that lead to lowered birth rates, increased child health and nutrition, and increased productivity;
- Programs that focus in each country context on the factors that put women and girls at greater risk of HIV/AIDS and that support improvements in their legal, economic, educational and social status;
- Collaboration with NGOs, other donors and host governments to coordinate the provision of essential HIV/AIDS, reproductive health and public health services and commodities;
- Commitment to tailor programs to fit each country's context and national HIV/AIDS plan, including participation in the country's HIV/AIDS coordinating agency and its national HIV/AIDS monitoring and evaluation framework;

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urgency of making HIV/AIDS awards does not allow time to comply with this procedure." *Id.* at 2. The purpose of the Federal Register notice requirement is to inform the public and to allow those affected by new reporting requirements an opportunity to present their perspective. This certification has no relation to the provision of HIV/AIDS funding, other than to filter out and identify organizations that do not share the Bush administration's ideologically-motivated perspective on prostitution. It is misleading to tie an unrelated certification requirement to an expediency-of-programming justification as a basis to deviate from the congressionally mandated public notice requirement.

- Renewed and increased commitment to the Global Fund, UNAIDS, UNFPA, UNGASS and other successful multilateral initiatives and programs; and
- Renewed and increased commitment to family planning services and reproductive health education programs that lead to fewer unsafe abortions, lower maternal mortality, decreased sexually transmitted infections and HIV, and improved maternal and child health.