

January 24, 2020

Opening a New Front in the Battle to Undermine Safe Abortion Efforts Overseas? Anti-Choice Members of Congress Write to Secretary Pompeo

As the forty-seventh anniversary of the landmark *Roe v. Wade* decision establishing a constitutional right to abortion for American women was being commemorated—or on the occasion of a Trumpian rebranding now to be known as [National Sanctity of Human Life Day](#)—Republicans in Congress were ramping up their advocacy for a further dramatic expansion of the Trump-Pence administration’s Global Gag Rule—itsself a massive expansion of previous iterations of the GGR in force during Republican presidencies since 1984.

In a January 23rd [letter](#) to Secretary of State Mike Pompeo, Senator Mike Lee (R-UT), along with 18 Senators and 41 Representatives, push a false narrative, rife with misleading information in calling upon him to “close a loophole in [Trump’s GGR] that allows taxpayer dollars to flow to U.S. Non-Governmental Organizations (NGOs) that are involved in the global abortion industry.” The anti-choice members urge him to inflict the current eligibility restrictions for U.S. government global health assistance currently imposed only on foreign NGOs to U.S. NGO partners that use privately-raised, non-USG funds to provide safe abortion services in an effort to address the [deadly problem of abortion-related mortality and morbidity](#).

Senator Lee’s malevolent intentions toward international family planning and reproductive health (FP/RH) programs were telegraphed earlier this year during the fiscal year 2020 appropriations process that just concluded in December when he [announced](#) that he would be prepared to offer an amendment to the committee-approved State Department and Foreign Operations Appropriations bill to drastically extend the GGR’s application to domestic NGOs if the bill were ever to reach the Senate floor and be debated.

Since its announcement during the Reagan administration at the International Conference on Population in Mexico City in August 1984, three types of entities have always been specifically and explicitly exempted from the GGR, and the restrictions have not been imposed on them—foreign governments because it would undermine the national sovereignty of aid-recipient countries, United Nations agencies and other public international organizations because it would be contrary to the principle of multilateralism, and U.S. NGOs because previous Republican administrations and many legal analysts have believed it would [violate the constitutional right to freedom of speech](#) and association of American citizens under the First Amendment.

The “loophole” that the anti-choice members allege exists relates to U.S. NGOs somehow co-mingling their non-USG-funded abortion activities with their American taxpayer-supported global health programs and are “restructuring in order to negate the impact” of the GGR restrictions on their in-country affiliated partner organizations by “employing gimmicks.” The first allegation turns on the notion of “fungibility,” the idea that government funds and private funds are interchangeable. The second raises the question of how “foreign affiliates” are to be defined, particularly whether the branch offices of a U.S. parent organization are to be classified as foreign NGOs under the GGR and foreign assistance statutes.

The bicameral letter calls for imposition of restrictions on U.S. NGOs implementing USG global health assistance. The restrictions would require a complete physical and financial separation of USG-funded programs from any privately-funded abortion services, counselling and referral, and abortion law reform advocacy activities forbidden under the Trump-Pence expanded GGR that the U.S. NGO may undertake. The letter cites the Trump-Pence administration’s promulgation of an onerous and [destructive set of restrictions](#) on the Title X domestic family planning program as a model, arguing that the restrictions on U.S. NGOs

working overseas should be at least as stringent. The implementation of the domestic gag rule has resulted in longtime providers of comprehensive sexual and reproductive health services in the U.S. to refuse to continue to accept federal family planning funds on principled ethical and programmatic grounds.

The assertion is made that if the Trump-Pence administration were to impose its version of the GGR on U.S. NGOs it would pass constitutional muster and would have sufficient statutory authority to survive a legal challenge. In support of this theory, the letter cites the Supreme Court's 1991 *Rust v. Sullivan* which upheld Bush 41's effort to issue a Title X domestic gag rule very similar to the one recently imposed by the Trump-Pence administration. Several federal courts around the country issued temporary injunctions blocking the implementation of the Title X domestic gag rule, although all of them have been lifted by appeals courts in several circuits pending final rulings in the still outstanding [legal challenges](#) on statutory and constitutional grounds. So the jury is still out on the constitutional question.

The statutory authority for an expansion of the Trump-Pence GGR to U.S. NGOs is similarly a matter of debate and not as clear cut as the letter implies. Republican administrations, past and present, have utilized the 1973 Helms amendment to the Foreign Assistance Act of 1961, the permanent statute governing foreign aid, as the legal authority underpinning an executive branch policy directive. The Helms amendment restricts the direct use of U.S. foreign assistance to "pay for the performance of abortion as method of family planning or to motivate or coerce any person to practice abortions." Technically, the Helms amendment restricts only how U.S. foreign assistance funds may be spent—not how organizations, whether a U.S. or a foreign NGO, may spend their private, non-USG funds.

Since the enactment of the Helms amendment nearly five decades ago, any organization receiving U.S. foreign assistance—both U.S. and foreign NGOs—has been required to maintain USG funds in segregated accounts, none of which may be spent to "pay for the performance of abortion as a method of family planning." (The phrase "abortion as a method of family planning" has been interpreted until this very day, even under the Trump-Pence GGR, to allow—at least theoretically—for the use of U.S. foreign aid to pay for abortion in the case of life endangerment, rape, or incest.) In addition to maintaining segregated accounts for U.S. funds, implementing NGOs have put in place extensive internal compliance and auditing mechanisms and procedures to monitor adherence with numerous legal and policy restrictions or requirements governing USAID family planning and reproductive health assistance including Helms and other abortion-related amendments.

The "Dear Colleague" letter circulating to congressional offices for signature notes the endorsement of a number of conservative religious groups including Susan B. Anthony List, March for Life, United States Conference of Catholic Bishops, Concerned Women for America, and C-FAM. Interestingly, the treatment of foreign NGOs—and if the letter's signatories get their way, U.S. NGOs—that use private, non-USG funds to provide abortion services, stands in stark contrast to how USAID treats faith-based organizations who need only separate their proscribed religious activities from their development and health programs and services directly funded by USAID to remain eligible. The regulation states:

A religious organization that applies for, or participates in, USAID-funded programs or services (including through a prime award or sub-award) may retain its independence and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from USAID (including through a prime award or sub-award) to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), or in any other manner prohibited by law (emphasis added).

When similar funding regulations are proposed to distinguish between direct and indirect USAID support of the programs and services of foreign NGOs pursuing abortion-related services or advocacy with their own funds, many of these same family planning opponents in Congress signing the letter routinely deride them as merely "bookkeeping tricks" or "shell games" and assert that money is fungible. In other words, there is a double-standard where fungibility arguments are applied. Like they did in the anti-prostitution pledge case, conservative and evangelical faith-based organizations would do well to take notice. Should this expansion

move forward, a future administration, more concerned about maintaining the separation of church and state, could use this line of reasoning to end their ability to promote their religious beliefs using private funds in parallel to their delivery of health services using U.S. global health assistance.

The letter puts a bullseye on a hit list of six family planning and reproductive health implementing organizations—among them the largest and most competent service providers and recipients of USAID FP/RH program funding—because all unabashedly engage in the provision of legal, safe abortion services in developing countries with their private, non-USG funds. If these highly respected organizations were to be removed as cooperating agencies that USAID can employ to implement its FP/RH program—either because of their own unwillingness to comply or because of political pressure directed at USAID to defund them—it would essentially dismantle the legacy of more than five decades of U.S. leadership on family planning and reproductive health around the world.

The concluding sentence of the letter is a transparent reflection of the true motivation of the letter's congressional signatories and endorsing groups, revealing their antipathy toward not just abortion but contraceptive services—the most effect means to prevent unintended pregnancies and to reduce the incidence of abortion. If the further massive expansion of the Trump-Pence GGR were to be imposed on U.S. NGOs, the letter proclaims U.S. global health assistance would not be reduced “by one dollar; rather, it would free up these funds for a new and more diverse partner base of providers that care for both mother and child.” [In other words, more money for conservative and evangelical FBOs actively working to undermine progress on sexual and reproductive health and rights across the globe](#) and fewer USG investments in the most competent FP/RH implementing partners.

Ironically, two of the countries where the U.S. NGOs singled out in the letter are engaged in privately-funded efforts to advance safe abortion care—Ethiopia and Nepal—specifically liberalized their abortion laws to address unacceptably high rates of maternal mortality. In Nepal, maternal deaths have been more than halved, with mortality rates [declining from 580 to 239 maternal deaths per 100,000 live births since the last Gag Rule was in place](#).

If Secretary Pompeo were to accept the congressional letter's recommendations to now target the eligibility of U.S. organizations and make them subject to the GGR restrictions, it would represent the [third major expansion](#) of the GGR during the Trump-Pence administration, rendering it orders of magnitude more punitive than its earlier incarnations under the Reagan and both Bush presidencies. Such an expansion would further highlight the administration's utter disregard for women's lives, undermine health systems in developing countries and make a mockery of pretensions to being concerned about the “sanctity of human life.”