

COMMENT

ABSTINENCE BREEDS CONTEMPT: WHY THE U.S. POLICY ON FOREIGN ASSISTANCE FOR FAMILY PLANNING IS CAUSE FOR CONCERN

I. INTRODUCTION

Since taking office, George W. Bush has been forced to act in a series of unprecedented and highly dramatic developments on the foreign policy stage. The media focuses most public attention on the issues perceived to affect the lives of American citizens most directly—the aftermath of September 11th and the amorphous potential threat posed by any number of Middle Eastern hotbeds. However, a tectonic shift in the United States' policy on foreign assistance for family planning has taken place as well. This shift has affected millions of people in the world's least developed countries.¹

The early stages of this radical change in policy have gone largely unnoticed and unchallenged. In light of current events and the relevance of our "rights" as Americans, it is now especially important to recognize that the sole voice² of our nation is communicating a policy to the world that is seemingly in conflict with American ideals, and, to challenge its legal underpinnings.

What follows is a critique of the United States' policy on foreign assistance for family planning, and the State Department's recent decision to deny release of appropriated funds to the United Nations Fund for Population Activities (UNFPA) for fiscal year 2002. Part II of this Comment traces the historical development of the United States' policy on foreign assistance for family planning and the role of the pro-life movement. Part III discusses the relevant legislation and subsequent case law. Part IV argues that policy decisions with a pro-life agenda undermine broader strategic goals of the United States, and the resulting policy leaves the United States vulnerable to challenges under National and International law. Part V concludes the critique.

1. Statement by Thoraya A. Obaid, Executive Director, United Nations Population Fund, on U.S. Funding Decision (July 24, 2002), *available at* <http://www.unfpa.org/about/ed/2002/usfunddecision.htm> (last visited Nov. 15, 2002) [hereinafter Obaid Statement].

2. The distribution of federal power is different as applied to international versus domestic issues. The delicate and complex nature of most international problems requires that the President speak as the "sole organ" of the United States on issues of foreign affairs. *United States v. Curtiss-Wright Exp.*, 299 U.S. 304, 319 (1936).

II. HISTORICAL DEVELOPMENT OF THE UNITED STATES POLICY OF FOREIGN ASSISTANCE FOR FAMILY PLANNING AND THE ROLE OF THE PRO-LIFE MOVEMENT

A. *Historical Context Before 1984*

The foreign policy label attached to foreign assistance for family planning when it became an appropriated expenditure pursuant to the Foreign Assistance Act of 1961 (FAA).³ In practice, this label empowers the President to speak as the sole voice of the United States on the matter,⁴ and encourages exploration of the gray area between moral proselytizing⁵ for political gain and the exercise of legitimate Executive authority.

The federal government first addressed the issue of foreign aid for family planning in response to global considerations of population policy and control, an evolutionary product of a 200 yearlong debate.⁶ The early commentators, which included mercantilist and utopian theorists, were not troubled by unchecked population growth.⁷ Greater population equaled greater wealth and military strength.⁸ Alternatively, economists, including Thomas Robert Malthus, felt that unchecked population growth was actually a threat to prosperity, and that population growth should be held at a sustainable level in order to prevent widespread poverty.⁹ Malthus concluded that, unless the "moral restraints" of marriage at a later age and extramarital abstinence were adopted, the death rate would rise and restrain population growth.¹⁰ However, as an Anglican clergyman, Malthus dismissed notions of contraception and abortion as "vice."¹¹

Karl Marx, who favored the mercantilist and utopian approach to population, later criticized the Malthus economic theory.¹² Marx felt that because population growth was a natural phenomenon and people were both consumers and producers, the resource limits, which worried economists, could

3. Foreign Assistance Act of 1961, 22 U.S.C. § 2151 et seq. (1961).

4. See *Curtiss-Wright*, 299 U.S. at 319.

5. The phrase "moral proselytizing" may be used to refer to the pre-emergence stage in the development of a customary norm in international law. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT. ORG. 887, 897 (1998). Finnemore and Sikkink use the term in reference to moral entrepreneurs, individuals having "strong notions about appropriate or desirable behavior in their communities." *Id.* The success of moral proselytizing typically requires the support of an organizational platform. *Id.* at 899. Central to this critique is reservation as to the appropriateness of the United States government as an organizational platform for certain issues.

6. Michael S. Teitelbaum, *The Population Threat*, FOREIGN AFF., Winter 1992/93, at 63, 70.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

arise under capitalism but not socialism.¹³ In 1921, Lenin embraced Marx's views.¹⁴ Three basic population principles ultimately emerged from Marxism-Leninism: population growth as a natural phenomenon; abortion as a woman's right, unrelated to population; and contraception as "shabby Malthusianism."¹⁵

In October of 1946, at the behest of the United States and Great Britain, the United Nations established a Population Commission.¹⁶ In 1950, the Commission issued a report, which stated that in some countries, a high birth rate could pose an obstacle to economic advancement.¹⁷ The report encouraged governments to adopt policies that would curb population growth.¹⁸

In 1959, the first U.S. report on the issue of population growth was issued by the President's Commission to Study the U.S. Military Assistance Program.¹⁹ The report recommended that in order to more effectively address the issue of economic development, the United States should assist countries in formulating plans to deal with the problems caused by rapid population growth.²⁰ President Eisenhower passed the report onto the Senate Foreign Relations Committee without commenting on the recommendation.²¹ The Committee agreed with the report. However, the President blocked the recommendation that the U.S. government provide contraceptive development assistance to developing countries.²² President Eisenhower felt that it was inappropriate for the federal government to have a positive political doctrine on birth control.²³

U.S. foreign policy on population was first introduced by the Kennedy administration and the adoption of the FAA.²⁴ In 1963, pursuant to the FAA, Congress authorized funding for research on population problems and family planning through population control programs.²⁵

The Johnson Administration continued to give attention to the relation between population control and development. President Johnson strongly supported the creation of a Population Office at the United States Agency for

13. *Id.*

14. *Id.* Lenin also legalized abortion in the Soviet Union. This was because abortion was viewed as a woman's right, rather than an instrument of population or birth control. *See id.*

15. *Id.*

16. Ruth Dixon-Mueller, *U.S. International Population Policy and the "Woman Question,"* 20 N.Y.U.J. INT'L L. & POL. 143, 146 (1987). At the beginning of the Cold War, the United States and Britain may have pushed for the establishment of the Commission to develop a counter population theory to the only existing Marxist-Leninist one.

17. *Id.*

18. *Id.* at 146-47.

19. *Id.* at 147.

20. *Id.* at 148.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 149; Teitelbaum, *supra* note 6, at 67.

25. Dixon-Mueller, *supra* note 16, at 149.

International Development (USAID).²⁶ In 1965, USAID began to support international family planning through grants of foreign assistance, as authorized by the FAA.²⁷

By the mid to late 1960s, the United States and several western European nations began working together to engage the specialized agencies of the United Nations in population activities.²⁸ However, this effort was frustrated by an alliance of Catholic and Islamic governments, led by the Soviet Union and other Marxist-Leninist supporters who felt that population growth was a natural phenomenon.²⁹ Then, in 1969, the United States spearheaded an initiative to establish the voluntary UNFPA.³⁰ The purpose of the Fund was to reduce poverty, improve health, and raise living standards around the world.³¹ Before long, the United States was the Fund's largest contributor.³²

President Nixon continued to support international population initiatives. During his administration, USAID funding for contraceptive research and family planning distribution programs grew exponentially.³³ This funding went towards, among other things, simplified methods of female sterilization and methods of early pregnancy termination that were safe and effective.³⁴ Nixon also lobbied for the first global conference on population, which was held in Bucharest, under the auspices of the United Nations.³⁵ The focus of debate at the conference was on the issue of population growth and its fundamental link to underdevelopment.³⁶ In order to develop a parallel domestic policy, which reflected the impact of population growth on life in America, President Nixon appointed the Commission on Population Growth and the American Future.³⁷

While the U.S. foreign policy on population quietly subsisted through the Ford and Carter Administrations, the domestic abortion debate reached a fever pitch.³⁸ A 1973 U.S. Supreme Court decision, *Roe v. Wade*, legalized

26. Teitelbaum, *supra* note 6, at 67.

27. Dixon-Mueller, *supra* note 16, at 150.

28. Teitelbaum, *supra* note 6, at 67.

29. *Id.*

30. *Id.*

31. Government Press Release, Senator Feinstein Calls on the Bush Administration to Reconsider Decision to Divert \$34 Million from UN Fund for Population (July 24, 2002) available at 2002 WL 7273380 [hereinafter Feinstein Release]; *The Bush Global Gag Rule: A Violation of International Human Rights and the U.S. Constitution*, BO19 (July 2001), available at http://www.crlp.org/pub_art_ggr.html (last visited Dec. 1, 2002) [hereinafter *Global Gag Rule*].

32. *Global Gag Rule*, *supra* note 31; Susan F. Rasky, *Reagan Restrictions on Foreign Aid for Abortion Programs Lead to a Fight*, N.Y. TIMES, Oct. 13, 1984, at A20.

33. Dixon-Mueller, *supra* note 16, at 153. "Total assistance to population programs grew from \$2.1 million in 1965 to \$125.6 million in 1973." *Id.*

34. *Id.* at 152.

35. Teitelbaum, *supra* note 6, at 67.

36. Dixon-Mueller, *supra* note 16, at 154.

37. *Id.* at 152.

38. Teitelbaum, *supra* note 6, at 68.

abortion in the United States.³⁹ In response, disappointed pro-life groups sought ways to expand their efforts beyond narrowly defined abortion issues.⁴⁰ These groups turned their attention to programs funded by the government, which were meant to aid low-income people in controlling their fertility.⁴¹ Notably, the same year *Roe* was decided, Congress passed the Helms Amendment to the FAA, which prohibited U.S. foreign assistance from being used for abortion services in recipient nations.⁴²

The 1980 election of Ronald Reagan, who had run a staunchly pro-life campaign supported by a number of pro-life groups, ushered in a new era of pro-life activism.⁴³ Encouraged by a supporter of the pro-life movement in the White House, these groups continued to focus on the domestic limitations of federal funding for abortion and contraceptive services.⁴⁴ However, there was considerable opposition from pro-choice groups.⁴⁵ Undaunted, the pro-lifers simply sought a path of less resistance.

It did not take long for the pro-life movement to carve out a niche in the field of foreign policy shielded by a "general public ambivalence towards foreign assistance."⁴⁶ When activists were unable to eradicate abortion in the United States, foiled by those who viewed reproductive freedoms as indicia of personal autonomy,⁴⁷ they would simply take a different tack. The pro-lifers would take their fight to where access to education and marital choice aspects of personal autonomy⁴⁸ were of more primary concerns, and where local actors were dependent on assistance from the United States to achieve recognition of these fundamental freedoms.⁴⁹

In 1984, pro-life advocacy groups achieved two things that walked quietly towards this goal, but carried big sticks. First, with the help of supporters in the White House, James Buckley, a former Republican Senator from New York, was appointed chairman of the United States' delegation to the second United Nations International Conference on Population, in Mexico City.⁵⁰ As a senator, Buckley tried, unsuccessfully, to eliminate all U.S.

39. *Id.* See generally *Roe v. Wade*, 410 U.S. 113 (1973) (holding the Constitutional right to privacy is applicable to a woman's decision of whether or not to terminate her pregnancy).

40. Teitelbaum, *supra* note 6, at 68. Pro-life efforts had focused primarily on the passage of a constitutional amendment outlawing abortion. *Id.*

41. *Id.*

42. Pub. L. No. 93-189, 87 Stat. 714 (codified at 22 U.S.C. § 2151b(f)(1) (2002)); Dixon-Mueller, *supra* note 16, at 153.

43. Teitelbaum, *supra* note 6, at 68.

44. *Id.*

45. *Id.*

46. *Id.*

47. See Sylvia A. Law & Lisa F. Rackner, *Gender Equality and the Mexico City Policy*, 20 N.Y.U.J. INT'L L. & POL. 193, 209 (1987).

48. See *id.* at 213.

49. See Sharon Camp, *The Impact of the Mexico City Policy on Women and Health Care in Developing Countries*, 20 N.Y.U.J. INT'L L. & POL. 35, 46-51 (1987).

50. Teitelbaum, *supra* note 6, at 69.

funds for population assistance.⁵¹ Second, the pro-life advocacy groups successfully called for a review of U.S. foreign policy on population.⁵²

Around the same time, on the other side of the globe, the new Chinese leadership was rejecting the Marxist-Leninist population ideals, which had been embraced by Maoist leaders.⁵³ In China, it seemed as though the future of socialism now depended on limiting fertility.⁵⁴ Political officials at all levels heralded the Malthusian economic theory, as well as the abortion and contraception he opposed.⁵⁵

Ironically, as this was taking place in China, conservative political advisors in America were moving closer towards the Marxist theory.⁵⁶ They began to argue that “rapid population growth was, at worst, a neutral factor in economic development—and indeed might be a positive force so long as the ‘correct’ economic systems were in place.”⁵⁷ These arguments were promoted in background papers that were then presented to the Reagan White House.⁵⁸

B. Historical Context 1984-2000

In 1984, in his address to the UN Conference in Mexico City, Buckley announced President Reagan’s newly revised population policy.⁵⁹ The “Mexico City Policy” pronounced that rapid population growth was a neutral phenomenon, and any alleged population problem actually resulted from too much government control and “an outbreak of intellectualism which attacked science, technology and the very concept of material progress.”⁶⁰ The Mexico City Policy imposed additional restrictions on foreign assistance made pursuant to the FAA. Foreign Non-Governmental Organizations (FNGO’s), to which USAID provided population assistance, were prohibited from using not only USAID funds to provide or promote abortion as a method of family planning, but non-USAID funds as well.⁶¹

In order to implement this policy, a Standard Clause, outlining the restrictions, was inserted into all contracts and cooperative agreements for aid disbursed pursuant to the FAA.⁶² In order to remain eligible for USAID

51. *Id.*

52. *Id.*

53. *Id.* at 70.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Policy Statement of the United States of America at the United Nations International Conference on Population, 2d Sess., Mexico City (Aug. 6-13, 1984) [hereinafter Mexico City Statement]; Rasky, *supra* note 32.

60. Rasky, *supra* note 32; Teitelbaum, *supra* note 6, at 69.

61. Camp, *supra* note 49, at 35.

62. *Ctr. for Reproductive Law and Policy v. Bush*, 304 F.3d 183, 187 (2d Cir. 2002).

funding the Standard Clause required FNGO's to certify in writing that they would "not, while receiving assistance under the grant, perform or actively promote abortion as a method of family planning in [US]AID—recipient countries or provide financial support to other foreign nongovernmental organizations that conduct such activities."⁶³

Population assistance funding was further restricted by the Kemp-Kasten Amendment to the Foreign Operations Appropriations Act of 1985, which codified a new strain of Executive discretion.⁶⁴ Under Kemp-Kasten, none of the funds made available pursuant to the Appropriations Act could 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."⁶⁵

As a result of the Executive discretion afforded by Kemp-Kasten, the \$10 million earmarked for UNFPA that year, 1985, was withheld, although not because UNFPA was an "organization which includes as part of its population planning programs involuntary abortion."⁶⁶ Even though "UNFPA neither fund[ed] abortions nor support[ed] coercive family planning practices through its programs," the funds were withheld because of the UNFPA presence in China.⁶⁷

The People's Republic of China had adopted a one-child-per-family policy, as a means of controlling rapid population growth.⁶⁸ There were suspicions by "[s]ome U.S. policymakers" that this policy was enforced, in part, through coerced abortions and involuntary sterilizations.⁶⁹ The UNFPA funds for fiscal year 1985 were denied on the grounds that the practices of the family planning programs in China were "such that any support for that country's programs is linked with and gives the appearance of condoning its practices."⁷⁰ After spearheading its creation in 1969, the U.S. denied funding to the UNFPA in 1985 based on a subjective interpretation of the Kemp-Kasten language rather than any evidentiary proof of wrongdoing.

The Mexico City Policy and the Standard Clause restrictions remained in place during the first Bush Administration, and the U.S. continued to forego funding of the UNFPA. The Mexico City Policy and the Standard Clause were both repealed by President Clinton in 1993, but Kemp-Kasten remained a part of the yearly Appropriations Acts.⁷¹

63. *Id.*

64. Supplemental Appropriations Act for Fiscal Year 1985, Pub. L. No. 99-88, 99 Stat. 293 (1985) [hereinafter Appropriations Act].

65. *Id.* See *Population Inst. v. McPherson*, 797 F.2d 1062, 1064 (D.C. Cir. 1986).

66. *Population Inst.*, 797 F.2d at 1065.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Ctr. for Reproductive Law and Policy v. George W. Bush*, No. 01 CIV. 4986(LAP), 2001 WL 868007, at *5 (S.D.N.Y. July 31, 2001).

During the Clinton Administration, in 1994, there was an International Conference on Population and Development (ICPD) held in Cairo, Egypt.⁷² The ICPD was lauded as a “watershed event,” because “it moved away from traditional ideas of family planning and embraced the idea that giving women more control over their lives would provide a check against explosive population growth.”⁷³ The United States delegation to the Conference was instrumental in drafting the ICPD Programme of Action, which set out three principal goals: to provide universal access to health and primary education; to reduce maternal mortality and HIV/AIDS; and to advance gender equality.⁷⁴ The work of UNFPA would be crucial to meeting these goals around the world.⁷⁵

C. Historical Context 2000-2002

1. George W. Bush

Shortly after taking office, President Bush announced that he would reinstate the “Mexico City Policy.”⁷⁶ Although Congress had already appropriated \$34 million to the UNFPA for fiscal year 2002, Bush delayed the release of the funds after he took office.⁷⁷ The delay was due to new allegations, made by a small group of pro-life extremists, regarding UNFPA involvement in China.⁷⁸ The Administration sent a fact finding team to investigate the allegations and to determine whether it was appropriate to release the funds.⁷⁹

In July of 2002, Secretary of State Colin Powell announced the decision to deny the release of \$34 million that was appropriated for UNFPA family planning programs.⁸⁰ Based on an interpretation of Kemp-Kasten, as part of

72. James Dao, *U.S. May Abandon Support of U.N. Population Accord*, N.Y. TIMES, Nov. 2, 2002, available at <http://www.nytimes.com/2002/11/02/international/asia/02ABOR.html> (last visited Nov. 15, 2002).

73. *Id.*

74. Thoraya Ahmed Obaid, Executive Director of UNFPA, Statement at the 2002 International Parliamentarian’s Conference on the Implementation of the ICPD Programme of Action, Ottawa, Canada (Nov. 21-22, 2002), available at <http://www.unfpa.org/about/ed/2002/ottawa.html> (last visited Nov. 28, 2002) [hereinafter ICPD Statement].

75. *Id.*

76. Memorandum For the Administrator of the United States Agency for International Development: Restoration of the Mexico City Policy, 66 Fed. Reg. 17,303 (Mar. 28, 2001).

77. Michelle Goldberg, *A \$34 million “political payoff”* (July 23, 2002), available at <http://www.salon.com/news/feature/2002/07/23/unfpa/print.html> (last visited Aug. 8, 2002).

78. *Id.* The allegations were made by an organization called the Population Research Institute. *Id.*

79. *Id.*

80. Letter from Colin Powell, Secretary of State, to Patrick Leahy, Chairman of the United States Senate Subcommittee on Foreign Operations (July 23, 2002), available at http://www.unfpa.org/news/2002related_documents/usfundingreport01.pdf (last visited Nov. 15, 2002).

the Appropriations Act for fiscal year 2002, the funds were denied because UNFPA allegedly played a prohibited role in what has been interpreted as China's practice of coercive abortion.⁸¹ This decision was made, even though UNFPA: certified that they in no way support coercive abortion; investigated allegations of coercive abortion and withdrew funding where appropriate; and separated U.S. donations in different accounts, which certified that none of the money went to China.⁸² The State Department promised instead to put the money towards the USAID Child Survival and Health Program Fund.⁸³ This decision was inconsistent with the findings set out in the fact finding team's report.⁸⁴ Also, USAID serves significantly fewer countries than UNFPA,⁸⁵ and the permissible scope of the Agency's work is limited.⁸⁶

The evolution of United States involvement in international family planning programs, rooted in global population concerns, has yielded a political forum for abortion policy making, unfettered by the constitutional restrictions imposed on the domestic abortion debate.⁸⁷ While the President has broad discretion to set policy in Foreign Affairs matters, this decision undermines broader policies of the United States regarding population, family planning and development.⁸⁸

III. RELEVANT LEGISLATION AND SUBSEQUENT CASE LAW

A. Legislative Context

The Foreign Assistance Act of 1961 (FAA) was the first statutory authority to support international economic development with U.S. funds. The FAA declares Congressional policy on foreign development assistance.⁸⁹ Under the FAA:

[the] principal objective of the foreign policy of the United States is the encouragement and sustained support of the people of developing countries in their efforts to acquire the knowledge and resources essential to

81. *Id.*; Richard Boucher, Spokesperson, U.S. Department of State Daily Press Briefing (July 22, 2002), transcript available at <http://www.state.gov/r/pa/prs/dpb/2002/12036pf.htm> (last visited Nov. 15, 2002) [hereinafter July 22 Press Briefing].

82. Obaid Statement, *supra* note 1.

83. July 22 Press Briefing, *supra* note 81.

84. Obaid Statement, *supra* note 1.

85. July 22 Press Briefing, *supra* note 81. USAID is involved in family planning programs in 60 countries. *Id.* UNFPA provides family planning services in 142 countries. Obaid Statement, *supra* note 1.

86. July 22 Press Briefing, *supra* note 81.

87. *Global Gag Rule*, *supra* note 31. See also James Dao, *U.S. Raises Abortion Issue at Conference on Families*, N.Y. TIMES, Dec. 15, 2002, at A4.

88. Dao, *supra* note 72.

89. 22 U.S.C. § 2151 (2002).

development and to build the economic, political and social institutions which will improve the quality of their lives.⁹⁰

In 1973, Congress adopted the Helms Amendment to the FAA, which states that “[n]one of the funds made available to carry out this subchapter may be used to pay for any biomedical research which relates, in whole or in part, to methods of, or the performance of, abortions or involuntary sterilization as a means of family planning.”⁹¹ This restriction was applicable only to U.S. government funds.⁹² Under the Helms Amendment, FNGO’s receiving U.S. assistance were still able to promote abortion with non-U.S. funds.⁹³

After the addition of Kemp-Kasten in 1985, the President delegated the authority to administer the voluntary population planning policy to the Secretary of State, who then delegated it to the Director of the United States International Development and Cooperation Agency.⁹⁴ This authority was then delegated to the Administrator of the Agency for International Development⁹⁵ because funding for the UNFPA was appropriated as part of a USAID managed account.⁹⁶

Currently, any funding for UNFPA comes out of the State Department’s International Organizations and Programs Account.⁹⁷ Because of the source of UNFPA funds, the President delegated the authority to implement Kemp-Kasten to the Secretary of State in 1995.⁹⁸ So, as it currently stands, the Secretary has the authority to make the Kemp-Kasten determination, as to whether a particular program or organization supports or participates in a program of coercive abortion or involuntary sterilization.

In light of these delegations of authority, under Kemp-Kasten, it is not just the President who gets to “furnish assistance, on such terms and conditions as he may determine, for voluntary population planning.”⁹⁹ Rather, a political appointee, the Secretary of State, gets to determine the terms and conditions under which foreign assistance is given for voluntary population planning, while another appointee, the USAID Administrator, ensures that

90. *Id.*

91. 22 U.S.C. § 2151b(f)(3) (2002). See *DKT Mem’l Fund v. Agency for Int’l Dev.*, 887 F.2d 275, 277 (D.C. Cir. 1989).

92. *Ctr. for Reproductive Law and Policy*, 304 F.3d at 187.

93. *Id.*

94. Exec. Order No. 12,163, 44 Fed. Reg. 56,673 (Sept. 29, 1979). See *Planned Parenthood v. Agency for Int’l Dev.*, 915 F.2d 59, 61 (2d Cir. 1990).

95. IDCA Delegation No. 1, 44 Fed. Reg. 57,521 (1979) reprinted as amended in 45 Fed. Reg. 74,090 (Nov. 7, 1980). See *Planned Parenthood*, 915 F.2d at 61.

96. See *Analysis of Determination that Kemp-Kasten Amendment Precludes Further Funding to UNFPA*, Pub. L. No. 107-115, available at <http://www.unfpa.org/news/2002/relateddocuments/usfundingreport.02.pdf> (last visited Nov. 15, 2002) [hereinafter *Analysis of Determination*].

97. *Id.*

98. *Id.*

99. 22 U.S.C. § 2151b(b) (2002).

the President's population policy is implemented by aid recipients once the determinations are made.¹⁰⁰

B. Case Law

The text of the U.S. Constitution makes scant reference to definitive Foreign Affairs powers. Article II bestows upon the Executive, as "Commander in Chief of the Army and Navy of the United States,"¹⁰¹ the authority to "make treaties."¹⁰² Article I gives Congress the power to declare war and spend money.¹⁰³ When the Executive and Legislative branches seek to restrain the other with their respective swords of vague Constitutional authority, the Judicial branch is called upon for its soothsayings.¹⁰⁴

However, the judiciary will only rarely involve itself in matters that may be deemed foreign affairs.¹⁰⁵ Thus, a brave instigator of such a challenge must successfully navigate an obstacle course of nearly insurmountable justiciability doctrines before the federal courts will even consider the merits of the case.¹⁰⁶ The limited case law challenging the constitutionality of different aspects of the restrictions placed on foreign assistance for family planning has, for the most part, fallen prey to these doctrines of judicial restraint.

1. Alan Guttmacher Institute v. McPherson

The Alan Guttmacher Institute, and other professionals in the field of international population control and family planning, brought an action against M. Peter McPherson, the Administrator of USAID when the Agency declined to fund publication of the Institute's journal, *International Family Planning Perspectives (Perspectives)*.¹⁰⁷ *Perspectives* addressed issues of international population control and family planning.¹⁰⁸ Funding was denied because, *inter alia*, the journal contained two articles that USAID personnel perceived as advocating abortion.¹⁰⁹ In the past, the Institute received funding for *Perspectives* from USAID, pursuant to the FAA.¹¹⁰

100. See Analysis of Determination, *supra* note 96.

101. U.S. CONST. art. II, § 1.

102. *Id.* § 2.

103. *Id.* art. I, § 8.

104. See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

105. See *Population Inst.*, 797 F.2d at 1070.

106. See *Baker v. Carr*, 369 U.S. 186, 198 (1962) (distinguishes between issues of justiciability versus jurisdiction).

107. *Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1089 (2d Cir. 1986).

108. *Id.*

109. *Id.*

110. *Id.*

In 1982, when the Institute applied for funding for 1983, its application was denied.¹¹¹ In its Complaint, the Institute set forth five causes of action: first, that the funding was denied because of pro-abortion views expressed other than in the journal, and thus violated the First Amendment; second, that the denial of funding violated the First and Fifth Amendments because USAID's decision was "motivated by the accurate reporting of information in *Perspectives*;" third, that the denial violated the FAA because the FAA "affirmatively permitted funding the publication of articles that contained information about the use and incidence of abortion and that were neutral;" fourth, that the denial of funding violated "the Due Process Clause because the decision not to renew funding was not preceded by a hearing;" and fifth, that the denial was an "arbitrary agency action in violation of the Administrative Procedure Act."¹¹²

The court dismissed the third cause of action on the ground that nothing in the FAA prevented USAID from deciding not to fund the "publication of neutral information about abortion."¹¹³ The fourth cause of action was dismissed because the Institute lacked a property interest in the funds.¹¹⁴ The fifth cause of action was dismissed because USAID's funding decision was committed, by law, to agency discretion, and not subject to judicial review under the Administrative Procedure Act.¹¹⁵ The first and second causes of action were substantially resolved after USAID offered, early on, to reconsider the Institute's grant application without considering activities of the Institute beyond publication of *Perspectives*, or the two articles that had been initially construed by the Agency to advocate for abortion.¹¹⁶ Since the harm alleged in the first two causes of action had been redressed by a reconsideration of the Institute's grant application, the remaining litigation dealt with the Institute's efforts to prevent a dismissal of the constitutional challenges on mootness grounds.¹¹⁷

The Institute was ultimately successful on this point.¹¹⁸ Although the Institute brought the suit just after the announcement of the Mexico City Policy and the imposition of the Standard Clause provisions, the alleged harm occurred in 1982.¹¹⁹ Therefore, this lawsuit may have been brought in order to gauge the new policy's resistance to statutory versus constitutional challenges.

111. *Id.*

112. *Id.*

113. *Id.* at 1092.

114. *Id.* at 1090.

115. *Id.*

116. *Id.* at 1091.

117. *Id.*

118. *Id.* at 1096.

119. *Id.* at 1090.

2. Planned Parenthood Federation of America v. Agency for International Development

The first case to directly challenge the exercise of Presidential discretion, on the issue of voluntary population policy, was *Planned Parenthood Federation of America v. Agency for International Development*.¹²⁰ Planned Parenthood sued USAID and the Agency administrator, M. Peter McPherson, alleging that the Mexico City Policy and the Standard Clause were without statutory authority.¹²¹ Planned Parenthood claimed that the Mexico City Policy was not a decision about foreign affairs, but was instead a response by the Reagan Administration to domestic political pressure, and was adopted to serve domestic political interests rather than a legitimate foreign policy purpose.¹²² Allegedly, the “reason for the promulgation of the policy and the Standard Clause was to advance the Reagan Administration’s effort to suppress pro-choice views and activities in the United States . . . and not for any purported concern with foreign policy or other legitimate governmental purpose.”¹²³ Plaintiffs also alleged that the Mexico City Policy and the Standard Clause violated their constitutional rights to speech, association and privacy.¹²⁴ The government defendants moved to dismiss for failure to state a claim upon which relief could be granted, claiming that the challenges were non-justiciable political questions.¹²⁵ The District Court for the Southern District of New York granted defendant’s motion to dismiss, finding that the Mexico City Policy and the Standard Clause were within the statutory and administrative authority of defendants, and that the constitutional claims presented non-justiciable political questions.¹²⁶

The Court of Appeals affirmed the statutory and administrative authority of the defendant, and affirmed the finding that a challenge to the Mexico City Policy itself was a non-justiciable political question.¹²⁷ The court reversed the finding of a non-justiciable political question with regards to the First Amendment challenges to the Standard Clause as a means of implementing the Mexico City Policy.¹²⁸

On remand, Planned Parenthood argued that a dismissal for failure to state a claim was inappropriate, because their challenge to the motives behind the government’s implementation of the Mexico City Policy, through insertion of the Standard Clause into grant agreements, required discovery

120. No. Civ. 0248 (JMW), 1990 WL 26306 (S.D.N.Y. Mar. 7, 1990).

121. *Id.* at *2.

122. *Id.* at *7 (citing compl. ¶ 30).

123. *Id.* (citing compl. ¶ 97).

124. *Id.* at *2.

125. *Id.*

126. *Planned Parenthood*, 915 F.2d at 61.

127. *Id.*

128. *Id.*

and a trial.¹²⁹ However, the district court held that Plaintiff's challenges to the motives behind the Mexico City Policy were non-justiciable, in that they went to the policy itself, and not its implementation.¹³⁰ Because the Policy was non-justiciable, so too were the challenges. The District Court held that Planned Parenthood failed to state a claim upon which relief could be granted because the Standard Clause was the least restrictive means of implementing an unreviewable policy.¹³¹ The District Court granted the government's motion on those grounds.¹³² The Court of Appeals affirmed.¹³³

3. DKT Memorial Fund v. Agency for International Development

In the midst of the Planned Parenthood litigation, DKT Memorial Fund v. Agency for International Development¹³⁴ set forth another challenge to the FAA funding restrictions. DKT Memorial Fund, a domestic nongovernmental organization (DNGO), and two FNGO's, Parivar Seva Sanstha (PSS)¹³⁵ and Population Services Family Planning Programmes Ltd. (PSFP),¹³⁶ had contracted jointly for the purpose of carrying out family planning projects.¹³⁷ One of these projects sought to join educators and mobile medical teams that would then be sent to rural areas in India to provide comprehensive family planning services.¹³⁸ The project was meant to complement the efforts of the Indian government, with regards to rural family planning services, and would last for four years.¹³⁹ The teams would not provide abortion services or involuntary sterilizations.¹⁴⁰ None of the plaintiffs had ever applied for, nor been denied, receipt of a USAID family planning grant.¹⁴¹

In 1983, in an effort to secure funding to carry out the joint contracts with DKT and PSFP, PSS applied to the Indian government for a subgrant under India's Private Voluntary Organizations for Health Project (Project).¹⁴² The PSS subgrant application was not an application to USAID.¹⁴³

129. *Planned Parenthood*, 1990 WL 26306, at *7.

130. *Id.* at *8.

131. *Id.* at *7.

132. *Id.* at *8.

133. *Planned Parenthood.*, 915 F.2d at 59.

134. 630 F. Supp. 238 (D.C. Dist. Ct. 1986).

135. *Id.* PSS, a registered nonprofit society in India, operates family planning clinics which provide "a comprehensive range of family planning services, including abortion." *Id.*

136. PSFP, "a nonprofit charity registered in the United Kingdom and a member of the International Council of Voluntary Agencies . . . provides technical assistance in the operation of comprehensive family planning clinics around the world . . . and engages in certain activities relating to voluntary abortion." *Id.* at 240.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 241.

142. *Id.*

143. *Id.*

USAID's involvement in the Project was based on a 1981 grant agreement, in which the United States provided funding for the Project.¹⁴⁴ The Indian Ministry for Health and Family Welfare had overall responsibility for management of the Project and its funding.¹⁴⁵ However, a Special Grants Committee, together with the USAID mission in India, would screen applications for subgrants related to the Project and inform the applicants whether they had been awarded funding.¹⁴⁶

In February of 1985, the USAID mission in India reviewed PSS's application and then informed the Indian Ministry that USAID could not accept it.¹⁴⁷ The Ministry undersecretary, K.L. Bhatia, told PSS that the Indian Government rejected the application, on the ground that PSS "primarily performs or promotes abortion as a method of family planning and such activities" were not eligible for Project funding, because of the Standard Clause restrictions.

Plaintiffs sued USAID, alleging that the Standard Clause: conflicted with both the FAA and "important Congressional policies," was arbitrary and capricious, and deprived them of Due Process of Law.¹⁴⁸ Defendants moved for summary judgment, alleging that plaintiffs were without standing to bring their challenge because the injury complained of was not fairly traceable to the USAID Standard Clause certification requirement, and it was unlikely that a favorable ruling would redress their alleged injury.¹⁴⁹ The court granted the motion.¹⁵⁰

On appeal, plaintiffs were allowed to amend their complaint, to allege that they were "otherwise qualified" to receive funds, in order to establish "nonapplicant" standing.¹⁵¹ On remand, the district court held that: first, DKT, a DNGO, had standing; second, as FNGO's, PSS and PSFP had standing to make a statutory challenge; third, the FAA did prohibit the President from finding family planning NGO's ineligible for funding if they used abortion; fourth, the Standard Clause was overbroad and infringed on DNGOs' associational rights; and fifth, FNGO's did not have standing to raise a First Amendment claim.¹⁵² Defendants appealed.¹⁵³

This time, the Court of Appeals affirmed the district court rulings: all of the statutory challenges to the Standard Clause were unmeritorious, and the PSS and PSFP claims were dismissed for lack of standing.¹⁵⁴ The court re-

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 238.

150. *Id.*

151. DKT Mem'l Fund v. Agency for Int'l Dev., 810 F.2d 1236 (D.C. Cir. 1987).

152. DKT Mem'l Fund v. Agency for Int'l Dev., 691 F. Supp. 394 (D.D.C. 1988).

153. DKT Mem'l Fund v. Agency for Int'l Dev., 887 F.2d 275 (D.C. Cir. 1989).

154. *Id.* at 297.

versed the finding that the Standard Clause violated the right of DKT to associate with PSS and PSFP.¹⁵⁵ The court also found that DKT had not presented any ripe claims in which the clauses covering grants to unnamed FNGO's unconstitutionally interfered with DKT's right to associate.¹⁵⁶ The court then remanded the case with the instruction that it be dismissed.¹⁵⁷ The disposition of this case illustrates the degree of attenuation between the NGO and USAID funding, which may still render the NGO ineligible for USAID funding.

4. Population Institute v. McPherson

The sole action, in which the merits were actually reached, was Population Institute v. McPherson.¹⁵⁸ In 1985, after UNFPA was denied funding because of involvement in China, the Population Institute, together with other private organizations, filed suit in the District Court for the District of Columbia, seeking to enjoin McPherson, the USAID Administrator, from withholding the \$10 million that had been earmarked for UNFPA.¹⁵⁹ The complaint alleged: that McPherson had acted under an unlawful designation of authority; that McPherson had misinterpreted Kemp-Kasten, so his action was erroneous; and that McPherson's action was arbitrary and capricious because there was no evidence of any UNFPA involvement in any program of coercive abortion or involuntary sterilization.¹⁶⁰

The same day that the complaint was filed, the district court issued a temporary restraining order, which enjoined the government from disbursing the \$10 million.¹⁶¹ Plaintiffs then sought a preliminary injunction and defendants moved to dismiss.¹⁶² Defendants' motion was granted on the grounds that: "the Population Institute had standing, that the controversy was not moot, that the President's delegation of authority to the Administrator was proper, but that the plaintiffs' challenges to the Administrator's action presented nonjusticiable political questions."¹⁶³

Notice of appeal was filed, but appellants also moved for an injunction to prevent USAID from disbursing the funds at issue to anyone else.¹⁶⁴ Appellants' motion for an injunction was granted.¹⁶⁵ The court also considered

155. *Id.*

156. *Id.* In her dissenting opinion, Circuit Judge Ruth Bader Ginsburg stated that "the handicap our government has placed on DKT's speech and association is repugnant to the First Amendment." *Id.* at 307.

157. *Id.* at 299.

158. 797 F.2d 1062 (D.C. Cir. 1986).

159. *Id.* at 1065.

160. *Id.* at 1066.

161. *Id.*

162. *Id.*

163. *Id.* at 1067.

164. *Id.*

165. *Id.*

the propriety of McPherson's action and the "reviewability and correctness of that determination as a matter of law."¹⁶⁶ The court felt that the McPherson decision did not present a political question; rather, it was a "simple question of statutory construction that a court was competent to examine."¹⁶⁷

The court found that McPherson had impermissibly relied solely on Representative Kemp's interpretation of the Kemp-Kasten Amendment.¹⁶⁸ In doing so, McPherson had delegated his "responsibility to interpret the will of Congress to a single member of Congress."¹⁶⁹ Since the "opportunity to reach a reasoned interpretation of the statute belongs to the President and his delegates," the court held that appellant was likely to succeed in demonstrating that McPherson committed legal error in assuming that he was compelled by law to apply the statutory interpretation provided by the author of the statutory language.¹⁷⁰ However, the court also noted that, while not before the court, the issue of whether or not coerced abortion occurred in China was probably a political question, and therefore, non-justiciable.¹⁷¹

Before the appeal could be considered on the merits, McPherson issued a statement, indicating that he would affirm his decision to deny the UNFA funds, but had examined the statute in greater detail since the injunction had been granted.¹⁷² According to the court, this statement adequately addressed the concerns, which had prompted the granting of the injunction.¹⁷³ In response to McPherson's statement, the court vacated the injunction.¹⁷⁴ The court then rejected the government's claims that the case presented a non-justiciable political question.¹⁷⁵ However, McPherson's decision to deny the UNFPA funds was ultimately affirmed because, based on the additional evidence that McPherson indicated that he had considered in his statement, there was some rational basis for his decision.¹⁷⁶

5. Smith v. Atwood

In 1994, after President Clinton had repealed the Mexico City Policy and the Standard Clause restrictions in USAID grants, U.S. Congressman Christopher Smith, and several Chinese nationals, brought suit against Brian Atwood, the new USAID Administrator.¹⁷⁷ These plaintiffs sought to enjoin

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1067-68.

171. *Id.* at 1068.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 1073.

176. *Id.*

177. *Smith v. Atwood*, 845 F. Supp. 911 (D.D.C. 1994).

the disbursement of any U.S. funds to UNFPA, alleging that Atwood had illegally failed to determine that UNFPA was barred from receiving funding from the U.S.¹⁷⁸ Defendants moved to dismiss the action for lack of standing, and failure to state a claim upon which relief could be granted.¹⁷⁹ The district court granted defendants' motion to dismiss on the grounds that the Chinese nationals lacked standing to maintain the action, and that the action was moot with respect to Congressman Smith.¹⁸⁰

The district court found that the Congressman's action was moot because a letter submitted to the court by defense counsel, stated that: "the restrictions in the ambiguous language of Kemp-Kasten are not triggered by activities which are unintentional or remote, or which only indirectly or marginally relate to a program of coercive abortion or involuntary sterilization."¹⁸¹ Because the court was satisfied that the standard applied by Atwood, in deciding whether to disburse funds to UNFPA, was within the contemplation of the Appropriations Act, Atwood's claim was moot.¹⁸²

6. Center for Reproductive Law and Policy v. Bush

In the latest challenge to U.S. policy on foreign assistance for family planning, the Center for Reproductive Law and Policy (CRLP) sued George W. Bush, in his capacity as President of the United States; Colin Powell, in his capacity as Secretary of State; and Andrew Natsios, in his capacity as USAID Administrator.¹⁸³ CRLP, a DNGO that advocates for reproductive rights, alleged that the Mexico City Policy violated CRLP attorneys' First Amendment rights of speech and association, Due Process and Equal Protection provisions of the Fifth Amendment, and Customary International law.¹⁸⁴ The district court dismissed the action, finding that CRLP, and its attorney advocates, lacked Article III standing because the restriction in the implementing Standard Clause applied only to FNGO's.¹⁸⁵

On appeal, after conducting a *de novo* review, the court again dismissed the action.¹⁸⁶ The court dismissed the Due Process claim for lack of prudential standing because CRLP was not within the zone of interests protected by the Due Process clause.¹⁸⁷ The court dismissed the Equal Protection claim as meritless because, while CRLP had standing, a judicially created exception

178. *Id.* at 912.

179. *Id.*

180. *Id.*

181. *Id.* at 915.

182. *Id.*

183. *Ctr. for Reproductive Law and Policy*, 2001 WL 868007, at *2.

184. *Id.*

185. *Ctr. for Reproductive Law and Policy*, No 01-6168, 2002 WL 31045183, at *1 (2d Cir. Mar. 13, 2002).

186. *Id.*

187. *Id.*

called “competitive advocate standing” caused the court to conclude that the classification challenged by CRLP did not amount to an Equal Protection violation.¹⁸⁸ The First Amendment challenge was then dismissed on the merits because of another judicially created exception, which allowed the court to ignore a novel theory of standing because they determined that the identical legal issue had been determined twelve years earlier in *Planned Parenthood*.¹⁸⁹

IV. POLICY DECISIONS WITH A PRO-LIFE AGENDA UNDERMINE BROADER STRATEGIC GOALS OF THE UNITED STATES, WHICH LEAVES THE DECISIONS VULNERABLE TO CHALLENGES UNDER NATIONAL AND INTERNATIONAL LAW

A. The Legal Rationale for the Recent UNFPA Decision is Problematic

The evolution of United States involvement in international family planning programs, rooted in global population concerns, has yielded an international political forum for the domestic abortion debate.¹⁹⁰ Private interest groups have been able to impact foreign policy decisions to a degree that would be unconstitutional in domestic matters.¹⁹¹ The recent decisions that have resulted from such influence actually undermine broader strategic goals of the United States.¹⁹² Furthermore, if the decisions do serve a legitimate foreign policy purpose, the legal rationale for not contributing to the UNFPA would also prevent U.S. contribution to other international efforts, such as the World Health Organization (WHO) and USAID itself because of their similarly attenuated funding of abortion related activities.¹⁹³

There is increasing concern in the international community over the current Bush Administration’s aggressive exercises in unilateralism.¹⁹⁴ The United States could make concessions and reconsiderations on the international family planning issue that could help to dispel this concern. The resulting long-term strategic benefit that would result from renewed trust in the United States and its international reputation is far more appropriate and would outweigh any short-term domestic political backlash.

188. *Id.*

189. *Id.*

190. Feinstein Release, *supra* note 31; *Global Gag Rule*, *supra* note 31.

191. *Global Gag Rule*, *supra* note 31.

192. These goals are spelled out in 22 U.S.C. § 2151 (2002). ICPD Statement, *supra* note 74.

193. July 22 Press Briefing, *supra* note 81.

194. Dao, *supra* note 72.

B. Proposals

1. National

While the courts, on the issue of foreign assistance for family planning, have been unwilling to wade too deep into the constitutional aspects of this question in the past, reconsideration is now due. Some of the nuances of the recent reimposition of restrictions, in light of developments in International Law and the general tone of the global community, demand a fresh look at old issues.

In their analysis of the most recent determination that Kemp-Kasten precluded the release of UNFPA funds, the government cited Population Institute and Smith, as support for the decision.¹⁹⁵ In the analysis, the language excerpted from Population Institute is misleading. The analysis cites *Population Institute* for the proposition that “special deference should be accorded the executive in those activities that impinge on foreign affairs,” which “strongly sugges[ts] that the executive branch’s factual determinations regarding China’s programs are not reviewable by the judiciary.”¹⁹⁶ Yet, in the actual opinion, the court goes on to explain that the case did not present a non-justiciable political question, and that there could be a review of the Administrator’s decision.¹⁹⁷ As applied to the recent UNFPA decision, and contrary to the government’s interpretation of Population Institute, the factual determinations regarding programs in China are reviewable by the judiciary.¹⁹⁸

The language in the analysis, excerpted from Smith, is equally misleading. The government contends that in Smith, “the congressman had challenged a determination by the [US]AID Administrator that ‘only clear evidence of knowing and intentional direct funding or support by UNFPA’ would trigger Kemp-Kasten. The court stated, ‘[i]t is quite clear that such a standard is in no way contemplated by the Kemp[-]Kasten Amendment.’”¹⁹⁹ In the actual opinion, the court applied a criminal intent standard, which was not contemplated by Kemp-Kasten.²⁰⁰ The court went on to cite language contained in letter from counsel for the USAID Administrator, which stated that, “the restrictions in the ambiguous language of Kemp-Kasten are not triggered by activities which are unintentional or remote, or which only indi-

195. Analysis of Determination, *supra* note 96.

196. *Id.* (citing *Population Inst.*, 797 F.2d at 1070).

197. *Population Inst.*, 797 F.2d at 1070.

198. The re-delegation of authority in 1995, from the USAID Administrator to the Secretary of State should not affect the plausibility of this proposal. See Analysis of Determination, *supra* note 96.

199. *Id.* (citing *Smith v. Atwood*, 845 F. Supp. 911, 915 (D.D.C. 1994)).

200. *Smith*, 845 F. Supp. at 915.

rectly or marginally relate to a program of coercive abortion or involuntary sterilization."²⁰¹

The recent UNFPA decision was based on the finding that UNFPA programs in China provided computer equipment to the Chinese government.²⁰² Presumably, this freed up money within the Chinese government to enforce the one-child policy through means of coercive abortion and involuntarily sterilizations.²⁰³ The fact finding team, sent by the U.S. to China to investigate allegations about the UNFPA, however, "found no evidence that UNFPA ha[d] 'knowingly supported or participated in the management of a program of coercive abortion or involuntary sterilization in [China].'"²⁰⁴ In the absence of knowing participation or support, and with only an indirect relation to allegedly prohibited programs, Kemp-Kasten should not have been triggered by China's UNFPA programs.

While it seems clear that the rationale set forth for the denial of U.S. funds for UNFPA was not legally sound, the reluctance of U.S. courts to involve themselves in Foreign Affairs matters will probably prevent many of these issues from ever being addressed. Rather than a direct constitutional or statutory challenge to an Executive Policy decision, both of which have proved largely unsuccessful, plaintiffs may have a better chance at success if the challenge is more contractually based.²⁰⁵

Since many of the USAID funding agreements last for several years, and may overlap with a change in Administration, it may be possible for some organizations to recover the funding unofficially, as a contractual remedy. This may be possible for programs and organizations that hire educators and purchase family planning commodities over an extended period of time, but with the reimposition of the Mexico City Policy and Standard Clause provisions, or withdrawal of UNFPA funding, they are no longer able to fulfill contractual obligations with their employees or suppliers. It may be that family planning commodity manufacturers would have a cause of action against the government if FNGO's make up a substantial part of their market, but they are prevented from purchasing supplies because of U.S. funding restrictions.

2. International

There are several International Agreements that may be violated by a U.S. refusal to fund the UNFPA.²⁰⁶ Most directly on point is the ICPD Pro-

201. *Id.*

202. Analysis of Determination, *supra* note 96.

203. *Id.*

204. *Id.*

205. For an interesting proposal along similar lines see generally Rita Y. B. Carlson, *What if the United Nations Sued the United States?: A Hypothetical Case Analyzing the UN Charter as a Government Contract*, 30 PUB. CONT. L.J. 525 (2001).

206. See Women's Reproductive Rights, available at http://www.crlp.org/pub_fac_

gramme of Action.²⁰⁷ In light of U.S. support of the Conference, it is no longer appropriate for the U.S. to advocate for the Marxist-Leninist approach set forth in the Mexico City Policy, which characterizes population growth as a neutral phenomenon.²⁰⁸ The Programme of Action clearly recognizes the relationship between population growth and underdevelopment.²⁰⁹ The goals set forth therein: to provide universal access to health and primary education; reduce maternal mortality and HIV/AIDS; and advance gender equality, seek to remedy the adverse effects of this relationship.²¹⁰ The Programme of Action also articulated “three essential principles of reproductive rights”: the right to freely decide the number and spacing of children; the rights to attain the highest standard of sexual and reproductive health; and the right to make decisions concerning reproduction free of coercion, discrimination, or violence.²¹¹ The U.S. claims continued support of those goals.²¹²

Since the agreement is not self-executing, it does not, on its own, create any enforceable rights at the domestic level.²¹³ However, at the international level, it seems hypocritical that the United States played a pivotal role in the drafting of the goals and agreements, only to then discredit the International agency that has undertaken a course towards their achievement.

President Bush claims to be “committed to helping the U.N. to advance human rights, healthcare, security, and education throughout the world,” and has even gone so far as to proclaim October 24, 2002 United Nations Day.²¹⁴ The U.S. praises the recent creation of a U.N. program on HIV/AIDS.²¹⁵

rights.html (last visited Nov. 28, 2002) [hereinafter Women’s Reproductive Rights].

207. PROGRAMME OF ACTION OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, U.N. Doc. A/CONF.171/13/Rev.1, U.N. Sales No. 95.XIII.18 (1995), available at <http://www.unfpa.org/icpd/reports.htm> (last visited Nov. 28, 2002) [hereinafter *Programme of Action*].

208. Mexico City Statement, *supra* note 59.

209. *Programme of Action*, *supra* note 207.

210. ICPD Statement, *supra* note 74.

211. *United Nations, Report of the International Conference on Population and Development*, at 43-44, U.N. Doc. A/CONF.171/13 (1994); Bharati Sadasivam, *The Rights Framework in Reproductive Health Advocacy—A Reappraisal*, 8 HASTINGS WOMEN’S L.J. 313, 322 (1997).

212. Press Release, U.S. State Department, U.S. International Population Policy (Nov. 7, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/14985pf.html> (last visited Nov. 28, 2002).

213. See generally Russell G. Donaldson, Annotation, *United Nations Resolution as Judicially Enforceable in United States Domestic Courts*, 42 A.L.R. FED. 577 (1979).

214. Proclamation by President George W. Bush, United Nations Day, 2002, Washington D.C. (Oct. 23, 2002), available at <http://www.state.gov/p/io/rls/rm/2002/14638pf.html> (last visited Nov. 28, 2002).

215. United Nations Fact Sheet, Bureau of International Organization Affairs, Washington D.C. (Aug. 20, 2002), available at <http://www.state.gov/p/io/rls/fs/2002/12955pf.html> (last visited Nov. 28, 2002).

This program brings together the resources of several other U.N. programs, including UNFPA.²¹⁶

The Bush Administration's insistence on unilateralism undercuts U.S. sincerity and credibility in the eyes of the international community.²¹⁷ The perceived insincerity is then a threat to national security. Countries that depend on UNFPA services and other U.S. funding resources could be allies in fighting terror or mutually beneficial trade agreements. Instead, recent decisions have caused skepticism and distrust of the American agenda.²¹⁸

If the problem is with allegedly coercive practices employed in China, there are ways in which the leverage of U.S. funding could be wielded less derisively. The U.S. should continue to support multilateral programs, and inundate the successful ones, such as UNFPA, with funding. The United States is an active member of the UNFPA Executive Board.²¹⁹ If the daily involvement of the UNFPA in China was troublesome, the U.S. delegation could have called for a revision of program certification requirements, or other such in-house accountability provisions.²²⁰ The fact that the U.S. opted to act unilaterally, choosing instead to call into question the credibility of the UNFPA, seems inappropriate, and indicative of an ulterior agenda.

The U.S. is the only country to ever deny funding to the UNFPA for non-financial reasons.²²¹ In light of the ICPD Programme of Action, the International Law concept of an obligation *ergo omnes* may, in theory, provide a possible challenge to the funding decision.²²² When the U.S. agreed to pursue the goals in the Programme of Action, it may have undertaken an obligation owed to all of the other governments who participated at the ICPD not to withdraw funding for non-financial reasons, because doing so would undermine the principal goals which all parties agreed to pursue. If such an obligation exists, then any other party to the agreement may take action against the United States, in order to enforce the obligation.²²³ In practice, there are two significant challenges to this proposal. First, the Programme of Action is not itself a binding treaty.²²⁴ Rather, the goals set forth are meant to clarify the policy and commitment of the international community.²²⁵ This challenge may be overcome if the obligation not to deny funding for non-

216. *Id.*

217. Dao, *supra* note 72.

218. *See id.*

219. ICPD Statement, *supra* note 74.

220. *See id.*

221. UN Newsletter (July 23, 2002), available at <http://www.un.org.pk/unic/newsletters/NEWSLETTER020723.htm> (last visited Dec. 1, 2002).

222. *See* The Barcelona Traction Case, (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); The South West Africa Cases, (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6 (July 18).

223. *Id.*

224. Sadasivam, *supra* note 211, at 322.

225. *See id.*

financial reasons can be framed as a customary norm of international law.²²⁶ The Programme of Action set forth goals to strengthen and implement other international agreements.²²⁷ The concept of *pacta sunt servanda* requires that once a State is a party to an agreement, such a state may not act contrary to the object and purpose of that agreement.²²⁸ The United States is a party to several of the agreements that the ICPD is meant to strengthen.²²⁹ Since the denial of funding for non-financial reasons is contrary to the object and purpose of the Programme of Action, it follows that the denial of funding for non-financial reasons is also contrary to the object and purpose of the agreements that the Programme of Action is meant to implement.

Second, even if such an obligation was recognized, one of the fundamental weaknesses of the United Nations is the lack of any effective centralized enforcement mechanisms.²³⁰ This does not mean, however, that the obligation ceases to exist. The legitimacy of International Law does not depend on strict adherence to the processes of traditional and familiar institutional forms.²³¹ Rather, the international community may deem the United States' denial of UNFPA funding for non-financial reasons, moralistic and politically suspicious. This may then result in heightened resistance to cooperation with the United States on other issues that the Bush Administration has deemed more strategically important.²³²

V. CONCLUSION

While a measure of Presidential discretion in the realm of Foreign Affairs is necessary, it should not be available as an insulated field where political supporters may go to get their campaign favors repaid. This is especially true with regards to a sensitive topic like abortion, where the domestic

226. *Id.* at 334. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987).

227. See Women's Reproductive Rights, *supra* note 212.

228. See Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 26, 1155 U.N.T.S. 331. See also IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 620 (5th ed. 1998).

229. The preamble of ICPD reaffirms Human Rights in these agreements. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976); The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 3, U.N. Doc. A/810 (1948). Together, these agreements form the International Bill of Rights.

230. Sadasivam, *supra* note 211, at 334.

231. *Id.* at 333.

232. As this Comment was going to publication, the United States embarked upon the early stages of the disarmament of Iraq. As events have unfolded in the international community, these proposals have rung all too true. The author urges readers to bear this in mind over the coming months, as questions about international law become increasingly common and the answers take on an unprecedented relevance.

debate is hotly contested and largely religious. The U.S. is trying to rally support from the U.N. and build trust between nations with vastly diverse cultures and religions. Now is not the time to insist on the infusion of a conservative ideological agenda into international agreements. This is not the meaning of democracy in America. The mere attachment of a foreign policy label should not permit circumvention of domestic constitutional restrictions under these circumstances.

When made pursuant to the FAA, foreign assistance for family planning is about development assistance, not abortion. If the United States claims to support international cooperation for development and values the participation of NGO's, then the recent decision to withdraw UNFPA funding is illogical and runs contrary to government policy. The decision's hypocritical legal rationale breeds international contempt for the American political agenda, and sets the stage for challenges to U.S. foreign policy under National and International Law.

To focus so singularly on the abortion issue in international affairs is short sighted. As the need for international alliances becomes increasingly apparent, the issue of foreign assistance for family planning should not be overlooked. The legal underpinnings of these funding decisions and their treatment in U.S. foreign policy have important implications as reflections of domestic law and politics, and as potential dealmakers or breakers in the international community.

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