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April 13, 2005

The President
The White House
Washington, DC 20500

Dear Mr. President:

It has come to my attention that two federal grant programs are conditioning awards to U.S.-based groups on the signing of certain organization-wide policy pledges. This requirement interferes with free speech and may reduce the effectiveness of grantees. I am writing to ask you to preserve the First Amendment by instructing federal agencies not to enforce this potentially unconstitutional policy.

At issue are provisions related to organizations receiving funds under your Emergency Plan for AIDS Relief and the Trafficking Victims Protection Reauthorization Act. The *Wall Street Journal* reported this month that your Administration has begun to require American organizations receiving global AIDS funds to have a policy explicitly opposing prostitution.[1] As confirmed by Global AIDS Coordinator Randall Tobias on March 2, this move is subsequent to a Department of Justice reversal on the constitutionality of such a policy.[2] I have since received a copy of a Department of Justice opinion letter to the Department of Health and Human Services (HHS) discussing this reversal.[3]

The basic legal question is whether the government can put otherwise unconstitutional restrictions on American groups as a condition of receiving federal

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[1] *Bush Ties Money for AIDS Work To a Policy Pledge*, Wall Street Journal (Feb. 28, 2005).

[2] House Appropriations Committee, Subcommittee on Foreign Operations, Export Financing and Related Programs, Testimony of Global AIDS Coordinator Randall A. Tobias, *Hearing on International HIV/AIDS Assistance* (March 2, 2005).

[3] Letter from Acting Assistant Attorney General Daniel Levin to Alex M. Azar, General Counsel, Department of Health and Human Services (Sept. 20, 2004) (attached).

funds. The government may constitutionally place limitations on how groups *spend* federal funds, and in fact, such a limitation is already in place: All organizations receiving U.S. global AIDS or trafficking funding must comply with a requirement not to spend it to promote, support or advocate "the legalization or practice of prostitution."[4]

What is new is the decision by the Administration to require American organizations to adopt a policy explicitly opposing prostitution as a condition of receiving a grant. Until now, the free speech provisions of the U.S. Constitution have been understood as prohibiting the government from requiring American organizations to sign pledges to support specific government policies.

I understand that numerous organizations believe the new policy could be counter-productive. Prostitution unquestionably poses serious health, psychological and physical risks for women, men, and children. Many groups working to address the causes and consequences of prostitution, however, are concerned that the pledges will increase stigma and fears of legal reprisal among this vulnerable population, making it more difficult to bring them health services and viable economic alternatives.

My primary concern, however, is the precedent that is being set. The change of opinion by the Justice Department and the Administration's demand of pledges from American groups represent a major departure from U.S. policy and a questionable divergence from First Amendment jurisprudence. I urge you to direct all federal agencies to fully respect the constitutional rights of U.S. organizations by not requiring these pledges.

The Department of Justice Reversal

In a cursory explanation of its reversal, the Department of Justice has cited outdated and irrelevant cases, while ignoring recent Supreme Court precedent on exactly the kinds of restrictions on speech imposed here.

Until recently, the Department of Justice apparently concurred with the idea that the Constitution prohibits blanket restrictions on the speech of U.S.-based groups. In a September 2004 letter sent to HHS, Assistant Attorney General Daniel Levin wrote:

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[4] The Trafficking Victims Protection Reauthorization Act states that "No funds made available to carry out this division... may be used to promote, support, or advocate the legalization or practice of prostitution." 22 U.S.C. § 7110(g)(1). The AIDS Act states that "No funds made available to carry out this Act ... may be used to promote or advocate the legalization or practice of prostitution or sex trafficking." 22 U.S.C. § 7631(e).

> I understand that earlier this year the Department of Health and Human Services (HHS) asked the Department of Justice (DOJ) whether HHS could implement certain provisions of the [Trafficking Victims Protection Reauthorization Act] and of the AIDS Act.[5] At that time, I understand that DOJ gave its tentative advice that the so-called "organization restrictions" set forth in [the Acts] could, under the Constitution, be applied only to foreign organizations acting overseas.[6]

According to Mr. Levin, however, lawyers at the Department of Justice "have reviewed the matter further and we are withdrawing that tentative advice."[7]

To support the Department's new interpretation of this issue, Mr. Levin stated that "there are reasonable arguments to support [these provisions'] constitutionality."[8] Mr. Levin cited two cases to support his assertion that the restrictions are permissible if they are "closely tailored to the purposes of the grant program."[9] But neither case appears particularly relevant to the policy at hand.

Mr. Levin cited *South Dakota v. Dole*,[10] a case that refers to the federal government's ability to use the spending power to influence states' implementation of a drinking age. This bears on the federal government's spending power under Article 8 of the Constitution and on states' powers after the 21st Amendment, legal issues far different from limitations on the First Amendment rights of a nongovernmental organization.

Mr. Levin also cited *American Communications Association v. Douds*,[11] in which the Court upheld Congress' denial of certain benefits to unions with Communist leaders. The McCarthy-era policy was, in a similarly worded later statutory incarnation, held unconstitutional by a decision criticizing *Douds'* reasoning.[12] And a quarter-century later, the Supreme Court stated:

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[5] 22 U.S.C. § 7110(g)(2) and 22 U.S.C. § 7631(f).

[6] Letter from Mr. Levin to Mr. Azar, *supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] 480 U.S. 203, 206-08 (1987).

[11] 339 U.S. 382, 390-91 (1950).

[12] *United States v. Brown*, 381 U.S. 437, 460 (1965).

> With but three exceptions shortly after *Douds*, ... the Court's decisions have consistently rejected all inferences based merely on belief and association, and we do so today.[13]

Mr. Levin's letter, in short, does not provide persuasive legal justification for the Justice Department's about-face.

The First Amendment and Federal Funding

In more relevant cases, the Supreme Court has found that restrictions on the speech of a U.S. organization may be applied only to the program supported by federal funds, not to all of the organization's activities.

In *FCC v. League of Women Voters*, the Court invalidated a federal law that prohibited "editorializing" by public radio and television stations, because the prohibition applied not only to federally funded programs but to all activities of the stations.[14]

In *Rust v. Sullivan*, the Supreme Court upheld restrictions on American organizations' speech because the restrictions were limited to the program being funded.[15] Justice William Rehnquist wrote for the majority that the restrictions were upheld in part because "the regulations govern the scope of the ... *project's* activities, and leave the grantee unfettered in its other activities."[16]

In *Regan v. Taxation w. Representation of Washington*, the Court held that speech restrictions in a government subsidy were acceptable under the First Amendment because the organizations remained free to use other, nonfederal contributions for the prohibited activities.[17]

In these cases the Court has consistently held that American organizations' right to free speech cannot be abridged in whole simply because part of their funding comes from the federal government.

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[13] *Elrod v. Burns*, 427 U.S. 347, 366 (1976).

[14] 468 U.S. 364 (1984).

[15] 500 U.S. 173 (1991).

[16] *Id.* at 197 (emphasis in original).

[17] 461 U.S. 540 (1983).

International Policy

In 1984, President Reagan adopted the controversial "Mexico City policy." This ill-advised policy, which I strongly opposed, bans non-U.S. groups that receive U.S. funds from engaging in advocacy for safe and legal abortion. This policy denies funding to many worthy organizations, and restricts the ability of others to engage in policy debates in their own countries.

Whatever one thinks of the Mexico City policy, it is no precedent for applying pledge requirements to U.S. organizations. The legal rationale for the Mexico City policy is that the First Amendment does not apply to foreign groups; the free speech of U.S. organizations, in contrast, is protected.

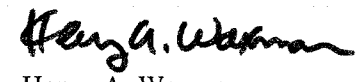
Conclusion

The requirement at stake here — to have an organization-wide policy opposing prostitution — may seem uncontroversial. But the concern among many public health and social service groups is that an explicit organizational policy condemning prostitution will both increase stigma and make it harder to work effectively with the vulnerable populations they are trying to reach.

Whether or not this is accurate, the precedent being set has far-reaching implications. It would be easy to demonize anyone who complains about the Administration's new policy as a "supporter of prostitution." But the fact that prostitution is a dangerous practice does not make the new policy right. Once a precedent is established, a variety of unconstitutional speech restrictions and policy requirements on U.S. organizations may follow.

I am writing to Attorney General Gonzales to request information on the Department's reversal. However, as Assistant Attorney General Levin noted in his memo, the President has the authority to decline to enforce an unconstitutional statute or portion of a statute. I urge you to exercise this power by directing your Administration not to apply this policy to American organizations.

Sincerely,



Henry A. Waxman
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