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July 15, 2005

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

On April 13, 2005, I wrote to you and to the President about two federal grant programs that had begun conditioning grants to U.S.-based groups on the signing of certain organization-wide policy pledges.¹ I was concerned that this was not only bad policy, but also unconstitutional. I am writing again because the answer that I have just received from the Department of Justice is not satisfactory.

The programs at issue are the federal anti-trafficking and global AIDS programs.² Though foreign groups had since 2003 been required to take a public position opposing prostitution, U.S. groups, until recently, had not. In fact, the 2004 USAID policy directive on the AIDS funds referred to an initial Justice Department determination that the requirement would not apply to U.S. groups: "The US Government has determined that it is appropriate to apply the requirement set forth in section 301(f) only to foreign organizations, including non-exempted public international organizations (PIOs)."³

¹ Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales (Apr. 13, 2005) (attached).

² Trafficking Victims Protection Reauthorization Act, codified 22 U.S.C. §7110(g)(2); AIDS Act (Appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies), codified 22 U.S.C. §7631(f).

³ United States Agency for International Development, *Acquisition & Assistance Policy Directive 04-04 (Revision 2), Implementation of the United States Leadership Against IV/AIDS, Tuberculosis and Malaria Act of 2003 — Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking* (July 16, 2004) (attached).

In September 2004, however, the Justice Department reversed its prior interpretation and advised the Department of Health and Human Services that these pledges could be applied to U.S. groups.⁴ My April 13 request noted the constitutional problem and sought “any opinion letters or other documents detailing the Department’s prior interpretation” of the relevant provisions of law.⁵

I received a response written by Assistant Attorney General William E. Moschella on June 27.⁶ Mr. Moschella argues that two laws passed in 2003 mandated the pledges and that “there are reasonable arguments to support the organization restrictions enacted by Congress.”⁷ He denied my request for copies of the Department’s opinion letters, writing:

There are substantial confidentiality interests associated with any such documents, which would consist of advisory and deliberative materials and internal legal analyses. Although we appreciate your interest in any such documents, their disclosure outside the Executive Branch would harm the deliberative processes of the Executive Branch and disrupt attorney-client relationships.⁸

This characterization does not appear to be consistent with Justice Department practice. Contrary to Mr. Moschella’s implication that the disclosure of “such documents” would harm both the deliberative process and the attorney-client relationship, the Department already makes many of its opinions available to the public. U.S. law in fact requires that some opinions be printed and distributed.⁹ In addition, the Office of Legal Counsel keeps a website of many of the Department’s opinions from recent years, stating: “The Attorney General has directed the Office of Legal Counsel to publish selected opinions for the convenience of the executive, legislative, and judicial branches of the government, and of the professional bar and the general public.”¹⁰

⁴ Letter from Acting Assistant Attorney General Daniel Levin to Alex M. Azar, General Counsel, Department of Health and Human Services (Sept. 20, 2004) (attached).

⁵ Letter from Rep. Henry A. Waxman to Attorney General Alberto Gonzales, *supra* note 1.

⁶ Letter from Assistant Attorney General William E. Moschella to Rep. Henry A. Waxman (June 27, 2005) (attached).

⁷ *Id.*

⁸ *Id.*

⁹ 28 USC §521.

¹⁰ United States Department of Justice, Office of Legal Counsel, *Memoranda and Opinions* (online at <http://www.usdoj.gov/olc/opinions.htm>).

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Release of the opinion letters could be embarrassing to the Department because it appears that the Department's original interpretation of the 2003 laws was that they could not constitutionally be applied to U.S. organizations. However, embarrassment is not a reason to withhold documents, and Mr. Moschella has offered no explanation of why disclosure of prior opinions on the issue at hand would be any more threatening to the deliberative process than the numerous opinions published by the Department annually.

I renew my request that the Justice Department provide all opinion letters or memoranda that the Department of Justice has provided to HHS and USAID on this issue. In addition, I ask that you explain why the Department reconsidered the constitutional question involved. I request a response by July 29.

Sincerely,

A handwritten signature in black ink that reads "Henry A. Waxman". The signature is written in a cursive, slightly slanted style.

Henry A. Waxman
Ranking Minority Member