

Congress of the United States
Washington, DC 20515

May 6, 2010

The Honorable Donald A. Gambatesa
Inspector General
U.S. Agency for International Development
Ronald Reagan Building
Washington, D.C. 20523-1000

Dear Inspector General Gambatesa:

We are writing to request an immediate audit of any and all uses of United States Government (USG) funds, or anticipated use of such funds, to support or engage in activities related to the proposed new constitution of Kenya (the "proposed constitution"). We submit this request on the basis of our deep moral obligation and ethical duty to rigorously pursue congressional oversight of potential violations of the Siljander Amendment by the current Administration. As you know, the Siljander Amendment appears as proviso eight under the heading "Global Health and Child Survival" of division F of Public Law 111-117 (123 Stat. 3035), as well as in previous foreign assistance appropriations laws, and states that "none of the funds made available under this Act may be used to lobby for or against abortion."

Kenya's current constitution includes no reference to abortion and abortion is not legally permitted in Kenya except to save the life of the mother. However, Kenya's new proposed constitution, which will be subject to a public referendum in August 2010, includes two articles that, if adopted, would enshrine a new constitutional right to abortion in Kenya and dramatically change Kenya's abortion law.

Article 26 of the proposed constitution states, in relevant part: "(1) Every person has the right to life; (2) The life of a person begins at conception....(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law." If promulgated, this article would radically change prevailing law in Kenya by creating a constitutional right to an abortion not only when the mother's life is in danger, but also when there is an undefined "need for emergency treatment," when the "health" of the mother is in danger, and "if permitted by any other written law."

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Article 43(1)(a) of the proposed constitution would in turn create a constitutional right “to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.” While “reproductive health care” is not defined in the proposed constitution, the Obama Administration has made it clear that “reproductive health” includes access to abortion.

On April 22, 2009, Secretary of State Hillary Clinton testified during a hearing before the House Foreign Affairs Committee that, “reproductive health includes access to abortion,” and “we are now an administration that will protect the rights of women, including their rights to reproductive health care.” With reference to access to abortion, Secretary Clinton went on to say, “it is my strongly held view that you are entitled to advocate... anywhere in the world, and so are we.”

Then on March 30, 2010, in response to a question as to whether abortion should be part of Canada’s global maternal health initiative, Secretary Clinton stated, “...you cannot have maternal health without reproductive health. And reproductive health includes contraception and family planning and access to legal, safe abortion.”

We firmly believe that such statements stand at odds with the Siljander Amendment, which strictly prohibits the use of U.S. taxpayer dollars to lobby for or against abortion. We also believe that due to the assertion of a right to “reproductive health” in Kenya’s proposed constitution and the Administration’s inclusion of access to abortion in its definition of “reproductive health,” any advocacy by the Administration in support of this proposed new constitution would constitute lobbying for abortion under Article 43 as well as Article 26.

There is no doubt that the Administration is advocating for adoption of the proposed constitution. On April 7, 2010, the U.S. Ambassador to Kenya, Michael Ranneberger, stated, “the Government of the United States welcomes Parliament’s overwhelming approval of Kenya’s harmonized draft constitution. The strong statements made by the [sic] President Kibaki and Prime Minister Odinga urging support of the draft constitution are particularly encouraging. The leaders of the coalition government have sent a clear and positive message to the Kenyan people that the implementation of a new constitution is critical to achieving political reform.”¹

¹ Statement by U.S. Ambassador Michael Ranneberger, Embassy of the United States of America, Nairobi, Kenya, April 7, 2010. Accessed at http://nairobi.usembassy.gov/speeches/2010-speeches/sp_20100407.html on May 3, 2010.

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Moreover, the Administration is not limiting itself to verbal support. Ambassador Ranneberger was quoted in the media on May 3, 2010, as stating that the United States has donated Sh154 million (\$2 million) for “civic education” with respect to the proposed new constitution, and that Washington is committed to providing additional funding for the referendum on the proposed new constitution.² On May 1, 2010, it was reported that the Kenyan government “is still waiting for the financial support promised by the United States government towards the facilitation of the ongoing referendum in the country.”³

We believe any expression of support for or opposition to the proposed new constitution (including by drafting, offering technical advice or providing foreign assistance of any kind that is designed to influence public approval in the upcoming plebiscite) unavoidably involves lobbying for or against abortion. This concern is particularly salient given the prominence of the abortion issue in the public debate over the referendum. In fact, the chairman of Kenya’s Committee of Experts on Constitutional Review (the “Committee of Experts”) has identified abortion as one of the four most contentious issues in the proposed constitution.⁴ Other media reports also identify abortion as one of the leading issues being debated in anticipation of the August referendum.⁵ Furthermore, interference by foreign envoys in Kenya’s debate about the proposed constitution, possibly including the issue of abortion, has raised objections by a Kenyan member of parliament reported by the Kenya Broadcasting Corporation.⁶

The Obama Administration’s advocacy in support of Kenya’s proposed constitution may constitute a serious violation of the Siljander Amendment and, as such, may be subject to civil and criminal penalties under the Antideficiency Act, 31 U.S.C. § 1341.⁷ Civil penalties may include suspension from duty without pay or removal from office of an officer or employee who violates the Antideficiency Act (31 U.S.C. § 1349(a)). Criminal penalties, applicable when an officer or employee “knowingly and willingly” violates the Act, include a fine of up to \$5,000, imprisonment up to 2 years, or both (31 U.S.C. § 1350). In addition, a violation of the Act triggers a mandated report from the applicable agency head to the President and Congress of all relevant facts and a statement of actions taken to address the violation (31 U.S.C. § 1351).

² Opiyo, Peter, *Voter Education Gets Sh154m boost from US*, *The Standard*, May 3, 2010. Accessed on the Internet at www.standardmedia.co.ke/news/InsidePage.php?id=2000008145&cid=159& on May 3, 2010.

³ Hassan, Burhan, *Kenya Voter Registration Law Under Fire by Church Leaders*, *World News Vine*, May 1, 2010, accessed at <http://worldnewsvine.com/2010/05/kenya-voter-registration-law-under-fire-by-church-leaders/> on May 3, 2010.

⁴ Kagiri, Anthony, *Kenyans Warned Over Constitution Lies*, *Capital News*, April 20, 2010. Accessed at <http://www.capitalfm.co.ke/news/Kenyanews/Kenyans-warned-over-Constitution-lies-8192.html> on May 4, 2010.

⁵ See, for example, Maliti, Tom, *Kenyan Churches Oppose Constitution Over Abortion*, *Associated Press*, April 30, 2010. Accessed at <http://www.google.com/hostednews/ap/article/ALeqM5iTdarPdLEaMQoY8c9dOsTfnobvbwD9FDCOIG1> on May 4, 2010.

⁶ Akoto, Judith, *Envoys Asked to Adhere to Diplomatic Practices*, *Kenya Broadcasting Corporation*, May 5, 2010. Accessed at <http://www.kbc.co.ke/story.asp?ID=63771> on May 5, 2010.

⁷ See U.S. General Accounting Office, *Principles of Federal Appropriations Law*, 3rd ed., Volume II, p. 6-82 (Feb. 2006).

Therefore, we request that you immediately undertake a thorough investigation and report on all past, current, or anticipated activities related to Kenya's proposed constitution that were or are being funded, or have been committed funding, pursuant to any U.S. foreign assistance appropriations laws that include the Siljander Amendment, including division H of P.L. 111-8 and division F of P.L. 111-117. (Further references to current activity or funding should be read to include any past or committed future activity or funding.) We request that the report of such investigation include:

- (a) USG funding and activities with respect to the Committee of Experts, including:
 - (1) any participation in the appointment of the members of the Committee of Experts;
 - (2) financial assistance for the Committee of Experts' salaries, facilities, equipment, or travel expenses; and
 - (3) financial assistance for the Committee of Experts' "civic education" campaign, both generally and specifically for "education" about the language and legal implications of articles 26 and 43(1)(a). If such financial assistance is being provided, how is the "education" being provided, who is providing it, where, when, and what population(s) are being targeted? Has any assistance been provided that supported any statements or activities by members of the Committee of Experts in opposition to any individual or group that is criticizing the proposed constitution on the basis that it would change the abortion law in Kenya?

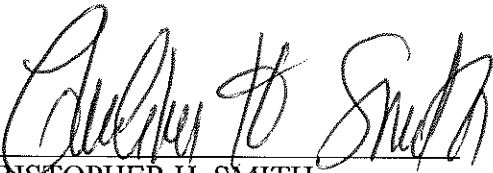
- (b) USG funding for or activities with non-governmental organizations (NGOs), including:
 - (1) the names of any NGOs that are receiving U.S. foreign assistance funds and that are undertaking any activity related to the proposed constitution, whether or not such activity is being funded with U.S. assistance;
 - (2) whether any NGO identified in paragraph (1) has a public position with respect to abortion;
 - (3) whether any NGO identified in paragraph (1) is funding abortion-related activities in Kenya with non-USG funding, and if so, what is the source of that funding;
 - (4) a description of any USG-funded NGO activity related to the proposed constitution, including any activity related to abortion, reproductive health, or involving any other terminology that might include abortion. If such activity involves verbal or written communications about articles 26 or 43(1)(a), then a verbatim quote of such communications or as detailed a description as possible, if a quote is not available, and the source of such quote or description;
 - (5) if abortion is an aspect of any NGO activity described in paragraph (4), a description of the stated objective of such activity, if available; and
 - (6) any assistance to an NGO that has supported any statements or activities in opposition to any individual or group that is criticizing the proposed constitution on the basis that it would change the abortion law in Kenya.

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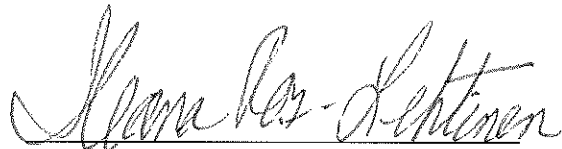
- (c) In addition to the statement made by Ambassador Ranneberger on April 7, 2010, any other statement(s) that have been made or activities that are being undertaken by the USG or a USG representative in support of the proposed constitution, including:
- (1) any statement(s) made publicly, and privately by any means whatsoever to a Kenyan government official or member of the Committee of Experts;
 - (2) any activities including the drafting or negotiation of the proposed constitution, and any activity related to the parliamentary debate of the proposed constitution, and both public and private activities that directly or indirectly influence or are intended to influence the position of the general public, a Kenyan government official or a member or members of the Committee of Experts;
 - (3) the date, location, target audience or population of and other details concerning any statement identified in paragraph (1) or activity identified in paragraph (2), including any statement or activity in opposition to any criticism of the proposed constitution on the basis that it would change the abortion law in Kenya.

We appreciate your urgent attention to this request. If you have any questions or comments, please contact Sheri Rickert, Minority Staff Director of the Subcommittee on Africa and Global Health, at 202-225-3765.

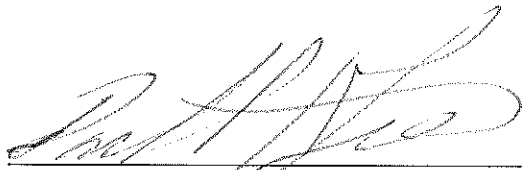
Sincerely,



CHRISTOPHER H. SMITH
Ranking Member
Subcommittee on Africa & Global Health



ILEANA ROS-LEHTINEN
Ranking Member
Committee on Foreign Affairs



DARRELL E. ISSA
Ranking Member
Committee on Oversight & Government Reform