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THE POLITICS OF GAGGING: THE EFFECTS OF THE GLOBAL GAG RULE ON DEMOCRATIC PARTICIPATION AND POLITICAL ADVOCACY IN PERU

I. INTRODUCTION

The United States is one of the world's largest donor countries to global family planning activities.¹ The majority of its international grants to foreign providers come under the auspices of United States Aid for International Development (USAID) grants, making the United States an important player in global family planning.² The 2001 reinstatement of the historically controversial "Mexico City Policy" attaches wide ranging aid conditionalities to the receipt of USAID funding, and effectively enables the United States to dictate the domestic and international family planning policies of recipient countries.³ Many of these funding restrictions relate to the provision of abortion services and counseling.⁴ In addition, some of the policy's provisions are aimed at curtailing political advocacy for liberalized abortion regulation by foreign recipient non-governmental organizations (NGOs).⁵ The restrictions of the U.S. policy prevent advocacy and civil participation by these recipient NGOs, and

1. Sarah Wildman, *Abort Mission*, AMERICAN PROSPECT, Jan. 1, 2004, at 1, available at 2004 WL 63582840.

2. *Report on Impact of the Mexico City Policy on the Free Choice of Contraception in Europe*, Eur. Parl. Ass., Doc. No. 9901, at 1 (2003), available at <http://www.assembly.coe.int/Documents/WorkingDocs/doc03/EDOC9901.htm> [hereinafter *Report on Impact of the Mexico City Policy*].

3. The Mexico City Policy is commonly referred to as the Global Gag Rule by the reproductive rights community because of its restrictions on speech and advocacy. It will be referred to as the "Global Gag Rule" or "Gag Rule" throughout this Note.

4. The provisions of the Gag Rule stipulate that a recipient country must agree that "it will not furnish assistance for family planning under this award to any foreign non-governmental organization that performs or actively promotes abortion as a method of family planning in USAID recipient countries." Presidential Memorandum on Restoration of the Mexico City Policy, 66 Fed. Reg. 61, 17303 (Mar. 28, 2001) [hereinafter Presidential Memorandum]. Additionally, in justifying this immediate reinstatement, President Bush expressed his belief that the Gag Rule would "make abortions more rare." Susan A. Cohen, *Global Gag Rule: Exporting Antiabortion Ideology at the Expense of American Values*, GUTTMACHER REPORT ON PUBLIC POLICY, June 1, 2001, at 1.

5. The Presidential memorandum that reinstated and amended the Global Gag Rule stipulated that "actively promoting abortion" is outlawed, and includes lobbying a foreign government to legalize or make abortion more available, and conducting a public information campaign on the benefits or availability of abortion. Presidential Memorandum, *supra* note 4, at 17306.

infringe on their right to free speech and their ability to speak out in a national democratic dialogue.⁶

This Note will examine the damaging effects of the Global Gag Rule on civil participation and political advocacy by NGOs focusing on reproductive rights in Peru and the overall effect this may have on the country's emerging conception of democracy. Peru provides an illustrative case study for the effects of the Global Gag Rule on women's health. Peru has some of the highest maternal death rates in the world; however, it also receives one of the largest amounts of USAID funding for family planning programs of any developing nation.⁷ Though many Peruvian NGOs have been forced to abandon their reproductive rights advocacy as a result of the Gag Rule, a few vocal Peruvian NGOs have continued to speak out against the rule itself.⁸ This continued advocacy in the face of the Gag Rule restrictions make Peruvian NGOs unique and provides valuable insight into the effects of the restrictions on speech and political advocacy.⁹

Part II will examine the global efforts to address unsafe abortions and place the Global Gag Rule in an international family planning context. This part will also provide a brief history of Peru's family planning program as well as an overview of the Global Gag Rule itself. Part III will examine USAID's democracy promotion program and the efforts of

6. See CENTER FOR REPRODUCTIVE RIGHTS, THE BUSH GLOBAL GAG RULE: ENDANGERING WOMEN'S HEALTH, FREE SPEECH AND DEMOCRACY, July 2003, at 1, <http://www.reproductiverights.org> [hereinafter THE BUSH GLOBAL GAG RULE] ("The Global Gag Rule erects barriers to the development of the democratic process in other countries . . ."). The Gag Rule has also failed to decrease the prevalence of abortion, the stated goal of President Bush in reinstating the restrictions. Susan A. Cohen, *Global Gag Rule: Exporting Antiabortion Ideology at the Expense of American Values*, GUTTMACHER REPORT ON PUBLIC POLICY, June 2001, at 1.

7. Judy Mann, *Bush's Gag Rule Decision Will Speak Loudly*, WASH. POST, Dec. 20, 2000, at C15.

8. The Gag Rule specifically limits advocacy for legalization of abortion, and many NGOs have taken this to outlaw advocacy against the Gag Rule itself. See *infra* note 67 and accompanying text for text and prohibitions of the Gag Rule; see *infra* note 155 and accompanying text for the conception among NGOs that the Rule prohibits speech even against the rule itself. Despite the Gag Rule's prohibition, Susana Galdos Silva, a leader in one of Peru's largest women's rights organizations, has repeatedly obtained specific permission from the United States to speak to the U.S. Senate and USAID officials about the effects of the Global Gag Rule on the women of Peru. This testimony is discussed further in Part III, though it must be noted here that Galdos Silva would not be able to speak out to her own congressional leaders about abortion under the Gag Rule. See Alyssa Rayman-Read, *The Sound of Silence*, 12 AM. PROSPECT 17 (2001).

9. See generally Susana Galdos Silva, Mexico City Policy: Effects of Restrictions, Testimony to Senate Foreign Relations Committee (July 19, 2001). This testimony will also be discussed further in Part IV.

NGOs to increase civil participation and advocacy and provide a brief history of Peru's own transition into democracy. This Note will explore the general theoretical and historical impact of NGOs on the democratic process and movements to increase civil participation, as well as the specific role that Peruvian NGOs play in their country. It will also investigate the real life effect of the Global Gag Rule on the democratic life of Peru.

This chilling of political activity in Peru by U.S.-imposed USAID restrictions is even more startling if one considers one of the other main objectives of USAID: to promote and facilitate democracy in emerging democracies.¹⁰ As an emerging and tenuous democracy, Peru presents a significant challenge to political activists, a challenge that is not made easier by the Gag Rule restrictions on political advocacy. Therefore, Part III will conclude with an analysis of the conflicting obligations placed on USAID in conducting a democracy project while monitoring NGO compliance with the restrictions on speech and political activity imposed by the Global Gag Rule.

Part IV will address the continued need for family planning funding and examine NGO reliance on gagged U.S. funding, as well as the levels of funding needed to accomplish international family planning goals. Finally, Part IV will recommend a course of action intended to move Peruvian NGOs and other foreign recipients away from reliance on USAID funding, allowing Peru to create its own, regionally appropriate, family planning and reproductive rights agenda through free and informed democratic debate and advocacy without constraint by USAID restrictions.

II. THE EVOLUTION OF INTERNATIONAL FAMILY PLANNING AND THE GLOBAL GAG RULE

A. Placing the Global Gag Rule in Context: Trends in International Family Planning

Globally, an estimated 13 percent of all maternal deaths are attributed to unsafe abortion procedures.¹¹ This is the equivalent of a large airplane

10. See USAID, http://www.usaid.gov/about_usaid/ (containing general information on the USAID objectives and a history of the organization). See also USAID, http://www.usaid.gov/our_work/democracy_and_governance/ (containing specific information on the organization's promotion of democracy across the world).

11. The World Health Organization estimates that of the "approximately 600,000 pregnancy related deaths each year, approximately 78,000 are related to complications resulting from unsafe abortions." Alan Guttmacher Institute, *Abortion in Context: United States and Worldwide*, 1 ISSUES IN BRIEF 4 (1999).

crashing every six hours, day and night.¹² As a result, nations at the Cairo International Conference on Population and Development (ICPD) identified illegal or clandestine abortion as a major public health problem.¹³

Clandestine abortion is recognized as a pressing issue by the international health community and has prompted heated discussion about how best to confront this epidemic.¹⁴ Because of the religious and political implications of a nation's abortion policy, the international health community has agreed to allow individual countries to make their own abortion policies.¹⁵ A plan of action was created at the Cairo ICPD that outlined goals for reducing maternal deaths, increasing access to family planning, and facilitating community education about reproductive health.¹⁶ Each country was left to implement the plan according to its national laws and religious or ethical values.¹⁷

The ability to independently determine a national abortion policy has allowed many countries to address the dangers of illegal abortion, while continuing to outlaw abortion itself.¹⁸ This has been the case in Peru.¹⁹

12. *Report on Impact of the Mexico City Policy*, *supra* note 2, at 6. The World Health Organization estimates that between 1995 and 2000 unsafe abortions resulted in about 78,000 maternal deaths. Sonia Correa & Judi Brown, *Abortion is a Global Political Issue*, WIN NEWS, July 1, 2003, at 4, available at 2003 WL 15940953. This number does not include the scores of women who are permanently injured because of these procedures and require extensive post-abortion care. For a brief description of post-abortion care, see SERVICE DELIVERY IMPROVEMENT DIVISION, USAID, POSTABORTION CARE (PAC) MEETING WOMEN'S HEALTH CARE NEEDS AFTER MISCARRIAGE AND UNSAFE ABORTION (2003) [hereinafter USAID, PAC].

13. Correa & Brown, *supra* note 12, at 2.

14. CENTER FOR REPRODUCTIVE RIGHTS, *BREAKING THE SILENCE: THE GLOBAL GAG RULE'S IMPACT ON UNSAFE ABORTION* 23 (2003) [hereinafter *BREAKING THE SILENCE*]; but see Jill M. Braken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 *IND. INT'L & COMP. L. REV.* 197 (1995) (arguing that access to a legal abortion is an international human right based on various treatises, resolutions, and international customary law).

15. "Measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process." Programme of Action of the ICPD, ch. 8.25 (1994), available at http://www.unfpa.org/icpd/icpd_poa.htm.

16. GLORIA FELDT, *THE WAR ON CHOICE* 221 (2004).

17. Kaci Bishop, *Politics Before Policy: The Bush Administration, International Family Planning, and Foreign Policy*, 29 *N.C. J. INT'L L. & COM. REG.* 521, 526 (2004).

18. For example, many countries, including Peru, allow for post-abortion care and other methods of family planning such as contraceptive use, though they continue to outlaw abortion. See, e.g., USAID, PAC, *supra* note 12.

19. PERU PENAL CODE arts. 114-120 (making abortion generally illegal, but allowing exceptions if the mother's life is at risk or faces the threat of severe bodily injury). However, Peru has also invested millions in its family planning activities, and it addresses

Peru has some of the world's most restrictive abortion laws, highest rates of abortion, and highest maternal death rates.²⁰ It also receives one of the largest amounts of USAID funding for reproductive health and family planning programs of any developing nation.²¹ Over 350,000 Peruvian women still obtain illegal abortions annually,²² resulting in the hospitalization of one in seven women who receive them.²³ Peru has an abortion-related mortality rate that is estimated at twenty times the registered U.S. rate.²⁴ Illegal abortions, and complications from these back-alley procedures, are the second leading cause of maternal death in Peru, accounting for 22 percent of the overall maternal death rate.²⁵ The overall maternal mortality rate is 265 deaths for every 100,000 live births, and an estimated five women a day die from complications during pregnancy, delivery, or postnatal complications.²⁶

In light of these tragic statistics, it is not surprising that the Peruvian government declared the 1990s the Decade of Family Planning.²⁷ The main instruments of Peruvian population policy are the National Population Law and the Program on Reproductive Health and Family Planning 1996–2000.²⁸ Both bodies of legislation cite the need to encourage free

post-abortion care and other aspects of family planning in an effort to decrease maternal mortality. CENTER FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, LATIN AMERICA AND THE CARIBBEAN, PERU 169 (1997) [hereinafter WOMEN OF THE WORLD].

20. Only 35 percent of women live where abortion is permitted to save the woman's life or to prevent severe injury as Peru allows. Alan Guttmacher Institute, *Abortion in Context: United States and Worldwide*, 1 ISSUES IN BRIEF 3 (1999). Peru has an abortion rate that is estimated to be about sixty abortions per one thousand women, coming in ahead of all other Latin American countries. *Id.* at 4. Peru's abortion-related maternal mortality rate is 22 percent. WOMEN OF THE WORLD, *supra* note 19, at 172.

21. Judy Mann, *Bush's Gag Rule Decision Will Speak Loudly*, WASH. POST, Dec. 20, 2000, at C15.

22. Marianne Mollmann, Carnegie Council on Ethics and International Affairs, *Gagging Democracy*, HUMAN RIGHTS DIALOGUE 2.9, SPRING 2003: "MAKING HUMAN RIGHTS WORK IN A GLOBALIZING WORLD" at 2, available at <http://www.carnegiecouncil.org/printerfriendlymedia.php/prmID/943>.

23. BREAKING THE SILENCE, *supra* note 14, at 26. See *infra* Part IV for additional discussion on the the struggle across the globe to maintain sufficient levels of funding for family planning NGOs.

24. Correa & Brown, *supra* note 12, at 4.

25. WOMEN OF THE WORLD, *supra* note 19, at 172.

26. *Id.* at 163. The Center for Reproductive Law and Policy changed its name to the Center for Reproductive Rights. Documents from this organization in both its incarnations are cited in this Note. For information on this agency name change, see <http://www.reproductiverights.org/about.html#name>.

27. WOMEN OF THE WORLD, *supra* note 19, at 167.

28. *Id.* at 169.

and informed reproductive choice by individual couples and propose agency goals to reduce the number of deaths among mothers and children.²⁹ The Peruvian Constitution also established a national objective to raise awareness and protect the right of individuals and families to make their own free decisions about reproduction and family planning.³⁰ The Peruvian government has recognized reproductive health as a fundamental human right,³¹ and has created a major family planning campaign, *Reprosalud*,³² which has received over twenty-five million dollars of USAID funding.³³

Despite the clear commitment of the Peruvian government to promote maternal health and increase family planning services, abortion remains illegal in Peru.³⁴ And though roughly one third of all pregnancies in Peru end in abortion, it is still considered “a crime against life, body, and health.”³⁵ The Peruvian Penal Code prohibits abortion unless it is conducted in order to save the woman’s life.³⁶ Though there are mitigating

29. Law on National Population Policy (Legislative Decree No. 346), July 6, 1985, art. 1; WOMEN OF THE WORLD, *supra* note 19, at 170. Though Peru prohibits most abortions, counseling for abortion is not illegal in the country and may play an important part in some couples’ “free and informed” choice when faced with severe health risks. However, even this often life-saving counseling may be prohibited by the Global Gag Rule.

30. WOMEN OF THE WORLD, *supra* note 19, at 169.

31. *Id.* at 170.

32. *Reprosalud* is a massive public health and reproductive campaign that is being undertaken by the Manuela Ramos Movement (Manuelas). The Manuelas organization has a long history of developing women-centered, progressive programs to address women’s health issues. See generally JUDY BRUCE & DEBBIE ROGOW, POPULATION COUNCIL, QUALITY, CALIDAD/QUALITE: ALONE YOU ARE NOBODY, TOGETHER WE FLOAT: THE MANUELAS RAMOS MOVEMENT (2000).

33. See Mann, *supra* note 21. Unfortunately, the Manuelas had to abandon their long standing efforts to establish more liberal abortion laws in Peru in exchange for the money to fund *Reprosalud*. See *infra* Part III.C.

34. Peru is not alone in severely restricting access to legal abortions. Only 41 percent of all countries in the world have completely unrestricted abortion access. ALAN GUTTMACHER INSTITUTE, SHARING RESPONSIBILITY: WOMEN, SOCIETY AND ABORTION WORLDWIDE 21–22 (1999). A possible reason that Peru retains strict abortion laws is that 81 percent of the population of Peru is Catholic, though there may be other contributing factors as well. CIA WORLD FACTBOOK, PERU COUNTRY PROFILE, available at <http://www.cia.gov/cia/publications/factbook/geos/pe.html>. It is worth noting that abortion is not available for severe socioeconomic hardship in Peru as it is in 20 percent of the world’s countries. With 54 percent of Peru’s population living in severe poverty, it is likely that were this economic exception created, many more abortions would be obtained. Barbara J. Fraser, *How Peru Shelved its Registry of Conceived Persons*, PANOS FEATURES, Oct. 22, 2003 <http://www.panos.org.uk/newsfeatures/featuredetails.asp?id=1159>.

35. WOMEN OF THE WORLD, *supra* note 19, at 172; PERU PENAL CODE arts. 114–20.

36. *Id.*

factors that may ease some criminal responsibility, these exceptions are rarely invoked and not commonly understood.³⁷

The situation in Peru is just one example of the individualized regional policies that local governments have developed in order to address the ICPD family planning agenda.³⁸ However, against the backdrop of an international consensus on the need to address abortion with individualized regional education and legislation, the United States has imposed the Global Gag Rule.³⁹ The Gag Rule restrictions enforce a broad anti-abortion policy that effectively foists the moral and ethical values of the United States' conservative and religious right on international health advocates, and presses a pro-life agenda on any foreign NGOs receiving U.S. funding.⁴⁰

Ironically, though the United States does not agree with the ICPD consensus on the need to create regional abortion policies, it does agree with the ICPD assessment of maternal mortality rates and the dangers illegal abortions pose to women across the globe.⁴¹ The United States' duplicitous response to this danger has been to impose the Gag Rule while devoting over sixty million dollars to USAID projects aimed at reducing maternal mortality, and establishing a thirty-three country, multimillion dollar effort to address complications that arise from the same unsafe abortions.⁴²

U.S. reproductive rights organizations, as well as international agencies and family planning advocates, have documented the widespread and

37. BREAKING THE SILENCE, *supra* note 14, at 26.

38. Other regions have developed different strategies to address abortion. In 25 percent of all countries, abortion is permitted only to save a woman's life or is not permitted on any grounds. Conversely, in other countries that have legalized abortion, there are other restrictions such as the need for permission from a husband or parent, mandatory counseling, or limited authorized providers (the U.S. state laws would fall into this category). In addition, some countries that have legalized abortion have not advertised its availability. For example, in India where abortion has been legal for decades, many women still do not know that it is available. ALAN GUTTMACHER INSTITUTE, ISSUES IN BRIEF, ABORTION IN CONTEXT: UNITED STATES AND WORLDWIDE (1999) [hereinafter ABORTION IN CONTEXT].

39. CAIRO +5: ASSESSING US SUPPORT FOR REPRODUCTIVE HEALTH AT HOME AND ABROAD (1999).

40. See generally Mollmann, *supra* note 22.

41. See, e.g., USAID, PAC, *supra* note 12; Letter from Duff Gillespie, former Deputy Assistant Administrator of the Population, Health and Nutrition Center, *Mexico City and Postabortion Care*, Sept. 10, 2001, available at http://www.usaid.gov/our_work/global_health/pop/mcpolicy_memo.html.

42. USAID, PAC, *supra* note 12. Arguably, these abortion-related complications are being created by USAID itself by imposing Gag Rule restrictions on abortion provision, making a dangerous clandestine abortion more likely.

damaging effects of unsafe abortions on women's reproductive health.⁴³ However, since the Gag Rule's reinstatement, the number of unsafe abortions has increased.⁴⁴ Paradoxically, family planning organizations have found that a country's abortion rate does not closely correlate with whether abortion is legal or easily accessible.⁴⁵ "20 million of the 46 million abortions performed annually worldwide occur in countries with highly restrictive abortion laws."⁴⁶

While the legality of abortion does not seem to affect its prevalence, what does appear to be affected is the death rate of women undergoing abortions.⁴⁷ In developing countries where abortion is more likely to be illegal, there are 330 deaths per 100,000 abortions while in developed countries, where abortion is more likely to be legal, there are 0.2–1.2 deaths per 100,000 abortions.⁴⁸ It appears that the legalization of abortion does little to affect the prevalence of abortion in a country, while it drastically affects the numbers of women who die as a result.⁴⁹ The Gag Rule has failed to accomplish its goal to "reduce the incidence of abortion."⁵⁰ It also runs against the global trend towards liberalizing abortion rights, and most distressingly, further endangers the health of women all over the world by prohibiting any local advocacy to increase the legality of abortions, which limits women's access to safe abortions.⁵¹

B. A Brief History of the Global Gag Rule

Abortion rights and federal funding of abortion-related activities have long been contentious issues in American policy.⁵² The debate over abor-

43. See generally *BREAKING THE SILENCE*, *supra* note 14; Population Action International DVD: Population Action International, Access Denied: US Restrictions on International Family Planning.

44. Wildman, *supra* note 1, at 2. It does not appear that the Gag Rule is achieving its stated purpose to "reduce the incidence of abortion." Cohen, *supra* note 4, at 1.

45. Abortion levels are high in Latin American countries (such as Peru) where abortion is highly restricted, and in any given year, thirty-four abortions per one thousand women are performed in developing countries where abortion is generally more often illegal, while thirty-nine are performed in developed countries where it is more often legal. *ABORTION IN CONTEXT*, *supra* note 38, at 3.

46. *Id.*

47. "When abortion is largely illegal and must be performed clandestinely, it is often unsafe; in such situations, complication rates and maternal morbidity skyrocket." *Id.* at 4.

48. *Id.* at 5.

49. *Id.* at 3, 5.

50. Cohen, *supra* note 4, at 1.

51. *Id.*

52. Larry Nowels, Foreign Affairs, Defense, and Trade Division, Population Assistance and Family Planning Programs: Issues for Congress, at 3, available at http://www.dec.org/pdf_docs/PCAAB120.pdf.

tion funding has raged within Congress for decades.⁵³ For years these political efforts focused only on the domestic policy of the United States.⁵⁴ However, in 1973, the Helms Amendment was enacted to prohibit the use of federal funding for abortion services in the United States—it also applied to the Foreign Assistance Act of 1961, thus restricting the use of federal funding in foreign development assistance as well.⁵⁵

The extension of the Helms prohibition to foreign funding was a watershed moment in global-U.S. family planning activities and marked a novel attempt to affect policy worldwide. It was also perhaps a harbinger of things to come in the United States.⁵⁶ The United States became increasingly committed to influencing foreign policies with the use of foreign aid conditionalities and began to more fully “explore the direct use of humanitarian assistance to achieve specific political ends.”⁵⁷ Policies became more ambitious, and in 1984 during Reagan’s presidency, the Global Gag Rule was introduced by Executive Order.⁵⁸ The Gag Rule went even further than the Helms Amendment and prohibited family planning centers and health care advocates from using their own, non-U.S. money to discuss the impact of abortions, educate women on the

53. See generally FELDT, *supra* note 16, at 9 (2004) (providing a brief discussion of the Hyde Amendment which restricted Medicaid funding for abortion). In the first five years of the 1980s there were thirty roll-call votes related to the issue of abortion. In the last five years of the 1990s, there were 144.” *Id.* at 23 (quoting Senator Olympia Snowe).

54. *Id.*

55. Nowels, *supra* note 52, at 4; Republican Senator Jesse Helms authored the Helms Amendment. Senator Helms continued his campaign to restrict reproductive rights in the United States and abroad as chairman of the Senate Foreign Relations Committee. As Chairman, Senator Helms refused to hold hearings on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is the only international human rights treaty that addresses family planning issues. Though CEDAW has been signed by over 150 countries worldwide, the United States remains the only industrialized country that has not ratified it. See generally WORKING GROUP ON THE RATIFICATION OF THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, HUMAN RIGHTS FOR ALL (2001), www.crlp.org/pub_fac_cedaw.html [hereinafter WORKING GROUP ON THE RATIFICATION OF CEDAW].

56. Encouraged by the success of the Helms Amendment, abortion proponents have proposed constitutional amendment or legislation to further prohibit abortion in every single Congress since 1973, though they have not succeeded in passing an absolute restriction on abortion. WORKING GROUP ON THE RATIFICATION OF CEDAW, *supra* note 55.

57. Humanitarian Policy Group, *Trends in US Humanitarian Policy*, HPG BRIEFING, Apr. 2002, at 1, available at <http://www.odi.org.uk/hpg/papers/hpgbrief3.pdf>.

58. Susan A. Cohen, *Abortion Politics and US Population Aid: Coping with a Complex New Law*, 26 INTERNATIONAL FAMILY PLANNING PERSPECTIVES 137, 137 (2000), available at <http://www.agi-usa.org/pubs/journals/2613700.pdf>.

availability of abortions, or advocate to their own governments for changes in restrictive abortion laws.⁵⁹

The Gag Rule remained in effect until 1993, when President Clinton revoked the order within two days of being sworn into office.⁶⁰ However, this respite was short lived; beginning in 1995, the Republican-controlled Congress pledged to make reinstatement of the Gag Rule a priority and pushed to enact it legislatively every year following its suspension.⁶¹ Congress was finally able to reinstate the Gag Rule in 1999 by holding up a congressional bill that provided over one billion dollars in back dues to the UN in exchange for reenactment of the regulations.⁶² Threatened with the loss of the United States' General Assembly vote in 2000,⁶³ President Clinton accepted reinstatement of the Gag Rule for one year.⁶⁴ However, in an attempt to limit its effect, President Clinton instructed USAID, the main implementing agency of the Gag Rule, to interpret its requirements in the least invasive manner.⁶⁵ When foreign NGOs were informed of the new U.S. policy, a vast majority of recipient organizations agreed to certify an agreement not to participate in abortion-related activities or advocacy in exchange for continued U.S. funding, but many clearly expressed that they were doing so "neither willingly nor easily."⁶⁶

Clinton's liberal interpretation of the Gag Rule was abandoned by President Bush,⁶⁷ who reenacted the Gag Rule in its strictest sense on his first business day in office.⁶⁸ Ironically, this day was also the twenty-eighth anniversary of *Roe v. Wade*, the United States Supreme Court de-

59. Wildman, *supra* note 1, at 1.

60. Cohen, *supra* note 58, at 137.

61. *Id.* at 137-38.

62. *Id.* at 137.

63. *Id.* at 137.

64. *Id.* at 145. However, as a result of this contentious passage, the Gag Rule was written to address the concerns of both sides of the abortion debate and represents a confusing maze of regulations and funding restrictions. This has created significant problems for foreign NGOs in their attempt to follow the confusing strictures of the rule; this vagueness has contributed in part to the silencing of NGO advocacy discussed later in this Note.

65. Nowels, *supra* note 52, at 5.

66. Cohen, *supra* note 58, at 138.

67. FELDT, *supra* note 16, at 203 (quoting Duff Gillespie, former Deputy Assistant Administrator of USAID, as stating, "Under the original Mexico City Policy, once the policy was made by the president, the political people explicitly gave it to the career people to implement in ways that would not harm the underlying programs. 'Let's continue to do the program,' we were told. While damage was done, it was minimized as much as possible. The big difference with the Bush Jr. gag rule is that it's much broader, it has a bigger agenda with zealots, if not fanatics, pushing it in a very aggressive way.").

68. THE BUSH GLOBAL GAG RULE, *supra* note 6.

cision upholding the right to an abortion in the United States.⁶⁹ In reinstating the Gag Rule, Bush announced that it was his “conviction that taxpayer funds appropriated should not be given to foreign nongovernmental organizations that perform abortions or actively promote abortion as a method of family planning in other nations.”⁷⁰ According to a White House spokesman, the reinstatement and renewed commitment to limiting foreign funding to promote U.S. political ideals signified a new approach to global family planning policy.⁷¹ Since President Bush’s Executive Order, there have been subsequent failed attempts in Congress to overturn the Global Gag Rule.⁷² With the gain in power of the conservative agenda throughout President Bush’s two terms, it is unlikely this deadlock will be changed in the near future,⁷³ and the aggressively pro-life agenda is likely to continue.⁷⁴

69. *Id.*

70. Presidential Memorandum, *supra* note 4.

71. Richard Boucher, White House Daily Briefing, Jan. 23, 2001, <http://www.state.gov/r/pa/prs/index.cfm?docid=12>.

72. Population Connection, *Senate Holds Hearing on Global Gag Rule*, LEGISLATIVE UPDATE: JULY 2001, at 1 available at http://www.populationconnection.org/Action_Alerts/alert200.html. In October 2001, the Senate approved language for an addition to the Foreign Operations Appropriations Act (H.R.2506). Press Release, Center for Reproductive Rights, *Senate Rejects Global Gag Rule* (Oct. 25, 2001), available at http://www.crlp.org/pr_01_1025gagrule.html. The added legislation, coined the “Global Democracy Promotion Act,” was designed to counteract the restrictions of the Global Gag Rule and found bi-partisan approval in a 96-2 vote. *Id.* Succumbing to a threat of a presidential veto, similar language had been struck down months earlier by the House in a 218-210 vote that stripped the pro-democracy amendment from the Foreign Relations Authorization Act (H.R.1646). Press Release, Center for Reproductive Rights, *House Retains Bush Global Gag Rule* (May 16, 2001), available at http://www.crlp.org/pr_01_0516ggrvote.html. More recent efforts have met the same end. In July 2003, the Senate again voted against the Gag Rule, recognizing its damaging effect on pro-democracy efforts across the world because of its restrictions on free speech. Statement by Nancy Northup, President of Center for Reproductive Rights (July 10, 2003), available at http://www.crlp.org/pr_03_0710ggr.html.

73. The 2003 vote in the Senate to repeal the Rule was close, and under pressure from the White House and the near certainty of a presidential veto, the House is unlikely to make another attempt to repeal the Rule. FELDT, *supra* note 16, at 213.

74. See, e.g., Cynthia Gorney, *Gambling with Abortion: Why Both Sides Think They Have Everything to Lose*, HARPER’S, Nov. 2004, at 33–46 (providing a detailed examination of conservative pro-life efforts to push increasingly restrictive abortion legislation with particular attention to currently challenged legislation, the “Partial Birth Abortion Ban”).

C. Text and Interpretation of the Global Gag Rule

The Gag Rule has gone through numerous revisions and reinstatements and has been the subject of much controversy both nationally and globally.⁷⁵ However, throughout its incarnations, the actual regulations have remained relatively consistent. Some of the most relevant text of the Global Gag Rule reads:

Section 13(I):

Abortion is a method of family planning when it is for the purpose of spacing births. This includes but is not limited to, abortions performed for the physical or mental health of the mother.

Section 13(iii):

To actively promote abortion means for an organization to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.

A) This includes but is not limited to, the following:

III) lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and

IV) conducting a public information campaign in USAID recipient countries regarding the benefits and/ or availability of abortion.⁷⁶

Efforts to “alter” the abortion policies of a foreign government, an activity prohibited by the Gag Rule, have consistently included communicating with national leaders and government officials.⁷⁷ Banned methods

75. See, e.g., Statement by Susana Galdos Silva, available at http://www.crlp.org/pr_01_0214ggrsilva.html (condemning the restrictions on advocacy and free speech and arguing that Peru has a right to determine its own answer to the public health problem of illegal abortions). In addition, European parliamentarians from the Netherlands, Denmark, Russia, and the United Kingdom held a congressional briefing on the dangers posed by the Bush administration’s reinstatement of the Global Gag Rule. REPRODUCTIVE FREEDOM NEWS, vol. XI, July/Aug. 2002, available at http://www.crlp.org/rfn_02_07.html#bw1; see also a letter to the Bush Administration from thirty-six organizations, urging him to repeal the Gag Rule’s restrictions on free speech. Organizations that signed the letter include Catholics for a Free Choice, Alan Guttmacher Institute, Planned Parenthood Federation, Advocates for Youth, and the ACLU. The full text of the letter and list of organizations is available at http://www.crlp.org/pr_01_1105ggr.html.

76. MEXICO CITY POLICY AND US INTERNATIONAL FAMILY PLANNING ASSISTANCE, DEMOCRATIC OFFICE FOREIGN POLICY BRIEFS (Jan. 2001), available at http://www.house.gov/international_relations/democratic/fpb_mexico?city.html.

77. Cohen, *supra* note 58, at 138.

of advocacy also include public education campaigns and organizing mass media or demonstrations to achieve increased reproductive freedom.⁷⁸ Similarly, outlawed activities related to the “promotion of abortion” include providing information to pregnant women that abortion is available as an option, even if abortion is legal in that country.⁷⁹ Illegal “promotion” also includes conducting a public information campaign in a USAID recipient country on the benefits or availability of abortion.⁸⁰ The Gag Rule also precludes NGOs from accessing key political forums such as parliaments and executive branch officials.⁸¹

As a result of these aid conditionalities, Peruvian NGOs have been gagged from speaking out about the dangers of clandestine abortion as well as addressing the overall effect of the Gag Rule itself. Susana Galdos Silva, a member of the Manuelas, a Peruvian women’s NGO, spoke to the U.S. Congress in 2001 about the impact of the Global Gag Rule on democracy and health in Peru with special permission from the U.S. Congress: “Yesterday your government gave assurances in court that I could speak freely about abortion. And because a judge has affirmed this understanding, I feel comfortable speaking out. When I return to my country tomorrow, I will again be silenced.”⁸² Galdos Silva was able to speak in the United States about the dangers of the Gag Rule, and the continued damage to women’s health created by Peru’s restrictive abor-

78. *Id.* The frustrating effect of the Global Gag Rule is that not only is direct advocacy prohibited, but many organizations are reluctant to even reveal when they have been prevented from speaking out because of the Gag Rule. Though the Gag Rule does not explicitly ban speech that reports on the silencing effect of the Gag Rule itself, many organizations have taken the ban to cover this sort of speech as well. Therefore, research and interviews with gagged NGOs are anonymous and specific examples of organizations being prevented from speaking out because of the Gag Rule are rare. In an interview I had with Marianne Mollman, a researcher and staff member at Human Rights Watch, she explained that statements about the Global Gag Rule’s effect on NGOs in South America were provided on an anonymous basis, and examples of gagged speech were purely anecdotal. *But see* Silva, *supra* note 9 (noting her inability to speak in her own country and lobby her own legislature though she could speak to the U.S. Congress through a special appeal for permission).

79. Nowels, *supra* note 52, at 7.

80. *Id.*

81. BREAKING THE SILENCE, *supra* note 14, at 15.

82. Silva, *supra* note 9. Silva has spoken to U.S. lawmakers frequently about the Gag Rule. She has met with USAID and State Department officials, congressional hearings, and press conferences but was gagged from discussing abortion even when U.S. officials asked her direct questions about the policy. After obtaining special permission from a court for the July hearings, Silva noted, “the Gag Rule has taken away my freedom to speak about an important issue in my country A freedom that I had to ask a judge to give me back, temporarily, so that I could speak to you today.” *Id.*

tion policy, though she could not lobby Peruvian lawmakers. By gagging all information and advocacy on abortion geared towards liberalizing abortion laws, the Global Gag Rule effectively “prevents [foreign NGOs] from addressing the causes of unsafe abortion by putting it on the political and social agenda.”⁸³

However, notwithstanding the Gag Rule’s fairly explicit language outlawing recipient NGOs from conducting abortion related advocacy, translating the statutory language to apply to actual service delivery⁸⁴ and advocacy is less clear.⁸⁵ This unclear application of the Gag Rule to reproductive choice activism and the unilateral ability of USAID to declare an activity restricted has resulted in continuous skirmishes between international health NGOs and anti-abortion groups.⁸⁶

83. BREAKING THE SILENCE, *supra* note 14, at 15. The levels of funding that an organization relinquishes as a result of refusing to accept the Gag Rule’s provisions cannot be underestimated. International Planned Parenthood Federation (IPPF), a major reproductive rights organization that collaborates with NGOs worldwide to increase access to reproductive health services, lost twelve million dollars in expected USAID funding because it refused to accept the conditions of the reinstated Gag Rule. See IPPF website, <http://www.heldtoransom.org/impact.asp> for the effect of the Gag Rule on IPPF. For additional information on family planning clinic closures, decreased overall access to family planning, and effects on other organizations, see FELDT, *supra* note 16, at 205–13.

84. For example, shortly after the Mexico City Policy was restored by President Bush, a letter was circulated by USAID reminding field officers that the administration continued to support post-abortion care activities, and that organizations that supported these activities were not to be sanctioned. It is not clear if this letter was translated or forwarded to participating organizations, but it seems possible that if clarification was needed for USAID officers themselves, then local foreign NGOs may have been confused about the legality of this service under the Gag Rule as well. See Letter from Duff Gillespie, Deputy Assistant Administrator, Population, Health and Nutrition Center, to Colleagues (Sept. 10, 2001), available at http://www.usaid.gov/our_work/global_health/pop/mcpolicy_memo.html.

85. See generally BREAKING THE SILENCE, *supra* note 14 (providing first hand accounts from regional NGOs on the difficulty of applying and understanding the Global Gag Rule). Not only do the Gag Rule restrictions prevent individual NGOs from participating in advocacy, but they may create an overall climate that discourages any type of family planning related activity in USAID recipient countries.

86. For example, according to Delicia Ferrando of Pathfinder International, a family-planning NGO working in Peru and other countries, signs pointing to family-planning departments were removed from public health centers in the capital, Lima. Fraser, *supra* note 34. See also Press Release, CHANGE, Charges Against USAID-Peru Are Completely False Asserts Center for Health and Gender Equity (Feb. 19, 2003), available at <http://www.genderhealth.org/pubs/PR20030219a.pdf>. See also Letter to Natsios, USAID Administrator, available at <http://www.genederhealth.org/pubs/NatsiosUSAIDPeruLetter021804.pdf>.

This constant conflict has made some NGOs skittish about being perceived as violating the Gag Rule and losing badly needed funding.⁸⁷ Some international family planning organizations have spoken publicly about the perceived harassment of pro-choice NGOs. For example, in response to false allegations that Peruvian officials had violated the Gag Rule, the Center for Health and Gender Equity stated:

Previous campaigns by these same actors have led to numerous audits and investigations of USAID-Peru, none of which has found any evidence of violations of U.S. policy. Clearly this is not about abortion. Instead, the constant harassment of USAID-Peru constitutes an attack on the basic human rights of women and men to make informed and voluntary choices regarding their reproduction and childbirth. It is time to stop this harassment and support the funding and programs needed to improve the lives of women and their families.⁸⁸

Similar allegations that the Gag Rule had been violated by various NGOs were made during an October 2003 regional health conference in Peru.⁸⁹ The event was hosted by the Peruvian Ministry of Health and leading Peruvian NGOs to address the dangers of clandestine abortions and discuss the country's population policy in general.⁹⁰ Conference presentations that were alleged to violate the Gag Rule and included in complaints to USAID were "information on rates of unwanted pregnancy, unsafe abortion, and maternal mortality in Peru."⁹¹ These presentations also focused on building the capacity of local health providers to address critical issues such as adolescent pregnancy, contraceptive delivery, quality of care, prevention of sexually transmitted infections, and maternal and child health.⁹² Though the allegation of a Gag Rule violation was immediately debunked by various international organizations,⁹³

87. NGOs in Peru have reported, "No one knows at what point it becomes prohibited speech. . . . if we attend a general conference and the issue of abortion comes up we can speak. But we don't know how much we can talk about it before it crosses over into not being permitted anymore. We for example, can do research on unsafe abortion. But if we draw conclusions, someone can say 'that's lobbying.'" *BREAKING THE SILENCE*, *supra* note 14, at 11.

88. *CHANGE*, *supra* note 86.

89. *Id.*

90. *Charges Against USAID-Peru are Completely False Asserts Center for Health and Gender Equity*, *US NEWSWIRE*, Feb. 19, 2004, at 3.

91. *CHANGE*, *supra* note 86.

92. *Id.*

93. *Id.* Additional controversy has developed in Peru in response to recent attempts by the Peruvian Ministry of Health to allow the "morning after pill" in the country. This pill is a form of emergency contraception that may be taken immediately after unprotected sex and will prevent pregnancy. The pill is available in many countries from

it sparked significant debate in Peru about compliance by Peru's NGOs and the possibility of other regional violations.⁹⁴ Because of continued harassment, and because USAID has the sole ability to decide whether an NGO violated the Gag Rule stipulations, many organizations have erred on the side of caution and avoided any activity that could be construed as lobbying or activism.⁹⁵

Agency fear of lost funding as a result of a perceived violation of Gag Rule stipulations is not unfounded.⁹⁶ The Bush administration refused to continue longstanding funding to the United Nations Population Fund (UNFPA), an internationally funded source of family planning assistance funds for developing countries, because of allegations of Gag Rule violations.⁹⁷ Anti-choice groups claimed that UNFPA was involved in promoting coercive abortions and sterilizations in China, and as a result of heavy pressure from anti-choice groups, the U.S. State Department refused to distribute thirty-four million dollars appropriated by Congress

USAID for women seeking to prevent pregnancy. However, many anti-abortion groups see it as a non-surgical abortion. The pill is not outlawed by the Global Gag Rule and is being promoted by USAID and the World Health Organization, an international agency which receives USAID gagged funding. Despite the legality of the pill under USAID restrictions, 6000 Peruvians marched on Lima, demanding that President Alejandro Toledo overrule ongoing research on the pills' effect and halt efforts to distribute the pill women in Peru. Lifesite, *Peru's Health Minister is Pushing Forward with Morning After Pill*, Oct. 12, 2004, available at <http://www.lifesite.net/ldn/2004/oct/04101204.htm>.

94. For the USAID response to the allegations, see head of USAID, Andrew Natsios' letter to the international community, available at www.genderhealth.org/NatsiosUSAIDPeruLetter021804.pdf.

95. BREAKING THE SILENCE, *supra* note 14, at 10; Memorandum for all Contracting Officers and Negotiators, Restoration of the Mexico City Policy—White House Memorandum for the Acting Administrator of the US Agency for International Development (Revised), 66 Fed. Reg. 17, 303 (Mar. 29, 2001).

96. Though the Gag Rule is intended to restrict abortion related activity, the loss of funding for many agencies also results in a decrease in other available programs not covered by the Gag Rule, such as HIV/AIDS funding. For example, in Cambodia over three million dollars were lost that would have been used for HIV/AIDS funding and in Bangladesh fourteen individual family planning clinics were threatened with closure for lack of funding, ostensibly leaving the women in that region with less access to any kind of reproductive health services. See ACT UP, *How Bush's Policy Punishes Women Worldwide*, Aug. 5, 2004, http://www.actupny.org/reports/Bangkok/bush_gagrule.html; Marwaan Macan-Markar, *U.S. Bullying Tactics Come Under Fire at Meet*, Oct. 7, 2003, available at <http://www.commondreams.org/headlines03/1007-03.htm>.

97. Kaci Bishop, *supra* note 17, at 533–40; see also Susan A. Cohen, *Bush Bars UNFPA Funding, Bucking Recommendation of its Own Investigators*, GUTTMACHER REPORT, Oct. 2002, available at <http://www.guttmacher.org/pubs/tgr/05/4/gr050413.html>.

for UNFPA.⁹⁸ Despite later findings of the United States' own investigators that there was no evidence of illegal coercive abortion, the administration continued to refuse to release the funds.⁹⁹

III. DEMOCRATIC PARTICIPATION AND THE GLOBAL GAG RULE

Not only does the Global Gag Rule conflict with the international consensus established at the ICPD to allow states to determine their own abortion policies, it also conflicts with other major objectives of U.S. foreign policy.¹⁰⁰ USAID, the U.S. agency that distributes family planning funding to foreign NGOs, has many objectives in its involvement with foreign governments.¹⁰¹ While the Global Gag Rule restrictions operate within the USAID family planning program, USAID also maintains an extensive democracy promotion effort and pours money into developing democracies across the globe in order to facilitate and encourage their transition into democratic governance and foster civil participation.¹⁰² Over 70 percent of all USAID field missions worldwide have identified strategic objectives related to democracy and governance, making this one of the agency's major missions.¹⁰³

98. CENTER FOR REPRODUCTIVE RIGHTS, THE ANTI CHOICE MEASURES OF THE BUSH ADMINISTRATION, http://www.reproductiverights.org/hill_pri_bushadmin.html; see also Robert B. Bluey, *UNFPA Supports "Coercive Abortion" in China, New Evidence Suggests*, CNSNews.com, Mar. 7, 2003, <http://www.cnsnews.com/ViewCulture.asp?Page=%5CCulture%5Carchive%5C200303%5CCUL20030307a.html> (discussing pro-life allegations of coerced abortions).

99. See Cohen, *supra* note 97; see also BREAKING THE SILENCE, *supra* note 14, at 24; FELDT, *supra* note 16.

100. THE BUSH GLOBAL GAG RULE, *supra* note 6 (noting that the Global Gag Rule erects barriers to the development of the democratic processes, the promotion of civil society, and the enhancement of women's equality and participation in the political process. "Thus the Gag Rule severely undermines bedrock U.S. foreign policy objectives"). See also Mollmann, *supra* note 22.

101. The USAID homepage asserts that the agency supports long term and equitable economic growth and furthers U.S. foreign policy objectives by supporting economic growth, global health, agriculture, democracy, and humanitarian assistance. The agency conducts multiple programs across the world to accomplish these objectives. See the USAID website, http://www.usaid.gov/about_usaid/, for overall information on the agency and its missions and goals.

102. "Since its inception in 1965, USAID's population assistance program has been involved in all major innovations in international family planning, and is recognized for its leadership in the field. USAID support for family planning programs have helped developing countries provide family planning." USAID website, http://www.usaid.gov/our_work/global_health/pop/mcpolicy.html.

103. US AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE, DEMOCRACY AND GOVERNANCE: A CONCEPTUAL FRAMEWORK 5 (1998)

A. Conflicting Objectives Within USAID Missions

The USAID Center for Democracy and Governance has identified five elements essential for civil society development and promotion of democracy,¹⁰⁴ including increased civil participation in the policy process, legal frameworks to protect and promote civil society, enhanced free flow of information, a strengthened democratic political culture, and increased institutional and financial viability of civil society organizations.¹⁰⁵ USAID has focused on these elements in its democracy promotion campaigns across the world, including its campaign in Peru.¹⁰⁶ It is difficult to reconcile this USAID objective to promote democracy with the chilling effect of Gag Rule restrictions.¹⁰⁷ Peru serves as a particularly illustrative example of these conflicting obligations. It receives one of the largest amounts of USAID funding for reproductive health and family planning programs of any developing nation, as well as major grants to facilitate its transition into democracy.¹⁰⁸

In the 1980s, Peru was plagued by civil violence and under increasingly totalitarian control by President Fujimori.¹⁰⁹ The regime was widely known for extensive human rights abuses and restrictions on speech and political expression across the country.¹¹⁰ Fujimori finally resigned in 2000 in a blaze of controversy.¹¹¹ Peru has been governed by democratically elected leadership, and reports from the international community are that “[d]espite gains in civil and political rights like freedom of expression, the justice system has not yet recovered from years of

[hereinafter CONCEPTUAL FRAMEWORK], available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacd395.pdf.

104. *Id.* at 16.

105. *Id.*

106. USAID/PERU, ANNUAL REPORT FY 2004, at 3–4 (June 15, 2004), available at <http://www.dec.org>. See also USAID Program Profile for Peru, http://www.usaid.gov/locations/latin_america_caribbean/country/program_profiles/peruprofile.html, which reports that USAID’s strategy concentrates on promoting the expansion of sustainable opportunities for improved quality of life for Peruvians through their democratic institutions and processes, and lists democracy, poverty reduction, health, and girls’ education among its goals for the region.

107. See Cohen, *supra* note 58, at 139.

108. Mann, *supra* note 7.

109. North-South Center Update, *Peru After Fujimori’s Resignation: Corruption, Transition, and Democracy*, <http://www.miami.edu/publications/newsupdates/Update41.html>.

110. HUMAN RIGHTS WATCH, PERU OVERVIEW, <http://hrw.org/english/docs/2004/01/21/peru6988.htm>.

111. Videos were released and aired revealing top officials in the Fujimori regime bribing public figures and committing other criminal acts. North-South Center Update, *supra* note 109.

corruption, and remains slow and inefficient.”¹¹² Even with new leadership, Peru has continued to struggle to realize full democratic participation, and civil dissatisfaction has continued.¹¹³

In order to provide support for the region’s democratic transition, USAID gave 7.6 million dollars to the Office of Transitional Initiatives to assist Peru in this political transformation.¹¹⁴ Additionally, USAID identified two major objectives for the region: advance national level policy reforms, and support health, education, and governance activities.¹¹⁵ A USAID report on the agency’s programs in the region emphasized efforts to facilitate inclusion of all Peruvians in the country’s political, social, and economic institutions and processes.¹¹⁶ However, it appears that USAID may be working against itself by implementing Gag Rule restrictions that bar particular politically charged speech and organizations from democratic participation, while maintaining an overall agency objective to involve an increased number of citizens in civil participation and promote democracy.

In order to achieve its strategic objective in Peru and assist in its development as an emerging democracy, USAID works directly with local “civil society organizations”¹¹⁷ rather than using an umbrella organization; this approach allows the agency to be more integrated with local organizations and allows Peruvians to have more involvement in their transition to democracy.¹¹⁸ Ironically, these are the same organizations that Peru has decided to utilize in its efforts to decentralize health care

112. HUMAN RIGHTS WATCH, *supra* note 110.

113. *Id.*

114. US AGENCY FOR INTERNATIONAL DEVELOPMENT, OFFICE OF TRANSITION INITIATIVES, ADVANCING PEACE AND DEMOCRACY IN PRIORITY CONFLICT PRIME COUNTRIES, 2001–2002 REPORT 36–37; *see also* USAID/ PERU ANNUAL REPORT, *supra* note 106, at 2 (“Popular dissatisfaction with political leadership feeds both legitimate opposition that would undermine the GOP’s [government of Peru] and the USG’s [U.S. government] efforts to pursue free market policies, as well as opposition that would seek to mobilize violent protests to destabilize/ topple the government . . . USG assistance can play a decisive role in ensuring that Peru emerges as economic, political, and social model for its neighbors . . .”).

115. *Id.*

116. *Id.*

117. “Civil society organizations are defined as any non-government organizations that are organized around a common interest of its members and that may have cause to interact with government institutions.” USAID/PERU, STRATEGIC OBJECTIVE CLOSEOUT REPORT, PD-ABX-044, at 6 (June 28, 2002), <http://www.dec.org>.

118. *Id.* at 4; *see also* US AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE, CONDUCTING A DG ASSESSMENT: A FRAMEWORK FOR STRATEGY DEVELOPMENT 49 (Nov. 2000) [hereinafter CONDUCTING A DG ASSESSMENT].

services.¹¹⁹ As a consequence, the same agencies earmarked by USAID as cooperating agencies in the promotion of democracy are working under restrictive rules that specifically prohibit them from advocating or pushing for abortion liberalization, an issue that contributes to one of the biggest health issues in Peru.¹²⁰

In promoting cooperation with established Peruvian NGOs, USAID noted that civil society organizations founded on civil participation are often “the only viable opening for restructuring power and formulating a democratic social contract.”¹²¹ “Increasing civil participation in the policy formulation process is a key role for civil society.”¹²² These organizations also represent a more diverse citizen voice and are more likely to include the most impoverished and politically disadvantaged individuals of the population.¹²³ This diverse composition of NGOs makes them an indispensable voice in the political debate, especially in efforts to protect human rights or push for government reform.¹²⁴ Andrew Natsios, the di-

119. The Peruvian government has determined that the most effective way to promote informed reproductive choice is to decentralize family planning services and utilize established NGOs as access points to their population programs. WOMEN OF THE WORLD, *supra* note 19, at 170. It appears that both U.S. conservatives, as well as Peruvian family planning officials, have recognized NGOs as the primary access points for many women in the region to family planning services; sadly, in light of the Global Gag Rule’s specific restrictions on NGO advocacy, it seems that Peru could not have picked a more detrimental way to provide access to family planning information. Mann, *supra* note 7.

120. See, e.g., USAID/ PERU, CLOSEOUT REPORT, *supra* note 117, at 17 (reporting on the situation that the Manuelas faced when they received twenty-five million dollars of gagged USAID funding for their family planning program, *Reprosalud*, while also receiving close to two million dollars to “promote women’s political participation”).

121. CONCEPTUAL FRAMEWORK, *supra* note 103, at 16. USAID documents note that “the hallmark of a democratic society is the freedom of individuals to associate with like-minded individuals, express their views publicly, and petition their government.” *Id.* at 15. USAID has identified civil society organizations as an essential component of this freedom of association. These organizations include human rights groups, activist organizations, and media organizations and “play a vital role in educating the public and the government on important local and national issues.” *Id.*; see also US AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE, HANDBOOK OF DEMOCRACY AND GOVERNANCE PROGRAM INDICATORS 117 (Aug. 1998), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/dgtpindx.html#pnacc390 (follow link to list of Technical publications and select Handbook) [hereinafter USAID HANDBOOK].

122. CONCEPTUAL FRAMEWORK, *supra* note 103, at 16.

123. IPAS, *Governments and Donors Partner with NGOs*, INITIATIVES IN REPRODUCTIVE HEALTH POLICY, Jan. 1996, at 7. See also USAID HANDBOOK, *supra* note 121, at 117. This ability to represent and empower diverse viewpoints and minority interests may be even more essential in a country like Peru that has a recent history of extreme human rights abuses against minorities. HUMAN RIGHTS WATCH, *supra* note 110.

124. See CONCEPTUAL FRAMEWORK, *supra* note 103, at 3.

rector of USAID, has also noted the overwhelming importance of NGO involvement in any USAID project and focused on the critical role NGOs play in the shaping of policy and human rights, stating that NGOs “provide a unique knowledge of true conditions” in the places in which they are located.¹²⁵

However, in the ongoing fight for reform of Peru’s abortion policy and family planning activities, this working knowledge and diverse representation is wasted because of Gag Rule restrictions on political advocacy. Family planning NGOs who represent these disparate interests have important, unique insight into the perils and effects of unsafe abortion in Peru, but because of Gag Rule restrictions on speech and advocacy, they are silenced.

B. Free Speech is Essential to Political Advocacy and Democracy

NGOs were recognized by USAID as essential actors in democracy promotion, however much of an NGO’s ability to foster democratic participation hinges on its ability to speak openly and advocate to local and national government actors.¹²⁶ The importance of this freedom to disseminate information was also noted by Natsios, who insists that the most significant way that NGOs affect foreign policy is by facilitating the free flow of information and by speaking out on behalf of the population they represent.¹²⁷ This sentiment is echoed by reproductive rights advocates.¹²⁸ “Development of human rights throughout the world is dependent on the efforts of NGOs to gather, process, and disseminate information with their domestic constituencies as well as with world organizations like the UN and nation state governments.”¹²⁹ A routine part of USAID’s analysis of the success of local NGOs in the political process is an examination of the percentage of the populace that is aware of the NGO’s chosen issue or advocacy goal.¹³⁰ USAID has determined that

125. Brief for International Law Scholars as Amici Curiae Supporting Petitioner at 3, *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183 (2001) (No. 01-6168).

126. *See id.* at 19–27 (discussing the importance of freedom of speech and association between NGOs).

127. ANDREW NATSIOS, *FAITH BASED NGOS AND US FOREIGN POLICY, THE INFLUENCE OF FAITH: RELIGIOUS GROUPS AND US FOREIGN POLICY* (2001).

128. Brief for the Petitioner, *supra* note 125, at 3, 19.

129. *Id.*

130. USAID HANDBOOK, *supra* note 121, at 127. USAID also tracks the numbers of community based organizations that exist and are conducting this information sharing and advocacy. A change in the numbers of these agencies is seen as a “victory” or “defeat” in USAID’s mission to develop a politically active society. However, many CSOs operate on a broad scale to address HIV, domestic violence, and economic equality as well as reproductive health. Arguably, USAID may be sabotaging its own democracy

this is a relevant measure of NGO success because “knowledge is a prerequisite to support and informed support is more useful than uninformed support . . . getting an issue on the public screen is an important contribution.”¹³¹

Although there is a general push within USAID to promote democracy and develop civil society networks within Peru, the stated policy of the U.S. government demands that advocacy for particular political reforms or legislation must be brought by the people of the region rather than by U.S. actors.¹³² Because women are often at the forefront of democratizing movements, much of USAID’s activity in foreign political reforms has been driven by local women’s advocacy groups.¹³³ This is certainly the case in Peru.¹³⁴ “The inclusion of women’s rights in a new constitution . . . and the establishment of links by women’s advocacy organizations, both with elected officials and with the population at large” was noted as encouraging evidence of increasing democratic participation.¹³⁵

This political involvement of women’s organizations is reflected by the tremendous policy success of feminist NGOs in UN conferences and global summits where major advances were made in the international law protecting human rights and women’s rights.¹³⁶ In response to this success, the number of foreign NGOs focusing on women’s rights has risen exponentially in the last few decades, and in the last forty years, the

promotion efforts, and facilitating “defeat” by cutting all funding to these agencies because of Gag Rule stipulations. *See, e.g.,* FELDT, *supra* note 16, at 209 (discussing the funding cuts in Zambia that resulted in total closure of clinics, resulting in a net loss of advocacy organizations). Entire sites are forced to close because of violations in one program, affecting the overall numbers of agencies available to advocate and participate in democracy efforts.

131. USAID HANDBOOK, *supra* note 121, at 127, 129.

132. “Our efforts must be demand driven—they must focus on nations whose people are pushing for reforms or have already secured it.” White House, *A National Security Strategy of Engagement and Enlargement*, 1996, cited by CONCEPTUAL FRAMEWORK, *supra* note 103, at 1.

133. USAID documents note that “women have been at the forefront of democratization movements in many countries.” CONCEPTUAL FRAMEWORK, *supra* note 103, at 4.

134. The Manuelas are a major recipient of USAID funding for democracy in Peru. USAID/ PERU, CLOSEOUT REPORT, *supra* note 121, at 17.

135. CONCEPTUAL FRAMEWORK, *supra* note 103, at 4.

136. Bonnie L. Shepard, *NGO Advocacy Networks in Latin America: Lessons from Experience in Promoting Women’s and Reproductive Rights*, NORTH SOUTH AGENDA, PAPERS, no. 61, Feb. 2003, at 5. This reliance on NGO efforts in women’s rights advocacy stems from a number of causes, including a better record of working within the community, proven responsiveness to local needs, and experience mobilizing and organizing exploited groups and poor women. BETSY HARTMAN, *REPRODUCTIVE RIGHTS AND WRONGS* 139–40 (1995).

number of agencies directly involved with women's rights has grown to six times its previous number.¹³⁷ In some arenas, the participation of NGO agencies rivals that of government agents.¹³⁸

It would appear then, that although there is local "demand driven" advocacy for overall increases in women's rights in countries receiving USAID, it has been a challenge for these organizations to translate their policy achievements in international conferences into improved policies and programs in their home countries.¹³⁹ While there is demand and support for women's advancement and involvement in civil society, actual change is slow in coming.¹⁴⁰

Through this analysis, it is clear that there is a consensus from within USAID, as well as among NGOs and government agencies, that NGOs are imperative to the development of civil society and major players in the political activity of emerging democracies.¹⁴¹ NGOs draw on their ability to reach a diverse group of citizens, and their inclusion of marginalized segments of society represents an essential voice in any national policy debate.¹⁴² It is also clear that one of the essential goals of any NGO, and a measurement of success used by USAID itself, is the ability of NGOs to disseminate information to an informed populace.¹⁴³ However, because of the Global Gag Rule, these agencies are denied democratic political participation, and it is this free flow of information that is

137. See MARGARET E. KECK & KATHERYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 11 (1998).

138. In 1995, at the UN Fourth World Conference on Women in Beijing, 4035 NGO representatives attended, while there were 4995 government delegates. IPAS, *Governments and Donors Partner with NGOs*, 1 INITIATIVES IN REPRODUCTIVE HEALTH POLICY 1, 1 (Jan. 1996), available at http://www.ipas.org/publications/en/initiatives_in_reproductive_health_policy/volume1_number1.pdf.

139. Shepard, *supra* note 136, at 6.

140. *Id.*

141. See generally KECK & SIKKINK, *supra* note 137 (discussing the roles of NGO networks in facilitating change in a variety of social causes, including the environment, women's rights, and human rights). See also Shepard, *supra* note 136, for a more specific discussion on the roles of NGOs in Latin America and the advocacy efforts of women's organizations to increase access to reproductive rights in the region.

142. Indicators for achieving USAID Agency Objective 2.3 (Increased Development of Politically Active Civil Society) are the numbers of groups representing marginalized constituencies as well as the percentage of mainstream agency leadership positions held by marginalized groups. USAID HANDBOOK, *supra* note 121, at 132.

143. Latin American NGOs have specifically identified three main strategies to advocate, including direct communication with decision makers, public educators, and the media, and constituency and alliance building with other agencies and public-private partnerships. With the Gag Rule in place, these fundamental avenues of advocacy are blocked because the free speech abilities of NGOs are blocked. Shepard, *supra* note 136, at 9.

specifically prevented by the Rule's restriction on advocacy. Moreover, the agency providing the gagged U.S. funding and enforcing the Rule's prohibitions is also promoting the democratic involvement and political advocacy of these gagged NGOs.¹⁴⁴

This contradiction between USAID's democracy goals and the Gag Rule limitations on speech is not missed by NGOs working in reproductive rights. "It is hard to see how the stifling of free debate . . . is helpful for the ideals of democracy and freedom that the U.S. government purports to support through its development work."¹⁴⁵ This conflict of goals is clear and presents a difficult situation for foreign NGOs who receive gagged USAID family planning funding but are also charged with the promotion of democracy by USAID funded projects.¹⁴⁶

C. Advocacy and Civil Participation by Family Planning NGOs in Peru

Peru is in the midst of drastic political changes and is facing an uphill battle towards democracy after emerging from a regime that restricted speech, violated minority rights, and condoned widespread discrimination and violence against women.¹⁴⁷ Under new leadership, Peru is moving slowly towards democracy with help from USAID.¹⁴⁸

144. See Cohen, *supra* note 58, at 138–39.

145. Mollmann, *supra* note 22.

146. The choice was presented to the International Planned Parenthood Federation (IPPF) which chose to forego millions of dollars in U.S. aid in order to retain its right to advocate for safer abortion across the globe. However, other groups were not as lucky, and because of their reliance on U.S. funding, were forced to accept the Gag Rule stipulations in order to stay in action, despite the clear conflict of interest with the agencies' mission to protect women and promote their democratic participation. BRUCE & ROGOW, *supra* note 32, at 12; FELDT, *supra* note 16, at 202.

147. See HUMAN RIGHTS WATCH, *supra* note 110 for a brief overview of the political history of Peru. In Peru, women are victims of domestic violence at astounding rates, and the government "alternatively refuses to intervene to protect women and punish their batterers or do so haphazardly and in ways that make women feel culpable for the violence." Human Rights Watch, *Women's Rights Division Index*, <http://www.hrw.org/women/index.php>. Between 1996 and 1998, there was also a government-led forced sterilization campaign which has only recently been recognized and addressed by the international community. Press Release, Center for Reproductive Rights, *Peru Acknowledges Human Rights Violations in forced Sterilization Cases that Ended in Death* (Oct. 17, 2002), available at http://www.crlp.org/pr_02_1017peru.html. For additional information on this sterilization program and other abuses of women's reproductive rights in Peru in the past, see CENTER FOR REPRODUCTIVE RIGHTS, *SILENCE AND COMPLICITY: VIOLENCE AGAINST WOMEN IN PERUVIAN PUBLIC HEALTH FACILITIES* (1999), available at http://www.crlp.org/pub_bo_silence.html#online.

148. US AGENCY FOR INTERNATIONAL DEVELOPMENT, OFFICE OF TRANSITION INITIATIVES, *ADVANCING PEACE AND DEMOCRACY IN PRIORITY CONFLICT PRIME COUNTRIES, 2001–2002 REPORT* 36–37.

However, because the Global Gag Rule creates a barrier to advocacy and a limitation on free speech related to abortion, Peruvian organizations are prevented from addressing one of the major health dangers in Peru.¹⁴⁹ No matter how much local demand for abortion reform is present in Peru, the Global Gag Rule restrictions make this women's issue specifically "off limits" for NGOs.¹⁵⁰ Though USAID is facilitating an increase in free speech and democracy in the region, NGOs that are enlisted to assist in this democratic transformation are prevented from certain political speech related to reproductive rights.¹⁵¹

This conflicting obligation has been assigned to one of Peru's largest family planning organizations, the Manuela Ramos Movement (Manuelas), a Peruvian NGO with over twenty years of experience in women's rights advocacy.¹⁵² The Manuelas were forced to address these dueling objectives when the United States reinstated the Global Gag Rule and simultaneously poured money into NGOs in Peru to promote democracy and increase political advocacy.¹⁵³

The Manuelas began as a "Lima-based women's collective that later evolved into an organization of national standing" on women's rights issues.¹⁵⁴ Because of their efforts to educate and lobby the national government on the dangers of abortion as a public health issue, the Manuelas

149. Twenty-two percent of all maternal deaths in Peru are related to unsafe abortions. WOMEN OF THE WORLD, *supra* note 19, at 172.

150. See text and interpretation of the Gag Rule, *supra* Part II.C. Additionally, this limitation often affects the overall financial stability of NGOs; funding limitations for one aspect of a reproductive rights organization often affects the overall vitality of the NGO. See Susan A. Cohen, *US Global Reproductive Health Policy: Isolationist Approach in an Interdependent World*, GUTTMACHER REPORT ON PUBLIC POLICY, June 2004, at 7-9. Centers in developing countries such as Peru often integrate health services in order to preserve resources as well as provide the most comprehensive services possible in a single visit. Wildman, *supra* note 1, at 2. "With the Gag Rule in place, centers that discuss abortion lose funding, regardless of how many vital services they provide." *Id.* As noted earlier, the United States is one of the largest state funders of international family planning efforts, and any family planning funding going to foreign NGOs from the United States is restricted under the Gag Rule. While USAID's overall contribution to family planning has not diminished, investigations on the Rule's real life impact reveal that "women are paying the price in lost family planning and related primary care services in those areas where the U.S. cutoff forced clinics to close." Cohen, *supra* note 150, at 8.

151. See *supra* Part II.C for a discussion of the advocacy prohibited by the Gag Rule.

152. BRUCE & ROGOW, *supra* note 32, at 3. The Manuelas began with an eye towards empowering low income women through grassroots training and political leadership. The name "Manuela Ramos" is considered "so ordinary and common as to signify 'every woman'" and speaks to the organization's emphasis on bringing together women in the community to advocate for themselves. *Id.*

153. See *id.* at 12.

154. BRUCE & ROGOW, *supra* note 32, at 2.

became leading advocates for a liberalized abortion policy in Peru.¹⁵⁵ Their previous advocacy efforts included publishing magazines, organizing meetings, attending congressional sessions and advocating the government for abortion reform. All these efforts had to be abandoned when they started cooperating with USAID on *Reprosalud*,¹⁵⁶ a multimillion dollar family planning initiative, and one of the biggest grants given out by USAID for family planning efforts.¹⁵⁷ However, when the organization shut down its abortion advocacy efforts, the Manuelas made it clear that it was not voluntary and protested that “[s]hackling the discussion of ideas impoverishes such public debate and in doing so, weakens democracy.”¹⁵⁸

This type of silencing of foreign reproductive choice advocates is precisely what the Global Gag Rule restrictions were intended to produce.¹⁵⁹ As noted earlier, the United States,¹⁶⁰ as well as Peruvian family planning officials, both recognized NGOs like the Manuelas as an important resource for women and major players in the family planning programs of the country, as well as valued partners in democracy development.¹⁶¹ However, this recognition by the United States was followed up by fund-

155. *Id.* at 2, 7–8.

156. *Id.* at 8. *Reprosalud* has been recognized as “an exceptional project example rather than the norm.” CAIRO +5: ASSESSING US SUPPORT FOR REPRODUCTIVE HEALTH AT HOME AND ABROAD (1999), available at http://www.reproductiverights.org/tools/print_page.jsp.

157. After much deliberation, the leaders of the NGO accepted the terms of the Gag Rule, and agreed to stop all advocacy for abortion rights since so much money was at stake. However, in protesting to the U.S. government, they stated:

In formulating public policy, individuals and institutions in leadership positions must draw on a foundation of full information, awareness, and understanding of social problems. As abortion is widely recognized as a public health problem in Peru, we consider that it is not feasible to legislate responsibly or create effective public policy in a context in which provision of information and opinion regarding various proposals has been restricted.

Cohen, *supra* note 58, at 138–39.

158. Cohen, *supra* note 58, at 138. The leaders of the Manuelas argued that had the Global Gag Rule restrictions been part of the original project agreement they would not have accepted the restrictive terms, and noted that “[w]e are now in the difficult position of having to choose between needed funding for a historic project, on the one hand, and essential democratic participation on the other.” Cohen, *supra* note 58, at 139.

159. See generally FELDT, *supra* note 16.

160. CONDUCTING A DG ASSESSMENT, *supra* note 118, at 49 (identifying of civil society organizations as effective means to promote democracy and facilitate civil participation).

161. WOMEN OF THE WORLD, *supra* note 19, at 170; Mann, *supra* note 7 (addressing the use of NGOs in Peru as access points for reproductive and health services).

ing restrictions to cut off advocacy by these highly effective organizations.¹⁶² This silencing of a major section of the reproductive rights community may have dire consequences to women's reproductive choice in Peru and presents a challenge to democracy in a region that is undergoing dramatic political change.¹⁶³

The effect of restricting speech and advocacy for reproductive rights can clearly be seen in Peru's recent push to amend its constitution. The Peruvian Constitution contains a clause protecting "the conceived"; this controversial clause has been intensely debated by Peruvian lawmakers and activists, as well as international reproductive rights organizations and abortion opponents.¹⁶⁴ While most Latin American countries contain clauses protecting life from conception, the proposed revisions to the Peruvian Constitution would also stipulate that "abortion is prohibited, save for exceptions permitted by law."¹⁶⁵ Though this change would clearly not create a legal right to an abortion, it may create more space for lawmakers and activists within Peru to create legislated exceptions to the restrictive abortion laws, an opportunity not overlooked by either reproductive choice advocates or anti-abortion proponents.¹⁶⁶

Peruvian NGOs explicitly reported that during the campaign, the Gag Rule prevented them from mounting a balanced and informed debate on the proposed constitutional amendment.¹⁶⁷ A major NGO in Peru reported that "we were a leader on advocacy for liberalization of abortion before, and now we cannot even sign on with our colleagues to a public statement on the constitutional clause on abortion. Our silence, the fact that we did not sign the public statement, surprised parliament members."¹⁶⁸ Another women's activist stated, "When other groups signed a public statement about the abortion clause, we could not sign It was like not being present in the debate about reproductive rights, which are so central to a woman's empowerment. We had to hide from any public

162. Cohen, *supra* note 58.

163. "The Gag Rule forbids NGOs from participating in their own country's democracy and also encourages governments to act in authoritarian manner." BREAKING THE SILENCE, *supra* note 14, at 15.

164. See, e.g., HLI PUBLICATIONS, SPECIAL REPORT FEBRUARY 2003 (PERU, ARGENTINA), http://www.hli.org/sr_2_2003.html; Correa & Brown, *supra* note 12, at 5; BREAKING THE SILENCE, *supra* note 14, at 11.

165. HLI PUBLICATIONS, *supra* note 164, at 5. However, some legal exceptions to Peru's restrictive abortion law already exist, but are rarely invoked and not widely known. A similar fate may befall any exceptions made to the constitutional amendment as well. See *supra* Part II.A.

166. See *supra* note 40.

167. BREAKING THE SILENCE, *supra* note 14, at 14.

168. *Id.* at 13.

statement on the abortion aspect.”¹⁶⁹ However, while these reproductive rights advocates were silenced by Gag Rule restrictions, anti-choice groups were not and were able to participate in the debate without restraint by the U.S. policy.¹⁷⁰ This unequal debate was noted with dismay by donors as well as advocates.¹⁷¹

The importance of public statements and maintaining a visible presence in Peru’s constitutional debate cannot be overstated.¹⁷² Such appearances and pronouncements are viewed by many advocates as minimal action that is indispensable for what an NGO should do to protect the rights of its constituency.¹⁷³ Some advocates would argue that if a network does not make a public statement at a critical political juncture, it has failed in its central mission.¹⁷⁴ Not only is this important for the legitimacy and advocacy of an individual NGO, but having a large number of NGOs speak “with an unlimited voice in a policy debate can increase the legitimacy of pro-rights stances, and thus the chances that the advocates’ views will carry more weight.”¹⁷⁵ Given this argument, the silencing of individual organizations affects the overall ability for even

169. *Id.* This statement was made by an anonymous Peruvian NGO. The anonymity of this source illustrates a central and frustrating limitation of the Gag Rule. It is impossible to tell how many organizations have actually been silenced because many organizations will not even formally report on their inability to speak because of the Gag Rule. Anecdotal references are generally given anonymously. One example of a specific formal statement on the Gag Rule was Susana Galdos Silva, who received special permission from a U.S. court to speak to the U.S. Congress in 2001. Rayman-Read, *supra* note 8.

170. THE BUSH GLOBAL GAG RULE, *supra* note 6, at 2. The Global Gag Rule restricts lobbying regional governments for less restrictive abortion policy, however the rule does not prohibit agencies receiving USAID funding from advocating for more restrictive legislation. This inequality was addressed by a U.S. court in *Center for Reproductive Law and Policy v. Bush*, 300 F.3d 183 (2d Cir. 2002). Though the court concluded that the Rule’s restriction “has bestowed a benefit on the plaintiffs’ competitive adversaries by rewarding their suppliers of information while withholding those grants from suppliers of information who deal with CRLP,” the court found that the United States can legitimately promote anti-abortion ideologies without also supporting pro-choice advocates as well. *Center for Reproductive Law and Policy*, 300 F.3d at 197.

171. “At least one of the largest organizations, historically, can’t participate. And so for any anti-choice political analyst, that is a triumph, right? Because you’ve got one organization with national presence blocked, a big one, one that eventually—if it weren’t for this policy—could make life a bit more difficult for you than at present.” BREAKING THE SILENCE, *supra* note 14, at 14.

172. “The most important impact of the Global Gag Rule can’t be measured. That is the chilling effect.” FELDT, *supra* note 16, at 203 (quoting Duff Gillespie, former Deputy Assistant Administrator of USAID).

173. Shepard, *supra* note 136, at 11.

174. *Id.*

175. *Id.* at 5.

non-gagged NGOs to advocate.¹⁷⁶ The prevailing perception of international health advocates is that women's and reproductive rights advocates are being drowned out of the international dialogue around access to abortion.¹⁷⁷ An overall chilling of reproductive advocacy seems to be occurring in Peru, and as seen in the constitutional debate, is hurting Peruvian NGOs' ability to advocate. One international donor noted that "the fact that there are fewer groups doing advocacy or fewer groups creating a counter balance against pro-life activists, this can lead to modifications [making abortions even harder to obtain]. In fact if it keeps going this way, they have already lost the constitution."¹⁷⁸

This silencing may have a damaging cyclical effect as well, for as NGOs continue to lose the ability to impact politics because of scattered or disparate voices, donors that provide much needed, non-gagged funding may divert these funds to more politically viable regions or causes.¹⁷⁹

IV. GLOBAL FUNDING SOURCES FOR FAMILY PLANNING NGOS

In light of the restrictions placed on NGOs who accept gagged U.S. funding, and the possibility of being forced to abandon important advocacy efforts in order to maintain USAID funding, many Peruvian NGOs have considered rejecting the USAID funding and retaining their right to free speech and political advocacy.¹⁸⁰ However, to understand why most

176. For example, International Planned Parenthood Federation refused to sign the certification agreement and is still advocating for liberalized abortion laws. FEDLT, *supra* note 16, at 202. However, other NGOs like the Manuelas have forfeited this right in exchange for badly needed gagged U.S. funding. BRUCE & ROGOW, *supra* note 32. Therefore, in a public debate, if the only pro-choice voice is IPPF, many lawmakers may assume that other, often regional, NGOs like the Manuelas do not share the concerns of IPPF, making their statement less powerful or politically legitimate.

177. See Shepard, *supra* note 136, at 7. Abortion related material is increasingly hard to find on websites of international health organizations, and many NGOs have either severely curtailed any abortion related activity, or stopped addressing that aspect of reproductive health altogether. *Id.* at 1, 8.

178. BREAKING THE SILENCE, *supra* note 14, at 13.

179. Shepard, *supra* note 136, at 39. It appears that this departure may be imminent or already occurring, as several regional advocates and donors have noted the general stagnation of the movement to expand the legal basis for abortion. *Id.* at 7.

180. After the 2001 reinstatement of the Gag Rule, nine organizations refused to certify the policy and accept its restrictions. The two largest recipients that rejected gagged U.S. funding were the IPPF and the World Health Organization. Conversely, in a White House Briefing, an official estimated that "450 non-U.S. based grantees received U.S. funds." Nowels, *supra* note 52, at 5. "The vast majority of these organizations will probably consent to the Mexico City Policy Restrictions, and thus would not choose to lose their funding." Boucher, *supra* note 71. But see Silva, *supra* note 9, discussing her organization's unwilling acceptance of the restrictions in exchange for U.S. funding and

NGOs have agreed to certify the USAID restrictions in exchange for funding, one must understand the difficulties family planning NGOs face in their efforts to stay afloat financially.

As the United States is the largest single donor to international population assistance, contributing over 43 percent of all global funding for international family planning, maternal health care, and prevention of sexually transmitted diseases, lost USAID funding has come as a severe blow to many NGOs.¹⁸¹ Though few NGOs have been able to refuse gagged funding, cuts have still translated into a not insignificant amount of lost funding for the few international NGOs who are unwilling to submit to the U.S. restrictions.¹⁸² Though many smaller agencies may receive other international funding from organizations such as the United Nations Population Fund, U.S. funding plays a part in many NGO budgets.¹⁸³ In addition, any agency that may receive both USAID funding and other independent funding, from UNFPA or private donors, must stop its abortion advocacy altogether because of the Gag Rule's prohibition on abortion services or advocacy using any money, including that collected from non-U.S. sources, if an agency receives U.S. funding.¹⁸⁴

Given current levels of global family planning funding for other nations, even if these additional sources were allowed under the Gag Rule, it is unlikely that NGOs would be able to refuse U.S. money entirely. According to the 1994 ICPD, "all countries should strive to make accessible, through primary health care systems, reproductive health to all individuals of appropriate ages as soon as possible and no later than the year 2015."¹⁸⁵ Despite the international community's apparent commitment to reproductive rights, as reflected by the goals of the ICPD, this

her continued fight to continue her organization's longstanding advocacy for abortion rights in Peru.

181. ANS ZWERVER, COMMITTEE ON EQUAL OPPORTUNITIES FOR WOMEN AND MEN, IMPACT OF THE "MEXICO CITY POLICY" ON THE FREE CHOICE OF CONTRACEPTION IN EUROPE, EUR. PARL. ASS., Doc. No. 9901, 1 (2003). This report was created by the Assembly in an effort to address the impact of the Gag Rule on family planning efforts in Europe, and led to a draft resolution calling on member states to take a number of measures to reverse the negative impact of the Policy.

182. For additional discussion on lost funding, see *supra* text accompanying note 99.

183. Bishop, *supra* note 17, at 523.

184. See Silva, *supra* note 9.

185. CAIRO PROGRAM OF ACTION, ch. 7.6., available at http://www.unfpa.org/icpd/icpd_poa.htm#par7d6. The *Program of Action* addresses abortion as well, and states that though "in no case should abortion be used as a method of family planning, it also states that in circumstances where abortion is not against the law, such abortion should be safe." CAIRO PROGRAM OF ACTION, ch. 8.25, available at http://www.unfpa.org/icpd/icpd_poa.htm#par8d25.

commitment has not been supported by similarly ambitious funding levels.¹⁸⁶ International expenditures for global population activities yielded an estimate of 9.4 billion dollars in 2001, compared to a target figure for 2000 of 17 billion dollars.¹⁸⁷ In 2000, total expenditures on family planning accounted for only 45.6 percent of the target set by the program.¹⁸⁸ Developing countries were expected to provide over two thirds of the funding for ICPD initiatives, while industrialized nations were to supply only one third of the funding.¹⁸⁹ While developing countries contributed as much as 75 percent of their target funding, developed donor countries only produced 45 percent of the share that they had undertaken.¹⁹⁰ Given these numbers, it is currently unlikely that NGOs would be able to substitute large amounts of neutral funds for gagged U.S. funds.

A. Increase Alternate Funding Sources for Global Family Planning Programs

The Gag Rule restricts individual agencies from providing abortion related services. It also limits demand-driven political advocacy for increased access to abortions. Furthermore, studies have shown that the Gag Rule is not decreasing the prevalence of abortions and is only making the situation for pregnant women more perilous.¹⁹¹ Though a total repeal of the Global Gag Rule would clearly allow for increased advocacy and civil participation by NGOs, this remains a very remote possibility.

186. There were 179 countries involved in the creation of the ICPD Program of Action that explicitly addressed reproductive rights, family planning, and access to health care, and estimated that with full international involvement, universal access to services could be achieved. VERONIQUE DE KEYSER, COMMITTEE OF FOREIGN AFFAIRS, HUMAN RIGHTS, COMMON SECURITY AND DEFENSE POLICY, ANNUAL REPORT ON HUMAN RIGHTS IN THE WORLD IN 2003 AND THE EUROPEAN UNION'S POLICY ON THE MATTER, EUR. PARL. DOC. (2003/2005(INI)) (2004).

187. U.N. Econ. & Soc. Council, *Commission on Population and Development, Flow of Resources for Assisting in the Implementation of the Programme of Action of the ICPD*, U.N. Doc. E/CN.9/2003/1 (2003).

188. KARIN JUNKER, COMMITTEE ON DEVELOPMENT AND COOPERATION, REPORT ON POPULATION AND DEVELOPMENT: 10 YEARS AFTER THE UN CONFERENCE IN CAIRO, EUR. PARL. DOC. (2003/2133(INI)) 8 (2004).

189. *Id.* at 15. This designation placed a higher burden on developing nations to address the lack of reproductive health services in their countries, and these nations rose to the challenge.

190. See JUNKER, *supra* note 188, at 8, 15.

191. The stated reason for re-imposing the Gag Rule was to reduce the numbers of abortions. See *supra* notes 4, 50 and accompanying text.

Repealing the Gag Rule through court action appears unlikely.¹⁹² The policy has been challenged five times in U.S. courts, often based on the restrictions on free speech and association suffered by U.S. NGOs working abroad.¹⁹³ Each time, the court has dismissed the case for lack of standing or found the restrictions to be permissible.¹⁹⁴ Additionally, U.S. foreign policy has become increasingly conservative, making successful congressional action even more unlikely than it has been in the past.¹⁹⁵

Because of the relative failure of challenges to the rule based on constitutional grounds, and the improbability that positive action will be taken by other areas of the government, this Note proposes a shift away from efforts to completely repeal the Gag Rule. As long as the political climate in the United States remains hostile to women's rights and unfriendly to family planning activities that go beyond the ABC's, revoking the Global Gag Rule is unlikely.¹⁹⁶

As an alternative approach, activists in the United States and abroad should focus on securing access to alternative sources of funding by lobbying more conscientious nations and international bodies to increase state contributions to family planning programs. By providing family planning NGOs with neutral, non-gagged funding, reproductive rights advocates may enable previously gagged foreign NGOs to freely voice the concerns of their constituents and continue their efforts to achieve increased reproductive rights in their own countries. Though past efforts to increase financial assistance to international family planning programs have produced dismal results, creating an alternative source of funding that could take the place of the United States may be possible.

192. "All of the Challenges to the Mexico City Policy have failed. Due to standing requirements and justiciability limits of the courts it is unlikely that a domestic or foreign NGO will find the relief they seek in courts." Yvette Aguilar, *Gagging on a Bad Rule: The Mexico City Policy and its Effects on Women in Developing Countries*, 5 SCHOLAR 37, 74 (2002).

193. See *id.* at 67–74. Challenges have been brought by Alan Guttmacher Institute, DKT Memorial Fund Ltd., Planned Parenthood Federation of America, Pathfinder, and The Center for Reproductive Law and Policy (now known as the Center for Reproductive Rights), and all have been dismissed or reversed by higher courts.

194. *Id.*

195. The House and Senate both gained four Republicans in the 2004 election.

196. This is referring to Bush's refusal to provide funding to the Global Fund to Fight AIDS in favor of a U.S.-led fund that focuses on faith-based programs and religious charities that promote an abstinence-based approach to AIDS. See Esther Kaplan, *The Bush AIDS Machine*, NATION, Dec. 20, 2004, at 29.

B. Provide Funding to Address Agency-Specific Funding Cuts

In recognition of this shortfall in international family planning funding as well as the damage being done by the Gag Rule, some international bodies have begun to address the lackluster financing of neutral family planning activities. These bodies may be valuable allies to U.S. activists and foreign NGOs in search of alternate funding sources.

In 2003, the Parliamentary Assembly of the Council of Europe called on its member countries to make up the payments cancelled by the United States as a result of the Global Gag Rule.¹⁹⁷ This recommendation was echoed by a recent European Parliament Report that called upon the Commission to “take into account the devastating impact of the Mexico City Policy of the Bush Administration” and fill the budgeting gap provoked by the Policy.¹⁹⁸

These calls to fill “budgeting gaps” generally refer to larger providers such as UNFPA and IPPF who have lost massive amounts of funding as a result of the Gag Rule, though the financial need of other smaller NGOs has also been acknowledged.¹⁹⁹ It is clear that Europe has recognized the need to counteract the damage being done by the anti-choice U.S. abortion policy exemplified by the Global Gag Rule; however they have focused too narrowly on the issue of lost funding.²⁰⁰

197. JUNKER, *supra* note 188, at 15. Specifically, the Assembly called “on governments of its member states to prioritize, in their international development policies, the allocation of funds to those organizations which have lost funding as a result of the Mexico City Policy.” ZWERVER, *supra* note 181, at 3.

198. ANNE E.M. VAN LANCKER, COMMITTEE ON WOMEN’S RIGHTS AND EQUAL OPPORTUNITIES, REPORT ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS, EUR. PARL. DOC. (2001/2128(INI)) 11 (2002).

199. DE KEYSER, *supra* note 186, at 16. UNFPA funding was cut in response to unfounded allegations of abuses in China, and despite reports by the U.S. government’s own investigators that these charges were false, UNFPA lost thirty-two million dollars of U.S. funding. See *supra* Part III.A for further discussion of these charges and similar harassment of family planning organizations by pro-life groups.

200. Though the European Parliament Reports recognized the lack of commitment to funding by industrialized nations as a whole, they placed the blame for funding cuts squarely on the United States’ pro-life policy, and found that “conservative circles have succeeded in capping or even reducing funds for family planning and education.” JUNKER, *supra* note 188, at 10. However, the United States refutes this charge and argues that it has not reduced overall funding for family planning activities, it has just “utilized other providers” while maintaining roughly four hundred million dollars in annual contributions despite funding cuts. Robert Gehring, United States Department of State, *Statement at UNECE Population Forum* (Jan.12, 2004), http://www.unece.org/ead/pau/epf/part_react/pa_ts1/gehring.pdf. The United States claims that while it maintains its overall funding level, leaders in U.S. family planning policy “acknowledge that there are some disagreements about some policies between the U.S. government and some people

The international community should not wait for NGOs to be punished by USAID for breaking their silence and speaking up about the dangers of unsafe abortions in order to offer them alternative funding. There needs to be a broader international response that not only addresses specific cuts to agencies that result from perceived Gag Rule violations, but one that also provides an alternate source of funding for NGOs that do not want to accept the USAID restrictions.²⁰¹ The EU and other international bodies should continue to push their member states to increase individual state contributions to international family planning programs, and U.S. activists should focus on this alternative regime rather than continue challenging the constitutionality of the Gag Rule in U.S. courts.²⁰²

In response to the lackluster funding for ICPD goals coming from industrialized nations, the International Parliamentarians Conference on the Implementation of the Cairo Program in 2002 pressed nations to increase their contributions to population policy and sexual and reproductive health programs, and urged them to contribute 5–10 percent of their national budgets to these programs in order to meet ICPD goals.²⁰³ EU reports have gone even further, calling for legalization of abortion in order to combat the continued maternal mortality that results from unsafe abortions.²⁰⁴ These reports have recognized that while abortion should not be encouraged or used as a method of family planning, “legal and medically safe interventions [should] be possible for women who have no other

in the community of those interested in reproductive health.” *Id.* The acknowledgement of “disagreements” would be putting it lightly to say the least given the large amount of U.S.-based activism, pleading from hobbled NGOs, and international calls for the United States to rescind the Gag Rule.

201. Re-funding organizations such as UNFPA will clearly help combat the silencing effects of the Gag Rule; however this approach does nothing to assist NGOs like the Manuelas that have given up their rights to advocate for abortion, but have retained their USAID funding. Though these organizations may continue to operate, they do so under the Gag Rule restrictions and will continue to be gagged until an alternate source of funding is available.

202. This is not to say that the legality of the Gag Rule should never again be challenged; however, in the current political climate, alternative measures need to be utilized and activists should take an alternative tack as long as U.S. foreign policy remains largely ideology-driven.

203. European Parliament Resolution on Population and Development: 10 Years After the UN Conference in Cairo, EUR. PARL. DOC. (2003/2133(INI)) 5 (2004) [hereinafter European Parliament Resolution on Population and Development].

204. A 2002 report to the European Parliament underlined that abortion should not be promoted as a family planning method, but recommended that “in order to safeguard woman’s reproductive health and rights, abortion should be made legal, safe, and accessible to all.” VAN LANCKER, *supra* note 198, at 9.

way out of their difficulties, in order to protect their reproductive and mental health.”²⁰⁵

These EU sponsored reports led to a European Parliament Resolution on Population and Development in 2004. This resolution called for “a greater share of humanitarian and emergency aid to be used to benefit the reproductive health of people in emergency situations” and “to make more funding available for the protection of reproductive health.”²⁰⁶ The resolution also enacted a 2004 proposal to assure the “facilitation of medically safe abortions” and called for “legal and medically safe interventions to be possible.”²⁰⁷ Finally, the Resolution stated that healthcare aid should be allocated to developing countries while ensuring that “this aid is used also to maintain or restore reproductive health.”²⁰⁸

EU bodies have clearly demonstrated a commitment to women’s health through these resolutions as well as through their contribution of millions of dollars to fill funding gaps created by the Global Gag Rule. The EU presents the most immediate, natural ally for efforts to provide neutral family planning funding to foreign NGOs, however larger international bodies may also be tapped for increased financial commitment to the goals of the ICPD. The United Nations has professed a strong commitment to women’s rights, human rights, and health care, however financial contributions from UN organizations to global family planning programs amounted to just 17.6 percent of the ICPD target for 2000.²⁰⁹ It is distressing that the funding commitments for family planning are so meager, given the UN’s pledge to protect human rights and increase access to health care.²¹⁰ The EU has called on member states to coordinate activities among donor countries more efficiently in order to provide

205. JUNKER, *supra* note 188, at 11–12. These reports concluded that not only would legalization and access to safe abortions prevent mortality resulting directly from complications of clandestine abortions, it would also mean an overall “reduction in maternal mortality in developing countries since 14 percent of all women who do not survive labor are victims of botched abortions.” *Id.*

206. European Parliament Resolution on Population and Development, *supra* note 203, at 7.

207. *Id.* at 8–9.

208. *Id.* at 8.

209. DE KEYSER, *supra* note 186, at 30. See, for example, the Universal Declaration of Human Rights article 25(1) which included health care as a human right, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which was adopted by the UN General Assembly in 1979. The Convention provides social and economic protections for women as well as access to health care and reproductive health services. The Convention has been signed by 179 countries, though the United States is not included on that list. United Nations website, <http://www.un.org/womenwatch/daw/cedaw/>.

210. See United Nations website, <http://www.un.org/womenwatch/daw/cedaw/>.

family planning funding, and it seems that cooperation between the UN and the EU bodies would be a logical step.²¹¹

The United States has clearly moved to the right of the international community when it comes to reproductive rights, and this shift should not be reflected by the rest of the world.²¹² The broader international community should recognize the damage the U.S. policy is doing to reproductive rights and follow the suggestion of the EU by providing increased overall funding for family planning activities and strive for a universal 5–10 percent contribution to neutral global family planning programs by all member states of the UN and the EU.

The public health situation is only going to deteriorate. One billion young people will soon enter the reproductive phase of their lives, and increasing numbers of women will resort to illegal abortions.²¹³ Maternal mortality rates will only rise, and the restrictions on speech and advocacy created by the Global Gag Rule will wreak increasing havoc on women's health and plague developing democratic movements as speech and political activism are silenced.

According to the European Parliament, "access to reproductive health can only be guaranteed if the international community meets the goals set in the Cairo Program."²¹⁴ U.S. activists and NGOs should refocus their efforts to increase the level of neutral funding available for family planning activities through cooperation with the UN and the EU as well as other international bodies that share their commitment to women's health and political freedom and participation. International efforts to address the damage to health and democracy that has resulted from the Global Gag Rule should assist NGOs that have lost funding because of the Gag Rule restrictions, as well as NGOs that currently receive gagged funding, but would like to replace this funding in order to address massive and continued public health risks of illegal abortion. With this approach, organizations like the Manuelas that have a history of reproductive rights advocacy can move away from their reliance on gagged U.S.

211. JUNKER, *supra* note 188, at 12.

212. "The Global Gag Rule has only served to further isolate the United States in international affairs. Once a leader in family planning, and an inspiration to the world, the United States now has the reputation of being one of the most regressive, ideologically driven countries on the planet." FELDT, *supra* note 16, at 219.

213. JUNKER, *supra* note 188, at 10.

214. DE KEYSER, *supra* note 186, at 30.

funding and truly represent the interests of their constituents through political advocacy for increased access to abortion.

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