

FAQ:

How US Abortion Restrictions on Foreign Assistance, including the Global Gag Rule, Violate Women Rights & Human Rights

On January 23, 2017, his second day in office, President Trump issued an executive order reinstating the Global Gag Rule (“GGR” or “Gag Rule,” now termed “Protecting Life in Global Health Assistance”), restricting US funding for organizations that provide abortion services as a method of family planning. The GGR joins a multitude of other restrictions on family planning and abortion imposed on US foreign assistance that permit the US government to dictate the care provided to women around the world.

This FAQ explores commonly asked questions about what these policies are, what they mean and their impact, including on women’s and human rights.

1. What are US abortion restrictions on foreign assistance?’

After the US Supreme Court’s landmark ruling in *Roe v. Wade*, the US Congress began restricting abortion access through statutory funding restrictions both domestically (Hyde Amendment) and abroad. Restrictions on foreign aid include the Helms, Siljander and Kemp-Katsen Amendments. Over the years, the funding restrictions on foreign assistance have grown and now encompass **all US foreign aid** through their incorporation into annual appropriations acts, which are then implemented by agencies providing foreign aid, primarily the United States Agency for International Development (“USAID”) and the State Department. **These congressional restrictions limit what can be done with US funds** (see Question 2 below).

In 1984, President Reagan expanded these restrictions on foreign NGOs through the “Mexico City Policy” (Global Gag Rule) and began limiting what those organizations could do with their funds from any donor. The Gag Rule was rescinded by President Clinton, reinstated by President Bush, rescinded by President Obama and reinstated and expanded by President Trump. **GGR limits what can be done with funds from any donor** (see Question 3 below).

Today, all entities receiving US foreign aid cannot speak about or provide abortions with US funds in any circumstances, including rape, life endangerment and incest. Furthermore, under the Gag Rule, foreign NGOs receiving US global health assistance aid must now certify that they will not actively promote or provide abortion services as a method of family planning with funds from any donor. All NGOs receiving US global assistance funds cannot partner with or sub-grant to any foreign NGO that won’t certify the same.

2. What do these congressional restrictions require?

With respect to abortion restrictions in foreign aid, there are several major amendments: Helms, Siljander, Kemp-Kasten, Biden, DeConcini, Leahy and Tiahrt. A few of these are worth considering in further detail, including the Helms, Leahy, Siljander and Kemp-Katsen amendments.

The **Helms amendment** was first enacted in 1973 as an amendment to Part I of the Foreign Assistance Act of 1961 (development assistance). The Helms Amendment provides that no US funds “*may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice*

1. For a detailed look at how these restrictions operate in practice, see Global Justice Center, *Annotations on USAID Standard Provisions for Non-U.S. Non-governmental Organizations* (Aug. 2017), <http://genius.it/12495942/globaljusticecenter.net/publications/advocacy-resources/818-annotations-on-standard-provisions-for-non-u-s-nongovernmental-organizations>.

abortions.”² Today, these restrictions are applied as a total ban on abortion speech and services, with no exceptions for rape, incest and life endangerment.³ While initially restricted under the Foreign Assistance Act to only apply to development assistance, Helms is now applied to all foreign aid.⁴ While the focus of advocacy efforts on US abortion restrictions is often the Global Gag Rule, the Helms amendment is the core and underlying legal authority for the restrictions, has consistently been in place for over 40 years and affects the entirety of the US foreign aid budget, nearly \$36 billion in 2017.

The **Leahy amendment** aims to clarify the term “motivate” in the Helms amendment and provides that the term “shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options.” However, the Leahy amendment is little understood, and studies have shown that “information and counseling on abortion is either incorrectly understood as being prohibited or is otherwise avoided.”⁵

The **Siljander amendment**, which was first introduced into appropriations bills in 1981, imposes restrictions on the use of abortion funds for lobbying activities.⁶ When it was first introduced the restrictions only prohibited lobbying for abortion, however since then the restrictions have been amended to apply to both *lobbying for or against abortion*. Siljander, like Helms, is habitually included in annual appropriations measures and applies to all foreign assistance.

Finally, the **Kemp-Kasten amendment** prohibits the provision of US funds to any organization or program that “supports or participates in the management of a program of coercive abortion or involuntary sterilization.”⁷ The Kemp-Kasten amendment has been the justification for the withholding of funding to the United Nations Population Fund (“UNFPA”) under the Reagan, H.W. Bush, W. Bush, and Trump administrations.⁸

These restrictions apply to all US foreign assistance and limit what can be done with US funds only. Entities who are only subject to these restrictions can and should segregate their aid from other donors and use those funds to provide information and referrals for abortion in all circumstances, provide abortion services in all circumstances and advocate for the legalization of and access to abortion.

3. What is the Global Gag Rule?

GGR (also termed variously the “Mexico City Policy” and now “Protecting Life in Global Health Assistance”) is an executive action, first taken by Ronald Reagan in 1984, which imposes additional abortion restrictions on non-US NGOs (“foreign NGOs” or “fNGOs”) receiving either direct support or sub-grants from certain US foreign assistance funding streams. The GGR has been in and out effect since first imposed by President Reagan along political party lines. Every Republican since Reagan has put (or kept) the policy into place and every Democrat has repealed it. It was most recently reinstated in 2017 by President Trump. Under previous Republican presidents the policy only applied to fNGOs receiving US family planning assistance, it now applies to fNGOs receiving nearly all global health assistance funds.

In the simplest of terms, the GGR prohibits global health assistance from being provided to fNGOs that use funding from any source to: perform abortions in cases other than rape, incest or life endangerment; counsel or referral women for abortion; or lobby in any abortion related advocacy, including to make abortion legal, in their own country. Unlike the congressionally-mandated restrictions discussed above, these restrictions: (1) are

2. Section 104(f)(1) of the Foreign Assistance Act of 1961, P.L. 87-195, 22 U.S.C. § 2151b(f)(1) as amended by the Foreign Assistance Act of 1971, P.L. 93-189 (Dec. 17, 1973).

3. Kaiser Family Foundation, *The Mexico City Policy: An Explainer*, (Jun. 1, 2017).

4. Congressional Research Service, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Law and Policy* (Jan. 24, 2017).

5. Ipas and Ibis Reproductive Health, *US. Funding for abortion: How the Helms and Hyde Amendments harm women and providers* at 7 (Mar. 2016).

6. Section 525 of the Foreign Assistance and Related Appropriations Act 1982, P.L. 97-121, 95 Stat. § 1657 (Dec. 29, 1981).

7. Chapter V of P.L. 99-88 (99 Stat. 323), approved August 15, 1985.

8. In addition to Kemp-Kasten, since 2000, annual appropriations have also included restrictions that are specific to UNFPA that act in effect as a Gag Rule on the organization. These restrictions condition the availability of funds to UNFPA on the following factors: (1) the funds cannot be used for any programming in China; (2) that US funds to UNFPA are segregated from funds from other donor; and (3) that UNFPA does not fund abortions.

imposed at the discretion of the US President;⁹ (2) do not apply to all foreign assistance (they only apply to fNGOs receiving “global health” assistance); and (3) are in addition to the congressional restrictions on US aid discussed in Question 2.

WHO DOES THE GGR APPLY TO NOW?

While the congressionally imposed requirements on foreign assistance, including the Helms amendment, are imposed on all grantees, including US and fNGOs and foreign governments, the Gag Rule only applies to fNGOs. FNGOs may be subject to the Gag Rule in two circumstances: (1) where they are the direct recipient of affected global health assistance funds; or (2) if they receive a sub-grant from a US or fNGO of affected global health assistance funds.

Furthermore, even though US NGOs are directly exempted from the Gag (because it would violate US Constitutional guarantees of free speech), they are not immune from the impact of GGR. Impacts include limitations on who they can partner with in global work with respect to abortion, as well as the fact that where they do partner with fNGOs, they become the source of censorship of those organizations as a result of the pass-thru requirement.

WHAT DOES THE GGR APPLY TO NOW?

As stated above, Trump’s Gag Rule, extends the requirements the GGR to cover all fNGOs that either directly or indirectly receive US global health assistance. While previous iterations of the GGR only applied to US “family planning” assistance, President Trump expanded it to cover nearly all global health assistance with a few exceptions. Covered global health assistance funds includes “funding for international health programs, such as those for HIV/AIDS, maternal and child health, malaria, global health security, and family planning and reproductive health.”¹⁰

The GGR will be imposed on new grants, cooperative agreements and contracts, as well as any such existing funding agreements that are amended to include new funding.¹¹

Furthermore, as a result of the expansion and the mechanics of how US global health assistance is distributed, the GGR will be imposed through relevant funding streams by a variety of US agencies and departments, including:

- United States Department for International Development (USAID)
- State Department; and
- Department of Health and Human Services, including the National Institute for Health (NIH) and Centers for Disease Control & Prevention (CDC).

ARE THERE ANY EXCEPTIONS TO THE GGR?

Certain global health assistance funding streams are excluded from the policy, in particular humanitarian assistance provided by the State Department, USAID and the Department of Defense. However, while the funding streams themselves are excluded, organizations who receive exempted humanitarian aid may still be subject to the Gag Rule. For example, if a fNGO receives both humanitarian assistance and US global health assistance for malaria, through the malaria funding they would to sign the Gag Rule and as a result, their humanitarian work would also be impacted.

In addition, national or local governments, public international organizations, and other similar multilateral entities are exempted from the Gag Rule. However, congressional abortion restrictions, including the Helms amendment, still apply to the activities they engage in with the US funds.

Finally, the GGR is *not* a total ban on abortion related speech and services. Even if an organization is subject to the Gag Rule, they may still provide advice, information, referrals and services in cases of rape, incest or life endangerment, with their funds from other donors. Furthermore, organizations may provide what is known as a

9. Congressional abortion restrictions on foreign assistance, including the Helms amendment, coupled with cannons of Presidential authority over foreign affairs, are what grant the US President the ability to unilaterally impose this policy. If congressional restrictions are repealed, the President would almost certainly not have the ability to impose the Gag Rule without congressional approval.

10. United States Department of State, *Factsheet: Protecting Life in Global Health Assistance* (May 15, 2017), <https://www.state.gov/r/pa/prs/ps/2017/05/270866.htm>.

11. *Id.*

“passive referral” to safe abortion services if the following conditions are met: (1) a pregnant woman specifically asks a question about where to obtain a “safe, legal abortion,” (2) she states she has already decided to obtain an abortion; (3) the health provider “reasonably believes” medical ethics in the country they are in requires an answer as to where it can be obtained safely and legally. Additionally, the GGR has no impact on the provision of post-abortion care or emergency contraception—these services may and should continue to be provided, even by organizations subject to the Gag Rule.

4. What is the impact of these policies?

The Helms amendment has consistently been in place since 1973, the Siljander amendment since 1981 and the Gag Rule has intermittently been in place since 1984. Over the years, organizations have documented the negative impact that these restrictions have had, not only on abortion services and speech, but also on family planning and sexual and reproductive health services more broadly.¹²

One often cited 2011 study found that the GGR actually increased abortion rates in sub-Saharan Africa, in large part because organizations supporting family planning and contraceptive access had to reduce their programming as a result of declining funding from the US.¹³ Other reports have shown that the GGR has resulted in the need for providers to fire staff, reduce available services, charge higher fees or close altogether, a drastic reduction in the availability of contraceptives, including condoms and birth control, and cuts to outreach and education. Similarly, studies on the impact of the Helms amendment has been found to lead to the “avoidance of abortion-related service provision, information and counseling; censorship; and reduced access to life-saving equipment and supplies.”¹⁴ The same study also found “no evidence of counseling on abortion provided by US funded reproductive health providers” and that “U.S.-funded organizations that address gender-based violence also generally omit information about abortion as an option for a woman who is pregnant as a result of rape.”¹⁵

Perhaps the most pernicious (and largely unquantifiable) impact of US abortion restrictions is the chilling effect it has on abortion speech and service provision around the world. A 1990 study on the implementation of the GGR sponsored by the US government found that there was general confusion at the implementer level as to what sorts of activities are permitted and prohibited under GGR. For example, the study found that at the level of clinic staff, most understood the policy to prohibit “most everything” associated with abortion.¹⁶ The study also found that while many grantees understood what they *couldn't do*, they did not feel that the policy or guidance explicitly stated what was permissible.¹⁷

Similarly, in a Congressional hearing on the effects of the GGR, Duff Gillespie, a former senior USAID official,¹⁸ noted that “the Helms Amendment was, and remains, effective in preventing USAID funding for abortion activities.” He went on to describe the chilling effect of the GGR even after its repeal: “Even under the eight years of the Clinton administration, the chilling effect of the Mexico City Policy continued and few foreign NGOs became engaged in “prohibited” activities either because they had no desire to or they feared future retribution from another anti-abortion administration...These efforts have had a chilling effect on recipients of USAID population funds and have led to self-censorship and their isolation or exclusion from activities that may, however tenuously, leave them

12. See e.g. Guttmacher Institute, *The Global Gag Rule and Fights over Funding UNFPA: The Issues that Won't Go Away*, Guttmacher Policy Review (Jun. 3, 2015); Ipas and Ibis Reproductive Health, *US. Funding for abortion: How the Helms and Hyde Amendments harm women and providers* (Mar. 2016); Mehlika Hoodbhoy, Martin Flaherty, Tracy Higgins, *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya* (Nov. 2006); Leitner Center for International Law and Justice, *Exporting Confusion: U.S. Foreign Policy as an Obstacle to the Implementation of Ethiopia's Liberalized Abortion Law* (May 2010).

13. Eran Bendavid, Patrick Avila, and Grant Miller, *United States aid policy and induced abortion in sub-Saharan Africa*, Bulletin of the World Health Organization (Sept. 27, 2011).

14. Ipas and Ibis Reproductive Health, *US. Funding for abortion: How the Helms and Hyde Amendments harm women and providers* at 6 (Mar. 2016).

15. *Id.*

16. Population Technical Assistance Project, *Mexico City Policy Implementation Study* at 22, (Nov. 21, 1990), http://pdf.usaid.gov/pdf_docs/PNABG765.pdf.

17. *Id.* (emphasis added).

18. *The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the Comm. On Foreign Affairs*, 110th Cong. 18 (2007) (Prepared Statement of Duff G. Gillespie, Ph.D., Professor and Senior Scholar, Gates Institute for Population And Reproductive Health, Johns Hopkins Bloomberg School Of Public Health).

vulnerable to accusations of promoting abortion.”¹⁹

Finally, the chilling effect of the GGR is compounded by over-interpretation of the congressional restrictions and their aggressive monitoring and enforcement by all Administrations. Even under President Obama, the statutory restrictions were used to: gag political speech to change restrictive abortion laws in countries, including many who have been asked to do so in order to bring their laws in compliance with the human rights violations; censor the information provided by doctors to their patients about their options; and censor the content of public health publications, technical guidance on reproductive health care and even participate in meetings on maternal mortality.²⁰ As with the GGR, many grantees treat these restrictions as total restrictions on abortion-related speech and services. One study found that “the Helms, Leahy and Siljander Amendments are generally not well understood, particularly in the field. Several USAID grantees understand the restrictions to be a blanket ban on activities and speech around abortion.”

Since the GGR is only applies to new funding agreements or those that are modified, the impact of Trump’s expanded Gag is unclear—however it would not be unreasonable to speculate that it will magnify the negative impacts that have been documented during other times when the rule is in place. One study on the early impacts in Kenya and Uganda has found that, may provide a guidepost for what this impact may look like.²¹ Key findings included: a lack of information about the policy and overreach in implementation; reductions in key sexual and reproductive health services that cannot easily be replaced; a loss in training and technical support to government clinics providing abortion in circumstances legal under the GGR; and concerns over increased unsafe abortion and maternal deaths.

5. How do these restrictions violate women’s rights & human rights?

US abortion restrictions implicate a variety of rights under international human rights and humanitarian law. These rights include: right to life; right to non-discrimination; right to information; right to health and medical care; the right to be free from torture and cruel, inhuman and degrading treatment; and the right to free speech and association.

Human rights bodies and experts have made clear that abortion is necessary health care for women and girls, and that restrictions on and the denial of safe abortion services violates their fundamental rights.²² Furthermore, in situations of conflict, abortion is protected medical care under international humanitarian law and must be provided to all those who qualify as the “wounded and sick.”²³ By imposing restrictions on its aid, the US is ensuring that women and girls around the world will be unable to access care that is guaranteed to them under international law and denying them their fundamental human rights.²⁴

Furthermore, these restrictions not only implicate those rights protecting access to abortion itself, but also those of free speech and free association. As discussed above, these restrictions are not only restrictions on the provision of services, but also restricts a broad range of abortion-related speech, including information, research, technical assistance and advocacy. For example, under article 19 of the International Covenant on Civil and Political

19. *Id.*

20. Global Justice Center, *Suggested List of Issues to Country Report Task Force on the United States of America, Human Rights Committee* (Dec. 28, 2012), <http://www.globaljusticecenter.net/documents/ICCPR.pdf>.

21. Human Rights Watch, *Early Impact of the Protecting Life in Global Health Assistance Policy in Kenya and Uganda*, (Oct. 13, 2017).

22. Human Rights Watch, *Human Rights Law and Access to Abortion* (Jul. 2017), https://www.hrw.org/news/2017/07/24/qa-human-rights-law-and-access-abortion#_Right_to_enjoy; Office of the High Commissioner for Human Rights, *Safe abortions for all women who need them – not just the rich, say UN experts* (Sept. 28, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22167&LangID=E>.

23. Global Justice Center, *What is the Law? Armed Conflict & Abortion Services* (Nov. 2017), <http://globaljusticecenter.net/documents/What%20is%20the%20Law%20Factsheet.pdf>.

24. See Global Justice Center, *Submission to UN Human Rights Council Universal Periodic Review: United States of America* (Sept. 2014), <http://www.globaljusticecenter.net/documents/GJC.US.UPR2015.CompleteSubmission.pdf>; Global Justice Center, *US Abortion Restrictions on Foreign Assistance and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Nov. 2016), http://globaljusticecenter.net/documents/GJC.FactSheet_US_LOI.11.21.2016.pdf; Global Justice Center, *Suggested List of Issues to Country Report Task Force on the United States of America, Human Rights Committee* (Dec. 28, 2012), <http://www.globaljusticecenter.net/documents/ICCPR.pdf>.

Rights (“ICCPR”), everyone has the right to freedom of expression.²⁵ US abortion restrictions, including the Helms Amendment and the Siljander Amendment, infringe upon that right “to seek, receive and impart information and ideas of all kinds.”²⁶ They effectively censor political speech: US funding recipients are prohibited from expressing any ideas that “motivate” or “lobby” for abortion, and women are unable to receive information regarding abortion in violation of the protection of free expression and free speech.

In addition, funding restrictions can also violate, and individual and an organization’s right to freedom of expression and association by curbing access to resources they need to exist and operate as an organization. International jurisprudence recognizes NGOs as essential to the promotion of human rights, whether they advocate for policy change or provide meaningful support and resources to citizens. Article 22 of the ICCPR affirms an association’s right to carry out its activities, and the UN Human Rights Committee has stated that the protection of Article 22 extends to all the activities of an association.²⁷ Furthermore, the UN Special Rapporteur on the rights to freedom of peaceful assembly and association has found that the right to seek and secure funding from domestic, foreign, and international entities is inherent to an organization’s right to association.²⁸ As a result, States are obligated to refrain from implementing restrictions upon an NGO’s access to funding, and any limitations must meet a stringent test in order to be a valid restriction on the right to free speech and association²⁹—a test which US abortion restrictions do not meet. Consequently, US abortion restrictions also violate fundamental guarantees of free speech and association.

25. International Covenant on Civil and Political Rights, art. 19(2), Dec. 16. 1966, 99 U.N.T.S. 171.

26. *Id.*

27. International Covenant on Civil and Political Rights, art. 22, Dec. 16. 1966, 99 U.N.T.S. 171.; *Korneenko v. Belarus*, U.N. Human Rights Committee, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (Nov. 3, 2006).

28. Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, U.N. Doc. A/HRC/23/39 (Apr. 24, 2014). See also Maina Kiai and Community of Democracies, *General Principles: Protecting civic space and the right to access resources* (Nov. 2014), http://freeassembly.net/wp-content/uploads/2014/11/General-principles-funding-update_Nov.-14.pdf.

29. International Covenant on Civil and Political Rights (“ICCPR”), art. 22(2), Dec. 16. 1966, 99 U.N.T.S. 171.