

## **How to Talk About the Speech Censorship at the Heart of U.S. Foreign Policy: The Helms Gag Question & Answer**

The Global Justice Center, on April 19, 2010, in a submission to the UN Human Rights Council in Geneva, challenged the U.S. policy requiring censorship of abortion related speech as a condition placed on all U.S. foreign aid. This foreign policy extends to censoring the speech of some 150 foreign governments receiving some form of U.S. foreign assistance.

This “Q and A” provides an overview of how this all encompassing censorship, which we term the “Helms Gag,” came to dominate U.S. foreign policy and the injurious effects of what is an egregious violation of international human rights law and a gross violation of international humanitarian law.

### **1. What is the source of the U.S. policy censoring abortion related speech as central to our foreign aid program?**

There is no one single source or law behind the Helms Gag. The Helms Amendment to the Foreign Assistance Act (FAA) in 1973 was the first time the U.S. placed abortion related restrictions on U.S. foreign aid. However, these restrictions have metamorphosized over the last 37 years far beyond the scope of the original Helms Amendment.

### **2. What is the legal authority for the U.S. to be able to require censorship of abortion speech on all foreign aid?**

There is none. There is no domestic legal authority that can ever justify the U.S. violating international humanitarian law, as the U.S. Supreme Court underscored in the Hamdan case. The Helms Gag, as applied to U.S. humanitarian aid funding, constitutes a serious breach of what are called *jus cogens* principles, or, peremptory norms. No domestic law, even if one existed, could ever be a defense to the U.S. breaching fundamental obligations. However, no single domestic law exists. The expansion of the Helms Gag has been through a series of Congressional restrictions on annual foreign appropriations, by means of USAID administrative orders and policies, and, by the Helms Gag language being incorporated into new development initiatives such as the Millennium Development Corporation. The Helms Gag now covers all foreign appropriations; censoring over \$49 billion in U.S. foreign aid in 2010.

### **3. What abortion related speech does the Helms Gag cover?**

Almost all speech about abortion. The Helms Amendment prohibits “motivating” or “coercing” abortions in all circumstances, which has been interpreted broadly by U.S.AID to include “information, education, training, or communication programs...” about abortion. The Siljander Amendment, expanding the gag, prohibits any speech that could be construed to “lobby for or against abortion law reform,” including by foreign governments reforming their own laws. Recently, for example, some members of the U.S. Congress, sought to enforce Siljander Amendment ban on lobbying by protesting the abortions discussions which took place in Kenya around the drafting of the new Kenya constitution. They stated in a letter to USAID that “any expression of support for or opposition to the proposed new

constitution (including by drafting, offering technical advice, or providing foreign assistance of any kind that is designed to influence public approval in the upcoming plebiscite) unavoidably involves lobbying for or against abortion.”

#### **4. Didn't President Obama remove all the abortion related restrictions when he lifted the Global Gag Rule?**

No. The “Global Gag Rule” or Mexico City Policy expanded the Helms Gag to prohibit foreign NGOs receiving U.S. funding from engaging in any abortion related activities using even their own private funds. Since the Global Gag Rule was issued by executive order, President Obama was able to unilaterally lift it in January 2009; many people mistakenly believe that revoking the Global Gag Rule meant an end to abortion speech censorship placed on foreign aid. That is not true. In fact, the executive order revoking the Global Gag Rule explicitly states that the Helms restrictions remain in place.

#### **5. Is the Helms Gag on abortion speech the only censorship imposed on all U.S. foreign aid?**

Yes. The Helms Gag language is mandatory for all foreign assistance contracts; including both bilateral aid to foreign governments and, aid earmarked for particular programs, such as the U.N. Voluntary Fund for Victims of Torture. The only other censorship condition on foreign aid, that we have been able to find, is one requiring U.S. and foreign NGOs certify that they have an anti-prostitution policy as a condition to receiving U.S. HIV/AIDS funds. However, unlike the Helms Gag, this anti-prostitution policy condition exempts the U.N. and foreign governments. This anti-prostitution policy condition has been challenged and a federal court in New York has granted a preliminary injunction on free speech grounds. *Alliance for Open Society Int'l v. USAID*, Preliminary Injunction Order, 05 Civ. 8209 (2006).

#### **6. What U.S. and foreign entities does the Helms Gag censor?**

All U.S. and foreign organizations and governments that receive U.S. foreign aid funds directly, or, as sub grantees or contractors, are covered by the Helms Gag. Further, since all U.S. foreign aid is accompanied by the Helms Gag, the U.S. acts as a viral censoring agent when U.S. funds are comingled with funds from other donors. Entities gagged include:

1. Over 150 foreign governments who receive foreign aid funds from the U.S. government. For example, the grant contract between the U.S. and the government of Afghanistan providing \$4.2 million for democracy building requires Afghanistan to agree to the gag (see UPR appendix).
2. All democracy and rule of law funding by the U.S. including programs under the National Endowment for Democracy (NED) and various U.S. contracts and subcontracts with major U.S. organizations including the American Bar Association, universities, law schools.

#### **7. What Helms Gag related international law violations are the GJC seeking to have the Human Rights Council address?**

The Global Justice Center's submission to the Human Rights Council focuses on the illegality of the Helms Gag on two areas of foreign aid funding:

1. Censorship of U.S and foreign entities providing overseas law and democracy programs, which violates the rights to free expression under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
2. The provision of discriminatory medical services to women and girls raped in situations of armed conflict, which violates its obligation to “ensure respect” for international humanitarian law under the Geneva Conventions and customary international law, including torture.

The submission does not address the problematic restrictions on funding abortion services or U.S. funded population and family planning projects.

**8. Can the U.S. impose censorship of abortion speech on American citizens and universities as a condition of their receiving U.S. grants or contracts under the U.S. programs designed to promote the rule of law and democracy overseas?**

Not legally. All U.S. contracts under State and USAID “rule of law” and democracy programming, some 2.2 billion dollars a year, contain the Helms Gag. All U.S. and foreign NGOs (and foreign governments) are prohibited from freely discussing abortion when conducting trainings on international human rights laws, including CEDAW, which requires governments to reform their criminal abortion laws. U.S. law schools, funded with U.S. foreign aid to teach overseas, for example, could not legally discuss the GJC submission to the Human Rights Council.

**9. Is there a duty under international law to provide women and girls impregnated as a result of rape in conflict situations the option of abortion?**

Yes. International humanitarian law (IHL) mandates certain protections for civilians in armed conflict, including medical treatment and protection from torture. The Human Rights Committee and the Committee on Torture have recognized that forcing a woman to carry to term a pregnancy that is the result of sexual assault (by denying the option of abortion) constitutes at a minimum cruel, inhuman and degrading treatment. Further, in situations of armed conflict, this denial can raise to the level of torture. Because of the Helms Gag, U.S. funded humanitarian aid organizations and their local partners do not, with certain courageous exceptions, provide abortion to impregnated women and girl rape victims in conflict. This denial increases their risk of death in childbirth, or from an illegal abortion, many times over.

**10. Does the U.S. Have obligations under IHL when it is not a party to the conflict?**

Yes. All states, regardless of whether they are party to an armed conflict, have obligations to “ensure respect” for IHL, including taking all possible steps to stop war crimes, ensure accountability, and render aid to civilian victims. Therefore, where the U.S. provides humanitarian aid in situations of armed conflict, such aid must be provided in compliance with IHL.

**11. Can President Obama lift the Helms Gag like he did the Global Gag Rule?**

In part. President Obama not only has the authority but the duty to issue an immediate executive order stopping the Helms Gag from continuing to breach the right to nondiscriminatory medical services to women and girls raped in the context of an armed conflict. Further, the statutory language of the Helms Gag can and should be interpreted very narrowly and President Obama should instruct all agents and

departments under his authority to ensure that foreign aid contracts are amended accordingly. In the long term, to repeal the Helms Amendment and other legislation which includes the Helms Gag language, such as the Millennium Development Corporation, requires an act of Congress.

## **12. Is the U.S. Congress doing anything about the Helms Gag?**

Not directly. Two bills currently pending in Congress address U.S. funding restrictions on abortion in foreign aid, but neither calls for a direct repeal of the Helms Amendment nor would prohibit the speech censorship provisions addressed in the GJC's UPR. H.R. 4879, the Global Democracy Promotion Act, if passed, would legislatively block the ability of the President to reinstate the Global Gag Rule via an executive order, but it firmly leaves Helms in place. The second bill, H.R. 5121, the Global Sexual and Reproductive Health Act of 2010, would cut down some of the Helms Amendment restrictions by creating access to safe abortion where legal, but it does not address any of the speech restrictions that form the Helms Gag.