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LITIGATION UPDATES

THE ANTI-PROSTITUTION PLEDGE: LIMITING SPEECH AND DEVELOPMENT

by Rachael Moshman*

INTRODUCTION

DKT International is a Washington, DC-based non-governmental organization (“NGO”) specializing in family planning and HIV/AIDS services. DKT International provides such services to parts of South America, Africa, and Asia and currently serves just under ten million families worldwide.¹ The NGO subsidizes products such as condoms for poor populations,² selling some 390 million condoms last year in eleven different countries.³ DKT International has received United States Agency for International Development (“USAID”) funding for some of its HIV/AIDS programming in the past.⁴ However, in July 2005 DKT International’s Vietnam program was refused future funding from USAID because the DKT International Country Representative in Vietnam refused to sign an “anti-prostitution” loyalty statement for the organization.⁵

THE LEGISLATIVELY REQUIRED ANTI-PROSTITUTION PLEDGE

The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Global AIDS Act” or “GAA”)⁶ places two limitations on organizations that are eligible to receive funding under this Act. First, funding may not be used to “promote or advocate the legalization or practice of prostitution or sex trafficking.”⁷ Second, any organization that receives funding must have a “policy explicitly opposing prostitution and sex trafficking . . .”⁸ The Trafficking Victims Protection Act of 2003 (“TVPA”)⁹ has similar requirements. It states that no funding can be made available to “promote, support, or advocate the legalization or practice of prostitution,”¹⁰ and that any organization receiving funding must state in a grant application or grant agreement that “it does not promote, support, or advocate the legalization or practice of prostitution.”¹¹

The GAA and the TVPA do state, however, that the funding limitations do not apply to certain areas such as delivery of medical care, test kits, and condoms.¹² Though both the GAA and the TVPA are laws welcomed by professionals who work to prevent both HIV/AIDS and human trafficking, the impact of these funding limitations has caused deep concern, ranging from First Amendment limitations on speech to stigmatization of already vulnerable populations.

IMPLICATIONS FOR THE UNITED STATES: FIRST AMENDMENT VIOLATIONS

The implication on First Amendment rights and U.S. development policies arose in DKT International’s recent lawsuit against USAID. DKT International filed suit in August 2005 in the U.S. District Court for the District of Columbia, charging that USAID had violated its freedom of speech rights by making “otherwise eligible organizations ineligible for USAID grants or contracts” because they did not adopt the U.S. position on prostitution.¹³ An opinion letter written by the U.S. Department of Justice’s Office of Legal Counsel was issued in September 2004;¹⁴ the letter advised the U.S. Department of Health and Human Services (“HHS”) that the GAA’s prostitution-opposing policy guidelines, which previously applied only to non-U.S. NGOs, could be required of U.S. NGOs without implicating constitutional or separation of powers violations.¹⁵ Soon after this opinion was issued, HHS, USAID, and the U.S. Department of State began requiring the so-called “loyalty pledge” from all potential grant recipients, including American organizations.¹⁶

USAID subsequently implemented Acquisition and Assistance Policy Directive (“AAPD”) No. 05-04, which was released on June 9, 2005.¹⁷ The AAPD required that any USAID contract that provides funds from the GAA to include language that not only bars funding from being used to support or advocate for the legalization of prostitution, but also asserts that “prostitution and related activities . . . are inherently harmful and dehumanizing, and contribute to the phenomenon of trafficking in persons.”¹⁸

The Brennan Center for Justice at New York University School of Law (“Brennan Center”) submitted a memorandum on the DKT International case that analyzed from several perspectives the constitutionality of the anti-prostitution pledge requirement.¹⁹ The Brennan Center, as “Of Counsel” to DKT International, conclusively denounced the pledge requirement. At the same time, the memo, analyzing *Rust v. Sullivan*,²⁰ also determined that the government retained the discretion to explicitly oppose prostitution because GAA funding is meant to provide medical and social services to communities impacted by HIV/AIDS.²¹

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While the majority of organizations that are affected by this policy state that they do not advocate prostitution, they find the U.S. government's new policy requirements more harmful than helpful to HIV/AIDS and trafficking prevention.²² Moreover, the limitations on funding in the GAA and TVPA go further than simply limiting the use of government funds; the acts also prohibit NGOs from using private funds to promote or advocate for the legalization of prostitution.²³

In a response to these limitations, the Brennan Center memo points to cases like *Regan v. Taxation with Representation*, in which the U.S. Supreme Court affirmed that 501(c)(3) organizations could not lobby using federal funds,²⁴ but also affirmed that they had a constitutionally protected right to lobby using separately-held private funds.²⁵ Similarly, in *FCC v. League of Women Voters of California*, the Court found that television stations could not use federal funds to give editorial opinions, but could use private funds to do so.²⁶ Applying similar standards, the Brennan Center argues that Congress and federal agencies should not be able to limit U.S. NGOs from supporting or advocating their positions on prostitution when they use private funds.²⁷

By requiring NGOs to declare an anti-prostitution policy, the government is, according to Count I of DKT International's Complaint, "condition[ing] eligibility for USAID funding for U.S. organizations on expressly adopting the U.S. government's political viewpoint on prostitution."²⁸ The Brennan Center memo reiterates this position by pointing to Supreme Court cases such as *West Virginia State Board of Education v. Barnette*, which found that a public school could not require a child to say the pledge of allegiance in order to maintain the right to attend school. The government may not "... [transcend] constitutional limitations on their power and [invade] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."²⁹

In September 2005, the Alliance for Open Society International, Inc. ("AOSI") and Open Society Institute ("OSI") filed a similar suit, also charging USAID with First Amendment violations such as those outlined in the DKT International case.³⁰ AOSI is a not-for-profit organization that was formed by OSI in 2003 to work primarily on issues related to Central Asia.³¹ Rather than oppose the USAID policy outright, AOSI chose to sign the anti-prostitution pledge with USAID in August 2005, and then follow that pledge with a lawsuit against the agency. AOSI's lawsuit charged that the pledge requirement: (1) was unconstitutionally vague; (2) violated the First Amendment by forcing the organization to adopt an "entity-wide policy;" (3) violated the First Amendment by imposing the pledge on non-USAID funding; and (4) was too broad to comply with the funding limitation as originally stated in the GAA.³²

DEVELOPMENT IMPLICATIONS INTERNATIONALLY

On the international level, HHS, USAID, and the U.S. Department of State's requirements for funding HIV/AIDS and anti-trafficking programs have had a much broader impact than just limiting NGOs' freedom of speech rights. Besides the fact that non-U.S. organizations do not enjoy the protections of the U.S. Constitution and therefore, cannot argue free speech protections,³³ as mentioned by both DKT and AOSI's complaints, it is difficult to comply with the regulations, which are unconsti-

tutionally vague.³⁴ This charge is based on undefined terms in the acts' funding limitations. For example, it is difficult to understand what is meant by "promote, advocate, support the legalization of prostitution." NGOs that receive GAA and TVPA funding are at risk of violating their commitments for noncompliance without even knowing it because they have not been properly informed of the parameters of the pledge requirements. These NGOs could unknowingly make the wrong policy decision, lose their funding, or have to pay back used funds for inadvertent noncompliance; at worst, they may be prosecuted for violating their agreement with the U.S. government.³⁵ The policy impacts of the anti-prostitution pledge are of great concern to all NGOs, but especially those that work with sex workers worldwide. The threat of violating USAID's terms has already caused NGOs receiving USAID funding to cancel otherwise successful programs, such as one Cambodian program that attempted to provide English-language training to prostitutes.³⁶

The DKT International Vietnam Country Representative declined to sign the anti-prostitution pledge because, according to DKT International's complaint:

DKT has no policy on prostitution and does not wish to adopt one. . . In addition, as an organization working to prevent the spread of HIV/AIDS, it strongly believes it can best do that in the many countries in which it works by maintaining neutrality on the controversial question of how to handle the complex problems that arise at the intersection of the HIV/AIDS epidemic and prostitution.³⁷

Many other non-U.S. NGOs face similar pressures. They believe that adopting anti-prostitution policies will cause a wedge between them and the populations with which they wish to work, or will stigmatize already disadvantaged populations including prostitutes and AIDS victims. Furthermore, as noted, successful programs – such as those that hire prostitutes as peer HIV/AIDS prevention educators³⁸ – may not receive GAA or TVPA funding. The anti-prostitution funding limitations on these NGOs will have a serious impact on their ability to provide direct services to populations vulnerable to HIV/AIDS, prostitution, and trafficking. For example, DKT International was receiving sixteen percent of its funding for their HIV/AIDS programming from USAID.³⁹ The GAA has now appropriated three billion dollars for HIV/AIDS programming for the Fiscal Years 2004 through 2008,⁴⁰ but by refusing to sign the anti-prostitution pledge, DKT International and other NGOs will have no access to these funds.



ENDNOTES: THE ANTI-PROSTITUTION PLEDGE

¹ See Complaint for Plaintiff at 2, DKT Int'l v. U.S. Agency for Int'l Dev. (DKT Complaint), (D.D.C. 2005), available at http://www.globalaidsalliance.org/docs/DKT_Complaint.pdf (last visited Oct. 27, 2005).

² See *id.* at 4.

³ See Michael M. Phillips, *Aids Group Sues U.S. Over Funds*, Wall St. J., Aug. 12, 2005, at B3, available at http://www.globalaidsalliance.org/Wall_Street_Journal_August_12_2005.cfm (last visited

ENDNOTES: THE ANTI-PROSTITUTION PLEDGE *Continued from page 67*

Oct. 16, 2005).

⁴ See DKT Complaint, *supra* note 1, at 2.

⁵ See DKT Complaint, *supra* note 1, at 6-7.

⁶ The United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, 22 U.S.C.A. § 7631 (2004).

⁷ 22 U.S.C.A. § 7631 (e).

⁸ 22 U.S.C.A. § 7631 (f).

⁹ Trafficking Victims Protection Act, 22 U.S.C.A. §§ 7101-7110 (2005).

¹⁰ 22 U.S.C.A. §7110 (g)(1).

¹¹ 22 U.S.C.A. §7110 (g)(2).

¹² See 22 U.S.C.A. §7110 (g)(2); *see also* 22 U.S.C.A. §7631(e).

¹³ DKT Complaint, *supra* note 1, at 2.

¹⁴ Memorandum from the U.S. Dept. of Justice to the General Counsel of the U.S. Health & Human Services (Sept. 20, 2004), *available at* <http://www.populationaction.org/news/views/relatedDocs/DOJtoHHS.pdf> (last visited Nov. 5, 2005).

¹⁵ See DKT Complaint, *supra* note 1, at 3, ¶ 8.

¹⁶ See Memorandum from Burt Neuborne, Rebekah Diller to Interested Parties 4 (June 13, 2005), *available at* <http://www.nswp.org/pdf/BRENNAN-USAID.PDF> (last visited Nov. 5, 2005) [hereinafter BRENNAN]. The Brennan Center's memo is an excellent source on the First Amendment issues highlighted by DKT Int'l v. U.S. Agency for Int'l Dev.; *see also* *Legal and Policy Implications of the Prostitution Loyalty Oath in U.S. Global AIDS and Trafficking Funding*, CENTER FOR HEALTH AND GENDER EQUITY, 2005, *available at* <http://www.genderhealth.org/pubs/2005STPpolicyimplications.pdf> (last visited Oct. 17, 2005).

¹⁷ Acquisition and Assistance Policy Directive (AAPD) No. 05-04, *Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003 – Eligibility Limitation on the Use of Funds and Opposition to Prostitution and Sex Trafficking*, USAID, June 9 2005, *available at* http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd05_04.pdf (last visited Oct. 24, 2005).

¹⁸ See *id.* at 5.

¹⁹ See BRENNAN, *supra* note 16.

²⁰ *Rust v. Sullivan*, 500 U.S. 173, 192 (1991) (finding that a federally-funded doctor could be prevented from speaking about abortion because imposing conditions on government funding did not violate free speech rights because the government “ha[d] merely chosen to fund one activity to the exclusion of the other”).

²¹ See BRENNAN, *supra* note 16, at 6.

²² See *e.g.*, Letter from AIDS Law Project, Centre for Applied Legal Studies, Wits University, South Africa, et. al. to George W. Bush, President of the United States 2 (May 18, 2005) (referring to Cambodian NGOs that have discontinued plans to provide English language training classes for prostitutes out of fear that these programs would be viewed by USAID as supporting prostitutes), *available at* <http://www.genderhealth.org/pubs/20050518LTR.pdf> (last visited Oct. 20, 2005).

²³ See DKT Complaint, *supra* note 1, at 10-11, Count II.

²⁴ See *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983).

²⁵ BRENNAN, *supra*, note 16, at 7.

²⁶ See Fed. Commc'n Comm'n v. League of Women Voters of California, 468 U.S. 364, 368 (1984).

²⁷ See BRENNAN, *supra* note 16, at 7.

²⁸ DKT Complaint, *supra* note 1, at 10.

²⁹ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also* Brennan, *supra* note 16, at 8.

³⁰ See Press Release, Brennan Center for Justice, Brennan Center Represents OSI/AOSI in Center's Second Lawsuit Challenging Anti-Prostitution Pledge Requirement on U.S. HIV/AIDS Funding (Sept. 23, 2005), *available at* http://www.brennancenter.org/presscenter/releases_2005/pressrelease_2005_0923.html (last visited Oct. 20, 2005).

³¹ See Complaint for Plaintiff at 3, Alliance for Open Soc'y Int'l Inc. v. U.S. Agency for Int'l Dev. (S.D.N.Y. 2005), *available at* http://www.brennancenter.org/programs/downloads/aosi_district_court_complaint.pdf (last visited Oct. 23, 2005) [hereinafter AOSI Complaint].

³² See AOSI Complaint, *id.* at 5 & 15. Testimony by Senate Majority Leader Bill Frist is the only legislative debate on the pledge requirement, and he stated that organizations should oppose prostitution and sex trafficking “because of the psychological and physical risks they pose for women,” which indicates to some that the USAID policy defines the funding limitation too broadly. Some argue that the USAID pledge requirement refuses funding for reasons far beyond preventing the named risks.

³³ DKT Mem'l Fund LTD v. U.S. Agency for Int'l Dev., 887 F.2d 275, 281 (D.C. Cir. 1989). In this case, DKT sued USAID for limitations on funding to foreign NGOs for abortion-related activities found in the Mexico City Policy. The court held that there is not a “public association” between the U.S. government and foreign NGOs that should require the U.S. government to fund foreign NGOs for projects that work against U.S. foreign policy goals.

³⁴ See DKT Complaint, *supra* note 1, at 16, Count III (noting that the vagueness violates the First Amendment and the Administrative Procedures Act); *see also* AOSI Complaint, *supra* note 31.

³⁵ See Brennan, *supra* note 16, at 4; *see also* DKT Complaint, *supra* note 1, at 9.

³⁶ See *e.g.*, Letter from AIDS Law Project, *supra* note 22.

³⁷ DKT Complaint, *supra* note 1, at 7.

³⁸ See Press Release, Health GAP, U.S. Sex Worker “Loyalty Oath” (May 2005), *available at* http://www.healthgap.org/press_releases/05/051705_HGAP_PR_USG_SWP_gfatm.html (last visited Oct. 17, 2005).

³⁹ See DKT Complaint, *supra* note 1, at 8.

⁴⁰ See 22 U.S.C.A. § 7671.