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## **An Attack on Nonprofit Speech: Death By a Thousand Cuts**

[excerpt]

The Bush administration and conservative allies have proposed or begun implementing a number of proposals that are akin to a "death by a thousand cuts." These "cuts", which have suddenly accelerated in the last year, come in three areas:

Attacks on nonprofit advocacy, particularly when there are disagreements with Bush administration policies;

Limits imposed by government on other nonprofit speech, particularly targeted to those working on issues-- such as reproductive rights, HIV/AIDS, and international development activities, where there may be ideological differences with the administration-- are particularly singled out as targets to control their speech. This administration -- and its conservative allies-- is stifling free expression and using the heavy hand of government to quash dissent.

This paper provides a review of recent proposals and actions that have taken place limiting nonprofit speech in each of the three areas described above. It does not address an important corollary concern-- limiting access to information. Without access to information or by government controlling the flow or type of information, it will inevitably affect the ability of nonprofits to do their work. For example, when the government stacks the deck of scientific advisory committees by selecting people with strong ideological biases to serve, it undermines the value of good science that our sector relies on. These stacked advisory committees also squelch the substantive work undertaken by many nonprofits.

## **Government Control of Speech**

The Bush administration has used the levers of power to control the speech and the activities of nonprofits in ways that have never been seen before. Many of the examples nonprofits describe are real; some are apocryphal; all have left a deep impression of distrust and hostility.

Perhaps the harshest opinions are being voiced by those dealing with issues concerning reproductive rights and HIV/AIDS. Many have described their differences with the Bush administration as falling on one side or the other of the "safe sex" versus "abstinence" debate. Some claim that targeted audits are occurring to those to disagree with the administration's emphasis on "abstinence." Others, who fall on the "safe sex" side of the debate claim that they are being told not to apply for new grants since resources will be going to faith-based organizations more consistent with administration policies. Some claim that there is a blacklist being developed by agencies, such as the U.S. Agency for International Development (USAID), to insure that certain organizations do not get grants.

Some of these sentiments are based on oral communication with those in USAID and other government agencies, but have not been documented in writing. Some derive from written communications, such as a December 2, 2002 "action cable" to USAID mission directors regarding "implementation of USAID policies and programs on HIV/AIDS and trafficking." The final page of the action cable states. "all operating units should ensure that USAID-funded programs and publications reflect appropriately the policies of the Bush administration." It should be ensured that "USAID is not perceived as using U.S. taxpayer funds to support activities that contradict our laws or policies, including 'abortion.'"

The same action cable notes that "any websites fully or partially funded by USAID" must have materials reviewed before posting to the web. Many groups working on HIV/AIDS believe that USAID and others, such as NGO Watch (see below), are combing through websites to find code words and phrases that might lead to blacklisting. They say keywords, such as "condoms," are triggers. If this process is occurring, it raises questions about whether federal agencies are properly applying cost allocation rules that grantees are required to follow. Cost allocation rules, which were at the heart of the 1983 OMB Circular A-122 fight, state that activities deemed unallowable for federal reimbursement should be paid for with non-federal funds, but that grantees can properly allocate a portion of the

allowable cost to the federal government. 6In this way, nonprofits do not need two copies, two offices, two executive directors, etc. However, the USAID action cable seems to suggest that if any federal funds are used for the website, then the entire website must follow federal standards. Thus, if a grantee, were to mention something about abortion or sexual activity it would "taint" the entire website, meaning no federal reimbursement would be allowed.

The following examples demonstrate the overtly political agenda being imposed by the Bush administration, particularly on those dealing with HIV/AIDS.

### **Stop AIDS**

Stop AIDS, a San Francisco-based nonprofit providing AIDS prevention programs, may prove to be experiencing what other nonprofits, particularly those with different viewpoints from the Bush administration, may also begin facing. HHS is applying a heavy hand that may make continued federal funding contingent on following HHS guidance on conferences and workshops to ensure that such events do not encourage sexual activity, even if those activities are funded with private dollars.

On June 13, 2003, the director of the Centers for Disease Control and Prevention, Julie Louise Gerberding, sent letters to Stop AIDS and the and the city of San Francisco's Department of Public Health warning that promotional materials for certain recent "workshops with titles and/or program descriptions" appear to encourage sexual activity in violation of Section 2500 of the Public Health Act. 7CDC has a cooperative agreement with Stop AIDS and the San Francisco Department of Public Health to conduct AIDS prevention education programs. The claim was made despite the fact that the promotional materials in question had been approved by a local review board mandated by CDC's guidelines for AIDS grantees. The CDC letter to Stop AIDS said continued use of the materials could result in "disallowance or discontinuation of federal funding." More disturbingly, HHS appears to be applying these standards to Stop AIDS's non-federally funded workshops.

In June 2002, CDC published interim final rules that require grantees to have materials approved by a review panel. 8Stop AIDS says it is using the same standards for current materials and workshop titles and descriptions as in the past.

Current guidelines and regulations governing grants and cooperative

agreements do not apply to non-federal funds (except for matching funds). However, CDC has told Stop AIDS informally that the federal standards extend to all its programs, citing "federal accounting principles." But CDC has not provided any legal authority for this claim, and the department's "Uniform Administrative Requirements for Awards and Subawards" does not require specific procedures to separate federally funded activities from privately funded ones. 9 Nor does it place limits on how private funds can be used.

The focus on Stop AIDS is not new. On February 13, 2003, Gerberding wrote to Rep. Mark Souder (R-IN), a chair of a key congressional oversight committee, telling him that CDC and the Inspector General of the Department of Health and Human Services each investigated past activities of the nonprofit. 10 Each review gave Stop AIDS a clean bill of health. Gerberding was writing to Souder because he previously expressed concerns that Stop AIDS was engaging in improper behavior.

At the same time Gerberding sent the June 13 letter to Stop AIDS and the city, she sent another letter to Souder informing him that Stop AIDS has workshop titles and program descriptions "that involve, for example, advice on promoting relations with escorts and prostitutes, in my view, appear to violate Section 2500." 11

In the letter, Gerberding tells Souder that CDC is instructing Stop AIDS to "refrain from using such program titles." She also notes the CDC will notify other HIV prevention program grantees about existing restrictions, and will "intensify oversight of grantee activities," including local review boards.

Stop AIDS staff expressed shock over the CDC letter. They note that the city of San Francisco, with its own funds, not used to match federal funds, supports the workshops. However, CDC claimed it is difficult to discern between private and federal funds used by Stop AIDS and so has "suggested" that the private funds should carry the same restrictions as the federal funds.

But an Inspector General's report issued in February said, "the Project's new Finance Director installed a software package to track costs by departments and by grants, effective July 1, 2002, and was evaluating alternatives to implement an after-the-fact time and effort reporting system. 12 The Project's comments to our draft report stated that its new time and effort reporting system had been implemented effective October 1, 2002." This makes the recent CDC claim on accounting principles highly suspect.

The National Association of People With AIDS wrote to Gerberding objecting to the letter to Stop AIDS, saying, "the chilling impact it has on community-based prevention efforts across the country is frightening and unacceptable."

The CDC's letter to Stop AIDS and expected mass mailing to all its grantees notifying them about compliance with the June 2002 rules is similar to the letter HHS sent to Head Start grantees, threatening loss of funding for a grassroots lobbying effort to oppose the administration's plan for reauthorizing Head Start. Although federal grantees can spend their non-federal funds on lobbying, the HHS letter did not make this clear. It is hoped that the letter to grantees of AIDS prevention programs does a better job of explaining the law, and does not try to control the operation or content of privately funded activities or speech.

In this Stop AIDS example the federal government is attempting to control the speech and activities of the entire organization, not just its federally funded activity, by its continued harassment through audits, inspections, and now implied control on use of private funds.

### **Targeting Protestors at the Barcelona AIDS Conference**

Efforts to silence critics seem to focus on pet issues, including promotion of abstinence as an AIDS prevention measure. This was apparent when Republican House members encouraged the Department of Human Services to launch inquiries into the actions of groups that protested during a speech by HHS Secretary Tommy Thompson at the XIV International AIDS Conference in Barcelona, Spain in July, 2002.

On July 17, 2002, twelve House Republicans, lead by Rep. Robert Aderholt (R-AL) and including Rep. Mark Souder (R-IN), requested HHS provide a list of organizations that receive any federal funds, along with individuals in those organizations, that attended the Barcelona conference and participated in the protest. <sup>13</sup> The Republicans were upset that Thompson was noisily heckled when he tried to give a speech at the conference.

AIDS activists, according to the Washington Post, "drowned out" Thompson's speech at the conference with angry chants criticizing the Bush administration for not pledging more money for international HIV/AIDS. <sup>14</sup> The conference protesters handed out flyers signed by twelve U.S. organizations criticizing the U.S. for not spending enough

money on AIDS in developing countries and helped lead the heckling. The protesters began blowing whistles and yelling "Shame! Shame!" and "No more lies!" as Thompson ascended to the podium. The chanting continued until the end of his speech, rendering the address "virtually unintelligible to the audience," according to the Washington Post. The protesters also carried placards stating, "Wanted: Bush and Thompson for murder and neglect of people with AIDS," according to the Associated Press. 15 Several hours after his speech, Thompson met with approximately 10 U.S. protesters, and one of the activists said that the Secretary seemed "pretty sympathetic," according to an article in the Wall Street Journal on July 10, 2002.

The House Republican letter indicated the members were "very disappointed by the rude reception" Thompson received. They asked Thompson for the total amount of federal assistance that went toward the conference and for a list of individuals, and their affiliated organizations, who attended the conference with federal assistance. They emphatically noted that if the conference organizing committee cannot "guarantee the freedom of speech to U.S. representatives and discontinu[e] its discrimination against those of religious faith," financial assistance to future conferences may be withheld or "redirect[ed]."

On the same day the letter was written, Roland Foster, a staff member for the Republican majority on the House Government Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources, sent an e-mail message to HHS' legislative affairs office asking how much federal funding the 12 U.S. AIDS organizations that helped organize the protest receive. Six days later, Foster expanded the number of organizations in the audit request from 12 organizations to 16.

Claude Allen, Deputy Secretary of HHS, said the department did not want to engage in a witch hunt, but was quoted by the Washington Post saying that protestors, "need to think twice before preventing a Cabinet-level official" from speaking. 16 According to the Washington Post article, HHS officials are "genuinely angry and are seeking to prevent what they view as disrespectful behavior in the future."

The audits of the AIDS prevention groups were the subject of an August 19, 2002 CNN Inside Politics discussion. Maria Echaveste, deputy chief of staff under former President Clinton, argued that the HHS inquiry is, "a witch hunt. I think ... they're sending a signal that there may be retribution for people expressing their freedom of speech and it's just really shocking." On the other hand, Rich Lowry of the

National Review said, "what the groups engaged in went well beyond expressing their opinions or even booing. They engaged in a 30-minute effort -- a successful effort -- to shut down and make it impossible to hear the HHS secretary give an address at an international conference. So if you're a member of one of these groups that, on the one hand, fattens itself on federal funds, and on the other hand, goes overseas to shout down U.S. officials, you should expect to get some blowback and some additional attention from Congress."

Nonprofits clearly see the HHS action as retaliatory-- and believe it is intended to chill future advocacy. For example, Terje Anderson, Director of the National Association of People With AIDS, summed up this fear by telling the Washington Post: "Groups that do advocacy and get public money are always concerned that there's an awkwardness in that situation. But I can't think of another time there's been talk of retaliation." And Mark Harrington, Executive Director of the Treatment Action Group, added, "Anybody who hears what's happened is going to think twice about signing another flier or planning another demonstration."

Fear of retaliatory audits, even if a grantee receives a clean bill of health like Stop AIDS did (see section above), can have a chilling effect on speech, since the time and expense of dealing with an audit are considerable. Whether one agrees or disagrees with heckling as a tactic, it is a form of constitutionally protected speech that should not, on its own, give rise to increased scrutiny, audit, or withholding of federal grants.

### **AIDS Programs in Africa and the Global Gag Order**

This year, House Republicans included two religious amendments in the \$15 billion bill to help stop the spread of AIDS in Africa, which passed on May 1, 2003. The first would require one third of the money to be used to promote abstinence (a favorite cause of the religious right). The second provision would permit religious organizations that receive funding under the program to reject AIDS prevention strategies that they find objectionable (such as instruction in the use of condoms). This action, combined with the "global gag rule," creates a double standard in the degree of control the U.S. government seeks to assert over activities and speech that it does not fund.

The "global gag rule," also known as the Mexico City Policy, forbids any international family planning organization that receives federal funds from talking about abortion, counseling women on abortion,

providing abortions, and advocating for changes in abortion law, even with their own private funds. President Ronald Reagan first imposed the global gag rule in 1984, and President Bill Clinton rescinded the policy in 1993. Soon after taking office, Bush reinstated it.

Giving federally-funded religious groups free reign to promote a religious viewpoint in the context of service delivery (by automatically rejecting a crucial AIDS control method) while banning groups that provide information on abortion (or express a viewpoint on abortion) contrary to administration policies from receiving grants for international family planning programs is hypocritical and unjust. The U.S. government can limit the use of its funds as it sees fit, but it should not seek to control statements or activities it does not fund. In this situation, the religious groups have an additional benefit -- the ability to import their sectarian viewpoint into the realm of government sponsored programs.

The global gag rule is similar in substance to the attacks on nonprofits lead by Ernest Istook (R-OK) in the mid 1990's, which would have banned "political activity," including lobbying, by any nonprofit that received even \$1 in federal funds. That proposal was rejected for domestic grantees.

This issue is far from settled. On July 9, 2003, the Senate voted 53-43 in favor of an amendment to the foreign aid bill that allows federal grantees doing international work to use non-grant funds to provide information about abortion or advocacy on abortion rights. The Senate amendment, sponsored by Sen. Barbara Boxer (D-CA), is the first step in removing the policy legislatively. <sup>17</sup> However, the more conservative House is unlikely to approve the measure. Even if the bill gains House approval, Bush promised to veto the \$27 billion foreign aid package if it lifts the gag rule.

The Senate vote does not alter existing requirements that federal funds cannot be used for abortions. Nonetheless, the bill is being characterized as pro-abortion, with Sen. Sam Brownback (R-KS) reported by Reuters as saying, "It's about the use of taxpayer dollars to fund abortions overseas." Legislative efforts to do away with the rule have been ongoing since February 2001 when legislation was introduced in both the House and Senate to reverse the Bush administration's policy. The legislation, the Global Democracy Promotion Act of 2001, was sponsored by Rep. Nita Lowey (D-NY) in the House and Boxer in the Senate, and cosponsors included several anti-abortion Republicans.

## **From Citizens to Nonprofits: Challenging Dissent**

Ashcroft has been very clear: dissent equals disloyalty. As he told the Senate Judiciary Committee on December 6, 2001, "To those who scare peace-loving people with phantoms of lost liberty, my message is this. Your tactics only aid terrorists for they erode our national unity and diminish our resolve."

With the Patriot Act and subsequent administrative orders, the government has a host of new powers to monitor people and organizations that are not suspected of any wrongdoing. To compound the situation, past initiatives like "Operation TIPS" 22 encouraged Americans to watch and inform on their neighbors. As a result, political dissenters, as well as many others, have felt the backlash. (It is unclear what impact the Terrorist Information Awareness, formerly Total Information Awareness, operated by the Defense Department, will have.)

### **Conclusion:**

The Bush administration and some conservatives appear to be moving toward closing off debate on important issues, from the structure of the social safety net, involving programs like Head Start and education for disabled children, to health and safety regulation, impacting how scientific research and knowledge is used by government. Going a step further, the administration is attempting to extend its control of speech and activities to privately funded programs and communications, including AIDS education groups and humanitarian aid efforts in Iraq.

See also VILLAGE VOICE article:

**Watchdog Reveals Effort to Gag Anti-Bush Causes**

## **Muffling the Left**

by **Chisun Lee**

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