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United States Department of State
and the Broadcasting Board of Governors
Office of Inspector General

Report of Inspection

Review of Department Of State Activities Concerning the Draft Kenya Constitution

Report Number ISP-I-10-77, August 2010

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**United States Department of State
and the Broadcasting Board of Governors**

Office of Inspector General

PREFACE

This report was prepared by the Office of Inspector General (OIG) pursuant to the Inspector General Act of 1978, as amended, and Section 209 of the Foreign Service Act of 1980, as amended. It is one of a series of audit, inspection, investigative, and special reports prepared by OIG periodically as part of its responsibility to promote effective management, accountability and positive change in the Department of State and the Broadcasting Board of Governors.

This report is the result of an assessment of the strengths and weaknesses of the office, post, or function under review. It is based on interviews with employees and officials of relevant agencies and institutions, direct observation, and a review of applicable documents.

The recommendations therein have been developed on the basis of the best knowledge available to the OIG and, as appropriate, have been discussed in draft with those responsible for implementation. It is my hope that these recommendations will result in more effective, efficient, and/or economical operations.

I express my appreciation to all of those who contributed to the preparation of this report.

A handwritten signature in black ink, appearing to read "H. W. Geisel".

Harold W. Geisel
Deputy Inspector General

TABLE OF CONTENTS

KEY JUDGMENTS	1
BACKGROUND: HISTORY OF THE CONSTITUTIONAL REFORM PROCESS AND KENYAN PENAL CODE PROVISIONS ADDRESSING ABORTION.	3
BACKGROUND: THE SILJANDER AMENDMENT.	9
UNITED STATES EMBASSY FRONT OFFICE ACTIVITIES CONCERNING THE DRAFT KENYA CONSTITUTION	11
UNITED STATES EMBASSY POLITICAL, ECONOMIC, AND PUBLIC DIPLOMACY SECTION ACTIVITIES CONCERNING THE DRAFT KENYA CONSTITUTION	15
The Process	15
Kenya’s Cultural Norms on Abortion	16
CONCLUSION	17
ABBREVIATIONS	19
APPENDIX: CONGRESSIONAL REQUEST	21

KEY JUDGMENTS

- The U.S. Ambassador to Kenya has made it clear that the U.S. Government supports the constitutional reform process and told the inspectors that he has not explicitly taken a position asking Kenyans to vote “yes” on this draft.
- The U.S. Ambassador to Kenya has, however, speaking on behalf of the Administration, been a vocal supporter of Kenya’s comprehensive reform agenda (the central element of which is reforming the constitution).
- The OIG inspectors did not find any evidence that U.S. embassy officials made any private or public statements to Kenyan Government officials, nongovernmental organizations (NGO), or any other actors expressing either a positive or negative position on the abortion provision in the draft Kenyan constitution. The inspectors also did not find any evidence that embassy officials attempted to influence any Kenyan’s opinion, either positively or negatively, on the abortion provision.

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BACKGROUND: HISTORY OF THE CONSTITUTIONAL REFORM PROCESS AND KENYAN PENAL CODE PROVISIONS ADDRESSING ABORTION

The process by which Kenyans have drafted a new constitution is the direct result of an effort to avoid a repeat of the horrific violence that erupted after the most recent Kenyan presidential election held on December 27, 2007. President Mwai Kibaki received 46 percent of the vote, and his closest challenger, Raila Odinga received 44 percent. Odinga and his supporters alleged that Kibaki and his supporters manipulated the vote. Violence erupted in the country, and resulted in hundreds of deaths and hundreds of thousands of displaced Kenyans. According to embassy officials, the violence was particularly brutal with respect to women, including impregnation through rape.¹ Former UN Secretary General Kofi Annan met with President Kibaki and Odinga to impress upon them the need to end the violence, and to reform the country's structure and method of governance. On February 28, 2008, Kibaki and Odinga signed a power-sharing agreement called the National Accord and Reconciliation Act, which named Odinga as Prime Minister, and created a coalition government.

On May 23, 2008, representatives of the coalition government signed the Kenya National Dialogue and Reconciliation Statement of Principles on Long-Term Issues and Solutions (the Reform Agenda), which was negotiated by former UN Secretary General Annan. This agenda includes reforming the Kenyan constitution and land, police, and judicial reform. On June 19, 2008, the Kenyan Parliament passed the Constitution of Kenya Review Act (the Review Act), which provided a framework and timeline by which the constitutional reform process would take place. The Review Act identified a Committee of Experts (CoE) and a Parliamentary Select Committee (PSC), a bipartisan group of 26 Kenyan Members of Parliament, to manage the constitution drafting process. The CoE was established in February 2009, and produced a first "harmonized" draft of the Constitution on November 17, 2009. Ultimately, the CoE produced three drafts. The first draft did not have the word "abortion" in the text. Instead, the draft included a section entitled "Right to Life"² that

¹ Kenyans refer to the children that were born as a result as "post-election violence babies."

² This section was numbered 35 in the first harmonized draft. Later constitutional drafts which also contained a section on "Right to Life" were numbered differently.

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stated: “(1) every person has the right to life; and (2) a person shall not be arbitrarily deprived of life.” According to the CoE Guide to the Proposed Constitution,³ this draft received approximately one million submissions. The CoE revised the draft as it felt appropriate in response to these comments.

On January 8, 2010, the CoE submitted the revised draft⁴ (the second draft) to the PSC, which met in Naivasha, Kenya, from January 18 to 28, 2010, to discuss it. Embassy officials informed the OIG inspectors that they did not participate in any way in these discussions. While the PSC was meeting in Naivasha, embassy officials learned that Kenyan churches raised the abortion issue through the Kenya Christian Constitutional Forum (KCCF), an unofficial self-organized group of some Anglican, Evangelical, and other churches. The group wanted a Bill of Rights that explicitly said that the right to life begins at conception and imposed an absolute ban on abortion.

On February 2, 2010 (after the Naivasha meeting), the PSC developed recommendations for the CoE to consider as it prepared its third and final constitutional draft. These included a change in the governing structure in Kenya to more closely model the U.S. (presidential) system versus the British (parliamentary) session and a provision entitled “Right to Life,”⁵ which states: “(1) Every person has the right to life. (2) The life of a person begins at conception. (3) A person shall not be deprived of life intentionally except as may be authorized by this Constitution or any other written law. (4) Abortion is not permitted unless in the opinion of a registered medical practitioner, the life of the mother is in danger.” The PSC presented these and other recommendations to the CoE for consideration. The CoE reviewed all the recommendations. Embassy officials told the OIG inspectors that the CoE had wanted to delete the “life of a person begins at conception” text, but the PSC

³The complete guide can be found on the Committee of Experts’ Web site, http://www.coekenya.go.ke/images/stories/Resources/proposed%20constitution_simplified_version.pdf (last accessed July 23, 2010).

⁴ As required under the Review Act, the CoE identified contentious issues and incorporated public views on those issues into the revised draft. The CoE identified the three issues as the system of government, devolution of power, and transitional and consequential provisions.

⁵ Section 25 in the second revised draft.

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advised the CoE that the language must remain in the draft. The CoE was concerned that the language authorizing an exception was too restrictive (the only exception being the life of the mother in danger).⁶ Also, according to embassy officials and the UN Secretariat,⁷ the Kenyan penal code and jurisprudence currently provide other exceptions to the absolute ban on abortion, for example, in the case of impregnation resulting from rape or out of concern for the health of the mother.

After consulting with Kenyan medical professionals, particularly the obstetrical and gynecological community, the CoE submitted a report to the Kenyan Parliament that outlined the serious health issues the CoE had considered in its decision to further revise the draft constitution's section on abortion. The CoE presented its third and final draft to the Kenyan National Assembly on February 23, 2010. This draft contained the revised section entitled "Right to Life"⁸ which the CoE had developed after its consultations with the medical community: "(1) Every person has the right to life. (2) The life of a person begins at conception. (3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law. (4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."⁹

⁶ According to a public statement by a member of the CoE, Njoki Ndung'u, the CoE was concerned that such restrictive language "would prevent women from getting post rape care treatment, treatment for normal miscarriages, inducement for fetal death cases, treatment of ovarian cancers, and other serious cases where the mother may not be on her deathbed, but her health in relation to future fertility and maternal health would be seriously under threat." The PSC asked that "the CoE should not remove the definition of life, because [the PSC] did not want to offend the Church, but which could be resolved in court after enactment of the Proposed Constitution. [The PSC] did however agree that the unintended consequences of the definition were very serious, and required a rewording to ensure that such problems would be addressed. The PSC however was clear that the bottom line was that abortion on demand should not be provided for. The [CoE] therefore reworded the sections as follows, with changes that were made on the basis of the above concerns: "Abortion is not permitted unless, in the opinion of a trained health professional, there is a need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law. <http://capitalfm.co.ke/news/Eblog/view/CoE+right+on+abortion+clause.html> (accessed July 12, 2010).

⁷ www.un.org/esa/population/publications/abortion/doc/kenya.doc (accessed July 12, 2010).

⁸ Numbered section 26.

⁹ The term "trained health professional" is not defined in the draft constitution.

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After the National Assembly received the revised, third and final draft for debate, the National Council of Churches of Kenya (NCCCK) issued a public statement on March 3, 2010,¹⁰ stating in part:

“We are greatly saddened by the attempts by the Committee of Experts to go back on the PSC draft and deceptively re-introduce abortion. We insist that the constitution must protect all human life which begins with conception and ends at natural death.” The statement concluded by saying that “WE shall therefore NOT endorse a constitution that glosses over evident justice concerns persistently raised but ignored by the review organs.” (Emphasis in original.)

Accompanying the statement was a memorandum which recommended that Article 26(4), which provides exceptions to the abortion prohibition in the case of emergency treatment, the life or the health of the mother is in danger, or if permitted by any other law, be deleted.

The National Assembly debated the final draft and after 30 days passed it without further changes. The Kenyan people will be voting on this version of the draft in the national referendum on August 4, 2010. All three versions also contained a provision on health care for Kenyans, including reproductive health care. The version to be voted on includes Section 43(1)(a), which states: “Every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health.”

Although the existing Kenyan constitution is silent on abortion, the provisions of the Kenyan penal code currently in effect nevertheless address the abortion issue, including those rare instances when the intentional termination of pregnancy would be permissible under the law. As the only law that addresses abortion, the Kenyan penal code contains several provisions that make abortion on demand illegal and define when the life of a person begins. Those provisions include sections 158, 159, 160, and 214.

Section 158: Attempt to procure abortion

Any person who, with intent to procure miscarriage of a woman, whether she is or is not with child, unlawfully administers to her or causes her to take any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for fourteen years.”

¹⁰ http://www.nccck.org/index.php?option=com_content&view=article&id=149&Itemid=61 (last accessed July 23, 2010).

Section 159: Attempt to procure abortion by the pregnant woman

“Any woman who, being with child, with intent to procure her own miscarriage, unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, is guilty of a felony and is liable to imprisonment for seven years.”

Section 160: Supply drugs or instruments to procure abortion

“Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years.”

Section 214: When a child is deemed to be a person

“A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not and whether it has an independent circulation or not, and whether the navel-string is severed or not.”

The penal code also contains the current exception to the abortion prohibition:

Section 240: Surgical operation-the good faith clause

A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother’s life, if the performance of the operation is reasonable, having regard to the patient’s state at the time and to all the circumstances of the case.”

If the August 4th referendum results in the adoption of the constitution, unless and until the Parliament passes additional legislation either repealing the current penal code provisions or amending them, it appears that the penal code currently in effect (in conjunction with the constitutional limitations) will continue to control under what circumstances a Kenyan woman legally can have access to abortion. If Kenyans vote not to adopt the constitution, the penal code provisions, including both the restrictions on abortion and the limited exception to the abortion provision, similarly will still be in effect.

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BACKGROUND: THE SILJANDER AMENDMENT

The Siljander Amendment¹¹ is a provision that appears in annual Department appropriation legislation. It has most recently been included in the 2010 Consolidated Appropriations Act, and imposes a condition on the Department's appropriation, that "none of the funds made available under this Act may be used to lobby for or against abortion."¹² The term "lobby" is not defined in the Act.

This prohibition on using appropriated funds to lobby for or against abortion has historically applied to foreign assistance funds, primarily within the domain of USAID. According to the Office of the Legal Adviser, the consolidation of foreign assistance and Department operations appropriations into the same Act has resulted in the applicability of the Siljander Amendment to funding from the Department's operating accounts.

In their request, Representatives Smith, Ros-Lehtinen, and Issa state their belief that lobbying for reproductive health care is also a violation of the Siljander Amendment. The review team does not opine on the applicability of the Siljander Amendment to lobbying for or against reproductive health care because the Amendment references only abortion. However, as noted later in the report, the inspectors did speak with embassy officials on whether reproductive health was ever discussed with Kenyans.

¹¹ Named for former Representative Mark Siljander (R-MI).

¹² 111 P.L. 117.

UNCLASSIFIED

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UNITED STATES EMBASSY FRONT OFFICE ACTIVITIES CONCERNING THE DRAFT KENYA CONSTITUTION

Unquestionably, and taking his direction from the Bureau of African Affairs and the White House National Security Staff (NSS), the U.S. Ambassador to Kenya has been a vocal and aggressive proponent for constitutional reform as the central element of Kenya's comprehensive reform agenda, which the U.S. Government hopes will culminate in free, fair, peaceful, and democratic elections in 2012. The Administration believes the stakes are incredibly high in passing a reform agenda, including a new constitution. The Ambassador told the OIG inspectors that, "if the reform agenda fails and the constitution is the heart of the reform agenda, then this country is in crisis." He said that President Obama's June 1, 2010 interview with the Kenyan Broadcasting System in which the President urged Kenya to "take advantage of this historic moment" was interpreted by Kenyans as "pro-yes" (for the new constitution). In the Ambassador's remarks during the official embassy July 4 reception, the OIG inspectors heard him quote from the President's interview, and also from Vice President Joe Biden's June 9, 2010 speech to Nairobi university students in which the Vice President stated, "putting in place a new constitution and strengthening your institutions and the rule of law will ... unleash the energy of the youth, deepen the roots of your democracy, and ultimately guarantee your security..."

Although the Ambassador emphasized to the inspectors that he is "walking a fine line between advocating reform and voting yes," it was the OIG inspectors' impression that the Ambassador's public statements earlier in 2010 could have blurred that distinction and were advocating for a "yes" vote. For example, in an April 21, 2010 public appearance (broadcast on NTV Kenya and circulated via YouTube)¹³, the Ambassador said, "In the view of the United States, it would be wrong to let one or even a number of specific issues distract from the key need for a new constitution." The Ambassador also stated: "If this new constitution is not passed, all these other reforms that are carried out – police reforms and others – will not be enough to save the country. If, however, the constitution is passed, then other reforms along with that have the potential to really increase prospects for democratic stability and prosperity."

¹³ <http://www.youtube.com/watch?v=mdsc79SWTc4&feature=related> (accessed July 15, 2010).

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In an April 7, 2010, statement, the Ambassador stated in part:

The Government of the United States welcomes Parliament's overwhelming approval of Kenya's harmonized draft constitution. The strong statements made by the President Kibaki and Prime Minister Odinga urging support of the draft constitution are particularly encouraging. The leaders of the coalition government have sent a clear and positive message to the Kenyan people that the implementation of a new constitution is critical to achieving political reform.

We urge the leaders of the coalition government, civil society, and religious leaders to maintain positive momentum as Kenya moves towards a national referendum on the draft constitution. Unity in support of the draft will bring the Kenyan people together and establish a framework which will greatly improve prospects for democratic stability and shared prosperity for all Kenyans.

No political process and no constitution is perfect—including those of the United States—but the proposed new constitution contains checks and balances which will ensure greater accountability and adherence to the rule of law. The new constitution will, therefore, secure and protect the interests of all communities and regions in the country.

The United States will support a vigorous process of civic education to help ensure that the Kenyan people can make well-informed decisions. We will continue to support preparations for a credible and transparent referendum, and the implementation of the reform agenda.

The Ambassador's more recent statements, however, more clearly state that the embassy is supporting the constitutional reform agenda and not a "yes" vote, including a July 12 press release that states in part that Kenyans "will be alone in the voting booth, voting their conscience. The U.S. Government stands with the people of Kenya. We encourage the Kenyan people to vote in a free and fair referendum, towards a peaceful and prosperous future."

When the OIG team queried him regarding summary descriptions of USAID funding agreements with various NGOs which noted explicitly that they are intended to increase the number of "yes" votes, the Ambassador responded that he did "not review the specific grant language and had been unaware of the specific wording" contained in the summaries. He said that his "guidance and U.S. Government policy is that we are supporting the constitutional review process—and clearly want to see a successful outcome (per Obama and Biden statements, etc.). We are supporting civic education and efforts to encourage people to vote. We are not specifically supporting the "yes" campaign." Nevertheless, the Ambassador insisted that he is not "free-

UNCLASSIFIED

lancing,” as his pro-constitutional reform message has been fully coordinated with both the NSS, and the highest levels of the Department. After a comprehensive series of Washington interviews, including with the Assistant Secretary for African Affairs, the OIG inspectors agree with the Ambassador’s assessment.

It is the Ambassador’s practice to meet with all sides on the constitutional debate, including the NCKC. Although the Ambassador has listened to the churches’ concerns about the abortion provision, he did not (and does not) take a position on it. As the Ambassador has stated, his overall objective is to “help ensure that the constitution gets passed.” Impediments to its passage are four controversial issues the embassy identified which are addressed in the draft: land reform, decentralization of power, kadhis courts, and abortion.¹⁴ When the OIG inspectors asked the Ambassador what he says to the Kenyans about abortion, he was emphatic that he has “never said anything public about the abortion provision ... never, never. Absolutely not.” Although the Ambassador acknowledged that he has “occasionally been asked about the abortion issue in public meetings” he has “avoided taking any position on the issue, and have instead always shifted the focus to what we consider the key issues re: the constitution, including separation of powers, devolution to local levels, etc.” Moreover, even in his internal embassy meetings on the constitution, the Ambassador told the mission, including USAID, that the embassy would take no position on abortion. The inspectors found that public remarks and transcripts, as well as interviews and conversations with embassy officials and Kenyans in Nairobi, corroborated the Ambassador’s insistence on his neutrality with respect to the abortion issue.

Concerning the reference to “reproductive health care” in the draft constitution, the Ambassador informed the inspectors that, in Kenya, there is no health education or sex education in schools. He said that Kenyans would not see the term as a “code word” for abortion. The Ambassador added that, during the Secretary of State’s August 2009 visit to Kenya, he did not recall her making any comment with respect to reproductive health care. The OIG inspectors confirmed this through a review of the Secretary’s August 6, 2009 public remarks and transcripts while she was in Kenya to commemorate the 1998 bombing of the U.S. embassy, and also with the Assistant Secretary for African Affairs, who had accompanied the Secretary on her trip.

¹⁴ Kadhis courts are Islamic courts that currently exist and are legal under Kenyan law; land reform includes the establishment of policies to secure land rights and a requirement that foreigners can only lease (for no more than 99 years) but not own land.

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While in Kenya, the inspectors also spoke at length with the deputy chief of mission (DCM). Although the DCM acknowledged that he had not been as involved in the constitutional reform agenda as had the Ambassador, he could speak authoritatively on the issue of reproductive health, as he is the embassy lead on the Global Health Initiative. Like his embassy colleagues, the DCM confirmed that the term “reproductive health” is not specifically defined in Kenya. Although it appears in the current draft constitution, it is not a term in general Kenyan usage, and also not a term that the embassy discusses. The UN defines reproductive health comprehensively, to include family planning and contraception, pregnancy, birth and post-natal care. In Kenya, a recipient of more than \$500 million in the President’s Emergency Plan for AIDS relief (PEPFAR) funds, reproductive health would also include a heavy emphasis on HIV/AIDS prevention, particularly in the area of mother-to-child transmission.

Embassy officials told the inspectors that they have been very careful to “not” be associated with individual Kenyan politicians and also very careful to focus on ideas rather than specific provisions in the draft constitution (“ideas mean good governance”). The draft constitution would force Kenyans to take stands, opening up areas for debate. In this way, it represents a “race to the starting line.” As for the overall significance of the reform process, the DCM cited the Vice President’s comparison of Kenya to Pennsylvania, the “keystone state.” Without Pennsylvania, there would have been no democratic union and without a strong and stable Kenya, a point also emphasized by the Assistant Secretary for African Affairs and by the Ambassador, there can be no strong East Africa.

UNITED STATES EMBASSY POLITICAL, ECONOMIC, AND PUBLIC DIPLOMACY SECTION ACTIVITIES CONCERNING THE DRAFT KENYA CONSTITUTION

In addition to their review of embassy written documentation, including communication back to the Department, OIG inspectors held extensive individual interviews with American Foreign Service officers and locally employed Kenyan staff in the political, economic, and public diplomacy sections of Embassy Nairobi. The inspectors solicited information on whether there were discussions about abortion and reproductive health within the embassy and whether the Ambassador or any other American employee addressed the issues of abortion or reproductive health outside of the embassy.

THE PROCESS

The embassy employees walked the inspectors through the history of constitutional reform in Kenya and the steps that led through a consultative process to the present draft by way of the CoE and the PSC. By all employees' accounts, the embassy was never consulted and never made recommendations on who should be included in the CoE and the PSC or what specific issues should be addressed in the various iterations that led to the current draft.

Under the direction of the Ambassador, the political section took the lead in monitoring the constitutional process. Embassy political officers told the OIG inspectors that it is very important to have a noncontentious referendum. This is the embassy's position. The U.S. embassy staff vocally supported the consultative process between the CoE and the Parliament that led to the current draft. The official embassy position is that it is now up to Kenyans to accept or reject the draft.

An economic officer told the inspectors that, in November 2009, the Ambassador started meetings in the embassy to discuss the reform task in Kenya and the draft constitution. For the embassy, the main concerns were Kenya's security, stability, and survival through the 2012 election in a dangerous neighborhood that includes

Sudan and Somalia. Health care and abortion were not discussed in those meetings. During one internal meeting in the Ambassador's office, abortion was raised in the context of whether the embassy would have to address the subject as one of the contentious issues. There was no follow-up and neither abortion nor reproductive health was ever discussed publicly with Kenyans.

Despite the Ambassador's availability for questions in many public fora, American and Kenyan embassy employees, including the Ambassador's Swahili interpreter, did not recall him ever responding to a question about abortion. Questions on other "hot-button" issues such as land reform and kadhis courts were raised and the Ambassador has also made public statements about women's rights and PEPFAR. A political officer who attended "road shows" with USAID's Office of Transitional Initiatives reported that, at the road shows the officer attended, although there were questions from the general public about constitutional issues, the subject of abortion never came up (although the Ambassador acknowledged to the inspectors that he had been asked about abortion in public meetings "occasionally").

KENYA'S CULTURAL NORMS ON ABORTION

The OIG inspectors found unanimity among all embassy staff interviewed that no one had ever publicly discussed abortion or reproductive health. American and Kenyan employees at post agreed that the term "reproductive health" is not a "code word" for abortion in Kenya.

The Ambassador's Kenyan special advisor on civil society spoke at length to the inspectors about abortion in Kenya. While secret abortions take place (the special advisor took special note of the escalation of rapes and unspeakable abuses of women during the post-election violence. Another locally employed staff member described the medical hazards that female genital mutilations create for mothers during childbirth), they are not socially acceptable and Kenyan women rarely discuss the subject in public. When abortion is publicly discussed, it is usually by men.

CONCLUSION

The following statement, issued by Embassy Nairobi on the day that the OIG inspectors concluded their review of Department activities concerning the draft Kenya constitution, aptly summarizes the message which the inspectors heard repeatedly from Department officials in both Washington and Nairobi:

... “The U.S. Government is supporting the constitutional review process as the centerpiece of the broad reform agenda agreed to following the post-election crisis.

U.S. views are clear. President Obama stated: “this is a singular opportunity to put Kenyan governance on a more solid footing that can move beyond ethnic violence, can move beyond corruption, can move the country towards a path of economic prosperity. And so I hope that everybody participates, everybody takes advantage of this moment, and those who would try to undermine this process I think are making a big mistake.” ...

The referendum is in the hands of Kenyans. They will be alone in the voting booth, voting their conscience. The U.S. Government stands with the people of Kenya. We encourage the Kenyan people to vote in a free and fair referendum, towards a peaceful and prosperous future.”

-Statement by the U.S. Embassy, July 12, 2010

As noted in the statement above, it is U.S. policy to actively support the Kenyan reform agenda, in which the constitutional review process figures prominently. It is not U.S. policy to take an active role in the specific provisions of the draft constitution, including Article 26 which addresses the right to life, and Article 43(1)(a) which addresses health care services. At no time during their review did the OIG inspectors uncover any evidence that U.S. embassy officials made any private or public statements to Kenyan government officials, NGOs or any other actors expressing either a positive or negative position on the abortion provision in the draft Kenyan constitution, nor did they attempt to influence any Kenyan’s opinion, either positively or negatively, on the abortion provision.

ABBREVIATIONS

CoE	Committee of Experts
DCM	Deputy chief of mission
Department	Department of State
KCCF	Kenya Christian Constitutional Forum
NCKK	National Council of Churches of Kenya
NGOs	Nongovernmental organizations
NSS	(White House) National Security Staff
OIG	Office of Inspector General
PEPFAR	President's Emergency Plan for AIDS Relief
PSC	Parliamentary Select Committee
USAID	US Agency for International Development

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APPENDIX A

Congress of the United States
Washington, DC 20515

May 6, 2010

Mr. Harold W. Geisel
Acting Inspector General
U.S. Department of State
Office of Inspector General
Room 8100, SA-3
2201 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Geisel:

We are writing to request an immediate audit of any and all uses of United States Government (USG) funds, or anticipated use of such funds, to support or engage in activities related to the proposed new constitution of Kenya (the "proposed constitution"). We submit this request on the basis of our deep moral obligation and ethical duty to rigorously pursue congressional oversight of potential violations of the Siljander Amendment by the current Administration. As you know, the Siljander Amendment appears as proviso eight under the heading "Global Health and Child Survival" of division F of Public Law 111-117 (123 Stat. 3035), as well as in previous foreign assistance appropriations laws, and states that "none of the funds made available under this Act may be used to lobby for or against abortion."

Kenya's current constitution includes no reference to abortion and abortion is not legally permitted in Kenya except to save the life of the mother. However, Kenya's new proposed constitution, which will be subject to a public referendum in August 2010, includes two articles that, if adopted, would enshrine a new constitutional right to abortion in Kenya and dramatically change Kenya's abortion law.

Article 26 of the proposed constitution states, in relevant part: "(1) Every person has the right to life; (2) The life of a person begins at conception....(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law." If promulgated, this article would radically change prevailing law in Kenya by creating a constitutional right to an abortion not only when the mother's life is in danger, but also when there is an undefined "need for emergency treatment," when the "health" of the mother is in danger, and "if permitted by any other written law."

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Mr. Geisel
May 6, 2010
Page 2

Article 43(1)(a) of the proposed constitution would in turn create a constitutional right “to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.” While “reproductive health care” is not defined in the proposed constitution, the Obama Administration has made it clear that “reproductive health” includes access to abortion.

On April 22, 2009, Secretary of State Hillary Clinton testified during a hearing before the House Foreign Affairs Committee that, “reproductive health includes access to abortion,” and “we are now an administration that will protect the rights of women, including their rights to reproductive health care.” With reference to access to abortion, Secretary Clinton went on to say, “it is my strongly held view that you are entitled to advocate... anywhere in the world, and so are we.”

Then on March 30, 2010, in response to a question as to whether abortion should be part of Canada’s global maternal health initiative, Secretary Clinton stated, “...you cannot have maternal health without reproductive health. And reproductive health includes contraception and family planning and access to legal, safe abortion.”

We firmly believe that such statements stand at odds with the Siljander Amendment, which strictly prohibits the use of U.S. taxpayer dollars to lobby for or against abortion. We also believe that due to the assertion of a right to “reproductive health” in Kenya’s proposed constitution and the Administration’s inclusion of access to abortion in its definition of “reproductive health,” any advocacy by the Administration in support of this proposed new constitution would constitute lobbying for abortion under Article 43 as well as Article 26.

There is no doubt that the Administration is advocating for adoption of the proposed constitution. On April 7, 2010, the U.S. Ambassador to Kenya, Michael Ranneberger, stated, “the Government of the United States welcomes Parliament’s overwhelming approval of Kenya’s harmonized draft constitution. The strong statements made by the [sic] President Kibaki and Prime Minister Odinga urging support of the draft constitution are particularly encouraging. The leaders of the coalition government have sent a clear and positive message to the Kenyan people that the implementation of a new constitution is critical to achieving political reform.”¹

¹ Statement by U.S. Ambassador Michael Ranneberger, Embassy of the United States of America, Nairobi, Kenya, April 7, 2010. Accessed at http://nairobi.usembassy.gov/speeches/2010-speeches/sp_20100407.html on May 3, 2010.

UNCLASSIFIED

UNCLASSIFIED

Mr. Geisel
May 6, 2010
Page 3

Moreover, the Administration is not limiting itself to verbal support. Ambassador Ranneberger was quoted in the media on May 3, 2010, as stating that the United States has donated Sh154 million (\$2 million) for “civic education” with respect to the proposed new constitution, and that Washington is committed to providing additional funding for the referendum on the proposed new constitution.² On May 1, 2010, it was reported that the Kenyan government “is still waiting for the financial support promised by the United States government towards the facilitation of the ongoing referendum in the country.”³

We believe 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. This concern is particularly salient given the prominence of the abortion issue in the public debate over the referendum. In fact, the chairman of Kenya’s Committee of Experts on Constitutional Review (the “Committee of Experts”) has identified abortion as one of the four most contentious issues in the proposed constitution.⁴ Other media reports also identify abortion as one of the leading issues being debated in anticipation of the August referendum.⁵ Furthermore, interference by foreign envoys in Kenya’s debate about the proposed constitution, possibly including the issue of abortion, has raised objections by a Kenyan member of parliament reported by the Kenya Broadcasting Corporation.⁶

The Obama Administration’s advocacy in support of Kenya’s proposed constitution may constitute a serious violation of the Siljander Amendment and, as such, may be subject to civil and criminal penalties under the Antideficiency Act, 31 U.S.C. § 1341.⁷ Civil penalties may include suspension from duty without pay or removal from office of an officer or employee who violates the Antideficiency Act (31 U.S.C. § 1349(a)). Criminal penalties, applicable when an officer or employee “knowingly and willingly” violates the Act, include a fine of up to \$5,000, imprisonment up to 2 years, or both (31 U.S.C. § 1350). In addition, a violation of the Act triggers a mandated report from the applicable agency head to the President and Congress of all relevant facts and a statement of actions taken to address the violation (31 U.S.C. § 1351).

² Opiyo, Peter, *Voter Education Gets Sh154m boost from US*, *The Standard*, May 3, 2010. Accessed on the Internet at www.standardmedia.co.ke/news/InsidePage.php?id=2000008145&cid=159& on May 3, 2010.

³ Hassan, Burhan, *Kenya Voter Registration Law Under Fire by Church Leaders*, *World News Vine*, May 1, 2010, accessed at <http://worldnewsvine.com/2010/05/kenya-voter-registration-law-under-fire-by-church-leaders/> on May 3, 2010.

⁴ Kagiri, Anthony, *Kenyan Warned Over Constitution Lies*, *Capital News*, April 20, 2010. Accessed at <http://www.capitalfm.co.ke/news/Kenyane/Kenyans-warned-over-Constitution-lies-8192.html> on May 4, 2010.

⁵ See, for example, Maliti, Tom, *Kenyan Churches Oppose Constitution Over Abortion*, *Associated Press*, April 30, 2010. Accessed at <http://www.google.com/hostednews/ap/article/ALeqM5iTdarPdLEaMQoY8c9dOsTfnobvbwD9FDCO1G1> on May 4, 2010.

⁶ Akoto, Judith, *Envoys Asked to Adhere to Diplomatic Practices*, *Kenya Broadcasting Corporation*, May 5, 2010. Accessed at <http://www.kbc.co.ke/storv.asp?ID=63771> on May 5, 2010.

⁷ See U.S. General Accounting Office, *Principles of Federal Appropriations Law*, 3rd ed., Volume II, p. 6-82 (Feb. 2006).

UNCLASSIFIED

UNCLASSIFIED

Mr. Geisel
May 6, 2010
Page 4

Therefore, we request that you immediately undertake a thorough investigation and report on all past, current, or anticipated activities related to Kenya's proposed constitution that were or are being funded, or have been committed funding, pursuant to any U.S. foreign assistance appropriations laws that include the Siljander Amendment, including division H of P.L. 111-8 and division F of P.L. 111-117. (Further references to current activity or funding should be read to include any past or committed future activity or funding.) We request that the report of such investigation include:

- (a) USG funding and activities with respect to the Committee of Experts, including:
 - (1) any participation in the appointment of the members of the Committee of Experts;
 - (2) financial assistance for the Committee of Experts' salaries, facilities, equipment, or travel expenses; and
 - (3) financial assistance for the Committee of Experts' "civic education" campaign, both generally and specifically for "education" about the language and legal implications of articles 26 and 43(1)(a). If such financial assistance is being provided, how is the "education" being provided, who is providing it, where, when, and what population(s) are being targeted? Has any assistance been provided that supported any statements or activities by members of the Committee of Experts in opposition to any individual or group that is criticizing the proposed constitution on the basis that it would change the abortion law in Kenya?

- (b) USG funding for or activities with non-governmental organizations (NGOs), including:
 - (1) the names of any NGOs that are receiving U.S. foreign assistance funds and that are undertaking any activity related to the proposed constitution, whether or not such activity is being funded with U.S. assistance;
 - (2) whether any NGO identified in paragraph (1) has a public position with respect to abortion;
 - (3) whether any NGO identified in paragraph (1) is funding abortion-related activities in Kenya with non-USG funding, and if so, what is the source of that funding;
 - (4) a description of any USG-funded NGO activity related to the proposed constitution, including any activity related to abortion, reproductive health, or involving any other terminology that might include abortion. If such activity involves verbal or written communications about articles 26 or 43(1)(a), then a verbatim quote of such communications or as detailed a description as possible, if a quote is not available, and the source of such quote or description;
 - (5) if abortion is an aspect of any NGO activity described in paragraph (4), a description of the stated objective of such activity, if available; and
 - (6) any assistance to an NGO that has supported any statements or activities in opposition to any individual or group that is criticizing the proposed constitution on the basis that it would change the abortion law in Kenya.

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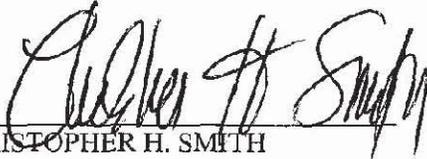
UNCLASSIFIED

Mr. Geisel
May 6, 2010
Page 5

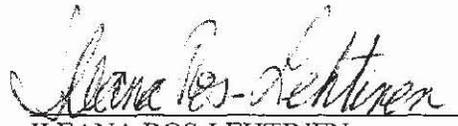
- (c) In addition to the statement made by Ambassador Ranneberger on April 7, 2010, any other statement(s) that have been made or activities that are being undertaken by the USG or a USG representative in support of the proposed constitution, including:
- (1) any statement(s) made publicly, and privately by any means whatsoever to a Kenyan government official or member of the Committee of Experts;
 - (2) any activities including the drafting or negotiation of the proposed constitution, and any activity related to the parliamentary debate of the proposed constitution, and both public and private activities that directly or indirectly influence or are intended to influence the position of the general public, a Kenyan government official or a member or members of the Committee of Experts;
 - (3) the date, location, target audience or population of and other details concerning any statement identified in paragraph (1) or activity identified in paragraph (2), including any statement or activity in opposition to any criticism of the proposed constitution on the basis that it would change the abortion law in Kenya.

We appreciate your urgent attention to this request. If you have any questions or comments, please contact Sheri Rickert, Minority Staff Director of the Subcommittee on Africa and Global Health, at 202-225-3765.

Sincerely,



CHRISTOPHER H. SMITH
Ranking Member
Subcommittee on Africa & Global Health



ILEANA ROS-LEHTINEN
Ranking Member
Committee on Foreign Affairs



DARRELL E. ISSA
Ranking Member
Committee on Oversight & Government Reform

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