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FOREIGN ASSISTANCE

Clearer Guidance Needed on Compliance Overseas with Legislation Prohibiting Abortion-Related Lobbying

U.S. Government Accountability Office

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Why GAO Did This Study

Following a 2007 disputed election and widespread violence, Kenya reformed its constitution, which its voters approved in August 2010. The United States has provided over \$18 million to support this process to date. GAO was asked to (1) describe any involvement that U.S. officials have had in Kenya's constitutional reform process relating to abortion; (2) describe any support that U.S.-funded award recipients and subrecipients have provided in Kenya's constitutional reform process relating to abortion; and (3) assess the extent to which agencies have developed and implemented guidance on compliance with the Siljander Amendment, which prohibits using certain assistance funds to lobby either for or against abortion. GAO analyzed documents and interviewed officials from the U.S. Agency for International Development (USAID), the Department of State (State), award recipients and subrecipients, and the Kenyan government, and conducted an extensive media search.

What GAO Recommends

GAO recommends that State and USAID develop specific guidance on compliance with the Siljander Amendment, indicating what kinds of activities may be prohibited, disseminate this guidance throughout their agencies, and make it available to award recipients and subrecipients. USAID concurred. State concurred that it should inform staff of the amendment but not that it should provide examples of potentially prohibited activities. GAO continues to believe that providing such examples would enable officials to better understand the amendment and when to seek additional guidance.

View [GAO-12-35](#) or key components. For more information, contact Jacquelyn Williams-Bridgers at (202) 512-3101 or williamsbridgersj@gao.gov.

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What GAO Found

Between 2008 and 2010, U.S. officials, including the U.S. ambassador to Kenya, publicly expressed support for Kenya's constitutional reform process. GAO found no indication that U.S. officials opined on the issue of abortion publicly or attempted to influence the abortion-related provisions of the draft constitution—a finding corroborated by a key Kenyan parliamentarian who served on the committee assisting in the constitutional reform process.

U.S.-funded award recipients and their subrecipients supported the constitutional reform process through activities that included civic education and technical assistance, both of which addressed the issue of abortion to some extent. USAID-funded civic education sought to inform Kenyans on the text of the draft constitution, and GAO found that some forums included discussion of abortion-related provisions. Some subrecipients undertook interpretation of the provisions at their forums, including describing scenarios in which abortion might be allowed. Several subrecipients explained to the public that, in their view, future legislation might be required to implement and further articulate the abortion-related provisions. While some subrecipients addressed the abortion-related provisions of the constitution, GAO found no indication that they cited the abortion provisions as a rationale to vote for or against the constitution. USAID also funded a technical assistance award to the International Development Law Organization (IDLO) to support the Committee of Experts (COE), the nongovernmental entity charged with drafting the constitution. In the course of providing comments and advice regarding the entire draft constitution, IDLO made suggestions relating to the issues of fetal rights and abortion during the early stages of drafting. IDLO later commented on broadening the exceptions when abortion would be legal. The COE has indicated that it generally considered IDLO's advice when revising the draft constitution. The final draft of the constitution is consistent with some of IDLO's advice relating to abortion, though GAO could not determine whether the COE made these changes in direct response to IDLO's advice.

Neither State nor USAID has clear guidance for compliance with the Siljander Amendment, which makes it difficult for some agency officials and award recipients to determine what types of activities are prohibited. State has not developed any guidance at all on the prohibition. USAID has offered training for its health and legal officers on compliance with family planning-related legislation, including the Siljander Amendment, for years and began offering some training to other officials in 2010. However, USAID's training and other family planning resources do not identify specific types of activities that are prohibited under the amendment. State and USAID attorneys indicated that they are available to provide advice to staff on a case-by-case basis, upon request. However, some State and USAID officials and award recipients GAO spoke to said that they were unclear as to what specific activities were prohibited.

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Abbreviations

ADS	Automated Directives System
CEPPS	Consortium for Elections and Political Process Strengthening
COE	Committee of Experts
DAI	Development Alternatives Incorporated
DCHA	Bureau for Democracy, Conflict, and Humanitarian Assistance
GLAAS	Global Acquisition and Assistance System
IFES	International Foundation for Electoral Systems
IDIQ	indefinite delivery/indefinite quantity
IDLO	International Development Law Organization
IG	Inspector General
OAA	Office of Acquisition and Assistance
PIO	public international organization
PSC	Parliamentary Select Committee
SUNY	State University of New York
UNDP	United Nations Development Programme
USAID	U.S. Agency for International Development

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G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

October 13, 2011

The Honorable Ileana Ros-Lehtinen
Chairman
Committee on Foreign Affairs
House of Representatives

The Honorable Darrell E. Issa
Chairman
Committee on Oversight
and Government Reform
House of Representatives

The Honorable Christopher H. Smith
Chairman
Subcommittee on Africa, Global Health,
and Human Rights
Committee on Foreign Affairs
House of Representatives

Kenya is a critical U.S. partner by virtue of its strategic geographical position and relative economic prominence in East Africa, and its political stability has implications for the entire region. Following a disputed presidential election in 2007 and resulting widespread violence, the Kenyan coalition government pledged to pursue an array of reforms to strengthen its democratic institutions, including constitutional reform. The United States has provided Kenya with constitutional reform-related assistance as part of the U.S. goal of promoting democratic, well-governed states, much as it has in other countries that have experienced recent political upheaval, such as Iraq and Sudan. Since fiscal year 2008, the United States has provided over \$18 million through the U.S. Agency for International Development (USAID) to nongovernmental and public international organizations to support these reform efforts. The Department of State (State) was also an active proponent for constitutional reform. After a 2 year process, the Kenyan government put forth a proposed constitution that the Kenyan people voted to accept in a national referendum on August 4, 2010. The new constitution includes provisions directly related to abortion. Though abortion has generally been illegal under existing Kenyan law, previous versions of the constitution had not directly addressed the issue.

Since annual appropriations restrictions known as the Siljander Amendment prohibit the use of certain U.S. assistance funds to lobby for or against abortion,¹ you have raised questions about the extent and nature of U.S. support and assistance regarding the abortion-related provisions in Kenya's constitution. In response to your request, we (1) described any involvement that U.S. officials have had in the Kenyan constitutional reform process relating to abortion, (2) described any support that U.S.-funded award recipients and subrecipients have provided in the Kenyan constitutional reform process relating to abortion, and (3) assessed the extent to which U.S. agencies have developed and implemented guidance to help ensure compliance with the Siljander Amendment.

To address these objectives, we analyzed program documents from State, USAID, and the USAID award recipients and subrecipients that have implemented U.S.-funded assistance programs.² We conducted an extensive search of Kenyan and international media resources in order to identify any statements that key USAID and State officials and USAID award recipients and subrecipients may have made about abortion or the constitutional reform process. We also interviewed key USAID and State officials in Washington, DC, and traveled to Kenya to interview key U.S. embassy officials, USAID award recipients, and selected subrecipients that we identified based on the results of our document review and media search as being most likely to have addressed the issue of abortion. Our work supplements reports produced at your request by the inspectors general (IG) of both State and USAID in 2010.³

We conducted our work between January 2011 and October 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our

¹This restriction applies to funds appropriated in the annual Department of State, Foreign Operations, and Related Programs Appropriations Acts.

²An award recipient is an organization that receives a grant, contract, purchase order, task order, or cooperative agreement from USAID to conduct agreed-upon foreign assistance projects. These organizations, in turn, often give subawards to partners, hereafter called subrecipients, to implement the work.

³For the State IG report, see: U.S. Department of State. *Review of Department of State Activities Concerning the Draft Kenya Constitution*. Washington, DC, 2010. The USAID IG reports are not public documents.

findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. A more detailed description of our scope and methodology can be found in appendix I.

Background

Kenya has attempted constitutional reform several times over the past 50 years, but has been unsuccessful until recently. (See app. II for a detailed chronology of Kenyan constitutional reform-related events.) A disputed presidential election in 2007, followed by allegations of vote rigging and ethnic violence that killed more than 1,300 people and displaced approximately 350,000 more, catalyzed the need for reform. On May 23, 2008, Kenya's new coalition government agreed to undertake a reform agenda that included constitutional reform.⁴

The Kenyan Parliament established a process to review and potentially replace the existing constitution with one that would better ensure security and stability, democratic governance, and protection of rights for all Kenyans. Parliament established two bodies to lead this process—a nongovernmental entity known as the Committee of Experts (COE) to draft the constitution, and a Parliamentary Select Committee (PSC) to assist the National Assembly in the constitutional reform process. Parliament also mandated that both the National Assembly and the Kenyan people would have to approve the draft.

The COE produced three different drafts of the constitution, considering comments from the Kenyan people, the PSC, and others. The COE released the first draft to the public on November 17, 2009, and then revised the draft based on approximately 1 million suggestions from the public. The COE submitted this revised draft to the PSC on January 8, 2010, which in turn provided recommendations for the COE to consider as it prepared its third and final draft. The COE reviewed the PSC recommendations, consulted with experts in areas of contention, revised the draft, and presented its third and final draft to the Kenyan National

⁴The Kenya National Dialogue and Reconciliation Statement of Principles on Long-Term Issues and Solutions (which we hereafter refer to in this report as the comprehensive reform agenda) committed the government to end violence and restore fundamental rights, address the humanitarian crisis and promote reconciliation, approve of a power-sharing agreement, and address long-standing issues that had led to the violence. The comprehensive reform agenda identified constitutional reform as one of these long-standing issues.

Assembly on February 23, 2010. The National Assembly debated the draft and discussed potential amendments, but approved the draft without changes on April 1, 2010. The Kenyan people voted on this proposed constitution in a national referendum on August 4, 2010. Seventy-two percent of registered voters participated in the referendum, and 67 percent of Kenyan voters approved the constitution. The new constitution was enacted on August 27, 2010.

Kenya's prior constitution did not directly address the issue of abortion, though the Kenyan penal code does address the issue. Under Kenya's existing penal code, abortion is generally illegal and is legally allowed only under certain circumstances.⁵ The new constitution, however, includes an article entitled "Right to Life." This article states that the life of a person begins at conception and that abortion is not permitted unless, in the opinion of a trained health professional, there is a need for emergency treatment, the life or health of the mother is endangered, or it is permitted under another written law.

The United States, in line with its objective of collaborating to foster peace and stability in East Africa, has supported Kenya's efforts at governmental reform at all levels, with particular emphasis on constitutional reform. Since the signing of the comprehensive reform agenda in May 2008, USAID has funded 12 awards to 9 award recipients for work on Kenyan constitutional reform efforts. The award recipients have, in turn, given 182 smaller awards to 124 Kenyan partner organizations, or subrecipients. Prior to the constitutional referendum, these award recipients and subrecipients conducted program activities such as voter registration, logistical support,

⁵Various sections of the existing Kenyan penal code address abortion. For example, Section 158 states, "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." Similarly, section 159 states, "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." However, section 240 contains an exception to the prohibition, stating, "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."

civic education, and technical assistance. Since the referendum, they have supported continued civic education, electoral reform, and conflict mitigation in preparation for the 2012 national elections. USAID's Bureau for Democracy, Conflict, and Humanitarian Assistance (DCHA) has had primary responsibility for managing the awards.

In implementing this assistance, State and USAID are prohibited from abortion-related lobbying. The prohibition, first enacted in 1981 and commonly referred to as the Siljander Amendment, currently appears in the annual Department of State, Foreign Operations, and Related Programs Appropriations Acts. It states in its entirety that "none of the funds made available under this Act may be used to lobby for or against abortion."⁶

U.S. Officials Publicly Supported the Constitutional Reform Process, but Did Not Take a Position on the Issue of Abortion

Between 2008 and 2010, U.S. officials publicly expressed support for Kenya's comprehensive reform agenda, including constitutional reform, as an essential tool for maintaining peace and stability. We did not find any indication that U.S. officials gave an opinion publicly on the issue of abortion or attempted to influence the Right to Life article of the draft constitution.

U.S. Officials Publicly Supported the Constitutional Reform Process

State and USAID officials supported Kenya's constitutional reform process primarily through public statements and constitutional reform-related assistance programs. As noted in the 2010 State IG report and in press releases, high-level U.S. officials, including the President, Vice President, and Secretary of State, publicly expressed their support for constitutional reform in Kenya. The U.S. Ambassador to Kenya also spoke in support of the constitutional reform process at multiple public events and in Kenyan news media.⁷ In general, these statements from U.S. officials supported the

⁶For the most recent provision see the Department of Defense and Full Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, April 15, 2011, §1104, 125 Stat. 38, 103 extending provisions found in the Consolidated Appropriations Act for 2010, Pub. L. No. 111-117, December 16, 2009, 123 Stat. 3034, 3324.

⁷Michael Ranneberger was the U.S. Ambassador to Kenya from June 2006 through April 2011. Although he is now the former ambassador to Kenya, we refer to him in this report as the ambassador, as he was present during the majority of the constitutional reform process, including the period leading up to the referendum.

reform process itself, although some statements implied preference for a “yes” vote in the referendum. For example, in June 2010, the Vice President told Kenyans that “putting in place a new constitution and strengthening your democratic institutions with the rule of law will further open the door to major American development programs . . . [and] bring about reinvestment by American corporations and international organizations in Kenya that could provide millions of dollars in assistance.” Although we found no indication that USAID officials gave public speeches on the constitutional reform process, they lent their support through assistance programs such as civic education.

Following the postelectoral violence in Kenya in 2008, key State and USAID officials we interviewed told us they supported the comprehensive reform agenda because they viewed it as essential to maintaining stability in Kenya as well as in East Africa. The officials added that they viewed constitutional reform as the cornerstone of the comprehensive reform agenda. They also said that a unique confluence of factors had made constitutional reform in Kenya a distinct possibility for the first time in decades. These factors included high-level support from both the Kenyan president and the prime minister, which gave the reform process legitimacy. In addition, former United Nations Secretary-General Kofi Annan lent his support as chair of the reform agenda negotiating team. Finally, U.S. embassy officials considered it important for Kenya to have a new constitution in place in advance of the 2012 elections or risk a repeat of the 2008 violence.

No Indication That U.S. Officials Took a Position on Abortion

While U.S. officials supported the constitutional reform process, we found no indication that U.S. officials took a public position on the proposed constitution’s abortion-related provisions or directly attempted to influence the text of the provisions. In addition to interviewing the ambassador and several other key State and USAID officials, we conducted an extensive search of U.S., Kenyan, and other international media sources (see app. I.). Our media search did not reveal any instances of U.S. officials publicly discussing the abortion-related provisions of the constitution, and the officials we interviewed stated that they never discussed abortion in public or sought to influence the text of the abortion-related provisions in the constitution. Moreover, a Kenyan parliamentarian we interviewed who had served on the PSC, which assisted the National Assembly in the constitutional reform process, told us that, to her knowledge, no U.S. official

had discussed the abortion-related provisions with PSC members.⁸ This information is consistent with the findings of the 2010 State IG report.

However, one key State official we interviewed briefly discussed the constitution's abortion-related provisions during private meetings with Kenyan leaders as an issue that could affect the reform process. This official, the political officer in charge of tracking the progress of the reform process overall, said that in the course of his work he had private discussions with Kenyan parliamentarians and church leaders in which they raised the topic of the abortion-related provisions.⁹ He emphasized, however, that he never took a position on the issue in these discussions.

Two U.S. officials also told us that they briefly discussed the constitution's abortion-related provisions internally as an issue that could affect the reform process. The U.S. ambassador told us that the topic arose during regular embassywide meetings on the reform process. He and a political officer we interviewed indicated that during these meetings the ambassador instructed staff to remain objective and limit any statements on the issue to repeating the text of the constitution. None of the other relevant State and USAID officials we interviewed recalled ever discussing the abortion issue in these meetings.

Some U.S.-Funded Award Recipients and Subrecipients Addressed Abortion through Civic Education and Technical Assistance

Two elements of U.S.-funded support for the constitutional reform process—civic education and technical assistance—addressed the issue of abortion to some extent. State did not have any constitutional reform-related programs. USAID-funded civic education forums sought to inform Kenyan citizens on the text of the proposed constitution, and we found that some forums included discussion of the constitution's abortion-related provisions. Civic education facilitators addressed the provisions in a variety of ways, but we did not find any indication that award recipients or subrecipients cited them as a rationale to vote for or against the constitution. USAID also funded technical assistance to Kenyan organizations involved in the constitutional referendum; in doing so, one

⁸We requested an interview with the chair of the PSC. However, the PSC is now defunct and the chair did not agree to meet with us.

⁹According to State's website, political officers analyze host country political events, assess the impact of these events on the United States, and make recommendations for U.S. government action. Political officers' duties include developing foreign contacts in government and other sectors in order to advance U.S. national interests.

award recipient provided comments on the text of the entire draft constitution, including advice on the abortion-related provisions. Since Kenya adopted the new constitution in August 2010, U.S. support for its implementation has focused on continued civic education, electoral reform, and conflict mitigation and has not addressed abortion.

U.S.-Funded Civic Education Sometimes Addressed Abortion-Related Provisions

USAID-funded civic education sought to inform Kenyans on the general contents of the proposed constitution, and sometimes addressed the abortion-related provisions. According to some of the U.S.-funded subrecipients we spoke to, educating the public on the contents of the constitution was necessary because many Kenyans were unaware of the actual contents of the constitution as they had not read the document or had heard misleading rumors about it. USAID did not give any awards for civic education specifically on the abortion-related provisions of the constitution; however, subrecipients sometimes conducted civic education on these provisions because they were commonly misunderstood. For example, some subrecipients told us that participants in their civic education forums came to the events with the understanding that the proposed constitution would allow unrestricted access to abortion. Furthermore, most subrecipients indicated that they addressed the abortion-related provisions in response to questions from participants at their civic education events.

USAID funded 124 subrecipients to provide assistance related to constitutional reform, including civic education. To determine which subrecipients may have addressed the abortion-related provisions in their civic education forums, we reviewed all award documents¹⁰ and conducted an extensive media search on each subrecipient to identify those most likely to have addressed the issue of abortion (see app. I for a complete discussion of our methodology). Based on these criteria, we identified and interviewed 24 subrecipients.¹¹ Four of these subrecipients told us that they did not address abortion at all during their civic education forums. The remaining 20 subrecipients told us that their facilitators

¹⁰These documents included the awards themselves, project descriptions, and all associated reporting.

¹¹We requested interviews with 29 subrecipients meeting our selection criteria, but 4 could not meet with us because of scheduling conflicts. A fifth subrecipient, the COE, is now a defunct entity, and no former officers would meet with us or answer written questions.

addressed the proposed constitution's abortion-related provisions in one or more of the following ways:

- *Reading the text of the provisions.* More than half of the subrecipients told us that when questions about abortion arose, they responded by reading aloud the text of the Right to Life article, which stated, "(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 authorised 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."¹² Some subrecipient civic education materials addressed abortion and, in all but one case, did so by citing the Right to Life article.¹³
- *Indicating future legislation might be needed.* Some subrecipients explained to civic education participants that, in their opinion, future legislation and judicial decisions would be required in order to fully interpret and implement the abortion-related provisions of the proposed constitution. According to a few of these subrecipients, this legislation would be based on the existing law.¹⁴
- *Addressing undefined terms.* Some subrecipients we interviewed who addressed the abortion-related provisions went beyond reciting the text of the provisions and gave examples to try to clarify undefined terms. For instance, in attempting to answer questions about

¹²Since Kenyans passed the proposed constitution during a national referendum in August 2010, the text of the proposed constitution cited here is identical to the text in the enacted constitution.

¹³All but one of the subrecipients told us they used the COE civic education materials or other civic education materials that either did not address abortion or did so by citing the text of the constitution's abortion-related provisions. However, one subrecipient produced a civic education booklet that goes beyond citing the text. This booklet states that "[all Kenyans] respect the sanctity of life and Kenyans will go to great lengths to protect life." It also urges the clergy "not to misguide Kenyans into reading [the abortion-related] clauses in isolation. Instead they should persuade Kenyans to read the clause on abortion together with the bill of rights as well as the whole document and examine the two clauses against all the contents of this Constitution and the broader Reform Agenda."

¹⁴According to U.S. officials and subrecipients, the two main pieces of Kenyan legislation that relate most directly to the abortion-related provisions are the penal code and Medical Practitioners and Dentists Act.

emergency situations in which an abortion might be legal, two subrecipients told us they gave the example of an ectopic pregnancy.¹⁵ More than half of the subrecipients told us civic education participants asked what the term “trained health professional” meant in order to understand who would be able to authorize an abortion. A few of these subrecipients told us they had legal and medical experts on hand to explain the term.¹⁶

No Indication That U.S.-Funded Civic Education Cited Abortion as a Rationale to Vote for or against the Constitution

While some U.S.-funded civic education subrecipients addressed the abortion-related provisions of the constitution, we did not find any indication that U.S.-funded award recipients or subrecipients cited the provisions as a rationale to vote for or against the constitution. We conducted an extensive search of U.S., Kenyan, and other international media sources for any possible mention of abortion in relation to Kenya and the constitution made by any award recipient or subrecipient. In addition, we reviewed all award documents. Neither our media search nor our document review revealed any information indicating that U.S.-funded award recipients or subrecipients cited the abortion-related provisions as a rationale to vote for or against the constitution.¹⁷

Moreover, in our interviews with the 24 subrecipients we identified as being most likely to have addressed abortion, we found no indication that any cited the abortion-related provisions as a rationale to vote for or against the constitution. Half of the subrecipients we interviewed told us that they conducted their civic education in an objective manner, regardless of the issue at hand. Furthermore, none of the subrecipients

¹⁵During an ectopic pregnancy, a fetus begins to develop outside the uterus. The fetus cannot grow as it should and the pregnancy can become a medical emergency for the mother.

¹⁶Some of these subrecipients indicated that Kenya’s Medical Practitioners and Dentists Act laid a foundation for defining the “trained health professional” term. The act states that “the expressions ‘legally qualified medical practitioner’ and ‘duly qualified medical practitioner’ or any words importing a person recognized by law as a medical practitioner or a member of the medical profession, when used in a written law with reference to that person, shall be construed to mean a person registered as a medical practitioner under this Act or, where the context so admits, a person who is licensed by the Board under section 13.”

¹⁷Our media search revealed that seven subrecipients had publicly addressed abortion. However, we did not find any indication that they did so using U.S. funds or as a rationale to vote for or against the constitution.

we spoke with told us they had ever used abortion as a rationale to convince Kenyans to vote for or against the constitution.

U.S.-Funded Technical Assistance Included Advice on the Draft Constitution's Abortion-Related Provisions

U.S.-funded award recipients provided technical assistance to Kenyan organizations involved in the constitutional reform process,¹⁸ which included providing advice on the abortion-related provisions of the draft constitution to the COE, the nongovernmental entity charged with drafting the constitution. The International Development Law Organization (IDLO), the award recipient that provided technical assistance to the COE, did so at the request of the COE.¹⁹ This assistance included contracting a consultant to convene a selected group of international scholars to produce reports analyzing the text of the entire draft constitution at various stages for the COE. While the COE indicated to IDLO that it generally considered IDLO's advice when revising the draft constitution, we were unable to confirm whether the COE changed the Right to Life article based on IDLO advice.²⁰ In remarking on the first and second drafts of the constitution, IDLO commented on the Right to Life article and abortion in the following ways (see fig. 1).

- *IDLO report on the first draft constitution.* The COE published the first draft constitution in November 2009 and subsequently called for comments from the public. During this comment period, IDLO provided the COE analysis on the entire draft constitution, including advice on the issues of fetal rights and abortion, though the draft had not mentioned either issue at this point. Specifically, the IDLO report advised that the COE might consider adding language to make clear that the fetus lacks constitutional standing, and that the rights of women under these articles therefore take priority. IDLO also provided

¹⁸For example, the State University of New York (SUNY) provided technical assistance to Kenya's National Assembly and the United Nations Development Programme (UNDP) provided technical assistance to the Interim Independent Electoral Commission (IIEC). We did not find any indication that this technical assistance addressed the abortion-related provisions of the constitution.

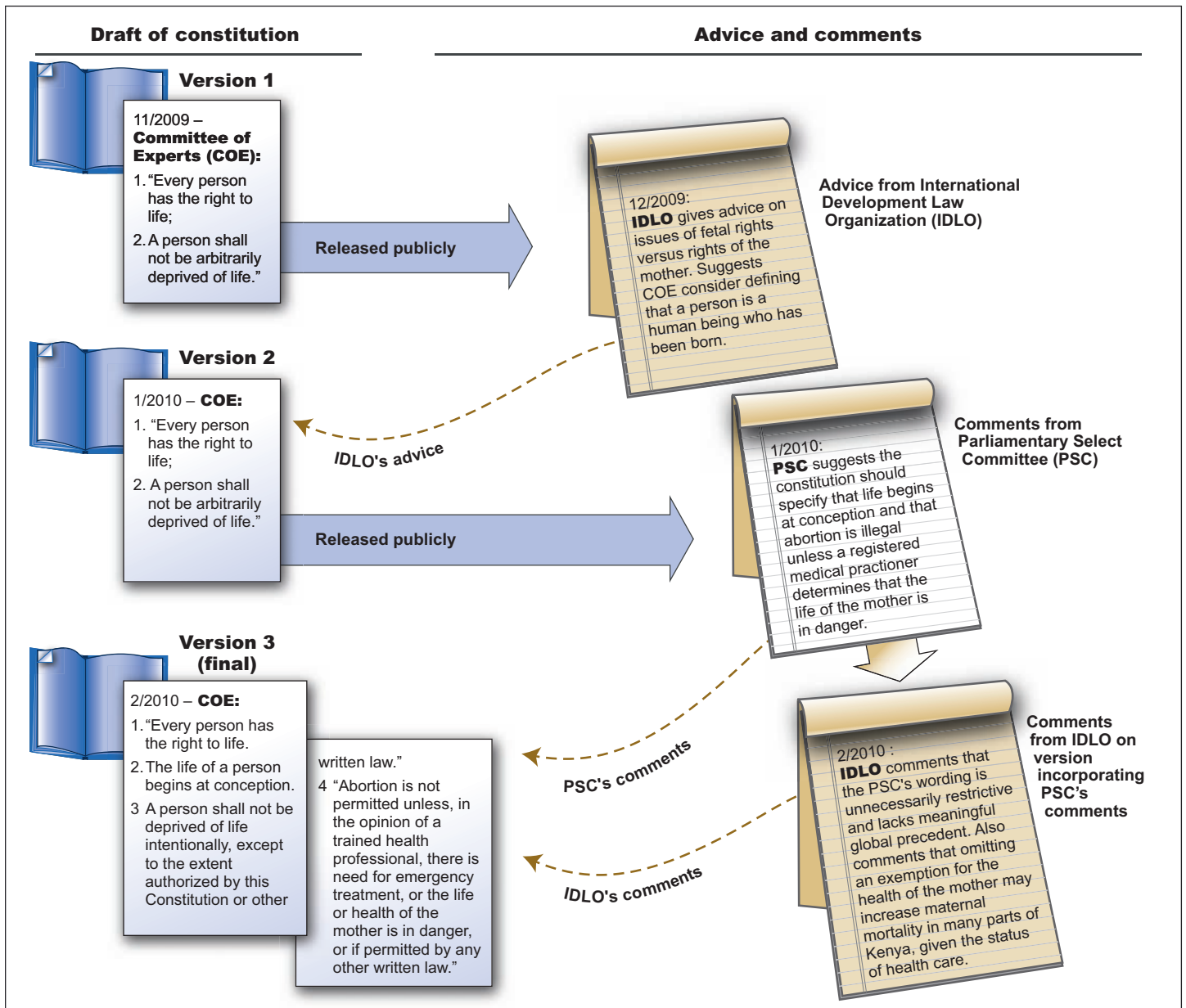
¹⁹IDLO is a public international organization that promotes the rule of law and good governance in developing countries, transition economies, and countries emerging from conflict or natural disasters. Both the United States and Kenya are member states.

²⁰The COE no longer exists, and although we requested a meeting with former COE members, none would meet with us. Furthermore, we received no response to written questions we submitted to the former COE chair.

examples of countries whose courts have held that fetal rights to life serve as a partial barrier to the ability of national legislatures to protect the right to reproductive dignity via the legal right of access to abortion. The IDLO report went on to state that “given the *de facto* decriminalization of access to abortion in Kenya, and the health risks to women in Kenya associated with the current system of abortion provision, and the absence of any express intention to disturb the current situation, it also seems quite feasible that in the coming years, the Kenyan Parliament may wish to take such measures. One way to handle this would be to modify [the constitution] to make clear that a person is a human being who has been born.” The COE’s second draft did not include IDLO’s suggested revisions.

- *IDLO report on the second draft constitution.* The COE produced a second draft in early January 2010. Later that month, the PSC provided recommendations on this second draft, including adding clauses to clarify that “the life of a person begins at conception,” and that “abortion is not permitted unless in the opinion of a registered medical practitioner, the life of the mother is in danger.” IDLO commented on the draft that included the PSC’s recommendations, indicating that the language on abortion was unnecessarily restrictive and lacking international precedent. For example, the report commented that “even understanding the powerful feelings invoked on all sides of the abortion issue, the omission of a ‘health of the mother’ exception in this provision seems overbroad.” In addition to receiving IDLO’s comments, the COE reported that it had extended discussions with the PSC and members of the medical community on the draft Right to Life article during January and February 2010. The COE’s final draft constitution included an exception for allowing abortion when “the life or health of the mother is in danger.”

Figure 1: IDLO Advice and Comments to the COE on the Right to Life Article in Kenya's Constitution



Source: GAO analysis of COE and IDLO information.

Note: IDLO provided advice and comments on the Right to Life article in the context of analyzing the text of the entire draft constitution.

USAID officials told us they were not aware of the advice and comments in these IDLO reports until after the COE had drafted the final constitution and the National Assembly had approved it for a referendum vote. USAID awarded IDLO a noncompetitive grant based on the recommendation of the COE, under which IDLO provided technical assistance. As we have previously reported, in contrast to other USAID funding mechanisms, typically under a grant agreement USAID has no substantial involvement in the implementation of the work.²¹ IDLO's description of program activities, as established in the grant agreement and as agreed upon with USAID, included addressing general topics such as the Bill of Rights, but did not specifically mention the issue of abortion. USAID officials told us that oversight of the IDLO grant included requiring and reviewing an activity approval document, collecting and reviewing quarterly program reports, and calling IDLO to obtain clarification on the work it had conducted. The USAID official responsible for managing this grant told us that IDLO submitted the required quarterly program reports in a timely manner, with copies of its reports to the COE submitted as attachments, including those commenting on the constitution's abortion-related provisions. She indicated, however, that she had not fully read the attachments until the USAID IG inquiry brought them to her attention in mid-2010.

U.S. Support for Implementation Does Not Address Abortion

Since Kenya adopted the new constitution in August 2010, U.S. support for its implementation has focused on continued civic education, electoral reform, and conflict mitigation leading up to the 2012 national elections and has not addressed abortion. Senior State and USAID officials told us that U.S. assistance focuses on electoral reform and conflict mitigation because they are essential to holding fair, nonviolent elections in 2012. In addition, according to key U.S. officials we interviewed and the vice-chair of the Kenyan parliamentary committee overseeing the constitution's implementation, Parliament is unlikely to address any legislation that might affect the abortion-related provisions before 2013. The U.S. officials we interviewed also said that the Kenyan government has not asked for assistance with implementing the Right to Life article of the constitution, and the United States has not provided any. Furthermore, the officials emphasized that State and USAID have no plans to provide such assistance.

²¹GAO, *Foreign Assistance: USAID Relies Heavily on Non-Governmental Organizations, but Better Data Needed to Evaluate Approaches*, [GAO-02-471](#) (Washington, D.C.: Apr. 25, 2002).

Neither State nor USAID Has Clear Guidance on the Types of Activities Prohibited under the Siljander Amendment

Neither State nor USAID has guidance on complying with the Siljander Amendment that includes a formal definition of lobbying, which some agency officials and award recipients indicated makes it difficult for them to determine what types of activities are prohibited. State has not developed any guidance on this legislative prohibition, and while USAID has developed some in the context of its family planning compliance resources, it has no specific guidance on the kinds of activities prohibited. Without clear guidance on the Siljander Amendment, some of the State and USAID officials and award recipients we interviewed said that they were unclear as to what specific activities were prohibited.

Neither State nor USAID Has Formally Defined Lobbying for the Purposes of the Siljander Amendment

The Siljander Amendment is an appropriations provision first enacted in 1981 that appears in the annual Department of State, Foreign Operations, and Related Programs Appropriations Acts, stating that “none of the funds made available under this Act may be used to lobby for or against abortion.” The term “lobby” is not defined in the legislation, and neither State nor USAID has developed a formal definition of lobbying in this context.

Attorneys in State’s Office of the Legal Adviser told us they are available to provide legal advice for staff on the Siljander Amendment, although they do not provide a formal definition of lobbying. The attorneys said the language in the amendment is adequate to inform nonlegal State officials that a restriction exists. They also indicated that when a proposed activity relates to taking a position for or against abortion, the office would review the specific facts to determine whether the activity could be conducted consistent with the law. Furthermore, they said the office preferred to provide advice on a case-by-case basis rather than having nonattorneys interpreting legal provisions.

Similarly, USAID attorneys told us they have not developed a formal definition of lobbying in the context of the Siljander Amendment, but they said they inform staff about the restriction and advise staff to seek legal counsel if they have questions regarding whether a particular activity complies with the law. USAID attorneys told us, however, that they developed an informal definition of lobbying with respect to the Siljander Amendment in the summer of 2010 to assist them in conducting their legal assessments in response to the USAID IG inquiry about U.S. assistance for Kenyan constitutional reform. They said the definition is an

internal working one that is not formally documented anywhere, and it is not readily accessible to staff outside of the Office of the General Counsel.²² The attorneys went on to say that they used this definition to determine that IDLO, in providing advice to the COE on the abortion-related provisions of the Right to Life article, did not violate the Siljander Amendment. In making this determination, USAID officials said they considered the following factors:

- USAID had given IDLO a noncompetitive grant at the recommendation of the COE.
- IDLO coordinated a process in which the COE received advice that it specifically requested.
- The comments on the abortion-related provisions were made in the course of a clause-by-clause review of the entire constitution, and as such were neither emphasized over other comments nor were they a direct, explicit appeal for a change in the legal status of abortion in Kenya.
- The Right to Life article in the draft constitution did not represent a change in national law, but rather reflected existing Kenyan and commonwealth law regarding abortion, according to a Kenyan attorney who provided a legal opinion to USAID in 2010.
- The COE was a nongovernmental entity, and as such, USAID officials maintain that IDLO did not provide assistance to the Kenyan government.

State Has Not Developed Guidance on Compliance with the Siljander Amendment

State has no specific guidance or training on the Siljander Amendment. Although a senior political officer in the U.S. embassy in Nairobi recalled having heard about the Siljander Amendment informally while in Washington, most State officials we spoke to said that they had not heard of it prior to the State IG's special review in 2010. Political officers in Nairobi, including the Deputy Chief of Mission, also told us they did not receive guidance on the Siljander Amendment during the regular

²²During a meeting with USAID attorneys, the attorneys read the definition aloud to us once, but then would not provide us with a written copy.

embassywide meetings leading up to the referendum, and the ambassador told us that he had not received guidance from Washington.

USAID's Limited Guidance on the Siljander Amendment Does Not Document the Types of Activities Prohibited

USAID has developed various family planning compliance resources, primarily for health and legal officers, which includes some guidance on the Siljander Amendment. These resources, however, do not provide guidance on the kinds of activities prohibited under the Siljander Amendment. Some examples include the following.

- *Family planning compliance team.* USAID has a family planning compliance team that consists of advisers from the Bureau for Global Health, the regional bureaus, and the Office of the General Counsel. The team provides advice to field staff and assists them with developing tools and resources to facilitate monitoring of compliance with family planning requirements, including the Siljander Amendment. Team members are available to field questions on compliance as they arise, and they hold an annual teleconference with each Mission's health, legal, and contracting staff to discuss family planning requirements and review specific concerns. The team's written materials distributed to staff do not provide any description of the types of activities that Siljander prohibits.
- *Family planning compliance training.* USAID has offered compliance training for its health and legal officers on family planning-related legislation for years, according to USAID officials. In addition to routine training both in Washington and in the field, USAID has offered a computer-based course on family planning requirements since 2006. USAID officials told us they expect health officers to take the computer-based course or attend a live training session on the family planning legislative requirements annually. None of the training materials, however, describes the kinds of activities that might constitute lobbying under the Siljander Amendment. After the USAID IG inquiry in 2010, USAID began to incorporate the Kenyan constitutional reform example as an oral case study in some of its trainings to alert staff that activities without a family planning focus could be subject to the Siljander Amendment.
- *Global Health intranet resources.* USAID's internal Global Health website offers a variety of family planning compliance tools, such as a chart of all family planning-related legislation, key documents related to family planning requirements, and a compliance plan template. In general, any mention of the Siljander Amendment within these resources does little more than repeat the amendment's text. The

compliance plan template warns staff that non-family planning programs could violate family planning-related legislation, but none of the materials on the intranet describes the types of activities that might be prohibited under Siljander.

USAID began disseminating these compliance resources beyond health and legal officials in mid-2010, when it offered some training and general written guidance to other agency officials. A member of the family planning compliance team gave a presentation on abortion-related requirements at the annual DCHA conference for democracy and governance officers in June of both 2010 and 2011.²³ Additionally, DCHA officials sent e-mails to all DCHA staff in late July 2010 and in March 2011, alerting them to the existence of the Siljander Amendment and advising them to seek legal counsel if they are unsure whether a particular activity complies with the law. Neither e-mail, however, details the types of activities that might constitute lobbying for or against abortion. USAID officials acknowledged in the e-mails that determining whether a particular activity complies with the Siljander Amendment is complex, and officials later told us that they did not add more detailed descriptions of the types of activities that might violate the amendment, because they do not want staff to undertake their own legal analysis.

USAID award recipients have access to some of USAID's family planning compliance resources, including the computer-based training, but these resources do not include examples of the types of activities prohibited under the Siljander Amendment. Two award recipients told us that USAID discussed the Siljander Amendment with them in June 2010—after the USAID IG inquiry had begun. One award recipient, who managed more than half of the subrecipients, told us it in turn reminded its subrecipients to be objective and remain neutral when discussing the proposed constitution in civic education forums. USAID also requires its award recipients and their subrecipients to abide by the Siljander Amendment through the inclusion of mandatory language prohibiting abortion-related

²³DCHA includes the Office of Transition Initiatives, as well as the Office of Democracy and Governance. Office of Transition Initiatives personnel and a Democracy and Governance officer at the Kenya Mission monitored USAID's constitutional reform process activities in Kenya.

activities in all awards.²⁴ The language reads in part, “No funds made available under the award will be used to finance, support, or be attributed to . . . lobbying for or against abortion.” The language, however, does not specify what types of activities would constitute lobbying with U.S. assistance funds and would thus be prohibited. USAID officials told us this is consistent with other mandatory prohibition language in USAID awards. Furthermore, we found that the mandatory language prohibiting abortion-related activities was missing from some of the awards for Kenyan constitutional reform. (See app. III for a discussion of compliance with the requirement to include the mandatory language in each award related to Kenyan constitutional reform.)

Some State and USAID Officials and Award Recipients Unclear on the Types of Activities Prohibited

We found that without written guidance on the types of activities that might constitute lobbying for or against abortion, some key State and USAID officials as well as award recipients are unclear on what the Siljander Amendment prohibits them from doing. For example, the State political officer responsible for tracking the progress of the Kenyan constitutional reform process in 2010 told us that when he asked for guidance on the Siljander Amendment, officials in the Office of the Legal Adviser replied that they would not interpret it for him. As a result, he said he still did not know what activities would violate the legislative prohibition. An attorney in the Office of the Legal Adviser told us that the office’s consistent approach is to work with nonlegal State officials to determine what activities are proposed and to advise whether those activities are allowable. She said that with respect to legislative restrictions on the use of funding, the specific facts are often key, and abstract legal interpretations can be misapplied. Thus, she said the office advises nonlegal State officials on how to apply the law based upon specific facts as to how funds would be used for particular U.S.-funded activities. However, all of the State officials we interviewed in Nairobi said that guidance on what lobbying means in the context of the Siljander Amendment would be useful to help them avoid any potential violation of the amendment in other situations. In addition, DCHA officials we interviewed in Kenya told us that even after the USAID IG inquiry they do not know what types of activities constitute lobbying and therefore would

²⁴According to USAID attorneys, USAID generally exempts non-family planning awards with public international organizations (PIO) from this requirement in recognition of their status as entities composed of member state governments with some degree of sovereignty.

be a violation of the Siljander Amendment. Moreover, the two award recipients who together have overseen over 70 percent of the subrecipients for the constitutional reform process told us they do not understand the Siljander Amendment and that clearer guidance on what constitutes lobbying under the amendment would be useful.

Conclusions

The United States has long determined that it is vitally important to support nations in undertaking democratic reforms, such as Kenya's constitutional reform. With the current political upheavals in parts of the Middle East and Africa, it is likely that several nations will either establish new constitutions or revise existing ones in the near future. The U.S. government has already expressed its willingness to assist with these and other kinds of democratic reforms. State's political officers and USAID's DCHA officers would be at the forefront of that assistance. However, constitutional reform can involve a wide spectrum of issues, including abortion and its corresponding U.S. legal restrictions, which are unfamiliar to some U.S. officials who deal with democracy and governance issues. Without clear guidance, including a description of what activities would constitute lobbying overseas, U.S. officials and implementing partners—award recipients and subrecipients—risk becoming involved in activities that may be interpreted by some as lobbying for or against abortion. Similarly, they may miss appropriate opportunities to provide assistance for fear they may potentially violate this prohibition.

Recommendation for Executive Action

To help ensure the actions of U.S. officials and implementing partners comply with the legislative prohibition against using certain U.S. assistance funds to lobby for or against abortion, we recommend that the Secretary of State and the USAID Administrator develop specific guidance on compliance with the Siljander Amendment, indicating what kinds of activities may be prohibited, disseminate this guidance throughout their agencies, and make it available to award recipients and subrecipients.

Agency Comments and Our Evaluation

We provided a draft of this report to State and USAID. We received written comments from both agencies, which we have reprinted in appendixes IV and V, respectively. The agencies also provided technical comments, which we incorporated throughout the report, as appropriate.

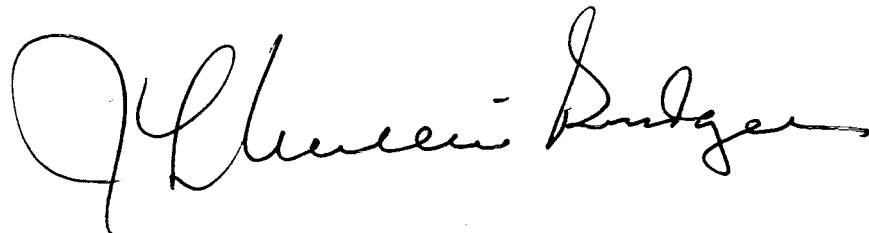
State partially agreed with our recommendation. Specifically, State agreed that informing employees throughout the department of the Siljander Amendment would be useful. State implied, however, that such information would not go beyond providing the text of the Siljander Amendment and encouraging staff to seek appropriate guidance on whether proposed activities are subject to the amendment. State does not believe that developing and disseminating specific guidance indicating the types of activities that may be prohibited is appropriate. We disagree. While we respect that State would like its officials in the field to seek guidance on whether an activity is permitted under the Siljander Amendment by presenting specific facts on a case-by-case basis, we do not believe that officials will necessarily know to seek such guidance if they are unaware of the types of activities that may raise compliance concerns. We believe that guidance providing examples of the types of activities that may violate the Siljander Amendment would help officials in the field better understand how the amendment affects their activities overseas and would help them better recognize those instances when they should seek guidance from the relevant State policy or legal office regarding a proposed activity.

USAID agreed with our recommendation and indicated that it would develop additional guidance for USAID and award recipient and subrecipient staff on the Siljander Amendment. At the same time, USAID took issue with our graphic representation of the development of the Right to Life article (fig. 1 on p. 13), expressing the view that it dramatically overstated the importance of IDLO's comments in the evolution of that article. In particular, USAID noted that the figure did not reflect the advice and comments COE received from other sources, and that it suggested a causal link between IDLO's comments and revisions to the draft constitution. We have revised the title of the figure to more clearly indicate that it focuses on IDLO's advice and comments to the COE. This does not mean that IDLO was the only entity providing advice. In fact, we state in the text immediately preceding the figure that others also provided advice and comments on the Right to Life article. The figure appropriately focuses on IDLO's advice and comments, because IDLO was a USAID award recipient and, thus, a subject of our review. We disagree that the figure suggests a causal link between IDLO's advice and comments and the COE's revisions to the draft constitution. The figure shows the text of

the Right to Life article as it appeared in each draft version and IDLO's input on that text, and we clearly state in the text preceding the graphic that we were unable to confirm whether COE changed the text based on IDLO's input.

As agreed with your offices, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the Secretary of State, the USAID Administrator, and interested congressional committees. The report will also be available at no charge on the GAO Web site at <http://www.gao.gov>. If you or your staff have any questions concerning this report, please contact me at (202) 512-3101 or williamsbridgersj@gao.gov.

Contact points for our Office of Congressional Relations and Public Affairs may be found on the last page of this report. Key contributors to this report are listed in appendix VI.

A handwritten signature in black ink, appearing to read "J. Williams-Bridgers". The signature is fluid and cursive, with a large initial "J" and a long, sweeping underline.

Jacquelyn L. Williams-Bridgers
Managing Director
International Affairs and Trade

Appendix I: Objectives, Scope, and Methodology

To describe any involvement that U.S. officials have had in the Kenyan constitutional reform process regarding the constitution's abortion-related provisions, we conducted the following work.

- We used the 2010 Department of State (State) and the U.S. Agency for International Development (USAID) Inspector General (IG) reports on the same topic for our requesters as a foundation for our methodology. Specifically, we reviewed the reports for key findings and statements. We also spoke to the IG teams that produced the reports in order to identify key officials to interview and to clarify each team's methodologies.
- We conducted an extensive review of Kenyan, international, and U.S. media to identify any public statements made by key State, USAID, and other Administration officials that mentioned the constitutional reform process, abortion, or reproductive health. Our review used the Nexis research database, which searched Kenyan media sources including Kenya Broadcast Corporation, *The Nairobi Star*, *The Nation*, *The People*, and *The Standard* and international and U.S. sources including *Africa News*, Associated Press, BBC, *Federal News Service*, *Global Legal Monitor*, *Los Angeles Times*, *States News Service*, *The East African*, *The Monitor* (Uganda), *The Washington Times*, and Xinhua. Search terms included any combination of the official's full name, "Kenya," "constitution," "abortion," "reproductive," and "termination of pregnancy." For most officials, this search covered the period from May 23, 2008—the date that the Kenyan government signed the Reform Agenda—through late March 2011. However, the number of results for President Obama, Vice President Biden, and Secretary of State Clinton exceeded the number of results that Nexis can return. We therefore limited the searches for these officials to the period from July 12, 2010—the date that the USAID IG submitted its preliminary report on support for Kenya's constitutional reform to the requesters—through late March 2011. We also searched the *Congressional Quarterly*, *Congressional Record*, the transcripts database of Lexis Nexis, and executive branch websites using similar search terms for statements made by officials during the period from January 2009 through January 2011. These results included transcripts of congressional hearings, State Department press releases, and coverage of diplomatic speeches and comments.
- We interviewed key State and USAID officials in Washington, DC, and we traveled to Kenya to interview key officials at the embassy in Nairobi to obtain additional data and to discuss their involvement in the reform process, particularly as regards the issue of abortion. We

interviewed State officials including the former ambassador, the Deputy Chief of Mission, the Political Counselor and other relevant political officers, and officials from the Bureau of African Affairs and the Office of the Legal Adviser. We also interviewed USAID officials including the Deputy Mission Director and officials from the Offices of the General Counsel and Acquisition and Assistance, and from the Bureaus for Africa, Global Health, and Democracy, Conflict, and Humanitarian Assistance, including the Offices of Transition Initiatives and Democracy and Governance. These officials have been responsible for managing and monitoring U.S. support for Kenya's constitutional reform process. In addition, we requested an interview with the chair of the Parliamentary Select Committee (PSC), which assisted Parliament in the constitutional reform process, but embassy officials were unable to contact him. We did, however, interview another key parliamentarian who sat on the PSC and is the vice-chair of the Committee for the Implementation of the Constitution to discuss U.S. officials' involvement in the reform process regarding the abortion-related provisions of the constitution.

To describe the support provided by U.S.-funded award recipients for the constitutional reform process relating to the constitution's abortion-related provisions, we conducted the following work.

- We asked the USAID IG and other USAID officials to identify the USAID award recipients and subrecipients that have conducted constitutional reform work in Kenya. The USAID IG provided us with a list of award recipients and subrecipients who had received U.S. funding through the date of the referendum, August 4, 2010. USAID officials notified us of some new awards and subawards that began in the implementation phase after the referendum, and award recipients provided us with information about an additional implementation award recipient as well as other implementation subawards. Together these lists identified 9 award recipients, who together received 12 awards, and 124 subrecipients, who together received 182 smaller awards.
- We reviewed the related USAID IG reports for key findings and data on USAID award recipients. We also spoke to the IG team that produced the reports in order to identify key officials to interview and to clarify the team's methodology.
- We conducted an extensive review of Kenyan and international media on all 9 USAID award recipients and their 124 subrecipients. This media search sought to identify any statements that the award

recipients or subrecipients made mentioning the constitutional reform process, abortion, or reproductive health. Like our media search for relevant statements from U.S. officials, this search covered similar Kenyan and international publications, used similar search terms, and covered the period from May 23, 2008 through mid-February 2011 for award recipients and subrecipients identified by the USAID IG. However, for award recipients and subrecipients who started their work after the USAID IG produced its report, the search covered the same Kenyan and international publications, but we adjusted our search terms to exclude the term “constitution” since the constitution had already been enacted and adjusted our search period to cover the period for which these awards were effective.

- We obtained and reviewed all award documentation for each USAID award recipient and subrecipient performing constitutional reform work in Kenya. These documents included the base award and any modifications, statements of work and project descriptions, progress reports, final reports, and any supplementary materials produced under the award.
- We interviewed relevant USAID officials in Washington, DC, and in Kenya. These officials included the USAID Deputy Mission Director and officials from the Offices of the General Counsel and Acquisition and Assistance, and from the Bureaus for Africa, Global Health, and Democracy, Conflict, and Humanitarian Assistance, including the Offices of Transition Initiatives and Democracy and Governance. These officials have responsibility for managing USAID’s awards and for planning, implementing, and overseeing USAID’s Kenyan constitutional reform awards.
- We interviewed all 9 award recipients—in Kenya if they still had an office there, or in Washington, DC. In addition to using a standard set of questions about award recipient activities and guidance received on complying with the Siljander Amendment, we added specific interview questions based on our media search results and document review.
- To identify which of the 124 subrecipients to interview during our limited time in Kenya, we analyzed the results of our media search and document review to determine which were most likely to have addressed the issue of abortion during the period leading up to the referendum. Our media search yielded more than 6,500 results, all of which we reviewed in order to identify those subrecipients who had publicly commented on abortion-related topics. These results identified 13 subrecipients whose names had appeared in media

articles that also included at least one of our search terms. Our document review identified 26 subrecipients whose award documents mentioned having discussed abortion, “contentious issues,” reproductive health, or women’s issues during the period leading up to the referendum. Our document review also showed that of the 13 subrecipients identified through our media search, 6 subrecipients used their USAID funds to conduct civic education on topics that were unlikely to address abortion at all, such as land reform or decentralization. We therefore determined that we should request interviews with the remaining 7 subrecipients identified through our media search, as their activities were likely to be most relevant to our review. To come to this determination, one GAO analyst identified those subrecipients whose activities were most likely to be relevant to our review, and another GAO analyst independently reviewed them, resolving any disagreements in the determinations through discussion. We also determined that we should request interviews with all 26 subrecipients identified through our document review in order to clarify how they had addressed abortion during their U.S.-funded activities, if at all. Given some overlap between the 7 subrecipients identified through the media search and the 26 identified through our document review, and 1 additional subrecipient we identified based on professional judgment, we identified a total of 29 subrecipients for interview.

- We requested interviews with all 29 subrecipients in Kenya that we had identified based on our media search and document review, and we interviewed 24 of them. Of the remaining 5 subrecipients, 4 subrecipients could not meet with us because of scheduling conflicts. The remaining subrecipient, the Committee of Experts, is now a defunct entity and no former executive officers would meet with us or answer written questions. During our subrecipient interviews, we used a standard set of questions about activities and guidance received on complying with the Siljander Amendment. In addition, we added specific interview questions for individual subrecipients based on issues that we identified through our media search results or document review.

To assess the extent to which agencies have developed and implemented guidance to help ensure compliance with the Siljander Amendment, which prohibits using certain U.S. assistance to lobby for or against abortion, we conducted the following work:

- We reviewed USAID program and procurement guidance and policies, as well as other relevant documents. This helped us

determine what guidance on the Siljander Amendment USAID has available or requires for agency officials, award recipients, and subrecipients.

- We obtained and analyzed award documentation for all USAID award recipients performing constitutional reform work, as well as their subrecipients, to determine which awards contained USAID's mandatory language provision prohibiting abortion-related activities. USAID considers this language to be a form of guidance on complying with the Siljander Amendment and requires that all assistance and acquisition awards contain the language. Award recipients, in turn, are required to pass this language on to awards with any subrecipients. To understand why this language was not included in some awards for the Kenyan constitutional reform process, we conducted interviews with responsible officials in USAID's Offices of the General Counsel and Acquisition and Assistance, and the Bureau for Democracy, Conflict, and Humanitarian Assistance, including the Offices of Transition Initiatives and Democracy and Governance.
- We interviewed high-level State and USAID officials about their agency's guidance on complying with the Siljander Amendment. In Washington, we spoke with responsible officials in State's Bureau of African Affairs and the Office of the Legal Adviser, and interviewed the former U.S. ambassador to Kenya. We also spoke with responsible officials in USAID's Offices of the General Counsel and Acquisition and Assistance, and the Bureaus for Africa and Democracy, Conflict, and Humanitarian Assistance. Additionally, we traveled to Kenya to interview key officials at the embassy and mission who are responsible for managing and monitoring U.S. support for Kenya's constitutional reform process. We spoke with responsible State officials including the ambassador, Deputy Chief of Mission, Political Counselor, and other relevant political officers. We also spoke with responsible USAID officials including the Deputy Mission Director and officials from the Bureaus for Global Health and Democracy, Conflict, and Humanitarian Assistance, including the Offices of Transition Initiatives and Democracy and Governance.
- We also discussed guidance with the 9 award recipients and 24 subrecipients we interviewed, and we documented their responses given concerning any guidance USAID had given them regarding compliance with the Siljander Amendment.

The information on foreign law in this report does not reflect our independent legal analysis, but it is based on interviews and secondary sources.

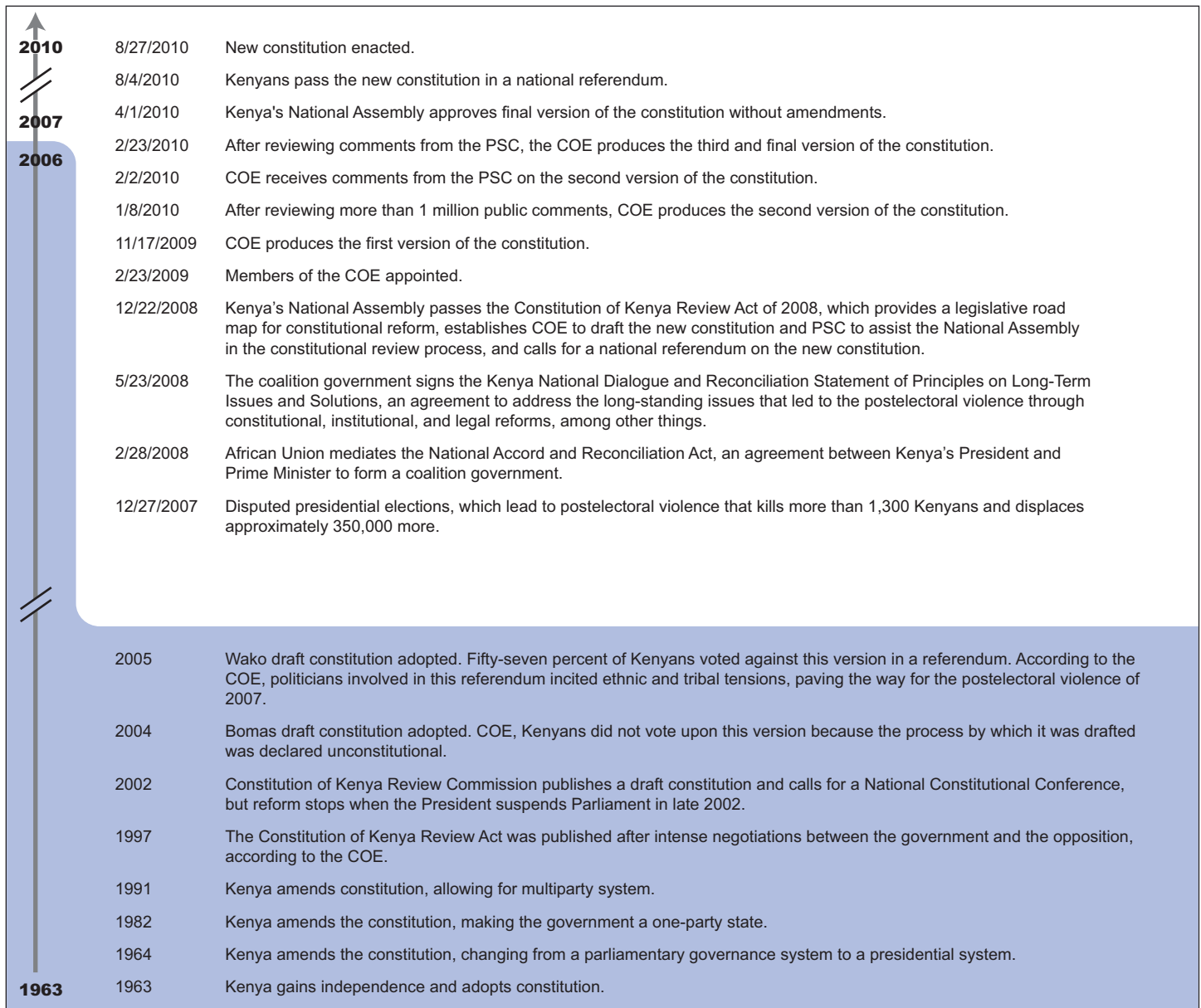
We conducted our work between November 2010 and October 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Chronology of Constitutional Reform in Kenya

Kenya has had a long history of attempted constitutional reform. Before passing the new constitution in August 2010, Kenya had amended its original constitution several times since gaining independence from the United Kingdom in 1963. For a chronological list of constitutional reform-related events, see figure 2.

Appendix II: Chronology of Constitutional Reform in Kenya

Figure 2: Timeline of Constitutional Reform in Kenya, 1963-2010



Source: GAO analysis of Committee of Experts information.

Appendix III: Status of Compliance with the Requirement to Include USAID’s Mandatory Provision Prohibiting Abortion-Related Activities in Awards

USAID requires language prohibiting abortion-related activities in all assistance and acquisitions awards.¹ The mandatory provision language reads in part, “No funds made available under the award will be used to finance, support, or be attributed to . . . lobbying for or against abortion.”² USAID officials told us that while the provision language had been included in family planning awards for decades, it became a USAID requirement for all assistance awards in May 2006 and for all acquisition awards in June 2008.

Of the 12 awards GAO identified that USAID gave for the constitutional reform process in Kenya through June 2011, 5 were not in compliance at some point with the requirement to include the abortion-related language in awards.³ Of these 5 awards, 2 were associate awards from a leader award and 2 were task orders placed from an indefinite delivery/indefinite quantity (IDIQ) contract. In those instances, according to USAID officials, all of the mandatory provisions included in either the leader award or the IDIQ contract are assumed to flow down to the associate award or task order, respectively—without the need to be reprinted. However, in each of these 4 awards, the leader award or IDIQ contract was signed before the abortion-related language requirement took effect and did not include the language. The associate awards and task orders, therefore, did not

¹According to USAID attorneys, USAID generally exempts non-family planning awards with public international organizations from this requirement in recognition of the organizations’ status as entities composed of member state governments with some degree of sovereignty.

²Assistance awards include grants and cooperative agreements, while acquisition awards include contracts, task orders, and purchase orders. The prohibition on abortion-related activities language requirements is laid out in USAID’s Automated Directives System (ADS) (see <http://www.usaid.gov/policy/ads/300/303maa.pdf> for assistance awards to U.S. nongovernmental organizations and <http://www.usaid.gov/policy/ads/300/303mab.pdf> for assistance awards to foreign nongovernmental organizations), and in Acquisition and Assistance Policy Directive, AAPD 08-01 (http://www.usaid.gov/business/business_opportunities/cib/pdf/aapd08_01.pdf), for acquisition awards.

³Six awards did not originally include the language, but as one of those six awards was given to a public international organization, the United Nations Development Programme, it was not required.

Appendix III: Status of Compliance with the Requirement to Include USAID’s Mandatory Provision Prohibiting Abortion-Related Activities in Awards

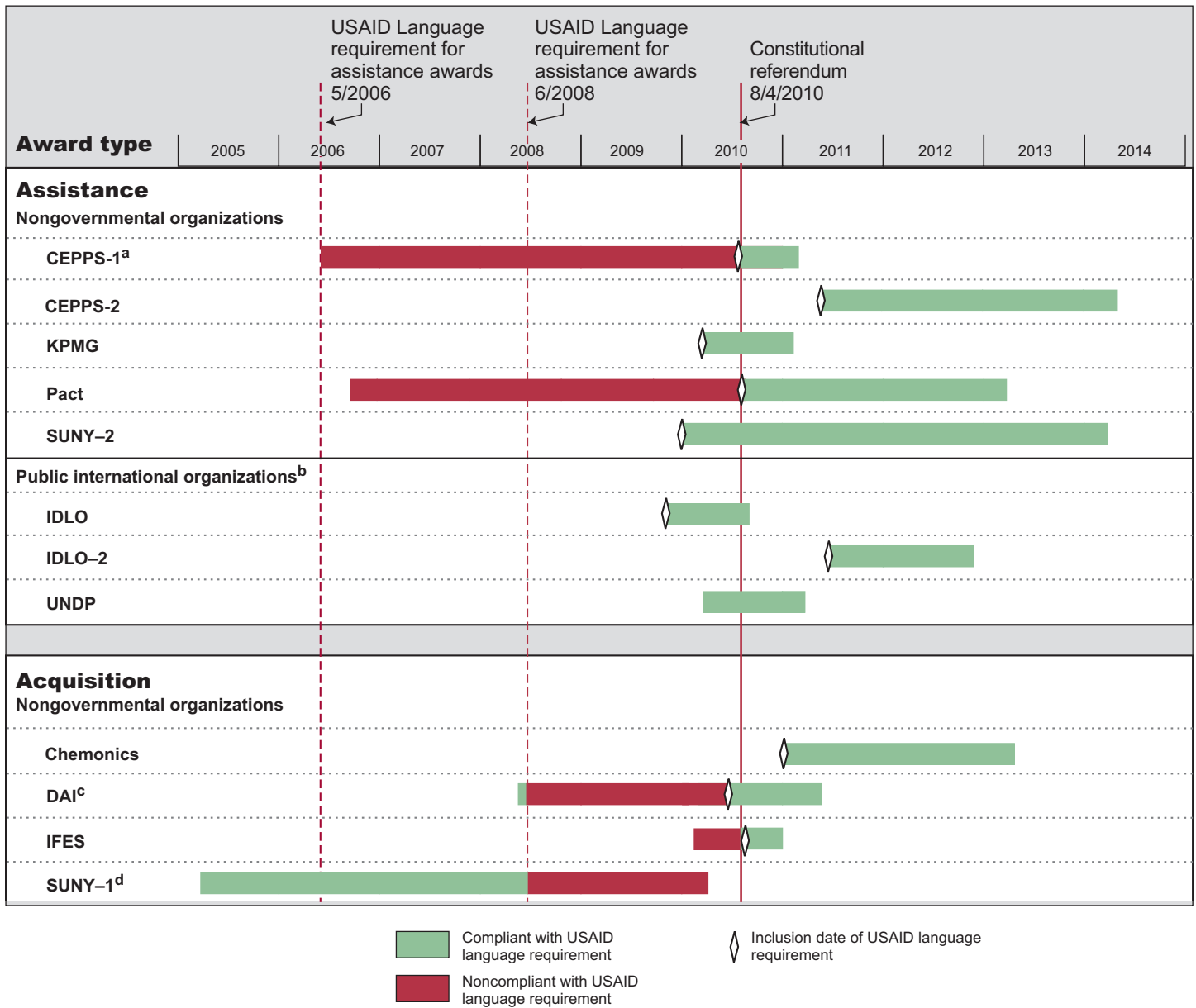
include the language either.⁴ The abortion-related language, however, had not yet become a requirement when the two task orders themselves were signed. As shown in figure 3, these two acquisition awards were not modified when the abortion-related language requirement took effect. USAID contracting officials we interviewed told us the omission of the abortion-related language from the fifth award was likely due to human oversight.⁵

⁴Four of the 12 award recipients made a total of 182 smaller awards to subrecipients. All of the pre-referendum awards to subrecipients included the mandatory language, even when the prime award did not. The award recipients told us they either have their procurement systems linked to USAID’s ADS, they manually update their procurement system on a regular basis to reflect any changes to ADS, or they provide a link to the relevant chapter of the ADS in their awards to subrecipients, thus including all mandatory clauses “by reference.”

⁵USAID has signed three additional awards since April 2011 for the implementation phase of the constitutional reform process. Although one award is with a public international organization, the International Development Law Organization (IDLO), it nonetheless includes the abortion-related language. The other two awards do not themselves include the abortion-related language, but each award is in compliance with the USAID language requirement because either its leader award—in the case of the second Consortium for Elections and Political Process Strengthening (CEPPS) award—or the indefinite delivery/indefinite quantity contract—in the case of Chemonics—includes the language.

Appendix III: Status of Compliance with the Requirement to Include USAID’s Mandatory Provision Prohibiting Abortion-Related Activities in Awards

Figure 3: Compliance Status of Kenyan Constitutional Reform Process Awards with the USAID Language Requirement Prohibiting Abortion-Related Activities



Source: GAO analysis of USAID information.

Note: The full names of the award recipients listed in the figure are Consortium for Elections and Political Process Strengthening (CEPPS); KPMG; Pact, Inc. (Pact); State University of New York (SUNY); International Law Development Organization; United Nations Development Programme; Chemonics International, Inc.; Development Alternatives Incorporated (DAI); and International Foundation for Electoral Systems (IFES).

Appendix III: Status of Compliance with the Requirement to Include USAID's Mandatory Provision Prohibiting Abortion-Related Activities in Awards

^aCEPPS is a consortium whose member organizations are the National Democratic Institute, the International Republican Institute, and IFES.

^bUSAID does not require the language for non-family planning awards to public international organizations such as IDLO or UNDP. While USAID therefore did not include the language in the UNDP award, it nonetheless included it in both IDLO awards.

^cThe DAI award was signed shortly before USAID began requiring the prohibition language for acquisition awards. It therefore started out in compliance, but then became out of compliance with the USAID language requirement until USAID modified the award to include the language.

^dSUNY's acquisition award was signed before USAID began requiring the prohibition language for acquisition awards, and it was therefore not out of compliance with the USAID requirement until June 2008. The award ended in March 2010, before USAID realized the language was missing.

The USAID contracting officials told us they added the mandatory language to 4 of the awards⁶ as quickly as possible. They did so following the USAID IG inquiry that brought the omission to their attention in mid-2010, although in three of the four cases they did not add the language until either the day before the August 4, 2010, referendum or afterward. According to USAID officials, the delay in adding the language was due to the nature of the contracting process. They told us USAID contracting officials cannot modify awards without a requisition for modification from the technical offices, including programmatic and financial officials. Furthermore, the contracting officials at the Mission did not have copies of all of the awards, particularly the IDIQ contracts, as those had been signed in Washington. The officials told us it was time-consuming to determine where the awards were located, whether they included the mandatory language or not, and whether they could modify them at the Mission or whether the contracting office in Washington had to do the modifications. They received that information in an e-mail on July 28, 2010, 1 week before the referendum, and made the modifications shortly thereafter.

Officials from USAID's Office of Acquisition and Assistance (OAA) told us that USAID's new web-based procurement information system automatically includes mandatory provisions in awards, including the language prohibiting abortion-related activities, although the system is not foolproof. OAA officials in Washington told us that the Global Acquisition and Assistance System (GLAAS) procurement information system includes award templates with standard clauses for each type of award. They said that GLAAS generates mandatory provisions, such as the language on prohibiting abortion-related activities, based on the award

⁶The fifth award had ended in March 2010, before USAID realized the language was missing.

Appendix III: Status of Compliance with the Requirement to Include USAID's Mandatory Provision Prohibiting Abortion-Related Activities in Awards

type chosen.⁷ They went on to say that GLAAS greatly reduces the possibility of human error in including all mandatory provisions. The OAA officials we spoke with at the Mission agreed with this assessment, but they also emphasized that GLAAS is not foolproof. For example, they told us that GLAAS does not yet capture all types of award mechanisms, nor have all USAID staff begun using GLAAS. In addition, they said that while GLAAS automatically includes new mandatory provisions, contracting officials can copy language from a recently generated similar award and then upload that language into GLAAS, bypassing the standard and mandatory inclusions the system would otherwise make. To address this, USAID officials told us that OAA is in the process of issuing a policy directive to require that all contracting officials generate their award documents through GLAAS.

⁷USAID officials said that rollout of the system to its operating units began in 2008 and should be complete by the end of 2011.

Appendix IV: Comments from the Department of State



United States Department of State

Washington, D.C. 20520

Ms. Jacquelyn Williams-Bridgers
Managing Director
International Affairs and Trade
Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548-0001

SEP 29 2011

Dear Ms. Williams-Bridgers:

We appreciate the opportunity to review your draft report, "FOREIGN ASSISTANCE: Clearer Guidance Needed on Overseas Compliance with Legislation Prohibiting Abortion-Related Lobbying," GAO Job Code 320828.

The enclosed Department of State comments are provided for incorporation with this letter as an appendix to the final report.

If you have any questions concerning this response, please contact Susan Driano, Kenya Desk Officer, Bureau of African Affairs at (202) 647-8913.

Sincerely,

A handwritten signature in black ink, appearing to read "James L. Millette", written over a horizontal line.

James L. Millette

cc: GAO – Jim Michels
AF – Johnnie Carson
State/OIG – Evelyn Klemstine

Department of State Comments on GAO Draft Report

**FOREIGN ASSISTANCE: Clearer Guidance Needed on Overseas
Compliance with Legislation Prohibiting Abortion-Related Lobbying**
(GAO-12-35, GAO Code 320828)

Thank you for the opportunity to comment on your draft report entitled *Foreign Assistance: Clearer Guidance Needed on Overseas Compliance with Legislation Prohibiting Abortion-Related Lobbying*.

Recommendation: To help ensure the actions of U.S. officials and implementing partners comply with the legislative prohibition against using certain U.S. assistance funds to lobby for or against abortion, we recommend that the Secretary of State and the USAID Administrator develop specific guidance on compliance with the Siljander Amendment, indicating what kinds of activities may be prohibited, disseminate this guidance throughout their agencies, and make it available to award recipients and subrecipients.

Response: The Department of State concurs with this recommendation only in part. The Department agrees it would be useful to inform State Department employees of the restriction so that they can seek appropriate guidance from the relevant Department policy and legal offices as to whether their proposed activities, including activities executed through grants and contracts, are subject to this funding restriction and will undertake to disseminate such information within the Department. The Department does not agree that disseminating specific guidance indicating what kinds of activities may be prohibited is appropriate. Determining whether activities are prohibited requires an understanding of the specific facts of any particular case. As general guidance cannot foresee all the relevant facts, it could result in activities being undertaken in reliance upon the guidance without specific legal review by the Department. The Department prefers to take steps to broaden awareness of the provision and have individuals seek advice on a case-by-case basis.

Appendix V: Comments from the U.S. Agency for International Development



October 11, 2011

Jacque Williams-Bridgers
Managing Director, International Affairs & Trade
U.S. Government Accountability Office
Washington, DC 20548

Dear Ms. Williams-Bridgers:

I am pleased to provide the formal response of the U.S. Agency for International Development (USAID) to the GAO draft report entitled "**Foreign Assistance: Clearer Guidance Needed on Overseas Compliance with Legislation Prohibiting Abortion-Related Lobbying**" (GAO-12-35).

The enclosed USAID comments are provided for incorporation with this letter as an appendix to the final report.

Thank you for the opportunity to respond to the GAO draft report and for the courtesies extended by your staff in the conduct of this audit review.

Sincerely,

Sean C. Carroll /s/
Chief Operating Officer
U.S. Agency for International Development

Enclosure: a/s

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**Foreign Assistance: Clearer Guidance Needed on Compliance Overseas with Legislation
Prohibiting Abortion-Related Lobbying (GAO-12-35)**

Constitutional reform in Kenya has been a cornerstone of the reform agenda endorsed by the Kenyan Coalition Government in the wake of the violence that devastated the country following the disputed December 2007 presidential elections. The U.S. Government supports the process of constitutional reform and, like the vast majority of Kenyans, believes a new constitution is a critical element in laying the foundation for deepened democracy and prosperity in Kenya. In August 2010, the Kenyan people overwhelmingly approved the referendum on the draft constitution.

USAID has funded a broad spectrum of activities in support of the constitutional reform process, free and fair elections, increased transparency and efficiency in the government, and civic education and voter registration. Following the August 2010 referendum, USAID has continued to work with the Kenyan government and people to support the constitutional reform process in the country.

USAID takes compliance with the abortion-related restrictions, including the Siljander Amendment, very seriously. Over the years, the Agency has taken a number of steps to ensure compliance with these restrictions, such as the inclusion of mandatory standard provisions in all Agency awards with implementing partners, the development of live and online training materials, presentations at Agency conferences, and the development of compliance tools and resources for USAID and partner staff. In the past year, the Agency has also taken steps to increase awareness of these restrictions among non-health staff, particularly those working in the area of democracy and governance. USAID is committed to ensuring compliance with these restrictions and continually seeks to strengthen and refine our existing compliance resources.

Unlike the U.S. constitution, the new Kenyan constitution is a lengthy document containing 264 articles spanning nearly 200 pages of text. The Right to Life article referred to in your report is one article among hundreds in the document. As with several other sections of the draft constitution, this particular article generated significant discussion within and outside Kenya, and many entities – from medical associations to religious groups – expressed public views on it throughout the period leading up to the referendum. As your report notes, however, there is no indication that U.S. officials gave an opinion publicly on this issue or attempted to influence the provision. While your report also correctly notes that in several instances this article was addressed by USAID-funded implementing partners, in no case did the activities constitute a violation of the Siljander Amendment.

We do not believe that the USAID-funded activity providing technical assistance to the drafters of the Kenyan constitution violated the Siljander Amendment. In 2009, the Kenyan Committee of Experts (COE), a non-governmental entity charged with drafting the constitution by the Kenyan government, requested that USAID provide funding to a specific public international organization (PIO) for purposes of providing advice on the draft constitution. At the COE's request, USAID funded the PIO to provide such advice, and the PIO subsequently contracted with a group of constitutional scholars who prepared several lengthy reports analyzing the draft constitution, article by article. The scholars' major recommendations related to issues such as

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the authorities of the executive and legislative branches, election processes, a proposed ban on ethnic minorities, and land tenure rights. Although two of the scholars' reports included comments relating to the provisions in the Right to Life article, they did not highlight these points in particular or make them a focus of their key recommendations. In fact, we believe that the GAO's draft report dramatically overstates the importance of the scholars' comments on the evolution of the Right to Life article. As we noted above, many organizations in Kenya expressed ardent views on this provision leading up to the referendum, and these opinions may well have impacted the COE's decisions on text. For example, the State Inspector General's report on this issue, dated August 2010, found that the COE revised the text after consulting with Kenyan medical professionals. However, the chart set forth on page 13 of the draft report implies that the only entities advising the COE on this issue were the scholars and the Parliamentary Select Committee. Indeed, the chart suggests a causal link when the draft report itself does not find one, as you note that the GAO was "unable to confirm whether the COE changed the Right to Life article" based on the scholars' advice. We therefore request that the GAO delete the chart in its entirety or indicate substantial input from other sources.

In any event, we do not believe that the scholars' two references to the Right to Life article constituted lobbying for or against abortion. We considered several factors in arriving at this conclusion. First, the scholars were providing advice to the COE upon the COE's request. They did not reach out on their own initiative to express a view on abortion or any other issue related to the constitution. Second, the group did not single out the article for focus but rather commented on it as part of its exhaustive article-by-article review of the draft. Third, USAID obtained a legal opinion from Kenyan counsel indicating that the Right to Life article in the draft constitution would maintain the status quo on the country's existing abortion law and would not represent a change. Finally, the COE was a non-governmental entity, separate and distinct from the Kenyan government. In light of these factors, USAID has concluded that there is no evidence of a violation of the Siljander Amendment in connection with the scholars' reports.

Similarly, there is no evidence that any USAID-funded civic education activities violated the Siljander Amendment. As your report notes, USAID-funded civic education activities sought to inform Kenyans on the general contents of the proposed constitution. In the context of general civic education, USAID-funded sub-recipients addressed questions from Kenyans on many provisions of the constitution, including in some cases the Right to Life article. They were not lobbying on the issue but rather trying to ensure that citizens were familiar with the text in the document.

Recommendation: To ensure the actions of U.S. officials and implementing partners comply with the legislative prohibition against using certain U.S. assistance funds to lobby for or against abortion, we recommend that the Secretary of State and the USAID Administrator develop specific guidance on compliance with the Siljander Amendment, including what kinds of activities are prohibited, disseminate this guidance throughout their agencies, and make it available to award recipients and subrecipients.

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Management Comments: As noted above, USAID takes compliance with the abortion restrictions very seriously. USAID will build upon its existing compliance tools and resources to develop additional guidance for USAID and implementing partner staff on the Siljander Amendment.

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

Jacquelyn L. Williams-Bridgers, (202) 512-3101 or williamsbridgersj@gao.gov.

Staff Acknowledgments

Key contributors to this report include Jess Ford, James Michels, Judith Williams, Chloe Brown, Mary Moutsos, William Tuceling, Martin De Alteriis, Debbie Chung, Etana Finkler, Christopher Mulkins, and Michael Kniss.

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