



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D.C. 20548

BELKIN  
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B-218900

July 9, 1986

The Honorable John F. Kerry  
United States Senate

Dear Senator Kerry:

This is in response to the letter dated April 26, 1985, in which you and Senator Nancy L. Kassebaum requested our Office to answer several questions relating to a provision on population planning assistance contained in title II of the Foreign Assistance and Related Programs Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 1837, 1887, 1888 (1984). The provision in question provides that not less than \$46 million of the \$290 million appropriated for population assistance be made available to the United Nations Fund for Population Activities (UNFPA). The provision further states that none of the funds appropriated thereunder could be made available to any country or organization that "includes as part of its population planning programs involuntary abortion \* \* \*."

Your letter asked us to determine whether this provision authorized the Agency for International Development (AID) to withhold \$10 million of the \$46 million earmarked for UNFPA on the basis of UNFPA's support for population-related programs in the People's Republic of China (China). While we were awaiting AID's response to our request for its views on this matter, which we did not receive until February 27, 1986 (copy enclosed), the Supplemental Appropriations Act, 1985, Pub. L. No. 99-88, 99 Stat. 293, 323 was enacted on August 15, 1985, containing a provision having a direct bearing on this issue. The provision in question amended Public Law 98-473 by adding a new paragraph, under the heading "Population, Development Assistance," that reads as follows:

"None of the funds made available in this bill nor any unobligated balances from prior appropriations may be made available to any organization or program which, as determined by the President of the United States, supports or participates in the management of a program of coercive abortion or involuntary sterilization."

On September 25, 1985, the AID Administrator, acting under authority delegated to the Secretary of State and redelegated to the Administrator, determined that UNFPA was

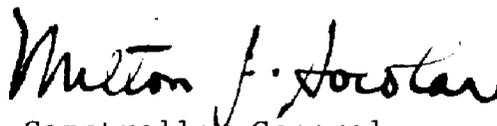
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participating in the management of a program of coercive abortion and involuntary sterilization, within the meaning of the above-cited amendment, as a result of UNFPA's assistance to China's population control program. Accordingly, before the end of the 1985 fiscal year, the remaining \$10 million of the appropriation earmarked for UNFPA by Public Law 98-473 was reprogrammed for other voluntary family planning programs. On September 30, 1985, the Population Institute brought an action for a declaratory judgment and injunctive relief in the United States District Court for the District of Columbia challenging the Administrator's determination.

The district court dismissed the complaint on October 18, 1985, on the grounds that it involved a nonjusticiable political question. Subsequently, the plaintiffs appealed the district court's dismissal of the complaint to the Court of Appeals for the District of Columbia Circuit. While the court of appeals heard oral argument on January 16, 1986, it has not yet ruled on the matter.

It is the longstanding policy of our Office to refrain from commenting on matters that are the subject of ongoing litigation. See 63 Comp. Gen. 98, 99 (1983); 58 Comp. Gen. 282, 286 (1979). After a complaint has been filed and while it is pending, we believe that the appropriate forum for resolving the matter is the court that has actual jurisdiction over the dispute. The complaint filed by the Population Institute that is currently before the court of appeals involves essentially the same issues that we were asked to consider. Accordingly, under the present circumstances we are not in a position to respond to your request for our legal opinion. However, in the event the court of appeals affirms the district court's dismissal of the complaint, without resolving the substantive issues involved, and assuming no further appeals are filed, our Office would be able to render our opinion on the matter.<sup>1/</sup> Your staff has been previously advised of our position and has agreed that this letter will become generally available in 5 days.

Sincerely yours,

  
Comptroller General  
of the United States

Enclosure

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<sup>1/</sup> For this reason, we have arranged for officials at AID to keep us informed as to the status of the litigation.