

## U.S. Global HIV Prevention Policy: Still Time to Get It Right

By Susan A. Cohen

Over the summer, the United States strongly recommitted itself to fighting AIDS in the developing world. After months of wrangling earlier in the year, President Bush and congressional conservatives found a way to agree with congressional progressives on legislation renewing the President's Emergency Plan for AIDS Relief (PEPFAR). The former agreed to a much steeper increase in the financial promise to the effort to fight AIDS, tuberculosis and malaria than they had wanted originally. In exchange, the latter made significant policy concessions, particularly around HIV prevention.

If trading evidence-based prevention policy for more money evokes déjà vu all over again, it should: This is exactly the deal that led to the creation of the original PEPFAR law in 2003. Incorporated in that law were requirements that at least one-third of all HIV prevention funds be reserved for abstinence-until-marriage programs; that nongovernmental organizations adopt a position opposing prostitution and sex trafficking in exchange for PEPFAR funding; and that faith-based organizations be given priority in receiving funding, without regard to their willingness to provide truthful information about the effectiveness of condom use in preventing HIV, if they provide any information about condoms at all.

Without doubt, the new PEPFAR is improved in many ways. It bolsters its previous treatment focus with an increased emphasis on care and support services for people living with HIV. In addition, the new law allows for somewhat greater prevention efforts overall, as well as

some increased flexibility in how to allocate those funds. Yet, the new law's fundamental prevention policy remains fraught with proscriptions and prescriptions that will continue to hamper PEPFAR's ability to be as responsive as it could and should be to local needs in terms of supporting the most effective interventions. Also, the U.S. HIV prevention agenda is greatly weakened by ignoring the well-established interrelationships between reproductive health services and HIV prevention and AIDS treatment programs.

Congress and the administration passed on the opportunity to acknowledge these realities in writing the new law. In 2009, the new administration will develop a plan to implement the new version of PEPFAR that could remedy or at least mitigate some of the law's failings and inadequacies. And the new Congress will have another shot at fixing some of its legal flaws.

### Two Steps Forward

Perhaps the most challenging, innovative and ultimately successful aspect of the original PEPFAR was that it provided life-saving medicines to more than one million people already living with AIDS. As the single largest donor to the global effort, and with more than half of all its support earmarked for treatment, the United States can take much of the credit for the fact that AIDS in the developing world no longer need be considered a death sentence. If the United States lives up to the funding goals of the new law, and considering that the price of AIDS medications has declined markedly in recent years, the program's reach going forward will be even greater.

The law calls for much greater spending on HIV and AIDS overall. The 2003 law authorized \$15 billion over PEPFAR's first five years for AIDS, tuberculosis and malaria; the Bush administration had originally agreed to double that amount for the coming five. The final deal on the new law authorizes \$39 billion through FY 2013 for HIV and AIDS, accompanied by another \$9 billion to combat tuberculosis and malaria. In recognition of the drain that the shift in focus to HIV has had on health systems, the new program establishes a goal to train at least 140,000 new health care workers. It also calls for much greater coordination among donor agencies and recipient country governments, and for deeper commitments by host countries to better integrate HIV and AIDS services into health systems to promote greater sustainability.

In addition, the new law takes into account some of the broader public health implications of HIV, by opening up PEPFAR funding for important ancillary services such as nutrition, access to safe water, sanitation and income-generation projects. It strengthens the provisions emphasizing that programs and policies must take into account the particular vulnerabilities and needs of women and girls. And it repeals the 20-year-old law that prohibits all HIV-positive people from entering the United States.

Finally, in line with the recommendations of the 2007 Institute of Medicine report, *PEPFAR Implementation: Progress and Promise*, the new law allows for greater flexibility in responding to local epidemics, by dispensing with many of the spending requirements enacted in the original law. Specifically, rather than requiring that 55% of the funding go toward treatment, now half of the funding must go toward treatment and care, in recognition of the facts that growing numbers of people will be living with HIV for long periods of time and that ongoing care services will be increasingly important. The new law also allows for a slight increase in the proportion of funding that may go toward prevention.

Regarding prevention, the new law repeals the earmark for abstinence-until-marriage programs. Instead, it stipulates that in those countries with

generalized epidemics (as opposed to countries where HIV is concentrated among sex workers, for example), the global AIDS coordinator must develop an HIV sexual prevention strategy for which at least half of funding supports "activities promoting abstinence, delay of sexual debut, monogamy, fidelity and partner reduction." The coordinator must report back to Congress on any country plans that do not meet this goal.

### One Step Back

One of the new law's most significant failings, though, is its silence on the subject of integrating HIV prevention and treatment programs with sexual and reproductive health services and programs. In contrast to the original PEPFAR law, the current law explicitly recognizes the importance of establishing linkages with related programs and activities, such as maternal and child health care, primary health care, diagnosis and treatment of other sexually transmitted infections (STIs), nutritional counseling and substance abuse services. Family planning programs had been included in that list, but were deleted by the end of the legislative process. Similarly, the law expands the concept of AIDS treatment to include the provision of food and nutrition. It stops short, however, of acknowledging the role that providing HIV-positive women with voluntary contraceptive services plays in preventing new cases of HIV, by enabling these women to prevent pregnancies they do not want (related article, Winter 2008, page 2).

These glaring omissions resulted from distortions, misunderstandings and even hyperbolic charges from the administration and antiabortion activists, who objected to a draft PEPFAR bill floated early in 2008 by then-House Foreign Affairs Committee Chairman Tom Lantos (D-CA), who died before the process got fully underway. That bill listed family planning programs among those that should have good referral networks with HIV and AIDS programs and among the sites where PEPFAR-supported HIV prevention efforts would be appropriate. In fact, this approach merely reflected the status quo policy. As early as 2003, the Bush administration published a technical guidance on family planning and HIV integration stating explicitly that "family

planning is a critical component of the continuum of care and support” for clients seeking HIV counseling and testing, regardless of their serostatus, because “unprotected sex may lead to unintended pregnancy, STIs and HIV infection.” Recently, the administration had even begun implementing this policy, using PEPFAR funds to provide HIV testing and counseling services at family planning clinics.

Antiabortion Rep. Mike Pence (R-IN), however, led a successful campaign to twist this simple notion into one that would “transform a successful strategy to reverse the HIV/AIDS pandemic into a mega-funding pool for organizations with an abortion promotion agenda.” The State Department, despite PEPFAR’s own policies and practices, lent political support to Pence. The assistant secretary of state for legislative affairs wrote to Lantos in February insisting that all references to “family planning” and “reproductive health” be deleted from the bill as controversial and unnecessary. In the same letter, the administration objected even more strongly to the provisions in the chairman’s bill that would have actually advanced U.S. global HIV policy significantly. His draft bill would have permitted PEPFAR funds to pay for contraceptive services for women in HIV treatment programs and for postpartum mothers in programs to prevent mother-to-child transmission of HIV who want to delay or avoid a subsequent pregnancy. This idea is “contrary to PEPFAR’s life-saving principles,” wrote the State Department and “wrongly suggests it is necessary to prevent children from being born in order to prevent them from being born with HIV.” U.S. Global AIDS Coordinator Mark Dybul strongly advocated this view, asserting that it was somehow unethical to provide voluntary contraceptive services to women with AIDS in PEPFAR programs—although it is apparently appropriate to refer them to a family planning program, assuming one exists for them to be referred to.

By the time the bill found its way to the president’s desk in August, all references to family planning and reproductive health had been purged. As in 2003, forces from across the political spectrum had converged in a way that reproductive health policy was squeezed in the legisla-

tive vise. In a political world in which social conservatives read the words “family planning” and hear “abortion,” leading actors in the HIV advocacy community signaled to the newly installed chairman of the House Foreign Affairs Committee, Howard Berman (D-CA), and Senate Foreign Relations Committee Chairman Joe Biden (D-DE) that it was not worth holding the legislation up over these issues. Once the administration and most conservatives agreed to the higher overall funding level, progressives had won the battle many considered to be the most important. The policy issues, they maintained then as they still do, could be redressed later.

At least the issues of contraceptive services and of family planning and reproductive health programs rose to the level of getting a fight. That is more than can be said for the requirement that nongovernmental organizations must take an “antiprostitution pledge” in exchange for PEPFAR funding. It had been slated for repeal in the original draft House bill, but it quickly and quietly reappeared intact before the real bill moved forward. This took place despite the questionable legality of the way in which the pledge is being implemented (see box). Similarly, without any public discussion or debate, the new law strengthens the old one, which already allowed organizations to opt out of providing condoms or information about condoms if they have a moral or religious objection to doing so. The new law goes further to clarify that they need not refer clients for condoms, nor “integrate with” any program to which they have a moral or religious objection.

### **Devil in the Details**

Early in 2009, the new administration will appoint a new global AIDS coordinator, who will oversee the effort to interpret the updated law and write a new PEPFAR guidance. The purpose of the guidance is to provide more specificity at the program level for how to achieve the legislation’s goals. Some of these activities may be explicitly dictated in the law, some may be implied and others may be prompted by program professionals as important to operating a successful program.

## Federal Judge Blocks Enforcement—Again—of Antiprostitution Pledge Against U.S. Groups

*Judge Victor Marrero of the U.S. District Court for the Southern District of New York ruled on August 8 that the government's new twist on its original proposal compelling U.S.-based organizations to pledge their opposition to prostitution to qualify for PEPFAR funding continues to violate the free speech clause of the First Amendment. Judge Marrero rejected the government's claim that its new approach to implementing the law fixed the First Amendment violations that he had found in a May 2006 ruling. He had earlier enjoined the government from enforcing the requirement against the original plaintiffs—the Alliance for Open Society International and Pathfinder International. This time he expanded the injunction to include all members of InterAction, the nation's largest coalition of humanitarian organizations, and the Global Health Council, the preeminent membership coalition of international public health organizations.*

*In effect, Marrero's order protects virtually all major U.S.-based recipient organizations from having to comply with the pledge themselves. Foreign nongovernmental organizations (NGOs), however, are not protected under the U.S. Constitution, and thus are not saved from the pledge. And despite the ruling, U.S. PEPFAR recipients still must enforce the requirement against their overseas partners.*

*At the same time, the court decision does call into question exactly how the pledge is to be enforced, even against foreign NGOs. Regulations proposed by the Department of Health and Human Services (DHHS) on April 17, 2008, would require all PEPFAR recipients to establish legally and physically separate entities if they wish to express their own views or even to say nothing at all about the relationship between prostitution and effective ways to prevent HIV among sex workers. (Both DHHS and the U.S. Agency for Inter-*

*national Development administer PEPFAR funding and both agencies operate in synch.) The agencies had argued that this scheme would suffice in meeting the legislative intent of Congress, while respecting the First Amendment rights of U.S.-based recipients. Marrero rejected that claim, however, concluding that as applied to U.S.-based groups, the proposed separation requirements are too sweeping and that they would overly burden what NGOs are free to say—or not say—with their private funds.*

*As of this writing, the next move is the administration's, which has several options: It can appeal the court decision, take the court ruling into account in writing a final rule to be promulgated later this fall or both. Accordingly, the battle will continue over how to implement the pledge in a way that is constitutional, interferes least with best public health practices and allows funding to go to the most effective foreign NGOs on the ground.*

Indeed, the law's silence regarding the integration of HIV services into family planning programs and contraceptive services into HIV and AIDS programs does not preclude a new administration from addressing these issues in a new guidance governing the use of PEPFAR funds. The evidence base for doing so is clear, and many programs around the world are already moving ahead in this direction (related article, page 7). Whether the new administration is likely to move U.S. policy forward will depend in part on the administration's stance on evidence versus ideology, its posture toward the distortions and inevitable pressures that staunch family planning opponents in

Congress will continue to apply, and the follow-through efforts of advocates of HIV and sexual and reproductive health integration, including those who committed to returning to fix PEPFAR's policy problems "later."

Funding for abstinence and fidelity programs, meanwhile, is still explicitly mentioned in the new law, but in a more circumscribed way that leaves more room for interpretation at the country level. The new PEPFAR replaces the rigid spending requirement on abstinence with a more flexible goal on spending for a wide array of activities that lead to fewer concurrent sexual

partners and delayed sexual debut, for example. It will be up to the new administration to determine what kinds of programs and interventions to fund that will most effectively achieve these outcomes.

In short, what PEPFAR will actually look like on the ground later next year will depend largely on the new administration. Over the longer term, Congress too will have the chance to weigh in with further adjustments to the law itself. After the original PEPFAR passed in 2003, for example, House and Senate appropriators added new provisions of law guiding how PEPFAR funds are to be spent. One that has been particularly important to reproductive health advocates is the requirement that PEPFAR recipients that choose to provide information about the effectiveness of condom use in HIV prevention do so in a truthful and fair way. Other such improvements are possible in the legislative arena.

Meanwhile, a major question looms regarding funding: Will the United States actually provide the large sums of money that the law establishes as goals? Clearly, the global need more than justifies the huge investment. The United States

entered into supporting AIDS treatment programs several years ago because the epidemic had reached a point where it had become ethically intolerable to opt out. And, as PEPFAR continues to bring medicines and care to more and more people living with AIDS, it is a commitment now widely regarded as being unethical to break. "The legislation...extends an implicit pledge that has little precedent in the history of U.S. foreign assistance," wrote the Washington Post's David Brown, "to continue purchasing lifesaving drugs for millions of individual people in developing countries for an indefinite period of time."

As a result, spending on the global AIDS program is likely to even further dwarf other global health spending at whatever levels are eventually determined for the coming years, unless Congress takes major steps to ramp up other important public health programs at the same time. Always an uphill fight where foreign aid is concerned, this may be even more so in this time of extreme fiscal pressure. That makes it all the more important that the large amount of funding that the United States actually commits to PEPFAR is guided by policies that get it right.

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