

**SAFEGUARDING RELIGIOUS LIBERTY IN CHARITABLE
CHOICE AND FAITH-BASED INITIATIVES**

**A POSITION PAPER FROM
THE CENTER FOR INQUIRY
OFFICE OF PUBLIC POLICY**

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Introduction

Government funded social service programs conducted by religious organizations are becoming increasingly sectarian. The Center for Inquiry (CFI) believes this trend threatens religious liberty.

Religiously affiliated organizations have for many years received government funds to conduct social service programs. Though established, in part, to further religious missions, these programs were, until recently, secularized and distinctly separate from the organizations' religious activities.

Beginning in the 1990s, however, so-called Charitable Choice legislative proposals – some enacted and some not – were advanced to allow religious organizations to integrate their religious and government-funded social service activities. Charitable Choice, in turn, was in many respects the model for President George W. Bush's Faith-Based and Community Initiative (FBCI) promulgated by executive order. Today, government funding is provided to religious organizations, not just for separate secularized programs, but also for faith-based programs (FBPs) – that is, programs in which sectarian and secular missions and activities are intertwined.

CFI has deep misgivings about government funding of FBPs. These programs' tendency to use government funds to support or favor religious activities and beliefs undermines religious liberty unwisely and often unconstitutionally. Indeed, CFI questions whether FBPs, by their very nature, can avoid this improper use of government funds. As outlined further below, government funded FBPs pose multiple threats to religious liberty and the constitutional principle of church-state separation:

- First, government funding of FBPs forces taxpayers to subsidize religious activities and beliefs that may be contrary to their conscience. This problem arises even when government funding of a religious institution's social programs is segregated from the institution's other funds. Money is fungible. Infusing a religious institution with public dollars effectively subsidizes religious activity by freeing more of the institution's other funds for religious worship, instruction and proselytizing.
- Second, government funding of FBPs threatens the religious freedom of the FBPs' beneficiaries. Taxpayer-subsidized religious institutions are in a position to coerce disadvantaged Americans to engage in religious worship or undergo religious conversion in exchange for critical benefits.

- Third, government funding threatens the religious freedom of the funded religious institutions. Taxpayer funding makes religious institutions dependent on the government for money. It also necessarily exposes religious institutions to potentially intrusive government monitoring and regulation.
- Fourth, government funding of FBPs threatens interfaith harmony by pitting various religions against one another in a competition for limited taxpayer funds.
- Fifth, government funding for FBPs raises the danger that government officials may improperly favor some faiths over others, or may favor religious over secular institutions, when doling out public funds.

For each of these reasons, CFI recommends that government funding of FBPs be eliminated.

CFI recognizes that despite the threats to religious liberty and church-state separation that government funding of FBPs poses, at present there is likely insufficient political support for eliminating funding altogether. Indeed, President Obama recently signed an executive order appointing Joshua DuBois Executive Director of the White House faith-based office and setting up an advisory council on FBP issues (Amdts. to EO# 13199). Given that government funding of FBPs is scheduled to continue, CFI recommends that the following minimum safeguards of religious freedom be adopted and vigorously enforced:

1. The program must not discriminate against its beneficiaries on the basis of religion, and potential beneficiaries must have a readily available option to obtain similar services from a secular organization.
2. The program must not engage in religious activities including worship, religious instruction, proselytization, distribution of religious materials, inculcation of religious beliefs or any other support of or favoritism toward religious activities or beliefs.
3. The program must not discriminate based on religion in retaining or terminating employees, independent contractors and volunteers (collectively referred to below as “employees”).
4. Government must treat programs conducted by religious and secular organizations equally. No preference may be given in granting funds to programs conducted by a particular religious organization or to such organizations in general, and the same rules must apply for performance accountability and compliance monitoring. Religious organizations must completely segregate government funds granted to their social service programs from all other funds.

The government must monitor these programs' adherence with the above principles, and must enforce such adherence.

These safeguards are expanded upon below following a brief discussion of the history of government funding of social service programs conducted by religious organizations. CFI applauds President Obama's instituting a new mechanism for the Executive Director of the White House faith-based office to seek the advice of the Attorney General on difficult legal and constitutional issues (*Id.*). CFI also expresses disappointment, however, that the President's recent executive order does not repeal the existing Bush administration executive orders that gave rise to these legal and constitutional difficulties, including one that specifically authorizes religion-based employment discrimination in publicly funded FBPs. The President's failure to address these issues directly makes it all the more important that the aforementioned safeguards be implemented immediately.

History of Government Funding of Religious Organizations' Social Service Programs

Whether and under what circumstances government funds should be provided to religious organizations' social service programs has long been debated. Until recently, this debate was generally resolved by allowing funding only to programs that were secularized and separate from the sponsoring religious organization (GAO 2006, p. 1).

For instance, Catholic Charities -- the largest church-related social service organization in the United States -- is a nonprofit corporation separate and distinct from the Catholic Church. Although created and operated to further the Church's religious mission, Catholic Charities conducts secular social service programs without religious content or materials and does not require its employees to be Catholics. Catholic Charities is regarded as a model for participation in federal funding by those who believe that government funds should not be used to support religion or religious discrimination (Steinfels 2004).

Some religious organizations and their supporters, however, object to this model. They believe that religious organizations' government funded social service programs

should be allowed to substantially integrate their sectarian and secular missions and activities.

To establish this new model, Senator John Ashcroft and others advanced various legislative proposals under the rubric of “Charitable Choice.” Charitable Choice loosens requirements to separate religion from the delivery of government funded social services, and permits religiously based employment discrimination.

The first enacted Charitable Choice provision was part of the Temporary Assistance for Needy Families (TANF) program of the welfare reforming Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Later legislation extended TANF with Charitable Choice through 2010. In addition, Charitable Choice was included in the 1998 Community Services Block Grant (CSBG) in 1998, and in grants administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) in 2000.

In other cases, Charitable Choice advocates were unsuccessful. For instance, Charitable Choice for Head Start was rejected. Among the opponents were religious organizations concerned that community support would be undermined if their Head Start programs were seen as furthering sectarian missions.

President George W. Bush sought to expand the scope of Charitable Choice principles through the Faith-Based and Community Initiative (FBCI). Beginning in January 2001, he issued a series of FBCI executive orders, including EO #13279, which laid out principles for federal agency implementation. The agencies administering FBCI funds include the Departments of Agriculture, Health and Human Services, and Justice, which issued regulations concerning grant competitions and conditions for awards. By 2006, 11 federal agencies had FBCIs. This use of executive orders and agency regulations extends the FBCI to a much broader applicability than Charitable Choice.

The FBCI rules generally follow Charitable Choice principles allowing the integration of sectarian religious missions and secular activities of government funded FBPs. The agency regulations also loosen specific rules in favor of FBPs. For example, the Department of Education removed the rule barring use of government funds for services provided by schools or departments of divinity; the Justice Department allowed chaplains working with prisoners to be paid from government funds; and the Agriculture

Department allowed religious schools receiving government provided school lunch funds to require students to attend classes in religion (Richardson 2005).

The FBCI, like Charitable Choice, also allows religiously based employment discrimination. Moreover, the recent release of a June 2007 opinion from the Justice Department's deputy attorney general revealed that the FBCI expanded permitted religious employment discrimination beyond Charitable Choice. This opinion allowed a government funded FBP to impose religiously based hiring restrictions even though Congress had explicitly prohibited them in the authorizing statute. The opinion is based on a broad interpretation of the Religious Freedom Restoration Act (RFRA), which prohibits government from substantially burdening the exercise of religion unless the burden furthers a compelling governmental interest and is the least restrictive means of doing so.

Because the FBCI was created and implemented by executive order and agency regulations, it can be unilaterally changed or eliminated by the executive branch. During his campaign, President Barack Obama advocated creation of the Faith-Based and Neighborhood Partnerships program. No formal proposal has been made, however, and many specifics are as yet undefined.

Principles for Government Funding of Faith-Based Programs

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” This foundation of our free society clearly imposes some First Amendment limits on government funding of FBPs. In addition, some aspects of government funding that may arguably be less problematic under a formalistic reading of constitutional law are nonetheless unwise in the light of the principles underlying the First Amendment. Accordingly, while CFI believes that its positions regarding FBPs reflect a proper interpretation of the Constitution, this paper does not engage in lengthy constitutional argumentation. Instead, CFI's positions are based on the principles underlying the Constitution's guarantee of religious liberty:

- Government must not support or favor any religious activities or beliefs.
- Each individual must have the unfettered right to choose which religious doctrines or practices, if any, to follow or support.

CFI believes government funding of FBPs threatens these principles because of the mirror-image risks that the funds will be used for religious purposes or religious discrimination, and that the required regulation of FBPs to prevent this improper use of government funds will entangle government in the affairs of FBPs to the detriment of both. As Justice Hugo Black put it, “a union of government and religion tends to destroy government and degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

Given that government funding of FBPs is likely to continue despite these concerns, CFI recommends that FBP funding be administered with the following minimum safeguards of religious liberty:

1. Religious Discrimination against Program Beneficiaries

To protect religious freedom, FBPs must not be permitted to use government funds to impose religious doctrines or practices on any individual.

There is near universal agreement with this principle. Thus, the first Charitable Choice provision to be enacted states that a religious organization receiving government funds “shall not discriminate against an individual in regard to rendering assistance on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.” (PRWORA, sec.104 [g]). Moreover, “[i]f an individual . . . has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance . . . , the State in which the individual resides shall provide such individual . . . within a reasonable period of time after the date of such objection with assistance from an alternative provider . . .” (PRWORA, sec 104 [e] [1]).

Similarly, under the FBCI, FBPs “in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.” (Executive Order #13279). However, in a troubling retreat from principles of religious freedom, the FBCI does not provide individuals the Charitable Choice option to receive services from a secular organization.

CFI believes that similar protections of the religious freedom of program beneficiaries must be included in any government funded FBP. Religious discrimination against beneficiaries must be strictly prohibited, and secular options must be readily available and made known to potential program beneficiaries.

2. Religious Activities and Support for Religion

If government is to be prohibited from supporting or favoring any religious activities or beliefs, it is fundamental that FBPs must not be permitted to use government funds for religious purposes of any kind.

There is widespread support for applying this principle to the direct expenditure of government funds with regard to a few activities that are obviously entirely religious in nature. For instance, under Charitable Choice “[n]o funds provided directly to institutions or organizations to provide services and administer programs . . . shall be expended for sectarian worship, instruction, or proselytization.” (PRWORA, sec. 104 [j]). Similarly, under the FBCI, a FBP must “not use direct Federal financial assistance to support any inherently religious activities, such as worship, religious instruction, or proselytization.” (Executive Order #13279).

While these limitations are appropriate as far as they go, they leave major areas of concern. First, the only examples of prohibited religious activities cited by Charitable Choice and the FBCI are worship, religious instruction and proselytization, and federal agencies have refused to give any other examples. This approach invites the interpretation that the only activities prohibited are ones listed (as well, perhaps, as others that share the characteristic of being entirely or exclusively religious). Thus, it appears that the FBCI allows the use of government funds, for instance, to distribute materials or conduct activities that have religious content or otherwise inculcate religious views as long as the materials and activities are not entirely or exclusively religious (Lupu and Tuttle, pp. 275-288).

In addition, both Charitable Choice and the FBCI allow government funds provided in the form of vouchers to be used to support even worship, religious instruction and proselytization. The prohibition of these activities applies only to direct expenditures

and not to vouchers (or, perhaps, other indirect expenditures) (PRWORA, sec. 104 [j]; FBCI Executive Order #13279),

Also troublesome is that neither Charitable Choice nor the FBCI require a FBP to “remove religious art, icons, scripture, or other symbols” from the premises used for providing social services (PRWORA, sec. 104 [d] [2][B]; FBCI EO#13279, sec. 2[f]).

All of these areas of concern share a common fundamental defect: taxpaying citizens are compelled to support religious activities and beliefs that may be contrary to their conscience. There is problematic compulsion, for instance, any time government funds are used to distribute materials or conduct activities that have religious content or otherwise inculcate religious views, even if there is no forbidden religious worship, instruction or proselytization. Consider, for instance, the use of Protestant or Moslem citizens’ tax dollars for programs that follow a self-declared “Catholic approach” for dealing with addiction, abuse or other societal problems.

The fact that a FBP is attempting to fulfill the secular purpose of a government social welfare program -- for instance, to cure drug addiction -- does not, as some argue, justify the use of government funds to distribute materials or conduct activities that have religious content or otherwise inculcate religious views. Notwithstanding the existence of a secular purpose, it remains true that taxpaying citizens are being compelled to support religious beliefs or activities that may violate their deepest principles. Moreover, the secular purpose argument proves too much. Even if the purpose of worship, instruction or proselytization is to cure drug addiction, Charitable Choice and the FBCI agree that government funds cannot be used for these activities. The same prohibition should also apply to the use of government funds to distribute religious materials, conduct religious activities or inculcate religious views in any way. A FBP may have a religious motivation for providing social services, but must not use government funds to express religious views or conduct religious activities.

With respect to vouchers, some argue that their use for sectarian religious purposes should not be limited in any way, “because there cannot be even the appearance of a government establishment of religion when it is the beneficiary who, free to choose among providers, decides to redeem a voucher at a faith-based provider” (Center for Public Justice, page 14). This argument falls short, however.

The beneficiary's right to choose does protect him or her from the imposition of unwanted religious views or activities. This right to choose, however, does not protect taxpaying citizens from being compelled to support FBPs that violate their conscience. Even if, for instance, a beneficiary freely chooses to use a voucher for a program that follows, say, a "Hindi approach" to preventing spousal abuse, taxpaying Jewish and Buddhist citizens are no less compelled to support this program than they would be if the government directly provided funds to the program without the intermediation of beneficiary choice. We are aware that, in certain circumstances, the Supreme Court has allowed the use of vouchers for religious schools. Whether or not one agrees as a matter of constitutional law (CFI does not), it remains a serious infringement of religious liberty to compel citizens, even indirectly through vouchers, to support activities and beliefs with which they profoundly disagree. This infringement should not be permitted in the case of FBPs.

Finally, for similar reasons, we believe religious organizations should be required to remove religious art, icons, scripture, or other symbols from the facilities directly used to provide government funded social services. We are not persuaded that these items should be allowed for the "maintenance of [a] religious environment" so that "its religious expression and identity may not be censored or otherwise diminished . . ." (Center for Public Justice, pp. 11, 14). Religious organizations are free to maintain their religious environment, expression and identity in the context of programs that they finance themselves. Where governmental funds are accepted, however, this type of religious expression should be prohibited.

3. Religious Discrimination in Employment

If government is to be prohibited from supporting or favoring any religious activities or beliefs, it is also fundamental that FBPs must not be allowed to use government funds to engage in religiously based employment discrimination.

The Civil Rights Act of 1964 exempts religious organizations from the general ban against religious discrimination in employment (42 U.S.C. sec. 2000e-1). The 1964 Act, however, does not address government funded FBPs. Many proponents of these programs seek to extend the exemption to them. For instance, under Charitable Choice a

religious organization's 1964 Act exemption "regarding employment practices shall not be affected by its participation in, or receipt of funds from, [TANF] programs" (PRWORA, sec. 14[f]). The FBCI also exempts government funded FBPs from the otherwise applicable prohibition against religious discrimination in employment in a similar manner (FBCI Executive Order #13279, sec.4). Moreover, as discussed above, RFRA has been interpreted in a Justice Department opinion to apply this exemption even where Congress has explicitly prohibited such discrimination.

Some argue that employment discrimination should be allowed because employees' adherence to particular religious beliefs could be critical to the success of a FBP, or may be necessary to maintain a FBP's identity and effectiveness. Arguments like these, however, inadvertently demonstrate precisely why this type of discrimination should not be allowed.

If it is indeed critical to the success or effectiveness of a FBP that its employees adhere to particular religious beliefs, that very fact shows that the FBP has crossed over the line of religious establishment and is a sectarian activity that should not be government funded, however laudable the program's secular goals (or successes) may be. The reliance on RFRA to justify employment discrimination expressly prohibited by Congress is particularly objectionable. Because religious organizations are free to decline government funding, a prohibition against employment discrimination is not the type of substantial burden on the free exercise of religion RFRA requires to override an express act of Congress. In any event, regardless of whether Congress has expressly acted, if a religious organization wishes to conduct such a program and engage in religious discrimination, it must be required to use its own funds for that purpose. Exceptions may be necessary for high-level employees ultimately responsible for both social service and religious activities, but to the extent these exceptions are permitted, they should be carefully tailored and must not be allowed to unravel the fundamental principle. It is wrong to use government funds to support religiously based discrimination against actual or potential employees. Moreover, taxpaying citizens must not be compelled to support programs that discriminate in favor of members of religions with which they may disagree.

4. Equal Treatment in Fund Granting and Performance Evaluation

As with any other government-funded program, FBPs should be held accountable for showing that they are effectively and efficiently carrying out their purpose. However laudable their goals, government funded FBPs should be subject to the same standards as secular programs.

Also as with any other government funded program, FBPs should be monitored to ensure compliance with applicable law, including prohibitions against using government funds to support or favor religious activities or beliefs. Rules have little significance or effectiveness if they are not enforced. Moreover, government must provide clear guidance to FBPs regarding the rules to which they are subject and how to comply with those rules.

As a minimal requirement for accountability and monitoring, FBPs should be required to strictly segregate government funds. They also should be required to maintain an accounting system that allows them to demonstrate that government funds are not being used inappropriately.

Although we do not presume that FBPs will commonly perform ineffectively or violate the rules to which they are subject, the monitoring necessary to ensure accountability and compliance may be somewhat intrusive, perhaps highly intrusive on occasion. These intrusions must be borne by FBPs just as similar intrusions must be borne by other recipients of government funds. If a religious organization believes that such monitoring interferes with its religious mission, it is free to reject government funds. Indeed, many religious organizations oppose government funding because they believe that religion benefits from a strict separation from government.

The brief history of the FBCI shows the need for and difficulties of effective evaluation and monitoring of FBPs. The long-term goals of the FBCI were to increase the number of religious organizations providing social services, and to improve outcomes for participants. Its proponents assumed that the integration of sectarian and secular missions and activities would improve the delivery of social services and enhance the success rate.

However, progress to these goals has not been documented for a number of reasons. Evaluation seems not to have been a priority for the White House Office of

Faith-based and Community Initiatives. A Government Accountability Office report in 2006 bore the subtitle, “Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability,” which sums up the situation (GAO 2006). No further reports have appeared.

It is also impossible to evaluate the success of the FBCI in achieving its goals because no objective definition of “faith-based” has been established. Instead, the FBCI has relied on self-identification, resulting in inconsistent and questionable analysis. For example, some YMCAs and YWCAs identify themselves as faith-based and others do not. Under these circumstances, conclusions concerning the number of FBPs providing social services and the effectiveness of these programs are inherently unreliable.

Beyond this definitional problem, there is insufficient data to evaluate whether the FBCI has improved outcomes. Outcome evaluation in social services is always difficult, but in the case of the FBCI, it had hardly begun when the GAO Report was published in 2006, and there is no evidence of any subsequent progress.

In addition, FBPs’ compliance with the FBCI prohibitions against beneficiary discrimination, worship, religious education and proselytization has been uneven at best partly because communication and enforcement of these prohibitions has often been ineffective. Government funded FBPs commonly misunderstand, and therefore do not properly apply, rules requiring religious activities – such as prayer and religious discussions -- to be separate from the provision of government funded services (GAO 2006, pp. 29 – 36).

Conclusion

Government funding of faith-based programs presents serious constitutional concerns and CFI recommends that such government funding be eliminated. To the extent such funding continues, the minimum safeguards described in this position paper must be adopted and enforced. Freedom of conscience and separation of church and state are fundamental principles that must be respected.

REFERENCES

Publications:

Center for Public Justice. A Guide to Charitable Choice (1997)

Dilulio John. 2002. John Dilulio's Letter. Retrieved September 15, 2008 from <http://www.esquire.com/print-this/dilulio>

GAO-06-616. *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability*. United States Government Accountability Office Report to Congressional Requesters. June 2006.

Kuo, David. 2006. *Tempting Faith*. New York: Free Press

Lupu and Tuttle, *The Faith-Based Initiative and the Constitution*, DePaul Law Review, Vol. 55, No. 1.

New York Times. 2006. Religion for Captive Audiences, With Taxpayers Footing the Bill, by Diana B. Henriques and Andrew Lehren. *New York Times* December 10, 2006. Retrieved on October 5, 2008 from <http://www.nytimes.com/2006/12/10/business/10faith.html>

Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, H.R. 3734, 104th Cong. 2d Sess., P.L. 104-19, section 104(g).

Richardson, Joe. 2005. *Charitable Choice: Expansion by Executive Action*. CRS Report for Congress. Washington D.C.: Congressional Research Service. The Library of Congress.

_____. 2006. *Charitable Choice Rules and Faith-based Organizations*. CRS Report for Congress. Washington DC: Congressional Research Service. The Library of Congress.

Steinfels, Peter. 2004. Beliefs; Religious organizations have long had a role in providing social services to the needy. Does a new California law threaten it? *The New York Times*, March 13 2004. Retrieved October 5, 2008 from <http://query.nytimes.com/gst/fullpage.html>

U.S. Government Accountability Office. 2006. *Faith-based and Community Initiative. Improvement in Monitoring Grantees and Measuring Performance Could Enhance*

Accountability. GAO-06-616. Washington DC: Government Printing Office. Retrieved September 17, 2008 from www.gao.gov/cgi-bin/getrpt?GAO-06-616

Legal Authorities:

Amendments to Executive Order #13199 and Establishment of the President's Advisory Council for Faith-Based and Neighborhood Partnerships (2009), available at http://www.whitehouse.gov/the_press_office/AmendmentstoExecutiveOrder13199andEstablishmentofthePresidentsAdvisoryCouncilforFaith-BasedandNeighborhoodPartnerships/

Engel v. Vitale, 370 U.S. 421, 431 (1962)

FBCI Executive Order #13279, 3 C.F.R. 258 (2003), section 2(f)