

The Faith-Based Initiative and 'Charitable Choice': Harmful to Religious Liberty and Civil Rights

The Anti-Defamation League is a strongly pro-religion, national human relations and civil rights organization. For close to a century, it has been an ardent advocate for religious freedom for all Americans.

ADL believes that the best way to safeguard religious freedom is through the separation of church and state embodied in the First Amendment's Establishment Clause, which allows Americans to practice their various faiths freely and boldly.

To this end, ADL strives to advance religious liberty by opposing government interference, endorsement, and entanglement with religion. In the familiar words of distinguished U.S. Supreme Court Justice Black: "A union of government and religion tends to destroy government and degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

The Faith-Based Initiative represents a dramatic shift in the way government funds social welfare services for our nation's most needy citizens. The design and implementation of the initiative raise serious and deeply troubling implications for the religious freedom of all Americans – and the integrity of our nation's religious institutions. This publication seeks to provide answers to frequently asked questions about the Faith-Based Initiative.

Q: What is the Faith-Based Initiative and why is it problematic?

A: The Faith-Based Initiative is a federal program that provides houses of worship, religious organizations, and other faith-based institutions with federal funding to deliver government-mandated social services. Under this initiative, for the first time, houses of worship and other pervasively sectarian institutions are eligible for billions of taxpayer dollars.

President George W. Bush originated the Faith-Based Initiative in January 2001 with the creation of the White House Office of Faith-Based and Community Initiatives. The Bush Administration advanced its initiative through a series of executive orders.

These executive orders did not contain adequate constitutional and anti-discrimination safeguards. They opened the door to government-funded proselytizing of beneficiaries and, in many circumstances, explicitly allowed religious discrimination in hiring and firing within taxpayer-funded programs.

Renaming President Bush's creation the White House Office of Faith-Based and Neighborhood Partnerships, President Obama has continued the Faith-Based Initiative. By implementing new constitutional safeguards, President Obama's executive order takes some important steps towards restoring government and religion to their proper roles. However, problems remain, including religious discrimination in hiring and firing within taxpayer-funded social service and other programs.

Q: What is "Charitable Choice" and why is it controversial?

A: The Faith-Based Initiative builds on the controversial concept of "Charitable Choice," that was first enacted as part of welfare reform, drug treatment, and job training initiatives during the Clinton Administration. "Charitable Choice" means that whenever the federal government allows private organizations to assist in the distribution of social welfare benefits, it must also give religious organizations and sectarian institutions an equal opportunity to participate. Existing "Charitable Choice" provisions do not contain adequate safeguards to prevent the use of government funds to promote religious beliefs – and they permit religious discrimination in hiring for government-funded programs. "Charitable Choice" provisions were enacted without the benefit of congressional hearings and with almost no floor debate on their breadth and sweeping impact.

Q: Were partnerships between government and religious institutions permissible before the Faith-Based Initiative?

A: Yes. Supporters of the Faith-Based Initiative frequently talk about the need to "level the playing field" for faith-based organizations, but the government has contracted for food, shelter, job training, and drug treatment programs with religious-affiliated organizations – such as Catholic Charities, Jewish Federations, and Lutheran Social Services – for decades. These successful partnerships have provided excellent service to communities, unburdened by concerns over bureaucratic entanglements between government and religion. This success is due, in part, to the fact that before the Faith-Based Initiative, these organizations had been required to abide by strong constitutional and anti-discrimination safeguards – protecting beneficiaries from unwanted proselytizing and employees from discrimination in these programs. These organizations continue to be eligible for and receive considerable government support now.

Q: How has the Faith-Based Initiative been implemented so far?

A: ADL shares President Obama's appreciation for the vital role religious institutions have historically played in addressing many of our nation's most pressing social needs. Unfortunately, the implementation of the Faith-Based Initiative has been deeply troubling on policy and constitutional grounds.

Under the Bush Administration, the Faith-Based Initiative allowed proselytizing of social service beneficiaries. To date, it continues to permit government-funded employment discrimination, and it impairs the integrity of our nation's religious institutions through the specter of government monitoring and onerous audits.

The Obama Administration has made some important improvements to the Faith-Based Initiative, including:

- A requirement that all federal agencies providing financial assistance for social service programs ensure that beneficiaries have access to non-religious providers of government-funded social services;
- Greater transparency by requiring federal agencies to publicly post on-line entities receiving government funds to perform social services; and
- A firm commitment to monitor and enforce standards to avoid excessive entanglement between religious entities and government.

However, the Administration has failed to implement other necessary safeguards within the Faith-Based Initiative, including:

- Procedures to ensure that government money does not fund religious discrimination in the hiring and firing of people who deliver social services;
- A requirement that recipients of government funds must establish accounting systems and procedures to separate government dollars from core religious activities. Referred to as "firewalls," these procedures ensure that taxpayer dollars are not channeled into religious activities of religious organizations. As a practical matter, the best way to establish this division is through the creation of a separate corporate structure distinguishing the religious organization from its government-funded social services program; and
- Clarifying that extremist, terrorist or hate mongering groups are not eligible for government funds.

Q: Are "Charitable Choice" and the Faith-Based Initiative unconstitutional?

A: Probably Yes. The U.S. Supreme Court has not yet addressed the constitutionality of "Charitable Choice" or the Faith-Based Initiative. In other contexts, the Court has ruled that religious institutions, such as houses of worship, cannot receive taxpayer dollars because government funding and monitoring of these institutions would violate the First Amendment's Establishment Clause. For instance, a federal district court ruled that a rural health service program funded through the Faith-Based Initiative violated the Establishment Clause because nurses visiting patients provided religious services – prayer and Communion – in addition to health services.

Q: Are "Charitable Choice" and the Faith-Based Initiative bad public policy?

A: Yes, because "Charitable Choice" laws and the Faith-Based Initiative permit government-subsidized religious employment discrimination.

To prevent entanglement with government, Title VII of the 1964 Civil Rights Act exempts religious employers from its prohibition on religious employment discrimination. In 1987, the United States Supreme Court upheld the right of religious organizations to discriminate on the basis of religion in hiring staff with their own funds because doing so is intrinsic to their ability to define and carry out their religious mission (*Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327).

ADL supports this right of a church, synagogue, mosque or other religious organization to use its own private funds to hire only co-religionists for positions that forward its religious mission. A Methodist church, for example, should clearly be permitted to restrict its applicant pool to Methodists when setting out to hire a new minister for the church.

But that is very different from religious discrimination in hiring for government-funded programs. Allowing state-subsidized discrimination by houses of worship and other religious employers constitutes unconstitutional government support for a particular religious mission.

Furthermore, without essential anti-discrimination safeguards, a religious organization would be able to post a help wanted sign for a government-funded job saying "Jews, Catholics, Muslims, or Protestants need not apply" – creating a spoils system based on religious demographics.

Q: Are "Charitable Choice" and the Faith-Based Initiative bad for religion?

A: Yes. The Faith-Based Initiative and "Charitable Choice" can be harmful to religion for multiple reasons:

- By comparing religious and non-religious providers and seeking to treat them as equals, the Faith-Based Initiative fails to recognize the unique place that religion has in our society and in our constitutional scheme. Religion should be above the fray of government funding, government regulation, and government auditing, not entangled in it.
- The idea of government monitoring taxpayer-funded programs within houses of worship is disturbing. It raises serious concerns about possible government entanglement with religious practices. Religion has thrived in America because the government is prohibited from endorsing or burdening religious practice, and many religious organizations are rightly wary of "Charitable Choice" and the Faith-Based Initiative – concerned that their religious ministries would be subject to intrusive government regulations, including audits, reporting requirements and compliance reviews.
- "Charitable Choice" and the Faith-Based Initiative are likely to result in divisive competition among religious groups seeking limited government funds. This competition may compromise religion's historic and extremely important role as an independent critic on social issues – including government policy.
- Churches, synagogues, mosques and other houses of worship have traditionally provided a wide array of community health and welfare services as part of their sacred religious missions. Members of their congregations and communities have supported them by the countless hours of volunteer services and social action. Receipt of government funds may have a negative impact on volunteer contributions and the involvement of congregants.

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