

Equal Opportunity or Positive Discrimination for Faith-Based Organizations?

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Abstract: The purpose of this paper is to provide a comprehensive overview of President Bush's Faith-Based and Community Initiatives (FBCI). The essay describes in detail the program's most important steps in its history and its main accomplishments. An in-depth analysis covers the constitutional issue of whether the initiatives breach the "wall of separation" between state and church. Finally, it examines the question whether the program provides an equal opportunity for its intended target (faith-based and community organizations (FBCOs)) or practices positive discrimination in their favor, to the detriment of secular organizations.

The FBCI is among (specifically to the House Committee on Ways and Means) the most important new domestic policy issues introduced by the Bush administration. In order to understand its significance and the controversies surrounding, it a deeper understanding of its elements is necessary. I believe that this article will help provide such an examination. I have attempted to separate the objective description and the subjective commentary, devoting the first two sections to the former and the last two to the latter.

The language of the initiative and related regulations and communications suggests that the administration is trying to create equal opportunities for a suppressed minority population, the religious. Critics of the program claim, on the other hand, that it goes beyond that to manifest a

positive discrimination for the faith-based organizations, particularly the religious right and evangelicals. This is the driving theme and question that prompted this exploration.

History

On January 29, 2001 George W. Bush signed his first two executive orders as a president. He announced that, "the first Executive order¹ will create a new office, called the White House Office of Faith-Based and Community Initiatives. [(WHOFBCI) ...] The second Executive² order will clear away the bureaucratic barriers in several important agencies that make private groups hesitate to work with Government."³ President Bush defined the initiative's goal "to invigorate the spirit of involvement and citizenship."⁴ At the same time he laid down the priorities this way, "We will not fund the religious activities of any group, but when people of faith provide social services, we will not discriminate against them."⁵

The second of the two Executive Orders mentioned established five centers for FBCI in various agencies of the executive branch. Their responsibilities were five-fold: to conduct an "audit to identify all existing barriers[, ...] to incorporate faith-based and other community organizations in department programs[, ...] to remove barriers[, ...] to create pilots[, ...] and disseminate information."⁶ Over the years the number of centers grew two eleven through three more Executive Orders: two more centers were added in 2002⁷, three in 2004⁸, and one in 2006⁹. Each new center had the exact same mandate as the first five. The current list of agencies with FBCI centers includes the Agency for International Development (AID), the Department of Agriculture (DOA), the Department of Commerce (DOC), the Department of Education DOE), the Department of Health and Human Services (HHS), the Department of Homeland Security (DHS), the Department of Housing and Urban Development (HUD), the Department of Justice

(DOJ), the Department of Labor (DOL), the Small Business Administration (SBA), and the Department of Veterans Affairs (VA).

In June, 2001 the president accepted endorsements for FBCI from numerous organizations at a visit to Detroit Michigan. The White House announcement of the event listed five specific ways it intended to "stimulate an outpouring of private giving to nonprofits, faith-based programs, and community groups by expanding tax deductions and other initiatives."¹⁰

The day after president Bush signed the first two related executive orders he sent a message to Congress (specifically to the House Committee on Ways and Means) entitled "Rallying the Armies of Compassion"¹¹ with the intent to gain legislative support for the initiative. Based on this the House passed (on July 19) H.R.7, Community Solutions Act of 2001. "The bill included basic elements of President Bush's faith-based initiatives: tax incentives for private giving—scaled back from original proposals and expansion of charitable choice."¹² However, it did not pass in the Senate.

A report titled "Unlevel Playing Field,"¹³ issued by the White House in August 2001, summarized the findings of the five Cabinet centers in regards to faith-based organizations (FBOs) within the agencies. It listed 15 barriers for FBOs, including: Restricting some kinds of religious organizations from applying for funding; Restricting religious activities that are not prohibited by the Constitution; Not honoring rights that religious organizations have in Federal law; Burdening small organizations with cumbersome regulations and requirements; Imposing anti-competitive mandates on some programs; Congress' remedy to barriers to faith-based organizations - the Federal law known as "Charitable Choice" - has been almost entirely ignored by Federal administrators.

President Bush's Executive Order 13279¹⁴ (issued December 12, 2002) amended President Johnson's Executive Order No. 11246 (known as Affirmative Action) that required all federal contractors to consider applications "without regard to race, color, religion, sex or national origin." The new EO considered this an "unwarranted exclusion of faith-based organizations from such contracts" and changed the language to remove the obstacle. EO13279 was designed to "to ensure equal protection of the laws for faith-based and community organizations, to further the national effort to expand opportunities for, and strengthen the capacity of, faith-based and other community organizations."

In 2003 both Houses of Congress passed the "Charity Aid, Recovery, and Empowerment (CARE) Act, "a bill to promote charitable giving, and for other purposes."¹⁵ President Bush welcomed it this way "This legislation contains key elements of the faith-based initiative that I proposed more than two years ago to encourage more charitable giving and rally the armies of compassion that exist in communities all across America."¹⁶ The latest FBCI related major bill, the Pension Protection Act of 2006, "which included new charitable giving incentives totaling about \$1.4 billion over ten years,"¹⁷ was signed by President Bush in August 2006.

Accomplishments

The program accomplished most of its initial goals, although the administration was hoping for more legislative support and results in some areas. However to ensure the continuity of these results future presidents and administrations will need to provide support on an ongoing basis.

The first goal of the FBCI was to conduct an audit to identify all existing barriers. The first result of this was the "Unlevel Playing Field" report mentioned earlier. Since then no major report was released but the 11 centers oversee ongoing audits about potential barriers within their agencies.

The second explicit goal was "to incorporate faith-based and other community organizations in department programs." In this regard the program showed success, but not to the extent the administration wished. The White House's analysis for fiscal year 2005¹⁸ showed that FBOs received \$2.15 billion in funding (10.9% of total). This amount represents a 7% increase from the previous year, while the number of grants went up by 22%. Compared to fiscal year 2003 funds for FBOs increased by 21% (while the number of grants by 38%).

WHOFBCI delivered the most results, at least within the executive branch of the government, in relations of the third goal: removing barriers for FBCOs for receiving federal funding. By the end of 2003 almost all the agencies involved changed their regulation in accordance with EO 13279 as White House reported.¹⁹ For example on September 30, 2003 HUD released its final regulations about Temporary Assistance for Needy Families (TANF): "This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for federal funding."²⁰ The majority of the regulation changes used the same language.

The fourth goal was to create successful pilots demonstrating the feasibility of the program. From the numerous projects several are highlighted on the page²¹ summarizing the program's accomplishment. Ready4Work, a prisoner-reentry program has half the recidivism rate than national average: 1.9% after 6 month and 5.0% after 1 year. A web-based referral system between One-Stop Career Centers and FBCOs has been opened up to FBCOs by DOL. DOC invested \$3.5 million in the St. Patrick Center, the largest assistance program for the homeless.

The same page also lists accomplishments like removing barriers for FBOs offering drug and alcohol rehabilitation programs (USDA) and a loan guarantee for multifamily transitional housing for homeless veterans (VA).

The final goal was to disseminate information and make sure it reaches the target audience. In this are the WHOFBCI also excelled by training over 26,000 new and potential federal grantees (including 5,500 in 2006)²². The training mostly happened in workshops, announced in the office's newsletter. For example the most recent newsletter,²³ from April 23, 2007, lists over 50 events.) WHOFBCI also hosted 28 conferences (9 in 2006.)

Constitutionality

FBCI met, not only with the enthusiasm of supporters, but also strong concerns and sharp criticism. The primary concern was whether the goals set by the initiative are conflicting with the constitutional principle of separating church and state. The First Amendment's Establishment Clause states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This is interpreted by some, including evangelical Christians and the Bush administration as demonstrating the intent to prevent the establishment of a state religion. Others, however, including most legal experts see it as prohibiting any government support of religion. This difference of opinion is at the root of the controversies surrounding FBCI.

To assure constitutionality Executive Order 13279 declared "organizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance."²⁴ However even this requirement is not always met. For example as a Government Accountability Office found that "4 of the 13 FBOs that offered

voluntary religious activities—such as prayer or worship—did not appear to understand the requirement."²⁵ There are reports of federally funded meetings starting and ending with a prayer group and providing social services in between. They argue that they satisfied the above separation requirement, because they did not hold the two kinds of services at the same time. This argument however does not seem valid, because indeed they did mix them. The language of the separation is unclear how much time should separate the two functions; therefore organizations are free to interpret them as they wish.

One of the main aspects of the FBCI is the expansion of "Charitable Choice" provision of the 1996 Welfare Reform Act. However it was President Clinton, who signed that Act and three other related laws, who started to lower the traditional wall of separation. The further expansion of "Charitable Choice" however did not go as smooth as the WHOBCI hoped. For example when the Senate and the House passed the Charitable Giving Act of 2003 decisively, it did not include the controversial amendment that would have made it easier for faith-based organizations to obtain government money for social services. The public does not necessarily support it either: "59 percent of Americans oppose allowing groups that encourage religious conversion as part of their social services to compete for federal funds."²⁶

Even religious organizations are divided on the issue. Some say no evidence of the barrier the president talked about. Others believe that the separation is beneficial both for them and for the state, by ensuring their legitimacy in their constituencies. Pat Robertson considered the initiative a potential for opening a "Pandora's box" for fringe cult groups to receive federal funding.²⁷

A DOL handbook designed for "Empowering new partnerships in your community" mentions two myths they try to eliminate, "Faith-based organizations cannot be a government partner, because they will inevitably evangelize"²⁸ However the answers the handbook gives are

not convincing. One indicator is "the president's orders allowed faith-based groups to keep religious symbols in places where they distribute taxpayer-funded aid."²⁹ The second myth according to the DOL is that "faith-based organizations cannot partner with the government and still identify as 'faith-based.'"³⁰

The legal system found some workaround for the separation issue: "In two cases concerning a Wisconsin faith-based program for drug addicts (Faith Works), direct government funding has been found unconstitutional, but indirect funding (by voucher) has been found constitutional."³¹ This was recognized by the house when in the debate about H.R.7 in 2001 the danger of "voucherization" came up.³²

The same debate also brought up the issue of religious discrimination in employment. The 1964 Civil Rights Act prohibited companies to discriminate in hiring on the basis of religion. Religious institutions however exempt from this restriction, they are allowed to hire people of their own faith. The undecided question is whether this exemption still applies when they accept federal funds. The public opinion (two-thirds of Americans according to a 2001 Pew survey³³) is against it, saying that if they take federal funds they should play by federal rules.

The wording of all the FBCI related communication published by the administration addresses the concern about constitutionality in one form or another. As a June 2006 GAO report stated that "most of the agencies provided grantees with an explicit statement on the safeguard prohibiting the use of direct federal funds for inherently religious activities."³⁴ Similarly, all the relevant executive orders included clauses referring to the law and stating that these decisions are in full compliance with them. However, as seen above, this opinion is not shared universally.

Purpose

One of the key issues is whether the executive branch is trying to create equal opportunity for religious organizations or pushing for more and actually sanctions preferential treatment for them. There are signs and reason to believe to suggest the latter. In the eyes of those who interpret the First Amendment as a prohibition of mixing religion and government in any form it would be unconstitutional. As this is the majority view of both the courts and the population, the administration attempted to avoid it.

One example for the language issue is the inconsistent usage of the expression of "faith-based and community organizations" from which "community" is frequently omitted. This and the fact that the term "community organizations" was not clearly defined may imply that it was added only to provide the appearance of more legitimacy. Otherwise critics of the program would have an even more reason to suspect the willful erosion of the wall of separation.

Other places they suggest affirmative language in an indirect place "given the widespread presumption that funding faith-based groups is constitutionally suspect, the absence of affirmative language [...] can be taken [...] as mandating their exclusion."³⁵ The intention of statements like this is unmistakably to promote affirmative action. However it does not say that formally, thus it is harder to attack. Furthermore the "widespread presumption" has not been successfully proven; e.g. "James Winkler, general secretary of the church's General Board of Church and Society, compared Bush's claim of discrimination against faith-based organizations to his assertion that Iraq had weapons of mass destruction."³⁶

On the other hand the administration instructed "eleven federal agencies to lead a determined attack on need by strengthening and expanding the role of FBCOs in providing social services."³⁷ The word "attack" suggests an aggressive approach for the inclusion of FBCOs. This again seems to advocate affirmative action for the target groups.

The WHOFBCI's initial audit revealed that "HUD uses the term 'primarily religious' for faith-based organizations considered to be problematic."³⁸ The audit highlighted this as an example of bias to fight against. HUD's wording can be explained by the assumption that they wanted to "build a fence" around the Constitution, to prevent any potential breach. This practice in itself is not unconstitutional, because they did not preclude FBCI's by default or policy from funding. But it was found guilty looked at with a lens that prefers providing advantages for religious organizations.

Analysts agree that a significant factor of George W. Bush winning the election in 2000 was the successful mobilization of the religious right in his favor. A main slogan of his campaign was "compassionate conservatism." The FBCI is part of the delivery of that promise. From a more critical point of view it can and often is viewed as political payback for religious right's support for the president. This assumption questions the whole underlying purpose of the program.

This notion is supported by the uneven distribution of funds. The Boston Globe examined "52,000 awards of contracts, grants, and cooperative agreements from the US Agency for International Development"³⁹ and found only two Jewish and two Muslim groups received any funding the rest were all Christian, receiving 98.3% of all funds. Furthermore a disproportionately large percentage of funds were granted to evangelical organizations. Evangelicals make up a growing and active segment of the religious right.

Conclusions

The FBCI accomplishment can be considered significant or negligible depending on who views, with what expectations and compares it to what other programs. Its long term impact is not assessable, because we do not know what the next and consequent presidents will do with it,

how and to what extent they will incorporate it in their program. It has brought into focus, however, the relationship between state and church. No matter how one views the question, whether one judges FBCI as unconstitutional or not, it is an unavoidable aspect of the interaction between the government and the nongovernmental sectors in terms of funding considerations.

¹ EO 13199, "Establishment of White House Office of Faith-Based and Community Initiatives," January 29, 2001

² EO 13198, "Agency Responsibilities With Respect to Faith-Based and Community Initiatives," January 29, 2001

³ President Bush, G. W. "Remarks Announcing the Faith-Based Initiative." Weekly Compilation of Presidential Documents 37.5 (2001): 232-233

⁴ Remarks

⁵ Remarks

⁶ EO 13198

⁷ EO 13280, "Responsibilities of the Department of Agriculture and the Agency for International Development with Respect to Faith-based and Community Initiatives," December 12, 2002

⁸ EO 13342, "Responsibilities of the Department of Commerce and Veterans Affairs and the Small Business Administration with Respect to Faith-Based and Community Initiatives," June 1, 2004

⁹ EO 13397, "Responsibilities of the Department of Homeland Security with Respect to Faith-Based and Community Initiatives," March 7, 2006

¹⁰ "President's Faith-Based & Community Initiative Wins Key Endorsement." White House. June 2001. 26 May 2007 <<http://www.whitehouse.gov/news/releases/2001/06/20010625.html>>

¹¹ Y1.1/7:107-36

¹² CRS Report RS20948, "Charitable Choice Provisions of H.R. 7," July 21, 2001

¹³ "Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs." White House. August 2001. 26 May 2007 <<http://www.whitehouse.gov/news/releases/2001/08/unlevelfield.html>>

¹⁴ EO 13279, "Equal Protection of the Laws for Faith-based and Community Organizations," December 12, 2002

¹⁵ S.1924: "A bill to promote charitable giving, and for other purposes," 107th Congress

¹⁶ "Legislation." White House. 26 May 2007 <<http://www.whitehouse.gov/government/fbci/legislation.html>>

¹⁷ "WHOFBCI Accomplishments in 2006." White House Office of Faith-Based and Community Initiatives. 2007. 26 May 2007 <http://www.whitehouse.gov/government/fbci/2006_accomplishments.html>

¹⁸ White House Office of Faith-Based and Community Initiatives. "Grants to Faith-Based Organizations Fiscal Year 2005: Based on a Review of 130 Competitive Programs and 28 Program Areas at Seven Federal Agencies" March 9, 2006. 26 May 2007 <http://www.whitehouse.gov/government/fbci/final_report_2005.pdf>

¹⁹ "Regulatory Change." White House. 26 May 2007 <<http://www.whitehouse.gov/government/fbci/regulatory-changes.html>>

²⁰ Department of Housing and Urban Development. "Equal Participation of Faith-Based Organizations" Billing Code 4210-32P, 24 CFR Parts 5 and 570, Docket No. FR-4881-F-02, RIN 2501-AD03. September 23, 2003. 26 May 2007 <<http://www.hud.gov/initiatives/fbci/faithbasednotice.pdf>>

²¹ "WHOFBCI Accomplishments in 2006." White House Office of Faith-Based and Community Initiatives. 2007. 26 May 2007 <http://www.whitehouse.gov/government/fbci/2006_accomplishments.html>

²² "WHOFBCI Accomplishments in 2006"

²³ OFBCI Newsletter. House Office of Faith-Based and Community Initiatives. 2006. 26 May 2007

<http://www.whitehouse.gov/government/fbci/042307_newsletter.pdf>

²⁴ EO13279

²⁵ Government Accountability Office. "GAO Report to Congressional Requesters: Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability," GAO-06-616, United States Government Accountability Office

²⁶ The Pew Forum on Religion & Public Life and The Pew Research Center for the People & the Press. "Faith-Based Funding Backed, But Church-State Doubts Abound." April 10, 2001, p. 13.

²⁷ Robertson, P. "Mr. Bush's Faith-Based Initiative is Flawed." The Wall Street Journal. March 12, 2001.

²⁸ "Empowering New Partnerships In Your Community: Faith-Based and Community Initiatives in the Workforce System." U.S. Department of Labor Center for Faith-Based and Community Initiatives. 26 May 2007 <<http://www.dol.gov/cfbci/ENPbooklet.htm>>

²⁹ "Bush brings faith to foreign aid; As funding rises, Christian groups deliver help -- with a message." The Boston Globe, October 8, 2006. 26 May 2007

<http://www.boston.com/news/nation/2006/10/08/bush_brings_faith_to_foreign_aid.html>

³⁰ "Empowering New Partnerships In Your Community"

³¹ CRS Report RS20712

³² Ibid

³³ The Pew Forum on Religion & Public Life and The Pew Research Center for the People & the Press. "Faith-Based Funding Backed, But Church-State Doubts Abound." April 10, 2001, p. 13.

³⁴ "GAO Report to Congressional Requesters"

³⁵ "Unlevel Playing Field"

³⁶ "Bush brings faith to foreign aid; As funding rises, Christian groups deliver help -- with a message." The Boston Globe, October 8, 2006. 26 May 2007

³⁷ "White House Faith-Based & Community Initiative." White House Office of Faith-Based and Community Initiatives. 2006. 26 May 2007 <<http://www.whitehouse.gov/government/fbci/president-initiative.html>>

³⁸ "Unlevel Playing Field"

³⁹ "Bush brings faith to foreign aid"