

TRANSFORMING GOVERNMENT

A LEVEL PLAYING FIELD AND NEW PARTNERS

The Faith-Based and Community Initiative is built on the premise that government will most effectively address human need when it draws upon the strength of every willing partner. Yet when President Bush took office in January 2001, it was clear that two types of groups were not always welcome to work in partnership with the government: nonprofits motivated to service by their faith, and grassroots organizations lacking grant-writing skills and insight into the Federal grant process.

In response, the President required his Federal agencies to eliminate every unwarranted barrier to government partnerships with any faith-based or grassroots nonprofit capable of effectively delivering services to the needy. This work commenced in the second week of George W. Bush's presidency. On January 29, 2001, President Bush signed Executive Orders 13198 and 13199 creating the White House Office of Faith-Based and Community Initiatives (OFBCI), five initial Centers for Faith-Based and Community Initiatives within Federal agencies,⁷ and an agenda for the Initiative that ended discrimination against faith-based and grassroots nonprofit organizations.

Standing behind him during the signing ceremony were Catholic, Jewish, Protestant, and Muslim leaders as well as secular nonprofit leaders, foundation officials and others. The President articulated his vision of America as a pluralistic nation including good citizens of different faiths or of no faith at all, united in concern for those who live in the shadows of a society suffering from addiction and violence, homelessness and hopelessness. The President acknowledged that Americans share a common calling to respond to such needs. He emphasized the rightful responsibilities of government, yet said that when the toughest social problems arise, requiring love of one's neighbor as self, his Administration would look first to faith-based programs and community groups. He pledged not to fund the religious activities of any group, but also affirmed that government would not discriminate against effective nonprofits because of their faith.

The Executive Orders gave the FBCI its marching orders. For starters, Executive Order 13198 required the five Federal agency-based Centers to:

Conduct, in coordination with the White House OFBCI, a department-wide audit to identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services by the department, including but not limited to regulations, rules, orders, procurement, and other internal policies and practices, and outreach activities that either facially discriminate against or otherwise discourage or disadvantage the participation of faith-based and other community organizations in Federal programs... .

The results of these audits were published in an August 2001 report titled "Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs." The report identified 15 obstacles faced by faith-based and grassroots organizations that inhibited their ability to serve neighbors in need (see text box below). This chapter describes the nature of these obstacles, the

reforms fostered by a team of Bush Administration officials and dedicated career civil servants at 11 Federal agencies, and the guidance and training offered to government officials and nonprofit leaders to avoid bureaucratic mistakes and legal misinterpretations in the future.

Obstacles initially faced by faith-based organizations seeking to partner with government:

1. A pervasive suspicion of faith-based organizations on the part of many government officials.
2. The total exclusion of faith-based organizations from some Federal programs.
3. Excessive restrictions on religious activities.
4. Inappropriate expansion of restrictions on religious activities to new programs.
5. The denial of faith-based organizations' legally established right to take religion into account in employment decisions.
6. Failure to require and assist State and local officials in complying with Charitable Choice.

Obstacles initially faced by for small nonprofits, faith-based and secular, seeking to partner with government:

7. The limited accessibility of Federal grant information.
8. The heavy burden of regulations and other requirements.
9. Heavy requirements that have to be met before a group can apply for funds.
10. Complex grant applications and grant agreements.
11. Questionable favoritism in some programs toward faith-based organizations.
12. An improper bias in some programs in favor of previous grantees.
13. An inappropriate requirement to apply in collaboration with likely competitors.
14. Requiring 501(c)(3) status where a program statute requires only nonprofit status.
15. Inadequate attention in the Federal grant streamlining process to faith-based and community organizations.

Source: "Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs"

Seven years after the FBCI's inception, the Federal Government has become far more welcoming to the faith-based and community partnerships that the President envisioned. Foundational to this achievement are 16 rule changes affecting virtually all human service programs across government. These regulatory changes have been complemented by concerted action by Federal agencies to eliminate barriers to participation by grassroots nonprofits, both secular and faith-based, and the development of innovative program models for expanding partnerships with small and novice grassroots organizations. It is difficult to overstate the significance of leveling what was once a tilted playing field that disfavored possibly the most helpful and engaged organizations in solving the greatest social challenges facing the nation. Constitutional scholar and George Washington University law professor Robert Tuttle put it this way:

I think we have seen about the most dramatic administrative change that is possible for those inside the Beltway to conceive... the idea that you go from a government that was in form as well as practice quite hostile to many kinds of religious organizations participating in government funding programs to one that has now institutionalized an expectation—it's not always practiced, but an expectation of equal treatment. I mean, that's a remarkable change and that's a change that didn't happen because of Charitable Choice although the groundwork was there. It's happened because of the Faith-Based and Community Initiative.⁸

To comprehend the magnitude of this accomplishment, it is necessary to understand the Federal Government's shift from adherence to and application of the Supreme Court's pervasively sectarian standard to the equal treatment standards adopted by the Court over the past couple decades. While the Federal courts began moving in this direction in the 1980s, the Federal Government did not follow suit until President Bush's Executive Orders required it to do so.

Movement toward Neutrality in First Amendment Jurisprudence

Prior to the mid-20th century, the U.S. Supreme Court considered very few cases involving the Establishment Clause of the First Amendment. By the 1970s, the Court had interpreted the Clause to prohibit government aid to religious organizations deemed to be “pervasively sectarian,” meaning that groups with strong religious orientation were prohibited from participating in otherwise widely-available public programs. The Court's early cases nearly all dealt with the government providing direct financial assistance (cash or in kind) to religious schools.⁹ This pervasively sectarian doctrine required the courts to examine the religious beliefs and practices of religious organizations on a case-by-case basis to determine whether a “substantial portion of its functions are subsumed in [its] religious mission...”¹⁰

In the 1980s, the Court began moving away from a strict separationist paradigm to a philosophy of neutrality, which promotes pluralism and nondiscrimination and refrains from using the power of the government purse to coerce individuals' or organizations' religious beliefs or practices. A neutral policy provides equal access to government-sponsored programs and forums without requiring forfeiture of religious speech or character. Under the neutrality paradigm, the constitutionality of financial assistance provided directly to an organization rests on the type and use of such aid, instead of focusing on the nature or beliefs of the organization.¹¹

In its modern neutrality precedents, the Supreme Court made clear that faith-based organizations may participate as grantees of Federal social service programs, provided there is “nothing inherently religious” about services provided under the program.¹² Indeed, the Court added that Congress may “recognize[e] the important part that religion or religious organizations may play in resolving certain secular problems.”¹³ The Court abandoned the “pervasively sectarian” standard, permitting religious organizations to participate in neutral, secular direct aid programs, provided the aid is limited to secular uses and not diverted to religious uses.¹⁴ The constitutionality of a Federal program rests on the use of the aid provided, rather than the character of the organization receiving the aid.

The Supreme Court has also set forth distinct guidelines for programs that allow participants real choice among multiple service providers. Such programs do not provide government funds directly to organizations, but rather to individual participants, so the funding approach is referred to as “indirect aid.” In choice-based programs that deliver services using “indirect aid,” the Supreme Court shifted its focus from the nature of the organization providing the services to the nature of the choice provided

to the individual beneficiary.¹⁵ The Court held that “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of beneficiaries who, in turn, direct government aid to religious [organizations] wholly as a result of their own genuine and independent private choice” the program is constitutional.¹⁶ In such programs, faith-based organizations are not required to alter their religious identity or separate religious activities, as any religious indoctrination that may take place is the result of the choice of the individual, rather than government.¹⁷

Key Modern Establishment Clause Cases

- ✧ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002): The U.S. Supreme Court approved a State program providing vouchers for children in a distressed public school district to attend private schools, including religious schools, as well as neighboring public schools. The Court held that “where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of beneficiaries who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice,” the program does not violate the Establishment Clause.
- ✧ *Mitchell v. Helms*, 530 U.S. 793 (2000): The Court upheld a State and locally administered program that loaned educational materials, including books, computers, software, and audio/visual equipment, to schools in economically disadvantaged areas, including religious schools. The program required schools receiving the aid to limit their use of the materials to “secular, neutral, and nonideological” uses. A majority of the Court rejected the strict separationist theory that some organizations are too religious to participate in Federal aid programs. The plurality described the pervasively sectarian distinction as “offensive,” stating that, “[i]t is well established, in numerous other contexts, that courts should refrain from trolling through a person’s or institution’s religious beliefs,” which “is just what [the pervasively sectarian distinction] requires.” In her concurrence, Justice O’Connor, joined by Justice Breyer, held that for there to be a constitutional violation there must be actual diversion to religious use; providing public aid that merely “has the capacity for, or presents the possibility of, such diversion” is not automatically unconstitutional, thus essentially abandoning the pervasively sectarian standard.
- ✧ *Agostini v. Felton*, 521 U.S. 203 (1997): In *Agostini*, the Court took the rare step of explicitly overturning two of its strict separationist decisions. The Court upheld a program providing remedial education to students of private schools (including religious schools), in which instruction is given on the premises of those schools by public employees. The Court acknowledged that its Establishment Clause jurisprudence had significantly changed since the 1970s and 80s, especially with regard to its understanding of what constitutes an impermissible effect of state indoctrination of religion or constitutes a “symbolic union between government and religion.” The Court did not examine the character of the organizations aided by the program, and instead focused on whether any advancement of religion was reasonably attributable to the government.

- ✱ *Bowen v. Kendrick*, 487 U.S. 589 (1988): In *Bowen*, the Court upheld the constitutionality of the Adolescent Family Life Act (AFLA), which authorizes Federal grants to public and nonprofit organizations, including faith-based organizations, for services and research in the area of premarital adolescent sexual relations and pregnancy. The Court rejected the notion that a program that is facially neutral between secular and religious applicants would necessarily advance religion in violation of the Establishment Clause, noting that the Act contained no requirement that grantees be affiliated with any religious denomination and that there was “nothing inherently religious” about the education and counseling activities funded by the program.
- ✱ *Witters v. Washington*, 474 U.S. 481 (1986): In *Witters*, the Court approved a State program designed to provide vocational training to the blind under which beneficiaries could use State tuition grants at religiously affiliated colleges and to pursue ministerial degrees. The Court held that because the grants were “made available generally without regard to the sectarian-nonsectarian, or public-private nature of the institution benefited,” and flowed to religious organizations “only as a result of the genuinely independent and private choices of” individuals, the program did not have the effect of advancing religion.

Restrictive Federal Policy

The 2001 audits of social service programs at the Departments of Health and Human Services (HHS), Housing and Urban Development (HUD), Education, Justice (DOJ), and Labor (DOL) found that some Federal agencies retained both formal and informal barriers to funding “pervasively sectarian” organizations despite the U.S. Supreme Court’s repudiation of the doctrine. Specific examples of “a widespread bias against faith-based and community organizations in Federal social service programs” included:

- 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 under Federal law.
- Burdening small organizations with cumbersome regulations and requirements.
- Imposing anti-competitive mandates on some programs, such as requiring applicants to demonstrate support from government agencies or others that might also be competing for the same funds.¹⁸

While some limitations on religious organizations within a Federal program are constitutionally required and appropriate, the audit found that many Federal policies and practices went well beyond constitutional and legislative requirements, arising from an overriding misperception by Federal officials “that close collaboration with religious organizations was legally suspect.”¹⁹ These policies and practices included:

- Bans or other limitations on some or all religious organizations applying for funding.
- Requiring applicants to alter or disguise their religious character to be eligible for funding.
- Requiring religious organizations to forfeit their right under Title VII of the Civil Rights Act of 1964 to staff on a religious basis.

- Providing lists of prohibited religious activities without a positive affirmation of eligibility or guidance on how faith-based organizations *can* legally and effectively partner with government.
- Excessive restrictions on constitutionally permissible religious activities.

For example, the U.S. Department of Housing and Urban Development’s regulations for the Community Development Block Grant (CDBG) program (which provides Federal funds to localities to support nongovernmental services), and for the HOME program (which gives funds to States and localities who often enlist community groups in efforts to provide affordable housing) prohibited funding “as a general rule” from going to “primarily religious” organizations for “any activities, including secular activities.” Under the HOME program, a “primarily religious” organization could establish a “wholly secular entity” that could then take part in the program. In the CDBG program, a further regulation provided that a “primarily religious” organization could take part, if it agreed to a long list of restrictions, which included forfeiting its Title VII rights (a restriction not required by the authorizing statute). Similarly, the Department of Education’s guidance for the Even Start Family Literacy Program prohibited “pervasively sectarian” organizations from receiving direct funds under the program and permitted such organizations to participate only as a subordinate to a “nonsectarian” partner organization. Even where a program’s regulations or guidance documents did not specifically invoke the pervasively sectarian distinction, the audit found some Federal, State, and local program staff applied a similar, unwritten standard resulting in the exclusion of some faith-based organizations.²⁰

Additionally, where faith-based organizations were permitted to participate, some Federal agencies and their State or local administrators placed excessive restrictions on religious activities that were not required by constitutional law. For example, Head Start programs, often located in houses of worship, were sometimes locally pressured to remove or cover up religious art, symbols, or other items.²¹ Other faith-based organizations applying for locally administrated programs were told they would be ineligible unless they removed references to “God” from their mission statements or removed religious symbols from their walls.²²

Workforce Investment Act Job Training Vouchers

Under the Workforce Investment Act (WIA), the U.S. Department of Labor (DOL) provides a voucher-like system where an individual beneficiary selects from among a range of qualified job training programs and providers. The program requires the beneficiary, rather than the Federal Government, to choose the course of study and the provider; however, regulations prohibited beneficiaries from using indirect Federal funds “to be employed or trained in sectarian activities.” This Federal policy stood in clear contrast to guidance from the U.S. Supreme Court, which for over twenty years, had made clear that, when a program or provider is chosen by a private citizen and not designated by government, prohibiting training in religious vocations is not required by the Establishment Clause.²³

With assistance from its Center for Faith-Based and Community Initiatives, DOL revised its rules governing the WIA to allow for more choice and greater freedom by permitting beneficiaries of voucher-style programs to use that indirect funding to train for religious vocations.²⁴

Charitable Choice as the First Step to Equal Treatment

While First Amendment case law replaced the pervasively sectarian standard with equal treatment principles over the past two decades, no parallel transition was occurring in policymaking at the Federal agencies until the mid-1990s when Congress acted several times, by bipartisan majorities, to reduce barriers to participation by faith-based organizations in Federal social service delivery and to respond to the Supreme Court's more neutral, pluralistic interpretations of the Establishment Clause. Congress's remedy to the barriers faith-based organizations faced in several major Federal social service programs comprised a set of Federal laws known as "Charitable Choice."

Charitable Choice was first enacted in the 1996 Personal Responsibility and Work Opportunities Reform Act,²⁵ and covered State and local spending of Temporary Assistance to Needy Families (TANF) funds used to obtain services. Charitable Choice language was added to several additional programs including: the Welfare-to-Work program in 1997; the Community Services Block Grant (CSBG) program in 1998; and the Substance Abuse Prevention and Treatment Block Grant, the Projects for Assistance in Transition from Homelessness formula program, and the discretionary substance abuse treatment programs administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) in 2000.

Charitable Choice provisions required program administrators to permit faith-based providers to compete in covered programs without abandoning their religious character or mission, while protecting the religious liberty of individual beneficiaries and prohibiting the use of direct Federal funds for inherently religious activities. Unfortunately, although the language of the statutes enacting Charitable Choice made its provisions mandatory for the covered programs, the 2001 audit of Federal social service programs found that the provisions "had been almost entirely ignored by Federal administrators, who had done little to help or require State and local governments to comply with the new rules for participation by faith-based providers."²⁶ Specifically, the Charitable Choice provisions had been insufficiently incorporated into the agencies' grant-making rules and procedures, and that State and local governments had received almost no guidance as to how to comply with the new rules for participation by faith-based providers.

In 2002, HHS, which administers the TANF, CSBG, and SAMHSA substance abuse treatment programs, announced regulations to fully implement the Charitable Choice provisions and to provide guidance to State and local administrators, as well as to faith-based organizations, regarding the provisions' practical application.²⁷

The core principles of Charitable Choice regulations are reflected in the equal treatment principles set out in Executive Order 13279 and in the agencies' equal treatment regulations (discussed below). However, some principles are applied in slightly different ways to their respective programs, and some additional provisions are unique to certain Charitable Choice statutes.²⁸

Fulfilling Charitable Choice Principles through Executive Orders

Charitable Choice provisions provided solid legal guidelines for how government could adopt the Supreme Court's modern neutrality principles in partnerships with faith-based organizations. However, these provisions governed only five major programs. Even more significantly, as noted above, they had been widely ignored by the Federal, State and local officials charged with putting them into action. Executive Order 13279 changed this by applying Charitable Choice principles to virtually all Federal programs serving the needy *and* by requiring robust action to ensure they were fully applied.

CHAPTER 2

Executive Order 13279 provides that “[n]o organization should be discriminated against on the basis of religion or religious belief in the administration or distribution of Federal financial assistance under social-service programs.”^[i] This provision directs Federal agencies to end discrimination against organizations based on their religious character, and prohibits government from favoring organizations of one faith over another or from preferring religious organizations to secular ones. It focuses government less on the organization’s mission statement or beliefs and more on the organization’s ability to effectively deliver services.

Executive Order 13279 also provides clear, uniform guidance on the constitutionally required restrictions on the use of Federal funds. In accordance with the Establishment Clause and the Free Exercise Clause, “...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, and participation in any such inherently religious activities must be voluntary for the beneficiaries of the social service program supported with such Federal financial assistance.”²⁹

The Executive Order 13279 also protects freedom of religion by directing the agencies administering social service programs to prohibit organizations receiving financial assistance from discriminating against eligible beneficiaries of those social services programs “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.”³⁰

Introduction of the Equal Treatment Regulations

Implementing the Executive Orders through Agency Rule Changes

Upon publication of the President’s Executive Order 13279 requiring “Equal Protection of the Laws for Faith-Based and Community Organizations” and with additional guidance from the U.S. Department of Justice (DOJ), Federal agencies considered how to appropriately and constitutionally implement the FBCI. Federal social service programs vary greatly in size, content, and structure, and each agency which administers Federal social service programs has separate regulations, policies, and procedures, even among their own component organizations. Rules and practices may even vary from program to program. Therefore, regulatory and other administrative reforms needed to be tailored to individual agencies and programs.

Nine Federal agencies have produced 15 final rules, including general rules that cover the programs administered by seven agencies,³¹ three regulations implementing the Charitable Choice statutes,³² a U.S. Department of Labor (DOL) regulation permitting faith-based contractors to retain their Title VII right to take faith into account in making employment decisions,³³ and four regulations changing discriminatory or unnecessarily limiting language in specific HUD, Veterans Affairs, Commerce, and DOL programs.³⁴ A proposed sixteenth rule covering programs administered by the Department of Homeland Security was published on January 14, 2008.³⁵

The general rules for programs administered by HUD, USDA, HHS, USAID, Education, DOJ, DOL, and DHS closely follow the principles and guidance provided by Executive Order 13279. Each provides an affirmation that faith-based organizations are eligible to participate in Federal social service programs

on the same basis as any other private organization and that entities distributing Federal funds cannot discriminate either for or against an organization on the basis of religion or religious belief.

These rules also ensure that these programs are implemented in a manner consistent with the Supreme Court's interpretation of the Constitution. The regulations make clear that direct Federal funds cannot be used to support inherently religious activities, such as worship, religious instruction, and proselytizing. If an organization conducts such activities, the activities must be offered separately, in time or location, from the programs or services funded with direct Federal financial assistance, and participation must be voluntary for beneficiaries of the programs or services funded with such assistance.

The rules also reflect the different standard enunciated by the Supreme Court for programs of indirect aid, which permit inherently religious activities to be part of a funded program where the program is selected via a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of the program. (see chart on page 38)

The general regulations promulgated provide clear and detailed guidance regarding faith-based organizations' religious character, independence, and religious activities, very closely tracking the language of Executive Order 13279. They also confirm the Title VII right of faith-based organizations to select employees who share their vision and mission, including religious beliefs, under all of the grant programs covered by the regulations.

The notable exception to this protection of Title VII hiring rights are grant programs governed by authorizing statutes that prohibit all grantees from considering religious beliefs in employment decisions. In such programs, applicants are directed to consult with the relevant program office to determine the scope of these requirements. As discussed below, in some cases other independent statutory provisions may supersede this prohibition, particularly the Religious Freedom Restoration Act (RFRA).

Prior to the issuance of Executive Order 13279 and subsequent regulatory changes, no Federal Government-wide standard prohibited religious discrimination by directly-financed providers against eligible beneficiaries of the funded services. With regard to the rights of individuals served by Federal social service programs, the general regulations following from Executive Order 13279 make clear that organizations may not discriminate against any eligible "program beneficiary or prospective program beneficiary on the basis of religion or religious belief."³⁶

The general regulations also contain provisions prohibiting Federal program officers or State or local administrators from disqualifying religious organizations because of their religious motivation, character, or affiliation or from requiring *only* faith-based organizations to sign assurances that they will not use direct funds for inherently religious activities. They provide guidance to State and local administrators regarding the legal effect of commingling Federal funds and clarify that nonprofit organizations, religious or secular, are not required to obtain Federal 501(c)(3) status in order to be eligible for funding (unless specifically required by a particular program's authorizing statute).³⁷

16 Regulations Implementing the Faith-Based and Community Initiative

AGENCY	DATE	DESCRIPTION	Federal Register	C.F.R.
HUD (HOME, CDBG, HOPE, HOPWA, ESG, S+C, Supportive Housing, Youthbuild)	Effective: 10/30/03	Changed discriminatory language in eight programs, applies general equal treatment principles.	68 Fed. Reg. 56396	24 CFR Parts 92, 570, 572, 574, 576, 582, 583, and 585
HHS TANF	Effective: 10/30/03	Implemented TANF Charitable Choice Provisions.	68 Fed. Reg. 56449	45 CFR Part 260
HHS SAMHSA	Effective: 10/30/03	Implemented SAMHSA Charitable Choice Provisions.	68 Fed. Reg. 56430	42 CFR Parts 54, 54a, and 96
HHS CSBG	Effective: 10/30/03	Implemented CSBG Charitable Choice provisions.	68 Fed. Reg. 56466	45 CFR Part 1050
DOL OFCCP	Effective: 10/30/03	Amended regulation to reflect President Bush's amendment to EO 11246 regarding Title VII exemption for Federal contractors.	68 Fed. Reg. 56392	41 CFR Part 60-1
DOJ	Effective: 02/20/04	General affirmative statement of equal treatment principles.	69 Fed. Reg. 2832	28 CFR Parts 31, 33, 38, 90, 91, and 93
ED	Effective: 07/06/04	General affirmative statement of equal treatment principles.	69 Fed. Reg. 31708	34 CFR Parts 74, 75, 76, 80
VA Homelessness Providers Grant and Per Diem Program	Effective: 07/08/04	Changes existing regulation to protect Title VII hiring rights and to remove "religious influence" language, general affirmative statement of equal treatment principles.	69 Fed. Reg. 31883	38 CFR Part 61
HUD	Effective: 08/09/04	General affirmative statement of equal treatment principles.	69 Fed. Reg. 41712	24 CFR Parts 5 and 570
USDA	Effective: 08/09/04	General affirmative statement of equal treatment principles.	69 Fed. Reg. 41375	7 CFR Part 16
HHS	Effective: 08/016/04	General affirmative statement of equal treatment principles.	69 Fed. Reg. 42586	45 CFR Parts 74, 92, 96, and 87
DOL	Effective: 08/11/04	General affirmative statement of equal treatment principles; permits individual training account vouchers to be used for religious job training; addresses accommodation of students' religious exercise in the Job Corps program.	69 Fed. Reg. 41882	20 CFR Parts 667, 670 and 29 CFR 2, 37
DOL WIA	Effective: 08/11/04	Addresses use of funds for employment constructing, operating or maintaining religious buildings.	69 Fed. Reg. 41894	29 CFR Part 37
HUD Indian CDBG & Indian HOME	Effective: 11/22/04	Amends HUD regulations regarding Indian programs in same manner as other CDBG and HOME rules were amended.	69 Fed. Reg. 62164	24 CFR Parts 954 and 1003
USAID	Effective: 10/19/04	General affirmative statement of equal treatment principles.	69 Fed. Reg. 61716	22 CFR Parts 202, 205, 211, and 226
DOC	Effective: 09/27/06	Amends Economic Development Administration rules to clarify eligibility of FBOs.	71 Fed. Reg. 56658	13 CFR Chapter III
DHS	Proposed: 01/14/08	General affirmative statement of equal treatment principles.	73 Fed. Reg. 2187	6 CFR Part 19 and 4 CFR Part 206

Agencies with programs that fund the acquisition, construction or rehabilitation of buildings, including HUD, USDA, USAID, and DOL, provide instruction on the intersection of those programs and the prohibition on the use of direct Federal funds for inherently religious activities, including the requirement that where structures are used for both eligible and ineligible activities, Federal funds may be used only in proportion to the eligible use.

While much of the texts of the general regulations are nearly identical, where necessary and appropriate, regulations were customized for the unique needs of the agency. The regulation for the DOJ, for example, includes language permitting direct funding of inherently religious activities when funds are provided for the activities of prison chaplains or organizations that provide programs in prisons, detention centers, or community corrections centers to assist chaplains, in order to provide for inmates' free exercise of religion.³⁸ Similarly, DOL's regulation permits direct funding for those activities, as well as language permitting direct funding where "social service programs involve such a degree of government control over the program environment that religious exercise would be significantly burdened absent affirmative steps" by government or providers.³⁹ In addition, USDA's regulation contains a specific section on the participation of religious schools in Federal school lunch programs.⁴⁰ Further, the proposed rule for the DHS incorporates the guidance provided by the DOJ regarding eligibility of faith-based organizations for Federal disaster relief and emergency assistance.⁴¹

In addition to the regulations promulgated by Federal agencies to implement the equal treatment provisions of Executive Order 13279 and the Charitable Choice laws, certain agencies developed regulations to address discriminatory or unnecessarily limiting language within particular programs.

Via two regulatory amendments, DOL revised its rules governing the Workforce Investment Act (WIA), an employment and training services program for adults, displaced workers, and youth. Previously, the regulations prohibited beneficiaries from using "vouchers" (indirect Federal funds) "to be employed or trained in sectarian activities." Consistent with the Supreme Court's rulings upholding the constitutionality of programs permitting individuals to use government grants, scholarships, or other forms of indirect aid to study at religious colleges or to train for religious vocations,⁴² DOL amended the WIA regulation to allow for more choice and greater freedom by permitting beneficiaries of voucher-style programs to use that indirect funding to train for religious activities.⁴³ DOL also clarified statutory limits on the use of funds to employ participants to perform "construction, operation, or maintenance" of facilities used for religious instruction or worship.⁴⁴

In addition to its general implementation of equal treatment, HUD amended regulations for eight specific programs⁴⁵ to remove a provision requiring only faith-based organizations to provide assurances that they will conduct eligible program activities in a manner that is "free from religious influences." The regulations were revised to require all organizations to conduct program activities in accordance with the Constitution, refraining from using direct Federal funds for inherently religious activities and providing services to all eligible beneficiaries, regardless of their religion or religious belief.

The U.S. Department of Commerce revised the general operating regulation for the Economic Development Administration (EDA) (Commerce's principal component for social service grant-making) to specify that "community or faith-based non-profit organizations" are eligible participants in EDA programs.⁴⁶

The U.S. Department of Veterans Affairs' (VA) regulation repealed a prohibition within the regulation for the Homeless Providers Grant and Per Diem Program that prohibited faith-based organizations from making employment decisions on a religious basis, as the prohibition was not required by Congress in the statute authorizing the program. The regulation also included language requiring the equal eligibility of faith-based organizations and the protection of those organizations' independence and religious character. The regulation further prohibits the use of direct Federal funds for religious activities and prohibits discrimination against eligible beneficiaries on the basis of religion within the Homeless Providers Grant and Per Diem Program.⁴⁷

In addition, DOL amended its regulations implementing Executive Order 11246, which concerns civil rights and affirmative action in Federal contracting, to reflect the President's amendment of that order via Executive Order 13279 to permit religious organizations to retain their Title VII right to take faith into account in making employment decisions.⁴⁸

Many agencies also addressed these barriers by revising agency websites and grant documents such as solicitations and award letters, to include references to and explanations of the equal treatment regulations. For example, the 2001 audit of barriers to participation found that some programs at the DOJ had particularly long and complex solicitation forms.⁴⁹ In response to this finding, DOJ's Task Force for Faith-Based and Community Initiatives formed a working group with representatives of DOJ's major social service grant-making components to develop a standardized, simplified solicitation template. This template, now used by all DOJ grant-making components, contains standard language explaining the provisions of DOJ's equal treatment regulations, including: the requirements of non-discrimination in the application process; the ban on discrimination against eligible beneficiaries on the basis of religion; the prohibition on use of direct Federal funds for inherently religious activities; and the protection for faith-based organizations' independence and religious character. DOJ also incorporated similar guidance on the requirements of its equal treatment regulations in award letters sent to every new grantee and developed an FBCI website providing the text of the regulations, an explanation of the regulations' requirements, and related training materials.

Respect for Organizations' Religious Character and Independence

The Executive Order 13279 provided clear and detailed guidance regarding faith-based organizations' religious character, independence, and religious activities: "[F]aith-based organizations should be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression, or religious character."⁵⁰ While a religious organization may not use direct Federal financial assistance to support any inherently religious activities, the organization should be free to "continue to carry out its mission, including the definition, development, practice, and expression of religious beliefs."⁵¹ Further, Executive Order 13279 confirmed:

Among other things, faith-based organizations that receive Federal financial assistance may use their facilities to provide social services supported with Federal financial assistance, without removing or altering religious art, icons, scriptures, or other symbols from these facilities. In addition, a faith-based organization that applies for or participates in a social service program supported with Federal financial assistance may retain religious terms in its organization's name, select its board members on a religious basis, and include religious references in its organization's mission statements and other chartering or governing documents.⁵²

Executive Order 13279 addressed another issue essential to the ability of faith-based organizations to maintain their religious liberty and identity: the selection of employees who share their vision and mission. Title VII of the Civil Rights Act of 1967 protects Americans from employment discrimination based on race, color, religion, sex or national origin, by government, businesses, or other private organizations.⁵³ Title VII also secures the ability of religious organizations to protect their religious character by hiring employees who share their religious beliefs, in both their religious and secular activities.⁵⁴ In 1987, the Supreme Court unanimously held that it does not violate the First Amendment for Congress to provide this protection “alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions.”⁵⁵ Executive Order 13279 amended a previous executive order governing civil rights in Federal contracting by allowing faith-based organizations to take faith into account in making employment decisions. This policy places faith-based organizations on equal footing with secular organizations, which are also permitted to hire based on their ideology and mission. Of course, nothing in the Executive Order or any of the implementing regulations permits any organization to discriminate in employment on the basis of race, color, sex, or national origin, or other categories that are prohibited by Federal law for all organizations.

The Executive Order 13279 addressed only Federal contracting, which has its own regulatory scheme apart from Federal social service grant programs. However, the equal treatment regulations extended the protection of the Title VII religious hiring provision to faith-based recipients of grant programs and of contracts.

Some grant programs, however, are exceptions to this general protection for the Title VII hiring rights of faith-based grantees. These programs are governed by statutes, like the Workforce Investment Act or the Omnibus Crime Control and Safe Streets Act, which require grantees of programs funded by those statutes to refrain from considering religion in employment decisions related to positions funded by the grant. The Bush Administration continues to urge Congress to fix these legal provisions, which are not required by the Establishment Clause and discourage participation in these social service programs by faith-based organizations that regard the values and convictions of their employees as an important part of their organization’s identity.

It is important to note, however, that even in programs governed by laws requiring the loss of Title VII hiring rights, individual grantees may seek relief through another law: the Religious Freedom Restoration Act (RFRA).⁵⁶ RFRA requires the Federal Government to give a religious exemption from general rules or practices to individuals and organizations whose free exercise of religion is substantially burdened by those rules or practices, except where government can demonstrate it has a compelling interest that justifies restricting religious freedom. The U.S. Department of Justice recently concluded that RFRA is reasonably construed, on a case-by-case basis, to protect the right of faith-based organizations to prefer co-religionists for employment even when a program’s authorizing statute contains a contrary provision, where the organization can show that complying with the statute’s hiring provisions would substantially burden the organization’s exercise of religion.⁵⁷

Monitoring Implementation of the Equal Treatment Regulations under the President’s Management Agenda

The White House OFBCI and the Office of Management and Budget (OMB) monitor implementation of the equal treatment regulations via agreements with 11 agency Centers for Faith-Based and Community Initiatives under the President’s Management Agenda (PMA). The PMA, discussed more fully in Chapter

CHAPTER 2

Four, sets clear objectives and measurable standards for government in areas of key importance for effective government, including the FBCI. OMB, in consultation with the White House OFBCI, monitors progress toward those standards via strategic planning objectives established in agreements with each of the Centers. Periodically, the standards are revised to reflect the ongoing advance of priorities and goals. PMA standards routinely include a section on implementation of the equal treatment regulations and other administrative reforms. In the current iteration of the PMA, the standard measuring equal treatment implementation requires, for a “green” (highest level) status, that the FBCI Center:

Provides and facilitates education on the equal treatment principles at the Federal, State and local levels; assists Federal programs within their purview in developing mechanisms for assessing compliance with appropriate regulations and in addressing violations once they are brought to the agency’s attention; and works to enable State- and locally-administered programs to implement equal treatment principles using proven models for partnering with FBCOs.⁵⁸

The White House OFBCI and OMB have recommended to the Centers best practices for implementing the PMA standards, which have been refined over time. Typically, best practices for the equal treatment standard include the development of an education strategy for Federal program staff, State and local administrators, and FBCOs on the requirements of the equal treatment regulations and the development of activities to monitor compliance with the regulations. Because Federal social service programs vary greatly in size, content and structure, and because each agency has separate regulations, policies, and procedures, even among their own component organizations, FBCI Centers tailor their activities to the unique challenges and opportunities within their agency and address barriers identified in the “Unlevel Playing Field Report,” for faith-based and community organizations.

Bush Administration Reforms to Provide Equal Treatment for Faith-Based Nonprofits

Issue	Pre-FBCI	Post-FBCI
Eligibility. Are faith-based nonprofits eligible to participate as providers in Federal social service programs?	Only if they do not appear to officials to be “too religious” or “pervasively sectarian,” or only if they agree to restrictions not required by the Constitution.	Yes, without government being forced to evaluate an organization’s character, beliefs, or practices.
Protections for Faith-Based Nonprofits. Are elements of identity such as a religious name, religious mission statement, religious symbols and voluntary religious activities protected?	No. In many cases these represented the characteristics marking a group as “too religious” when government assessed faith-based nonprofits according to the outdated pervasively sectarian standard.	Yes. These characteristics are specifically protected in the law and regulations governing equal treatment.
Religious Staffing. Is the right to hire based in part on shared religious belief or identity protected?	No. In some cases, religious staffing marked a group as “too religious” to satisfy the outdated pervasively sectarian standard. Some programs required organizations to relinquish Title VII protection, even where authorizing statutes did not.	Yes. Legal clarification has been provided to show that this freedom is not lost simply by virtue of accepting government funds. However, the freedom is lost in some Federal programs where an authorizing statute requires.
Beneficiary Protection. Is the religious freedom of service beneficiaries protected?	No. There was no explicit Federal Government-wide protection of service beneficiaries.	Yes. There are now specific protections in the law that are applied uniformly to service beneficiaries in all programs.
Limits on Religious Activities. What are the limits on religious activities with direct government grants and contracts?	Inconsistent. Some programs provided lists of prohibited activities, while others used more vague language that could be interpreted to exclude even secular activities when motivated by a religious belief.	Direct government funds cannot be used to pay for religious activities; however, the same service provider can offer religious activities in a separate time or location using private funds. This standard is consistent across all directly-funded programs.
Indirect Funding. Will the government support services that include religiously-integrated programming when the beneficiary can choose between providers?	Inconsistent. Some programs, such as the Child Care Block Grant, permitted beneficiaries to choose faith-integrated services, while others, like the Workforce Investment Act-funded training vouchers, did not permit beneficiaries to choose from both faith-based and secular programs.	Yes. Numerous voucher or beneficiary choice programs have been established at the Federal and State level to enable faith-integrated service provision.

Equal Treatment Principles Training and Communication

The regulatory reforms described above address the six barriers identified in the “Unlevel Playing Field Report” as inhibiting equal access to Federal programs for faith-based organizations, including: a suspicion of faith-based organizations (often based on the defunct “pervasively sectarian” standard); exclusion of faith-based organizations from some Federal programs; restrictions on religious activities not required by the Establishment Clause; expansion of those restrictions into new programs; lack of enforcement of the Charitable Choice; and the denial of faith-based organizations’ established right to take religion into account in employment decisions.

Creating the 16 rules (described earlier) that revise the administration of dozens of Federal programs is, in itself, a significant achievement for any Federal initiative. The White House OFBCI and agency FBCI Centers built out the implementation of equal treatment for faith-based organizations by working with program offices to refine and improve the grant-making process by removing non-regulatory barriers, including equal treatment practices in agency guidance to State and local officials and to applicants and grantees, and providing training for Federal and State program officials.

Yet, another problem existed. Even though the Federal Government had contracted with some faith-based organizations for decades, President Bush’s Faith Based and Community Initiative was the first concerted effort to train policymakers and practitioners with clear, Constitutional guidelines for government partnerships with faith-based organizations.

In concert with regulatory reforms described above, the White House OFBCI has trained thousands of key Federal and State program staff, as well as nonprofit leaders, on the implications of the equal treatment regulations and of broader equal treatment principles. This education has explicitly spelled out the changes these reforms mandate in order to apply these reforms to Government’s day-to-day practice.

To support this training, the White House OFBCI produced first-of-their-kind guidance documents on how Federal and State program staff should update legal standards and program practices. A vast body of educational materials has been created for faith-based and community organizations as well, informing them of the opportunities and obligations of partnering with government. This guidance has been delivered through a wide range of mediums, from White House OFBCI conferences to trainings hosted by Federal agencies to events sponsored by entities outside government, as well as via the Internet. In addition, the White House OFBCI, working with OMB, provided guidance for the agency FBCI Centers as they worked with Federal program offices to implement administrative reforms in order to level the playing field.

Many program offices, working with Federal agency Centers, also incorporated references to and explanations of the equal treatment regulation requirements in the guidance materials for specific programs, and developed training materials for State and local administrators. For example, in 2005, the U.S. Department of Education revised its Supplemental Educational Services (SES) Non-Regulatory Policy Guidance manual for State and local officials administering these Federal funds. The Department incorporated plain language guidance on the eligibility of faith-based organizations, the right of religious organizations to retain their religious character and mission, the right of beneficiary students to be served regardless of religion or religious belief, and the prohibition on the use of Federal funds for

inherently religious activities, as well as the availability of regional training workshops for faith-based and community organizations interested in becoming providers.

The U.S. Department of Education followed up on this guidance by providing all State administrators for SES– the 21st Century Community Learning Centers program and the Adult Education and Family Literacy Act State grants program– with revised PowerPoint training documents. These documents explained the impact of the equal treatment regulations and provided extensive guidance on their implementation, including recommended best practices for providing equal treatment for faith-based and secular grassroots organizations.

Similarly, the U.S. Department of Justice (DOJ) developed a PowerPoint training document for State and local administrators of DOJ formula programs, explaining the requirements of the equal treatment regulations and providing best practices for their implementation. DOJ FBCI Center staff presented this training at national and regional meetings of each of the DOJ’s formula program administrators and made the tutorial available on its Website. Likewise, the U.S. Department of Labor’s (DOL) FBCI Center will soon launch a new online training course on equal treatment law and principles entitled “Leveraging Compassion: The Faith-Based and Community Initiative & How It Applies to Workforce System Administrators and Staff and to Faith-Based and Community Organizations.” This course provides a basic framework for understanding the FBCI and its implementation at DOL.

Guidance Materials and Conferences

The White House OFBCI has led a full-scale implementation of this guidance process through published documents providing additional information to organizations interested in Federal social service programs, as well as guidance for State and local administration of formula and block grant programs. One such document, “Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government,”⁵⁹ provides plain English answers to common questions about the availability and requirements of Federal social service grant programs. The booklet is designed to assist novice faith-based and community organizations in deciding whether partnering with the Federal Government would be appropriate and beneficial for their organization. The booklet provides explanations for common questions about the Federal grants process, such as how organizations can find out what types of services are funded through the Federal Government and where to find information about applying to become a provider under these programs. It also provides information on how to find training on writing and managing Federal grants and on understanding the legal obligations associated with accepting a Federal grant. For example, the booklet provides guidance on financial reporting requirements, cost-sharing/matching, record-keeping, performance reporting, and indirect costs, as well as advice on how to avoid audit problems.

The booklet also provides “Do’s and Don’ts” for faith-based organizations that receive government funding. These reiterate in plain language the equal treatment principles incorporated in the agency regulations and provide information regarding the protection of the religious identity and mission of faith-based organizations and their responsibilities toward the people they serve. Facts about the Charitable Choice laws are also presented in a conversational, accessible style. For example:

Q: If I cannot take government money to support religious activity, how do I separate our religious activities from our Federally-funded social service program?

A: A faith-based organization should take steps to ensure that its inherently religious activities, such as religious worship, instruction, or proselytization, are separate—in time or location—from the government-funded services that it offers. If, for example, your church receives Federal money to help unemployed people improve their job skills, you may conduct this program in a room in the church hall and still have a Bible study taking place in another room in the same hall (but no Federal money can be used to conduct the Bible study). Or a faith-based social service provider may conduct its programs in the same room that it uses to conduct religious activities, so long as its government-funded services and its religious activities are held at different times. If you have any questions or doubts, you should check with the official who administers your Federal funds.

Q: Can people who receive Federally-funded services from us also participate in our religious activities?

A: Yes, provided that a few rules are followed. It may be that some people have chosen to receive services from your organization because it is faith-based, and they will be eager to participate. But faith-based organizations that receive direct Federal aid may not require program participants to attend or take part in any religious activities. Although you may invite participants to join in your organization's religious services or events, you should be careful to reassure them that they can receive government-funded help even if they do not participate in these activities, and their decision will have no bearing on the services they receive. In short, any participation by recipients of taxpayer-funded services in such religious activities must be completely voluntary. For example, a church that receives direct government aid to provide shelter to homeless individuals may not require those individuals to attend a Bible study or participate in a prayer preceding a meal as part of the government-funded services they provide. But they may invite those individuals to join them, so long as they make clear that their participation is optional.

Q: What if we have someone on our staff who works for a government-sponsored program only part-time?

A: It is fine for a faith-based organization to employ someone on their staff to perform religious duties while also having that person administer part of a Federally-funded program. There are, however, rules that must be followed. The part-time worker must not engage in inherently religious activities while working on the Federally-funded portion of his or her job. And that part-time worker must also document that he met his time commitment to the government-sponsored program by keeping careful time records of his activities. This will make sure that government funds are spent only on non-religious activities.⁶⁰

The White House OFBCI and the agency FBCI Centers have also provided in-person training on these issues at regional conferences. Since the start of the FBCI, the White House OFBCI and staff from the Federal agency FBCI Centers have hosted conferences in 34 U.S. cities in 19 States and the District of Columbia, which have been attended by more than 28,000 people. The training provides an explanation of the guiding principles of the Initiative, restrictions on the use of Federal funds, the rights of eligible beneficiaries, and the rights and responsibilities of participating faith-based organizations. Further, the training provides plain-language answers to frequently asked questions, based on guidance from the equal treatment regulations and Supreme Court opinions. For example:

Q: What if religion is integrated throughout our program—can we still get government funds?

A: In most cases, no, because as a general rule inherently religious activities must be privately funded, separate, and voluntary. Exception: Vouchers”⁶¹

The training session also provides an open question-and-answer session where attendees can ask for further clarification on these issues. Conference attendees are also given the opportunity to meet with staff from the FBCI Centers at the various Federal agencies, and all attendees receive copies of informational materials including the “Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government” booklet.

In 2005, the White House OFBCI began inviting State and local administrators of Federal social service programs to meetings before each regional conference. At these meetings, staff from the White House OFBCI and DOJ provide guidance on implementing the equal treatment and Charitable Choice regulations, including detailed information regarding:

- Neutrality and nondiscrimination, including the ban on quotas, set-asides, or presumptions that faith-based organizations are more or less effective than secular providers.
- The elimination of the pervasively sectarian standard or other measures that discriminate against a provider based on their religious character or practices.
- The applicability of the regulations to all levels of government that accept Federal funds, and to any intermediary organizations that make sub-grants with Federal funds.
- Restrictions on the use of direct Federal funds for inherently religious activities.
- The rights of faith-based providers to retain their character and independence.

To ensure compliance with Charitable Choice and the equal treatment regulations, the training advises State and local administrators to:

- Educate staff on the principles of equal treatment.
- Undertake a formal review of grant and procurement policies at various State and local agencies.
- Revise and clarify announcements, regulations, and compliance forms governing social service programs.
- Rotate members of peer reviewer panels more frequently.
- Avoid defining “community organizations” so as to exclude faith-based organizations.
- Base application point-preferences on results, not repeat grantee status.
- Provide technical assistance to novice and non-bureaucratic providers.
- Consider ways to incorporate vouchers and other indirect funding mechanisms into programs for greater flexibility.
- Take steps to foster relationships with all types of civic, charitable, faith-based, and community organizations.⁶²

The pre-conference meetings also provide administrators the opportunity to ask questions regarding the regulations and their application to specific programs via an open question-and-answer session. Additionally, State and local administrators and FBCI Center staff share successful strategies for integrating grassroots groups into Federal social service delivery. For State and local administrators who cannot attend a regional meeting, the White House OFBCI makes available on its Website the PowerPoint

presentation presented at the conference, “Promoting Equal Treatment: A Guide for State and Local Compliance with Federal Regulations.”⁶³

In addition to national and regional trainings hosted by the White House OFBCI, many agency FBCI Centers conduct trainings of their own that collectively have reached more than 70,000 individuals engaged in social services (see Chapter Three for more details). Alongside other content, these trainings consistently provide instruction on the equal treatment principles and their application.

The Other Discrimination: Grassroots Organizations

In addition to bias and inconsistency with regard to faith-based organizations, the report found a number of barriers to participation by community organizations and small newcomer organizations. Not all of these barriers could be addressed through regulatory change or legal clarification. The unequivocal establishment of a level-playing field, however, set a clear context in which barriers could be addressed. In addition to requiring the FBCI Centers in the cabinet agencies to conduct the audit and make regulatory reforms, President Bush’s Executive Order 13198 directed the Centers to take outreach and programmatic actions to ease participation by faith-based and community organizations in the delivery of social services, including:

- Coordinating a comprehensive departmental effort to incorporate faith-based and other community organizations in department programs and initiatives to the greatest extent possible.
- Proposing the development of innovative pilot and demonstration programs to increase the participation of faith-based and other community organizations in Federal as well as State and local initiatives.
- Developing and coordinating department outreach efforts to disseminate information more effectively to faith-based and other community organizations with respect to programming changes, contracting opportunities, and other department initiatives.

Media coverage of the 2001 “Unlevel Playing Field Report” gave almost exclusive attention to the barriers faced by faith-based organizations. Notably, however, nine of the 15 barriers emphasized by the report were “obstacles facing all smaller and novice organizations.” Although often enacted with little fanfare, efforts to remove these barriers have stood as a central focus of the FBCI since its inception.

Throughout both domestic and international efforts by the U.S. Government to address pressing human need, remarkable progress has been made in the expansion of partnerships with small and novice social service organizations. Through the FBCI, government agencies have worked to identify and remove any unnecessary barriers to expanded partnership, which has been vital to this effort. A myriad of administrative changes have served to remove many of the specific barriers facing these organizations.

Equally important, major programmatic innovations have advanced. Pioneering forms of mini-grants, intermediary grants, choice-based and other partnership models have helped enable government to take advantage of the unique strengths of small, locally-rooted FBCO partners.

Of course, any institution as large as the Federal Government will undoubtedly always face challenges in coordinating its systems and culture with those of smaller, local organizations, and vice-versa. However,

FBCI Victory in the Supreme Court

The Initiative realized a major legal victory in June 2007 when the Supreme Court rejected a constitutional challenge to the FBCI's regional conferences sponsored by the White House to strengthen government's partnership with faith-based and community organizations in providing social services to individuals across the nation. The original suit brought by the Freedom From Religion Foundation (FFRF) alleged that the Bush Administration was promoting funding for faith-based groups, thereby violating the Establishment Clause of the Constitution. Such characterization confuses equal treatment with favoritism and reflects an ignorance of the Court's consistent rulings over the past two decades (described in an earlier section) clarifying that the Establishment Clause requires neutrality toward religion, not a prohibition on involvement of faith-based organizations in Federal programs merely because of their religious character.

The principal aim of the White House FBCI conferences, which are open to attendance by any organization, is to educate all willing partners—large and small nonprofits, secular and faith-based organizations and public and private leaders—on partnership opportunities with the Federal Government and on general principles of how to strengthen the nonprofit sector's performance in confronting social problems. The conferences particularly address the needs of faith-based and secular, neighborhood-based groups inexperienced in forming such partnerships. This is a perfectly acceptable policy approach according to George Washington Law Professor Ira C. Lupu who has been a close observer of the Initiative. According to Lupu,

[T]his lawsuit was destined to lose. This was a very weak lawsuit on its merits. The government had very good reasons to sponsor these conferences. They said, 'Look, we want to promote the inclusion of faith-based organizations that heretofore have been excluded from participation in various Federal programs.' It can't be unconstitutional just to invite them to apply for some kind of Federal grants. And there's nothing wrong with government officers showing up at these conferences and saying good things about the power of faith organizations to contribute to the social good.⁶⁴

The complaint of FFRF did not even get to first base, as the trial court was not convinced that FFRF had a legal right ("standing") to bring such a complaint to court. Since none of the plaintiffs could point to a specific injury that they encountered as a result of these conferences, questions were raised about whether the Federal court system has jurisdiction even to consider the matter. This was the ultimate question brought before the Supreme Court in *Hein v Freedom from Religion Foundation* and the Court ruled on the side of the President and his Initiative. In general, taxpayers cannot sue the Federal Government alleging a particular expenditure of funds is illegal based solely on their status as a taxpayer. The Court held that FFRF was not entitled to an exception to this well-established rule.⁶⁵

In this case and others, the legal tenets underlying the FBCI have been affirmed. The FBCI has taken care in crafting its legal guidance to conform to established First Amendment case law. Moreover, the Initiative has been vigilant in training public officials and nonprofit leaders to abide by two co-equal values: protecting the religious identity and autonomy of faith-based organizations and protecting the religious freedom of all citizens they serve. These are now the twin pillars of government-FBO partnerships.

the context and requirements for such partnerships have deeply changed today from what they were seven years ago. Some of the changes the FBCI has advanced include:

Barrier: The limited accessibility of Federal grant information

As described in Chapter Three, the FBCI has undertaken massive-scale efforts to demystify the Federal grants process for small and novice FBCOs. More than 100,000 faith-based and community organization leaders have received instruction and training in this regard. For more than 30,000 of these leaders, training has included an intensive, two-day grant-writing course. Grant announcements are e-mailed to all organizations on FBCI Center listservs, usually the day the grant opens. Some agencies offer “pre-application” conference calls and Webinars to explain the nuances of the program and application, and allow time for questions. Grant details are highlighted on the Websites of the FBCI Centers in each Federal agency, often including FAQs relevant to new applicants. All Federal grants amenable to nonprofit service organizations are highlighted in the FBCI’s “Grants Catalogue.” Many Centers also provide easy-to-understand, one-page summaries on specific grants and offer additional information downloadable from their Websites.

Every Federal agency that offers FBCO-eligible grants is staffed with experts in its FBCI Center who guide FBCOs to appropriate grant programs by telephone or in-person meetings; FBCOs no longer need private consultants to help them navigate through the grant bureaucracy. In some programs, such as Access to Recovery at the State level, technical assistance providers work directly with potential applicants to help them effectively compete for funding. In others, pre-competition technical assistance is provided, such as the series of one- to three-day outreach and capacity building workshops provided by PEPFAR staff across the U.S. and Africa. The workshops provided potential applicants specific technical assistance on topics such as: initial needs assessment; proposal writing; pre-award audits; personnel recruitment; competition processes; and monitoring and evaluation planning. In addition, every concept paper that was submitted, whether it was selected or not, received feedback from the Technical Evaluation Committee on elements of the proposal that were positive or that needed improvement.

In 2002, the Federal Government launched a central, easily navigable Website for the grant community to find and apply electronically for Federal programs at *Grants.gov*. Prior to this watershed effort, grant processes varied widely across agencies and programs. Consequently, the process of finding and applying for Federal grant opportunities was complicated, burdensome, and costly.⁶⁶ All Federal agencies have migrated or are in the process of migrating their discretionary grant information and applications process to *Grants.gov*. Over \$450 billion of grant awards distributed annually by 26 Federal agencies are now accessible via *Grants.gov*. With this site, the grant process is now more accessible and transparent than ever.

Barrier: The heavy burden of regulations and other requirements

Government funds will always come with necessary regulations and certain “strings attached.” However, the FBCI Centers across the Federal Government have worked to remove unnecessary requirements that would unduly burden small organizations. These efforts have ranged from simplified data collection requirements focused on only high-importance data points to creation of more user-friendly online data reporting systems, such as DOL’s Prisoner Reentry Initiative Management Information System.

Regulations also have been clarified and policies have been changed. For example, in 2006 USDA removed a barrier to the work of faith-based and community organizations that offer drug and alcohol

rehabilitation programs. This action also allowed individuals seeking help for their drug or alcohol addictions to make an important personal choice as to which recovery program they enter without fear of losing their food stamp benefits.

USDA and HHS worked together to develop a policy that ensures residents of faith-based and community drug and alcohol addiction recovery programs can retain their food stamp benefits while receiving help for their addiction. This policy makes clear that as long as a facility is recognized by the State's Title XIX agency as furthering the purpose of rehabilitating drug addicts and/or alcoholics, the residents of the facility may retain food stamp benefits and the facility itself may be an authorized food stamp retailer. USDA's Food and Nutrition Service and Office of Faith-Based and Community Initiatives, in collaboration with HHS's Substance Abuse and Mental Health Services Administration, continue to conduct outreach and education activities to help ensure that all relevant parties understand and are implementing this policy guidance.

Teen Challenge, a faith-based organization that provides residential addiction recovery centers all over the country, is one of the organizations that benefited from the change in the Food Stamp guidance permitting all organizations dedicated to drug and alcohol rehabilitation to participate in the program. Teen Challenge reports that within one year of the regulatory change, they were able to increase their Food Stamp revenue 75 percent to \$3.5 million—allowing the organization to expand their service to those who needed it most.

Equally important, aggressive technical assistance elements have been incorporated into many Federal grant programs that could benefit from the expanded involvement of smaller, grassroots organizations that might otherwise lack the technical sophistication to manage government grants. Technical assistance providers support new and smaller grantees with compliance and reporting requirements and often work to strengthen other aspects of their program as well. To that end, an emphasis was put on improving technical assistance in FBCI-related pilot programs, such as Access To Recovery and the Prisoner Reentry Initiative. In innovative “intermediary model” grants (see below), larger nonprofits are awarded large grants and act as intermediaries, providing sub-grants and technical assistance to small service providers, allowing them to do less paperwork, focus on serving those in need, and increase their service capacity and professionalism.

To mediate some of the burden necessary for ensuring all legal, fiscal, and programmatic requirements are met by grantees, some Federal departments have developed training programs or guidance documents to assist grassroots organizations in managing their grants. For example, offices within the DOL, working with DOL's FBCI Center, developed a guidebook for grassroots community and faith-based grantees. The book was designed for small or novice nonprofit groups administering DOL grants to strengthen services for job-seekers in low-income neighborhoods and to link with local “One-Stop” job training and placement centers that provide job placement and pre-employment services. As a result of this guidance, grassroots community and faith-based grantees are able to leverage a variety of “One-Stop” services with their own complementary services, equipping individuals to find good jobs and retain employment.

Barrier: Heavy requirements that have to be met before a group can apply for funds

To the fullest extent possible, the FBCI has worked to limit requirements that have to be met before an organization can apply for funds to only those likely to directly impact grant performance. When a required element would directly impact an organization's ability to perform services successfully under the grant, the FBCI supports retaining the requirement or modifying it to be narrowly focused to achieve its purpose.

An excellent example of this strategy is the Corporation for National and Community Service's revision of its regulations governing the AmeriCorps program in 2005. The AmeriCorps State and National program provides funds to local and national organizations and agencies committed to using national service to address critical community needs in education, public safety, health, and the environment. Each of these organizations and agencies, in turn, uses their AmeriCorps funding to recruit, place, and supervise AmeriCorps members. The revised regulations⁶⁷ for this program provide a less stringent match requirement for organizations in economically-distressed and rural areas, so that organizations in those areas can easily sustain volunteers. The revised regulations also permit AmeriCorps members to devote part of their time to capacity-building activities for the organization in which they are placed, helping to increase the sustainability of the programs in which members serve.

Barrier: Complex grant applications and grant agreements

The FBCI understands that grant applications must elicit enough information for evaluators to make well-informed decisions about the quality of various applicants. However, wherever possible, the FBCI has promoted simplification and size reductions in grant-related documents. For example, many grants at HHS included technical language that made it difficult for new FBCOs to determine even what information needed to be included in their grant application. HHS's FBCI Center helped implement a "Plain Language Initiative" throughout HHS that trained the HHS staff who write program announcements. This training helped HHS staff communicate information about grant opportunities in way that made it as easy as possible for all organizations, including FBCOs, to understand. Toward the same goal, DOL developed a uniform grant solicitation template that simplifies the overall structure and clarity of grant solicitations.

Barrier: Questionable favoritism in some programs for faith-based organizations

As noted in a prior section, the equal treatment regulations championed by the FBCI explicitly require that no favoritism be shown either for or against any organization based on religious belief or non-belief. In every instance of the hundreds of trainings provided for Federal and State administrators and program staff, the same unequivocal standard is established: every organization, whether faith-based or secular, is to compete on a level playing field for Federal funds. The HHS FBCI Center alone trained over 1,000 grants reviewers at the Administration for Children and Families in 2003 on the parameters for participation by faith-based and community groups under the equal treatment regulations. In addition, the DOL FBCI Center has trained over 600 Federal, State, and local government program staff.

Barrier: An improper bias in some programs in favor of previous grantees

When the FBCI was launched, some Federal grant competitions contained an explicit bias in favor of current or prior grantees. In some cases, additional points were awarded to organizations simply for having received the grant in the past. The FBCI continues to work to remove any "bonus points" awarded merely for being an incumbent grantee. For example, HHS's Administration for Children and Families eliminated the bonus points system for grant applications from the Family and Youth Services

Bureau. Before the FBCI, the point system awarded a five point bonus to previous grantees of their Runaway and Homeless Youth program (RHY), which contains three program funding areas: Basic Center Program, Transitional Living, and the Street Outreach Program. Within an extremely tight competition for funding like RHY, five bonus points assured no change in the usual grant recipients. Leveling the playing field simply consisted of eliminating the bonus point language described in the request for proposals. This change helped widen the field of grant participants and stimulated greater effort and creativity among prior grantees.

Another, more subtle change has helped eliminate improper bias in grantee selection. In the past, grant review panels often had very little turnover, resulting in an inclination toward the status quo and an absence of fresh perspective in reviewing proposals. While veteran grant reviewers remain an important part of grant review panels, the FBCI has also worked to encourage inclusion of new reviewers among grant panels, particularly individuals with front-line, nonprofit experience. For example, the HHS FBCI Center works with their program offices to issue regular calls for grant reviewers who have expertise with grassroots organizations, regularly adding new reviewers to grant panels across HHS.

Taking another approach, the DOJ's Office of Justice Programs (OJP) has introduced a policy requiring at least one quarter of peer reviewers to be new peer reviewers, resulting in a dynamic and evolving pool of consultants with the skills and expertise necessary to provide OJP with an assessment on the overall quality and potential of competitive discretionary grant applications. OJP also limits the number of panels a reviewer may sit on simultaneously.

Barrier: An inappropriate requirement to apply in collaboration with likely competitors

Some Federal grants have required new applicants to apply jointly, or with approval from other organizations that might view a new organization as unwelcome competition. To the extent possible, the FBCI has advanced changes in such requirements. For example, HHS's Health Resources and Services Administration's (HRSA) applications for funding for local nonprofits seeking Federal funds for medical services to the poor in community-based clinics were required to apply with support from another HRSA-funded clinic in the area. This sometimes prevented effective new organizations from partnering with HRSA. With support from the FBCI Center at HHS, this barrier to new organizations has been removed.

Barrier: Requiring 501(c)(3) status where a program statute requires only nonprofit status

The FBCI strongly encourages local social service programs to incorporate as 501(c)(3) organizations. However, requiring 501(c)(3) status before an organization can apply for or receive Federal funds can prevent high-quality programs from partnering with the government. The equal treatment regulations promulgated via the FBCI establish that—except where explicitly required by statute—lack of 501(c)(3) status cannot alone be used to prevent an organization from receiving Federal funds. While it is often necessary to weigh various elements of an organization's maturity or capacity to determine its ability to deliver quality services, 501(c)(3) status is no longer allowed as a litmus test. FBCI Centers at agencies have taken various steps to ensure that this rule is understood. For example, DOJ responded to a number of questions regarding the necessity of 501(c)(3) status by distributing to each of the State agencies administering Justice formula funds a letter clarifying the legal requirement that, States may not make 501(c)(3) status a prerequisite for a sub-grant under any formula program. This letter has also been posted on the DOJ Website.

Barrier: Inadequate attention in the Federal grant streamlining process to faith-based and community organizations

As noted earlier, the FBCI has worked to streamline the Federal grants process to the fullest extent possible. In all efforts to improve the Federal grants system—most notably, the use of the one-stop website, *Grants.gov* for all Federal grants (described earlier)—the FBCI has worked to ensure that the improved system is fully accessible to even the smallest and most novice organizations.

Innovative Models for Expanding Partnership with Small and Novice Organizations

The changes noted in this section have significantly reduced many of the barriers to partnership between grassroots nonprofits and government. However, the massive scale of government makes partnering with frontline, community-based partners a continued challenge requiring dedicated effort.

For every social problem, there are both faith-based and community organizations (FBCOs) engaged at the front lines. Alongside their deep, personal commitment to the people they serve, these organizations often possess assets and capabilities that can serve as a tremendous complement to those of government.

Designing programs that can draw effectively upon these capabilities, however, is a policy challenge of the first order. Despite FBCOs' distinctive strengths, they frequently possess other traits that make partnering with them difficult for typical government agencies. Small size, limited administrative staff, distinct organizational priorities, and other unique attributes of FBCOs can frequently create gaps in culture, language, and expectations between FBCOs and government agencies.

Simply put, traditional Federal Government systems are designed to deal in bulk. Government agencies have generally found it easier to manage a handful of multi-million dollar grants to large, national nonprofits. In contrast, seeking to partner with hundreds or even thousands of local organizations in smaller-scale partnerships strikes many agencies as impossible. While many government officials and administrators affirm that locally-rooted organizations are key to solving deep social ills, the challenges of partnering with these groups have often stymied efforts to do so on any large scale.

A principal contribution of the FBCI has been the design, operation and evaluation of innovative program models that solve this dilemma. These now-proven models allow government to tap into small and novice nonprofits to address vexing social ills on a national, and even international, scale.

Mini-Grants Models

The simplest tool promoted by the FBCI to fund small and grassroots nonprofits is the “mini-grant.” Simply put, mini-grants are grants that are rightly sized for the management capabilities of small FBCOs. Many traditional government grants are far larger than small FBCOs can effectively manage. An organization with a few employees, dedicated volunteers, and a shoestring budget would likely be overwhelmed by a sudden influx of hundreds of thousands of dollars. Often, an organization like this can accomplish more with \$25,000 than large bureaucracies could do with triple that amount.

In addition to right-sized grants, effective mini-grants programs also contain substantive technical support for grantees. This assistance is designed not only to help first-time grantees meet all government performance standards, data reporting, and other requirements, but also to hone their programs and

operations in ways that will increase their capacity to provide quality services to their neighborhood long after the grant is over.

For example, the U.S. Department of Labor (DOL) has pioneered a mini-grant program to partner small nonprofits with local government “One Stop Career Centers” to serve high-need individuals. While the government offices are typically able to place many individuals into jobs, they find it much harder to help people with major barriers to employment, such as high school drop-outs, the homeless, the chronically unemployed, and ex-prisoners, secure and retain employment. DOL realized early on that small faith-based and community organizations are often uniquely equipped to provide the highly personalized training and support these individuals needed to succeed in employment. However, the size of typical DOL grants—in the hundreds of thousands or even millions of dollars—were unmanageable for most small organizations. Thus, DOL pioneered its “Grassroots Grants” program in 2002.

Through these grassroots grants, DOL has funded local organizations across the country that are uniquely able to help high-need individuals find and keep good jobs. The initial grants were capped at \$25,000 and limited to organizations with five or fewer employees. Over time, DOL realized that the administrative burden of these grants to DOL sometimes outweighed their measurable benefits. Accordingly, it increased the grant size to \$50,000-\$75,000, extended the service period from 12 to 18 months, and allowed organizations with more than five employees to apply. Those refinements have helped achieve a balance between the complexity of managing the grants and the drive to reach as deep into the “grassroots” as possible.

Half-way through their grants cycle, the 78 active grassroots grantees from 2006 had leveraged nearly 50,000 volunteer hours through their grant programs, and placed more than 4,330 high need clients in jobs and 1,712 in post-secondary education or training.

Intermediary Grant Models

While mini-grants can effectively tap into small and novice nonprofits, they carry a higher administrative burden for government. As DOL found early on with its Grassroots Grants program, despite the great benefits of mini-grants, the workload of managing large numbers of small grantees can be inefficient. Intermediary model grants help address this challenge by placing a large portion of the administrative burden on larger, more mature “intermediary” organizations.

Under an intermediary model, grants are made to a large nonprofit organization, educational institution, or other entity. These “intermediary organizations,” in turn, use their grant funds to provide smaller awards to grassroots nonprofits. In addition to the sub-awards, intermediary organizations are responsible for providing technical support to sub-awardees and ensuring full compliance with all government regulations, data collection, and other grant requirements. In many cases, intermediaries provide training to help build the organization strengths and program performance of sub-awardees.

The U.S. Department of Justice’s (DOJ) Faith-Based and Community Rural Pilot Program, profiled later, is built upon this model, as are DOL’s Workforce Investment Board Intermediary Grants. The Compassion Capital Fund’s “Demonstration Program” is also designed as an intermediary grant model. Through this one program alone, 112 grants have been made to intermediary organizations to date, which have turned into 4,100 grassroots sub-awardees in 47 States and the District of Columbia.

Choice-Based Models

Although there are an endless number of potential variations, under the basic voucher model government does not provide funds directly to any service provider. Rather, a government agency provides a “voucher” to an individual beneficiary—a recovering addict, homeless individual or child in need of mentoring. This individual may choose to redeem the voucher for services at any number of service providers.

Choice-based models, such as vouchers, allow government to tap into the broadest possible diversity of service styles and approaches. In addition, since clients—not government—are making the choice as to which organization will receive the funds, Establishment Clause concerns are obviated.

This choice-based delivery system allows flexibility and freedom to both recipients and providers, and enables groups that might otherwise be disinclined to partner with government to consider doing so. Since clients have free and independent choice among providers, organizations are free to include faith-related content in programs. This allows recipients to choose the provider best suited to his or her unique needs. The fact that participants are allowed choice also encourages greater engagement by recipients of aid in their own life changes, since they are expected to take ownership in choosing the services they will receive.

The FBCI’s largest voucher-based program is HHS’ Access to Recovery (ATR) (see Chapter One). In August 2004, the first round of ATR grants was awarded to 14 States and one tribal organization, enabling them to establish voucher-based substance abuse treatment and recovery support services. Through ATR, more than 5,000 organizations partnered with government to address addiction issues—many of these organizations for the first time. For example, in Connecticut, 40 percent of the organizations redeeming vouchers were first-time partners; in Louisiana, this number was 70 percent.

Continued Innovation

While each of the models described above has proven highly successful in a range of contexts, the push for innovation continues, testing entirely new models and new contexts for the application of existing models.

For example, HHS’s Mentoring Children of Prisoners (MCP) program has just begun piloting a voucher-based extension of the program designed to reach children in areas of the country not currently served by an MCP grantee (see Chapter one). Meanwhile, DOL has recently launched “Beneficiary Choice Contracting,” a pilot project that blends traditional government contracting with client choice. Internationally, an impressive array of mini-grant, intermediary model, and other innovative approaches to partnering with small and novice organizations are at work in virtually every one of the 15 focus countries of the President’s Emergency Plan for AIDS Relief. In addition, USDA’s Foreign Agricultural Service is currently engaged in a pilot project to facilitate the participation of small, grassroots organizations that have traditionally not been able to participate in its food aid grant programs. This project provides grant money to new organizations that seek assistance from veteran USDA food aid grant participants with the logistics and/or monetization of donated commodities under their proposed food aid programs. The strategy will help organizations new to these programs partner with veteran organizations in order to increase their organizational capacity and better serve those in need overseas.

All of these innovative models—and, more importantly, their impact in human lives—have now become an established practice at the Federal agencies, and each represent an important and sustainable contribution of the FBCI to reforming government.