

Serving People in Need, Safeguarding Religious Freedom:

Recommendations for the New Administration on Partnerships with Faith-Based Organizations

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The Wake Forest University Divinity School's Center for Religion and Public Affairs promotes research, study and dialogue regarding the intersection of religion and public affairs and provides resources for policymakers, divinity school students, and religious leaders on these issues. Melissa Rogers serves as the Center's founding director. The Center has sponsored the Congregation Education Project, an initiative that explains the electioneering prohibition that applies to churches and other houses of worship that are organized as tax-exempt entities under Section 501(c)(3) of the Internal Revenue Code. Next year the Center will release a joint statement on religious expression in the public square. Projects of the Center represent the views of the authors and not the views of Wake Forest University or its Divinity School.

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Introduction

A New Path for Partnerships with Faith-Based and Community Organizations

One of President-elect Barack Obama's distinctive contributions to the nation's political debate is his call for a more productive, inclusive and open discussion of issues at the intersection of faith and public life. Even before he announced his presidential candidacy, Obama noted that Americans were "tired of seeing faith used as a tool of attack" and weary of "hearing folks deliver more screech than sermon." At the same time, he criticized those "who dismiss religion in the public square as inherently irrational or intolerant." He urged respect for believers and nonbelievers alike.

One sign of Obama's intention to put actions behind his words was his endorsement of government partnerships with faith-based and community institutions that do the work of charity and justice, combined with a call to reform President Bush's approach to these issues.

We offer this paper to suggest that despite the controversies over the Bush program, there is much common ground here. We can and should have a better discussion about these issues — even, and perhaps especially, where we disagree. We lay heavy stress on the history of cooperation between religious institutions and government to suggest that such partnerships are not an innovation of the Bush administration.

President-elect Obama was clear on his starting point, an "all hands on deck" approach to our nation's problems and particularly to the problems of our neediest citizens. Government, he declared, should partner with "grassroots groups, both faith-based and secular" because the challenges we face "are simply too big for government to solve alone." The key questions facing the next administration are: How will those partnerships function and how will the president-elect push for his agenda in this area to be institutionalized?

The next president's answers to these questions should be rooted in sound public policy and in respect for the Constitution's guarantees of religious freedom. This paper presents some options for the next president to consider.

We believe strongly that President-elect Obama should not view the moment as merely presenting him with the obligation to pass judgment on a signature item of the Bush presidency. He should regard it as an opportunity to rethink an approach that long predates the Bush administration and will far outlast his own presidency. It is our view that the discussion of this question has too often been divorced from history, and in the process has become excessively partisan and ideological. Because these partnerships are now identified with President Bush, we understand that some will view the next president's efforts in this area with deep skepticism. But we believe that President-elect Obama — himself a former community organizer supported by churches — has an opportunity to remind the nation of the long history of these partnerships and to encourage a richer and more thoughtful understanding of their possibilities.

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Where President Bush's initiative is concerned, we praise certain aspects of his program, but are critical of many of his approaches. We believe that by pushing against certain church-state boundaries, the administration reduced the opportunity for finding common ground and raised genuinely serious constitutional issues. We also believe that if partnerships with faith-based institutions are to succeed, there must be more accountability, more transparency in how grants are administered, and a concerted effort to make sure that government funding goes to programs that work and are constitutionally sound. We thus urge exten-

sive efforts to evaluate programs that receive government funding, and also favor a systematic study of the general practice of contracting out public services. We advocate a pragmatic view on the question of which services are best provided directly by government, and which by religious and secular intermediaries. At the same time, the work of community groups, faith-based and secular, should also be seen as part of a larger effort to promote bottom-up problem-solving that engages citizens in the work of self-government.

We also worry that placing a major public emphasis on the work of religious charities was, for some, a way of diverting attention from cuts in core government programs for the poor or, worse, a way of justifying them. We see the work of religious charities — including those that receive government aid and those that do not — as essential to compassion and justice. But they are not sufficient. Religious groups, for example, cannot guarantee that all low-income children receive health insurance coverage. In the end, this is a task that only government can do. We would hope that the next administration will see partnerships with faith and community groups as part of a larger effort to lift up the poor, and that this will be a more central purpose of government than it has been in the recent past. Action is required, not merely soothing words. As our friend John Dilulio nicely quipped in a play on the words of the New Testament letter of James: “Faith-based without works is dead.”

But if it is impossible not to admire and respect the contributions of our religious communities, it is also important to bear in mind that government’s task is to promote good works, not religion itself. Spreading the faith is the task of believers, not government. Government cannot and should not favor one religion over another. It should not favor religious over secular providers, and neither should it favor nonreligious over faith-based organizations.

Another danger for both government and religion is when grants of money become forms of patronage for political allies. If a new administration simply replaces a previous administration’s religious friends with its own, this effort will founder. That is one rea-

son we suggest more transparency in the grant process and annual hearings to assess progress and problems in this area.

Saying that the government should welcome partnerships with religious social service providers is not the same as saying that religious providers should enter into these arrangements. There are risks for religious groups in working with the government. In financial partnerships especially, these risks include concerns about becoming dependent on government and co-opted by it. Religious organizations should carefully consider these issues as they entertain the notion of seeking government funds.

If much of this report focuses on government partnerships with religious organizations, this emphasis should not in any way be seen as diminishing the importance of secular organizations involved in what President Bush’s program referred to as “community initiatives” or what President-elect Obama has called “neighborhood partnerships.” On the contrary, we believe that the “community” and “neighborhood” aspects of these programs have too often been lost in the controversies surrounding church-state questions. A well-organized and well-directed program should be designed to strengthen and encourage the work of the *entire* voluntary and not-for-profit sector — and to unite rather than divide it. If we speak far more about matters related to religion, it is because these aspects of the program have been the most controversial and raise issues that must be resolved if the broader effort is to move forward. We hope the new administration will do more, not less, to highlight the work of all neighborhood- and community-based groups, secular as well as religious — and, as is so often the case, the extraordinary partnerships that have been built across these two categories.

We began this project before the election, and our commitment was to offer these suggestions to either a President-elect Obama or a President-elect McCain. After the election, we rewrote parts of the paper to include President-elect Obama’s statements on the subject. We have not tailored our own views to fit his — and there are many questions on which he has not yet expressed a position. He has acknowledged candidly that there

are some questions on which he has not worked out his views. But it's also true that, as a general matter, many of his public statements square with our own leanings.

At the outset, we think it important to call attention to the fact that there are many forms of cooperation between government and faith-based groups that involve no transfer of government funds to religious entities and raise far fewer constitutional issues.

Both of us find it strange that a discussion focused around the word "faith" so frequently devolves into an argument about money. Yet religious groups and congregations have often done their best work in promoting shared objectives without receiving any grants from government. Church groups have been at the center of efforts to engage parents with teachers and to promote reforms of public education. Religious leaders have served as vouching agents with banks and other institutions outside poor communities in community development efforts. Churches have responded to the need to provide mentors for the children of the incarcerated. Religious groups reached out to poor citizens unaware of their eligibility for government benefits. These and so many of the most important contributions of our religious communities can be lost in the political crossfire when the entire debate over faith-based partnerships devolves into an argument over how to distribute government assistance.

“Both of us find it strange that a discussion around the word ‘faith’ so frequently devolves into an argument about money.”

We offer these proposals in the interest of finding common ground. We have consulted widely with people who have different perspectives on these issues. We have spoken with and interviewed people who are broadly sympathetic to our own view, and also with many who might disagree with some of our conclusions. Those we consulted included former members of the administrations of

Presidents George W. Bush and William J. Clinton; religious social service providers; social science scholars and researchers; religious and civil rights leaders; constitutional scholars; state officials; and activists who supported President Bush's faith-based initiative, those who opposed it, and those who fell somewhere in between. We thank all of them for their good counsel. As we indicate, some of the ideas presented in this paper are ideas they shared with us. We alone, however, are responsible for the conclusions of this report.

A word about our approach here: this report makes a number of specific proposals, but it is also aimed at providing background on the issues at stake. We offer what we hope is a fair if necessarily brief discussion of both the history of government partnerships with faith-based organizations and the legal background of certain controversies raised by these partnerships. There may be a bit more discussion of the law here than some of our policy-oriented colleagues might like. But because legal questions play such a significant role in this discussion, we felt some detail in this area was necessary. To reduce the burden on those for whom the law is of secondary interest, we have included an online appendix that discusses these matters in more detail (at http://www.brookings.edu/papers/2008/12_religion_dionne.aspx). A list of sources for this report also appears at that Web site.

This project has encouraged both of us to seek common ground together. We have broadly similar views on most of the issues at stake, but also a few differences. While both of us believe that government should welcome partnerships with religious as well as nonreligious organizations to serve those in need, Rogers sees more constitutional risks. Dionne is somewhat more willing to support a modest loosening of separationist strictures to encourage the work of faith-based groups. Nonetheless, we found agreement on most questions, and we have tried hard on difficult issues to recognize the various sides of the debate and to take their arguments into account.

One view we share strongly is that the discussion of these partnerships would be more promising if each side in the battle

would concede at least some good will to the other, and if partisans of each tried harder to understand the core concerns of their opponents. Some who support government partnerships with faith-based groups need to be more attentive to the legitimate concerns of those who believe there are risks for both religious liberty and religion in these arrangements. Some who are concerned with church-state separation and religious liberty should be more mindful of the long and fruitful history of government partnerships with faith-based groups in the pursuit of justice and compassion.

We think President-elect Obama himself offered a useful perspective during the campaign that might encourage conflicting parties to seek agreement. "I'm not saying that faith-based groups are an alternative to government or secular nonprofits. And I'm not saying that they're somehow better at lifting people up. What I'm saying is that we all have to work together — Christian and Jew, Hindu and Muslim, believer and non-believer alike — to meet the challenges of the 21st century."

A shared understanding of the close ties that both religious and secular grassroots groups have to their communities would encourage us to see them as indispensable partners in local and national efforts to solve social problems. This, in turn, might begin to move this discussion away from ideological cul-de-sacs and toward — if we may be permitted to use the phrase — common sense.

We do not pretend that good will on all sides will instantly resolve the principled conflicts over partnerships with faith-based organizations that have arisen over the last decade or so. We do believe that good will and honest bargaining could ease many of the conflicts that have gotten in the way of a broader consensus, and could narrow and clarify the real differences.

One of our proposals is aimed directly at encouraging such give-and-take: we suggest that the White House establish a commission or task force with broad representation to propose new legislation to Congress governing partnerships with religious and other providers. Presidential commissions are often a dodge intended as an alternative

to action, but in this case we believe history is on the side of the search for consensus. Witness the success of such efforts under President Clinton in finding broad agreement on the right of religious expression in public schools and in the federal workplace. This consensus process should be followed by hearings and debate on Capitol Hill.

The next administration can and should make some changes to executive orders and regulations early in its term. But we think everyone would benefit if government partnerships with religious and other social service providers were regulated through a relatively stable, long-term regime. Shifts in government's attitude toward these partnerships from administration to administration help neither the providers nor those who need their assistance. Ultimately, we believe this commission approach, followed by the legislative process, is the best strategy for resolving the complicated issues at stake in this area.

We see this paper as the beginning of this process. We do not pretend here to address or resolve all the questions involved in this discussion, but we do take on many of the difficult issues and suggest solutions. The challenge, as we see it, is to find constitutional ways for government to foster the good work done by religious and other community-based organizations — and to do this without so dividing Americans across religious and political lines that the work itself is jeopardized. This will not be easy. But good things often aren't, and we believe that in this area especially the effort to find common ground will genuinely advance the common good.

Executive Summary

Our nation has a long and productive history of government partnerships with religious and secular groups that serve people in need. While President George W. Bush's administration raised the visibility of these partnerships and introduced certain innovations into this system, it certainly did not invent them. The next administration should retain but also reform these partnerships. Those reforms should include increased funding for programs that effectively serve and support people in need. The incoming administration must also correct certain constitutional deficiencies and take steps to prevent use of this system as a form of political patronage.

President-elect Obama should make some changes through executive order, while also calling for a consensus process that would lead to a more durable policy regime — legislation rooted in broad agreement. It is unfair to expect social service providers to adjust to a new set of policies in this area with each new president, and it is costly for providers and taxpayers. The Obama administration should commission a diverse group with conducting a consensus process to fashion proposed legislation.

Many of the best partnerships in this area do not involve the transfer of money from the government to nongovernmental groups, and the incoming administration ought to promote those partnerships as much as it does financial collaboration. The incoming administration should also call for new incentives for charitable giving. Certain strategies for outreach and training need to be reformed to serve providers better and to reflect the spirit of the Constitution more faithfully. The next administration also should integrate these efforts into its domestic policy agenda. In all of these matters, President-elect Obama should seek to forge greater consensus and foster more civility on an often delicate matter that involves core American values: service to people in need and safeguarding our first freedom, religious liberty.

Social service partnerships between the government and religious organizations in the United States date back at least two centuries. The involvement of religious organizations in the delivery of government-funded social services is part of a larger and longstanding system of government reliance at all levels on third parties, including nonprofits, to provide government-funded services. In 1899, for example, the U.S. Supreme Court upheld a payment of funds from the District of Columbia to a hospital that was under the auspices of the Catholic Church. Other programs that have traditionally involved religious organizations in the delivery of government-funded social services include the Head Start program and the Child Care Development Block Grant Act.

The Supreme Court has always allowed government aid to flow to religious entities, but in the 1970s and '80s it often distinguished between pervasively sectarian organizations and those that were merely religiously affiliated. If a group was deemed to be a pervasively sectarian entity, its opportunities to receive government aid were much more limited. More generally, the Court carefully scrutinized all government aid that flowed to religious entities at this time. Thus, the rules the executive and legislative branches applied to partnerships during this era generally reflected these standards.

The Supreme Court began to loosen the reins somewhat in the late 1980s. "Charitable choice" emerged in this context in the mid-1990s. Charitable choice is notable for its attempt to replace a patchwork of church-state rules that applied to partnerships supported by federal funds with one standard set of rules, and its effort to capitalize on certain changes in First Amendment interpretation. Among the specific elements of charitable choice is a declaration that all religious organizations are eligible to seek government aid, and that the government should refrain from applying certain restrictions that often had followed government aid to religious organizations, most prominently prohibitions on religious discrimination with respect to government-funded jobs.

The Clinton administration had a mixed reaction to charitable choice, signing it into law several times but also seeking to soften some of its more controversial elements. The Clinton administration also took a number of actions that were not connected to charitable choice but linked to the long tradition of social service partnerships between the government and religious groups, such as promoting nonfinancial partnerships between public schools and religious communities and encouraging religious organizations to play a key role in advocating for affordable and adequate housing.

Nine days after he was sworn in as the 43rd president of the United States, George W. Bush issued an executive order calling for the establishment of the White House Office of Faith-Based and Community Initiatives, thereby drawing unprecedented attention to the issue of partnerships between the government and religious organizations to provide social services. The Bush administration initially sought to pass legislation in this area, but that effort failed. It subsequently crafted a set of executive orders and called for regulatory reform to implement those policies. President Bush's policies in this area hewed closely to the charitable choice model, although there were some significant departures. The Bush administration conducted numerous trainings on these matters and sought to encourage governors and mayors to emulate its program at the state and local level.

The Bush initiative was hailed by some as a healthy step forward in the relationship between religion and government as well as an example of compassionate governance. Others criticized it for disguising a failure to offer adequate financing to social service programs, for violating constitutional principles, and for becoming a form of political patronage.

During the 2008 campaign, Barack Obama said his administration would welcome religious as well as nonreligious bodies to partner with government to serve those in need, while bringing about needed reforms in this area. The key questions now facing the next administration are: How will those partnerships function and how will the president-elect push for his agenda to be institutionalized?

The next president's answers to these questions should be rooted in sound public policy and respect for constitutional guarantees. The following recommendations offer the incoming administration some options to consider.

Recommendation One:

Welcome Religious Organizations to Partner with Government

The next administration should welcome religious organizations to partner with government to serve those in need, whether through financial or nonfinancial partnerships. Both religious and secular groups have particular strengths in reaching and serving certain populations, and both have long and productive histories of partnering with government. The government should not discriminate either in favor of or against religious providers.

We do not advocate that more government assistance should be distributed through a proxy system, whether through faith-based or secular groups, and less through direct government assistance. Our view is that the decision on whether services are best delivered by government or third parties should be made, service by service, on a pragmatic basis related to what works best and meets the dictates of the Constitution.

Recommendation Two:

Increase Funding for Programs that Work

The current financial crisis will put new pressure on all government programs, especially social service programs. Nevertheless, current circumstances should prompt us to move quickly to assist those who are most threatened by the economic downturn. The incoming administration must take steps to strengthen the social safety net and ensure that government funds support effective programs. The Obama administration should steer us away from unproductive con-

versations about whether religious or nonreligious entities are categorically better and toward a regime that demands careful evaluations of all federal grantees in the specific circumstances in which they deliver government-funded aid.

Recommendation Three:

Use the Tools of Both the Executive Branch and Congress to Create a Consensus for a Durable Policy

The next administration should make some revisions in Bush policies through executive order and associated regulatory reform right away, while calling for legislation to establish the broad lines of policy for the future. It is unfair to expect social service providers to adjust to a new set of policies in this area with each new president. It is also costly for providers and taxpayers. President-elect Obama should commission a diverse group to seek a consensus for proposed federal legislation on the relevant issues. Once this process is complete, the body would forward proposed legislative to Congress for hearings and further debate.

Recommendation Four:

Clarify Restrictions on Direct Aid and Religious Activities

Bush administration policies prohibit the use of direct government aid for “inherently religious activities, such as worship, religious instruction or proselytization.” This “inherently religious” standard is confusing. Existing executive orders and rules should be amended to prohibit the use of direct aid to subsidize “explicitly religious activities.” Accompanying materials should note that any explicit religious content must be privately subsidized and offered separately, in time or location, from programs funded by direct government aid.

Recommendation Five:

Protect The Identity of Religious Providers

The Obama administration should protect the ability of religious organizations that receive government funds to retain religious terms in their organizational names, to select board members on a religious basis, to include some religious references in their mission statements and other organizational documents, and to provide services in areas where they have some religious symbols or scriptures. The new administration should continue the policy of allowing religious providers that receive direct aid to offer privately funded religious activities as well, as long as those activities are separated from government-funded activities by time or location and are purely voluntary for beneficiaries. It should take care to ensure that regulation accompanying federal funds does not affect matters beyond the boundaries of government-funded programs and activities.

Recommendation Six:

Provide Guidance on Separation between Religious Activities and Activities Funded by Direct Government Aid

The Obama administration should direct the Department of Justice to draft clear and practical guidance defining the nature of the required separation between activities funded by direct government aid and any privately funded religious activities. A document drafted by the Bush Department of Health and Human Services in 2005 entitled *Safeguards Required* could serve as a model. All relevant federal agencies should adopt and disseminate these instructions to its employees, grantees, and potential grantees. If providers cannot or will not separate their activities in this way, they should not receive direct government aid. The next administration also should make it clear that the relevant church-state safeguards that apply to funds received by religious organizations apply to grant subawardees as well as awardees.

Recommendation Seven:

Strengthen Protections for Beneficiaries' Religious Liberty Rights

The incoming administration should amend Bush executive orders and regulations to strengthen protections for the religious liberty rights of social service beneficiaries by ensuring that they: 1) have the right to an alternative provider if they object to the religious character of the provider assisting them; 2) understand that their participation — active or passive — in any privately funded religious activities the provider offers separately from government-funded services is purely voluntary; and 3) are notified of their rights in this area by the relevant governmental body as well as by the government grantee. The next administration should also encourage states that have not already done so to establish an ombudsman for social service beneficiaries.

Recommendation Eight:

Improve Monitoring of Compliance with Church-State Safeguards

The government must monitor the use of taxpayer funds. When an organization offers religious activities as well as activities funded by direct government aid, the government needs to verify that there is a meaningful separation between the two. This monitoring system should be aimed at avoiding government-financed promotion of religion as well as excessive church-state entanglement. It should include elements such as grant documents that spell out church-state safeguards and a requirement that all grantees sign assurances they will abide by applicable laws and policies, including church-state safeguards. Reporting documents should ask grantees to describe the method by which they separate any religious activities from government-funded activities and steps taken to protect beneficiaries' rights. The Obama administration should direct the Office of Management and Budget to ensure that tools used in the annual audit of providers expending \$500,000 or more annually in federal funds include references to church-state safeguards. The government should not engage in pervasive monitoring of religious groups, and it should not single them out for especially zealous scrutiny. But special care does need to be taken to prevent violations of First Amendment guarantees.

Recommendation Nine:

Address Religion-Based Decisionmaking in Government-Funded Jobs

The issue of whether religious organizations should be permitted to make employment decisions on the basis of religion in government-funded jobs is the most sensitive and divisive issue the new administration will face in this area. Indeed, the authors of this report have slightly different approaches to this issue, even as we both seek a reasonable and constitutionally-sound resolution of the controversy. Rogers believes religious discrimination in jobs subsidized with direct government aid should be prohibited. Dionne shares Rogers' concern about religious discrimination but worries that this rule, if enforced too rigidly, could upset some long-standing partnerships in which very little discrimination actually takes place.

We agree, however, that our national conversation over these issues would be better if we had more information about the actual employment practices of religious institutions, and more knowledge of how bans on religious discrimination affect the workings of social service programs and the opportunities of job applicants. Thus, we recommend that the administration commission a study that would answer these questions and look at other policy and legal considerations. The report should be completed not later than a year after it is commissioned. Upon its release, the next administration should invite people of various perspectives to comment on the report, and these deliberations should inform the administration's future actions on these issues, whether through executive order or the legislative process. (We note that our suggestions on these issues are especially detailed and only briefly summarized here.)

When it commissions this study, the incoming administration could also take one of two steps. It could allow religious groups some leeway with respect to religion in hiring for federally-funded positions until the study is finished, and have the study completed relatively quickly (in

perhaps six months). Or it could prohibit religious organizations from discriminating on the basis of religion in jobs funded by direct government aid with respect to all grants made after January 20, 2009, but allow such discrimination to continue where it is already permitted for grants made before January 20, 2009. Rogers supports the latter approach, while Dionne supports the former. But both of us believe that these policies should be revisited upon completion of the study.

It is time to move toward a resolution of this issue that shifts the focus from conflict to compassionate service. We believe these approaches would help us do so.

Recommendation Ten:

Keep the Government Out of the Church and Simplify the Process of Forming Separate 501(c)(3) Organizations

To steer clear of interfering with houses of worship, the next administration should refrain from giving direct aid to churches and other houses of worship and their integrated auxiliaries. Many congregations that receive direct government aid for social service work already have set up separate 501(c)(3) entities to receive government funds, including most that are large-scale recipients of federal funds. Houses of worship and their integrated auxiliaries are automatically considered tax-exempt by the Internal Revenue Service, and they are not required to file annual Form 990s with the IRS, although other religious organizations are required to do so. This special treatment is quite appropriate for these core religious bodies, but it raises genuine difficulties where the receipt of public funds is concerned. At the same time, the administration and Congress must make it far easier for houses of worship and other organizations to set up separate 501(c)(3) entities. These separate 501(c)(3) organizations would be free to use physical space in houses of worship, assuming the houses of worship agrees, and churches and other houses of worship could continue to engage in nonfinancial forms of collaboration with government.

We would be remiss if we did not note that some churches currently receive direct government funding for their valuable work. It makes sense to ensure that the current provision of services under these arrangements is not disrupted. It seems to us, however, that the expansion of this practice to many more houses of worship creates a large danger for religious autonomy and religious freedom. Thus, the government should refrain from directing aid to houses of worship in the future while easing the process of forming separate 501(c)(3) organizations.

Recommendation Eleven:

Avoid Cronyism and Religious Patronage by Highlighting Peer Review, Evaluation and Accountability

During the Bush administration, a former White House official and some civil servants alleged that peer review processes in some cases seemed tilted toward entities with political leanings sympathetic to those of the administration. Using this system to reward religious friends and cronies is unacceptable. The next president should direct agency heads to instruct peer reviewers on their legal and ethical obligations. All agency employees must have confidential ways to raise concerns in this area. The peer review panels should not be dominated by religious or secular voices, or by advocates of a particular faith, theology or political ideology — and the members of such panels should have genuine expertise in the program areas being funded. The incoming president should promise that his administration will promptly investigate any allegations of impropriety in this area.

President-elect Barack Obama should also call on Congress to pass legislation to expand the information on the searchable Web site that discloses to the public all federal grants and contracts. Access to this information should allow civic-minded individuals to raise questions not only about particular groups that receive government aid, but also about certain patterns in the distribution of assistance.

Recommendation Twelve:

Promote Nonfinancial Partnerships as Much as Financial Partnerships

The Obama administration should do as much to foster nonfinancial forms of government-nongovernment collaboration as it does to foster financial forms of such collaboration, particularly because nonfinancial partnerships are as valuable to government and pose far fewer constitutional difficulties when religious organizations are involved. Nonfinancial partnerships are those in which the government and religious organizations work together to advance a common cause, but no money is passed from the government to the religious body. One example of these partnerships: the Benefit Bank programs in which the government works with communities to help people claim state and federal benefits that are often left unclaimed, including Earned Income Tax Credit, food stamps, medical benefits (including children's health insurance) and heating/cooling assistance. Another powerful form of nonfinancial collaboration involves government asking community partners, including congregations, to recruit foster care or adoptive parents. The next president should call attention to the best of these partnerships and urge their replication nationwide. It also should revisit Clinton Department of Education guidelines on nonfinancial partnerships between public schools and religious communities, update them, and adapt them for use by other federal agencies.

Recommendation Thirteen:

Create New Incentives for Charitable Giving

President-elect Obama should call for enhancing incentives for charitable giving that will help congregations and other nonprofits. For example, he should call for enactment of a bill that would allow nonitemizers to deduct a portion of their charitable giving. Congress has come very close to enacting this bipartisan legislation in recent years. The new administration should push for this approach, either as part of new legislation on partnerships with faith-based and community organizations or, perhaps more logically, as part of a tax reform program. The incoming administration should also encourage corporations to review their charitable giving policies, especially policies that reflexively prohibit gifts to religiously affiliated entities.

Recommendation Fourteen:

Establish Annual Hearings to Assess Progress and Problems

The Obama administration should advocate annual hearings on the workings of these partnerships. Representatives of federal and state governments, social service beneficiaries, and nongovernmental — religious and nonreligious — organizations should be among those participating in these hearings. The hearings, which could be conducted by the President's Council on Faith-Based and Neighborhood Partnerships, would require the administration and its partners to take stock of progress and address problems before they become crises. In addition to considering the employment report described above, two other matters should be addressed at the first such annual hearing: the protection of beneficiaries' rights of religious liberty and monitoring of church-state safeguards. Beneficiary rights may pose a number of practical problems, and these problems are likely to be more acute in small towns and rural areas. There is also a need to know whether the monitoring system is successful in ensuring that direct government funds are not being used to promote religion *and* in avoiding excessive church-state entanglement.

Recommendation Fifteen:

Develop New Strategies for Outreach and Training

The outreach and training sponsored by the White House and federal agencies should be improved. The federal government should work toward smaller workshops and informational seminars for potential grantees and grantees. There is also a need to reposition expectations among potential grantees so they are more realistic. The Obama administration should ensure that the "train the trainers" program it envisions for grantees and potential grantees includes training on church-state safeguards. Federal officials serving in this area also need to be

trained on these issues. These training sessions should reflect an affirming message about both the participation of religious entities and the special rules that apply to their participation. Appropriate church-state restrictions are rooted in benevolence toward religion and religious liberty, but a poor articulation or implementation of them could suggest otherwise. Training for civil servants can help them regulate appropriately, and also work more effectively with both religious and secular partners.

Recommendation Sixteen:

Establish a Diverse White House Council and Integrate Efforts into Domestic Policy Agenda

President-elect Obama should structure his Council for Faith-Based and Neighborhood Partnerships so people with good-faith disagreements with parts of his initiative may serve on the council. By reaching out to those who have some differences with the administration on these issues, the incoming president will gain a full understanding of the debate and the options and promote greater unity and understanding. This council should also include representatives of a substantial number of secular as well as faith-based organizations. The next president should fully integrate this work into his domestic policy agenda. Giving the chair of the council a high rank within the White House staff would establish the importance of these initiatives and help coordinate them with other aspects of administration policy.

Part One

A Past to Build On: Partnerships Before the Bush Administration

To lay a foundation for its actions, part of the next administration's job will be to educate Americans about the rich history of social service partnerships between governmental and nongovernmental bodies, including religious ones. The new administration can profit from understanding what has worked well and what has not worked well in this area in the past.

Partnerships between the government and religious organizations in the United States date back at least two centuries. In the early 1800s, for example, the government provided funds to a variety of orphanages and hospitals, some of which had religious roots and ties. Indeed, a religiously affiliated hospital that received government funds was involved in an 1899 U.S. Supreme Court case, *Bradfield v. Roberts*. The Court described the hospital as "a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church...." When a litigant argued that the District of Columbia's payment of money to the hospital violated the First Amendment's Establishment Clause, the Court rejected the claim.

The involvement of religious organizations in the delivery of government-funded social services is part of a larger and longstanding system of government reliance at all levels on third parties, including nonprofits, to provide government-funded services. Political scientist Don Kettl has referred to this system as "government by proxy." Cooperation between the government and nonprofit organizations to provide social services did not occur as a result of any calculated decision, scholars have concluded. Rather, it developed ad hoc over time as Americans attempted to find practical ways of managing a longstanding conflict between citizens' need for and interest in public services and an aversion to, or at least skepticism of, some of the governmental structures that

deliver them. Under the proxy system, the government may increase its role in providing social services but do so without a parallel expansion of the governmental bureaucracy. For example, in the wake of the Great Depression, the government expanded the number and type of social services it subsidized while it increased its use of nongovernmental entities to provide these services.

In the 1960s, President Lyndon B. Johnson's call for a War on Poverty also spurred an increase in social service spending by the federal government and the creation of a variety of new cooperative arrangements between the government and nongovernmental groups, including religious groups. One of the programs the Johnson administration launched was Head Start, a federal initiative to assist disadvantaged children in overcoming the special obstacles they face when entering school. "Since its establishment in the 1960s," scholar Mary Bogle has observed, "the Head Start program has partnered with congregation-based providers, particularly those housed in predominantly African American churches." The Johnson administration also helped create many other social assistance programs, such as Job Corps and Medicaid.

Congress expanded social service aid in the 1970s, and it continued to increase until the administration of President Jimmy Carter. Economic hard times forced President Carter to cut government spending, and President Ronald Reagan made deep budget cuts in social spending during the 1980s. Nevertheless, the government by proxy system actually expanded during the Reagan administration, given Reagan's interest in privatizing functions of the government — shrinking the size of government and turning over more of its work to nongovernmental entities. More specifically, part of Reagan's "new federalism" initiative included the notion of "fewer federal regulations in return for less money," as Professor Kettl has noted. In these ways, Kettl says, government by proxy became the "predominant form of government activity" by the late 1980s. In other words, both the Democratic War on Poverty in the 1960s

and the Republican downsizing of government in the 1980s created more governmental partnerships with nongovernmental organizations.

In many respects, it is difficult to describe the interaction between the government and religious entities during these years because scholars did not often focus on this subject or on the broader issue of the nonprofit sector's relationship to government. Focused research on the not-for-profit sector only began to blossom in the 1980s. Research on the role of religious organizations in the provision of social services followed in the 1990s.

Nevertheless, some federal statutes and court cases provide glimpses at certain aspects of the provision of federally-funded social services by religious organizations before the 1990s. For example, in 1981, Congress passed, and President Ronald Reagan signed, the Community Services Block Grant Program allowing states and localities to work with nongovernmental groups to reduce poverty, reinvigorate communities, and help low-income families and individuals to become self-sufficient. The act noted that, to accomplish the goals of the law, it would be necessary "to secure a more active role in the provision of services for private, religious, charitable, and neighborhood-based organizations."

Also in 1981, Congress passed, and President Reagan signed, the Adolescent Family Life Act that provided funding for services related to adolescent sexuality and pregnancy. A Senate report on this bill said: "Charitable organizations with religious affiliations historically have provided social services with the support of their communities and without controversy." When the Supreme Court rejected a constitutional challenge to this program in 1988, it said, "We note...that this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." In this case, the Court said "there [was] no reason to assume that the religious organizations

which may receive grants [under this program were] 'pervasively sectarian,'" rather than merely religiously affiliated.

In the 1970s and 1980s, the Court often divided religious institutions into two categories: pervasively sectarian and religiously affiliated. It essentially defined the term pervasively sectarian in two ways. One referred to institutions in which "secular activities cannot be separated from sectarian ones." The other rested on a multi-factor analysis that required the court to "paint a general picture of the institution, composed of many elements" to see if the entity was "too religious" to receive government funds, or at least certain forms of government aid. These elements included whether the institution employed hiring preferences on the basis of religion or required participation in religious activities, and the institution's relationship to a church or other house of worship. If a court deemed an institution to be pervasively sectarian rather than simply religiously affiliated, its opportunities for receiving government aid were much more limited. The Court was concerned that if government funds flowed to pervasively sectarian institutions, either the aid would be used to promote religion, or the aid would have to be monitored so closely to verify that it was not used to promote religion that this would create excessive and unconstitutional entanglement between church and state. More generally, the Court carefully scrutinized all government aid that flowed to religious entities at this time.

Nonetheless, religious organizations often became key providers of government-funded social services, including federally-funded child care services under the Child Care and Development Block Grant Act (CCDBG), which President George H.W. Bush signed into law in 1990. Scholar Mary Bogle describes the CCDBG statute as "the first significant legislative effort to define church-state roles in the provision of a social-service program." For this and other reasons, it is worth considering this statute a bit more closely.

A key impetus for CCDBG was the doubling of the number of women in the nation's workforce between 1966 and 1986. Congress found that parents seeking child care struggled with its high cost, short supply, and the wide variation in the quality of care. Thus, Congress passed a bill that reserved most of its funds to assist low and moderate income families in accessing care. The bill also expanded child care options, established a floor of health and safety standards for child care providers, and improved enforcement of those standards. CCDBG provides block grants to states for these purposes. Under the act, states are required to give parents a choice of either sending their children to programs subsidized by government grants or contracts, or receiving federally-funded certificates that may be used to pay for child care.

In the course of drafting the child care block grant legislation, Congress was well aware that religious bodies would often receive the funding. A study produced by the National Council of Churches of Christ in the early 1980s estimated that church-based programs as a class were the largest provider of center-based child care in the United States. The fact that congregations often have large physical spaces available during weekdays helps explain the major role religious bodies play in this area. Recognizing that the government has special obligations to refrain from encouraging or discouraging religion, Congress sought to develop appropriate rules for the engagement of religious bodies in the provision of federally-funded child care.

As part of this process, Congress involved experts and advocates in a discussion of these important issues through hearings and other public forums. "Numerous interest groups participated in a multi-year process of debate and negotiation over [the CCDBG grant and contract] provisions," said Professor Elizabeth Samuels. Samuels noted that some groups "advocated an interpretation of the Establishment Clause that would permit extensive participation by religiously affiliated providers, including providers of sectar-

ian services; others advocated interpreting the clause to limit the participation of such providers; and still others wanted primarily to secure the enactment of legislation making federal child care assistance generally available to low-income families." According to Samuels, Congress sought to draft grant and contract provisions that would pass muster under the Establishment Clause, while still allowing robust participation by religious entities.

Parts of the legislative process surrounding the adoption of the Act were less deliberative, however. For example, Samuels notes "[a] provision allowing [child care] certificates to be used for sectarian services was engrafted onto the statute late in its legislative history," and "[u]nlike the complex church-and-state-related regulations governing grant and contract aid, this provision was not a product of protracted debate, negotiation, and compromise." Samuels explains that this indirect aid provision emerged when it appeared that the bill could not pass without it. Nevertheless, the bill did undergo substantial examination in Congress and was widely discussed and debated prior to its enactment.

The product of this negotiation and debate was a statute with some complex provisions on church-state issues. The statute's provisions sometimes differ depending on the type of government aid the religious organization receives, direct (i.e., grants or contracts) or indirect (i.e., certificates). For example, the statute prohibits the use of direct funds for "any sectarian purpose or activity, including sectarian worship or instruction." On the other hand, the statute says that "[n]othing in this subchapter shall preclude the use of [child care] certificates for sectarian child care services..." The CCDBG also sets forth a rather complex set of nondiscrimination rules on employment of individuals providing child care and admission of children to such programs. (See online Legal and Policy Backgrounder #4).

The history of CCDBG is instructive for at least two reasons. First, it documents one

area where the government sought to recognize and respect the major role religious groups play in providing social services, while also acknowledging and honoring the special constitutional mandates on government's relationship with religion. Second, these provisions represent one way the political branches engaged in a relatively open and deliberative process on a number of church-state matters in the social service context. The final product reflected a fair amount of give-and-take among a variety of perspectives.

These issues surfaced in a significant way in Congress again in 1995 with then-Senator John Ashcroft's introducing a provision that came to be known as "charitable choice." Whereas Congress laid the foundation for CCDBG with hearings, substantial congressional debate, and complex and prolonged negotiation among parties with different interests and views, there were no hearings over this charitable choice provision and limited opportunity for debate and compromise over the church-state rules it set forth.

The Clinton Administration's Partnerships with Faith-Based Organizations

The Clinton administration continued the long tradition of social service partnerships between the government and religious groups and added some of its own emphases. For example, the Clinton administration's Department of Education (DoE) reached out to religious groups on a regular basis to invite them to participate in its work. In 1994, Secretary of Education Richard Riley began the Partnership for Family Involvement in Education and asked religious organizations to join. The Clinton DoE subsequently issued guidelines for public school partnerships with communities, including religious communities. The guidelines noted that, "[f]aith communities can be important participants" in partnerships to support public education. This guidance explained that volunteers from faith communities could serve as tutors and mentors for children and work with other communities to provide safe

and enriching after-school activities. At the same time, the guidelines said that "it is not appropriate for members of faith communities to use their involvement in public schools as an occasion to endorse religious activity or doctrine or to encourage participation in a religious activity."

Another Clinton Department of Education project led to the issuance in 1995 of consensus guidelines on religious expression in public schools. President Bill Clinton said that his administration borrowed "heavily and gratefully" from a statement by a wide range of religious and civil liberties groups in order to draft its guidelines, which were sent to public schools nationwide. Clinton noted: "For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works."

It is also worth noting that, early in his first term as president of the United States, President Clinton signed the Religious Freedom Restoration Act (RFRA), a statute designed to provide heightened protection for the free exercise of religion in the wake of the Supreme Court's 1990 decision in *Employment Division v. Smith*. RFRA had the support of legislators ranging from Senator Orrin Hatch (R-UT) to Representative Jerrold Nadler (D-NY) and interest organizations ranging from Pat Robertson's American Center for Law and Justice to Americans United for Separation of Church and State. The statute requires the federal government to justify any substantial burden on religious exercise with a compelling interest or to remove that burden if it has no such interest. The Bush administration later relied on this statute to advance its faith-based initiative.

Charitable Choice Emerges (1995 – 1996)

Given the extensive and longstanding tradition of governmental financial partnerships with religious organizations to serve those in need, what innovations did the charitable

choice initiative seek to introduce into this equation in the mid-1990s? Then-Senator John Ashcroft (R-MO) introduced charitable choice into federal welfare reform legislation in 1995, and he sponsored other efforts to apply comparable provisions to other streams of federal social service funds. The charitable choice provision articulates a set of church-state standards to govern financial partnerships between the government and religious organizations to serve those in need.

Ashcroft's focus in the mid-1990s was on expanding opportunities for religious organizations to provide government-funded social services while reducing the rules and restrictions that typically followed government aid. One of the groups that attracted Ashcroft's interest was Teen Challenge, an organization that offers various "discipleship training program[s]" to conquer drug and alcohol addictions. Accordingly, a staffer for Ashcroft, Annie Billings White, sought out Carl Esbeck, a constitutional scholar who had been one of her law professors at the University of Missouri. Esbeck is a well-known church-state expert who believes that the Supreme Court has read the Establishment Clause too broadly in the area of government funding and religious organizations. Esbeck had drafted proposed legislation that set forth a model emphasizing religious organizations' ability to receive government funds without having to comply with certain conditions that often followed those funds. Esbeck sent his proposal to Ashcroft's office, and his ideas began circulating on Capitol Hill. Senator Ashcroft attached the charitable choice provision to the welfare reform bill in August 1995.

Charitable choice is sometimes erroneously described as a way to open the gates for government social service funds to flow to religious organizations. Yet as we have seen, those gates had stood open many years before charitable choice became law. Still, charitable choice is notable for its attempt to introduce at least three innovations.

First, the charitable choice initiative sought to replace a patchwork of church-state rules that applied to these partnerships with one standard set of rules that applied to all partnerships supported by federal funds. Prior to the mid-1990s, those rules often varied significantly from program to program and agency to agency. Further, there was a mix of formal rules and informal practices, and sometimes the informal practices within a particular area were inconsistent with the applicable formal rules. Proponents of charitable choice sought to take a particular model for these partnerships and apply it to all federally-funded social services provided by nongovernmental organizations.

The second distinctive aspect of the charitable choice initiative was its specific vision of the government's relationship to religion. Charitable choice seeks to capitalize on a relaxation of certain constitutional church-state rules that occurred during the 1990s. Charitable choice has caused controversy because some of the rules it articulates are permitted by Supreme Court interpretation but not required by it. That, in turn, has left plenty of room for a fierce policy debate about the wisdom of adopting these rules and applying them widely.

Still other rules set forth in charitable choice are controversial not because they apply existing interpretations of Establishment Clause law but because they articulate contested positions in unsettled areas of church-state law. Other rules even boldly challenge aspects of Supreme Court precedent that remain on the books but look vulnerable in the current climate. By taking this posture, the debate over charitable choice has served as one among many battles over the future direction of the Court's interpretation of the Establishment Clause.

A third innovation of charitable choice was its argument that the government should make an effort to partner with religious groups that previously had not been the recipients of government aid, especially smaller religious groups, including more explicitly religious groups. As a 2003 study

found, “[m]ost [longstanding partnerships between state governments and religious organizations] appear[ed] to be with multi-state or national faith-based service organizations, such as Catholic Charities, the Salvation Army, Goodwill, and Lutheran Social Services, as opposed to congregation-based or local religiously-affiliated nonprofits.”

Some Specific Elements of Charitable Choice

Charitable choice sets forth a certain structure for governmental partnerships with religious organizations. Although the charitable choice provisions vary to some extent, five basic characteristics stand out.

First, under the charitable choice provisions, all religious organizations are eligible to seek and receive government aid, including those that in the past had been considered pervasively sectarian institutions. Following the Supreme Court’s lead in this area, federal administrative agencies that oversaw various social service programs typically treated houses of worship and some religious bodies deemed to be pervasively sectarian differently than other religious organizations. They often required these bodies to form a separate nonsectarian or secular affiliate in order to receive government funds.

“[T]he charitable choice model requires the government to include all religious entities in the pool of organizations eligible to seek and receive federal social service aid.”

By the late 1990s, however, it could be argued that more recent Supreme Court case law had undermined this constitutional category. In an attempt to capitalize on this movement, the charitable choice model requires the government to include all reli-

gious entities in the pool of organizations eligible to seek and receive federal social service aid.

Second, the charitable choice model promise that religious organizations will be able to receive government money while also “retain[ing] [their] independence” from federal, state, and local government, including the ability of organizations to control “the definition, development, practice and expression of [their] religious beliefs.” Parts of this principle are more controversial than others. Allowing religious providers to use facilities that contain some religious art and icons, to retain religious terms in their organizational names, to select boards on a religious basis, and to include religious references in mission statements and other governing documents are less controversial.

But an area of great controversy and significance concerns whether religious organizations should be subject to the same regulations that nonreligious providers must labor under, or whether these religious organizations must or may be specially exempted from certain conditions that follow government funds.

Third, the charitable choice model encompasses the different treatment of direct aid (such as government grants or contracts) and indirect aid (such as social service vouchers or certificates). Under the charitable choice model, direct aid cannot be expended for “sectarian worship, instruction, or proselytization.” In contrast, charitable choice places no similar federal limits on the use of indirect aid.

Congress articulated this principle before the Supreme Court’s 2002 decision in the school voucher case, *Zelman v. Simmons-Harris*. The 2002 school voucher case gave charitable choice proponents a boost, because it essentially held that religious elementary and secondary schools could be included in government-funded voucher programs, as long the program did not favor or disfavor religious entities, provided benefits to a wide spectrum of individuals based on

secular criteria, and permitted participants “to exercise genuine choice among options public and private, secular and religious.” Thus, some have argued that the *Zelman* decision clears the way for the use of social service vouchers for religious as well as nonreligious activities. Even assuming that is true, social service vouchers may raise constitutional difficulties that school vouchers do not, including the lack of access to adequate nonreligious alternatives. And, of course, the *Zelman* case did not resolve the policy argument about whether religious groups *should* be included in government voucher programs. The Court simply determined that religious groups *could* be included in such programs.

Another reason this part of charitable choice remains controversial today is its articulation of the limits on the uses of direct aid. The charitable choice provision prohibits the expenditure of direct funds for “sectarian worship, instruction, or proselytization,” but it does not prohibit the use of such funds for religious activities generally. Further, while charitable choice prohibits the use of direct aid for these limited purposes, it does nothing to prevent religious organizations from mixing privately funded religious activities such as “sectarian worship, instruction, or proselytization” into government-funded programs.

Fourth, the charitable choice model provides certain protections for beneficiaries of government aid. It says religious organizations that receive state aid may not discriminate on the basis of religion against beneficiaries. The charitable choice provisions from the welfare reform law, for example, also state that if a beneficiary has an objection to the religious character of a provider, then the state must provide the beneficiary with an alternative provider that is equally valuable and accessible to the beneficiary. The latter provisions were added during the conference process at the behest of moderate Republicans. These are noteworthy and widely supported parts of charitable choice.

But charitable choice leaves room for providers to require beneficiaries to be present for religious activities. In addition, some charitable choice provisions do not contain a requirement that the government notify social service beneficiaries who object to the religious character of a provider of their right to an alternative provider. This remains one of the most criticized aspects of the model.

Fifth, the charitable choice model seeks to promise religious organizations that they would be able to make religion-based employment decisions vis-à-vis government-funded jobs. Charitable choice references Title VII of the 1964 Civil Rights Act. Title VII prohibits discrimination on the basis of religion (among other grounds) by certain employers, but it also provides an exemption from this ban for religious organizations. This aspect of charitable choice is discussed in more detail in Part Three of this paper.

Then-Senator Ashcroft attached the charitable choice provision to the welfare reform bill in August 1995. At the time the provision drew relatively little notice outside a small circle of church-state experts. It was largely eclipsed by the titanic debate over the shape and structure of welfare overhaul, including an end to the federal entitlement to welfare and a shift of substantial responsibility for public assistance to the states.

There was not a single congressional hearing on the charitable choice provision, and scant opportunity for debate on the Senate floor. After the welfare reform legislation passed both the Senate and the House, a conference committee took it up. The committee included Senator John Chafee (R-RI) and Representative Nancy Johnson (R-CT), who raised concerns about aspects of charitable choice and were successful in making a few changes to the bill, including language strengthening religious freedom rights of social service beneficiaries.

While President Clinton vetoed this particular bill, he signed another version of it in August 1996. This version of the welfare re-

form bill contained a charitable choice provision that was virtually identical to the one included in the earlier welfare reform bill.

The Clinton Administration Reacts to Charitable Choice (1996 – 2000)

After the welfare reform package became law, the Clinton administration sought to revise charitable choice in its package of “technical corrections” to the law. One of those corrections would have said that only groups not “pervasively sectarian” could receive government funds. Given the state of constitutional law at the time, the Clinton Department of Justice believed it was bound to adhere to that distinction. When Senator Ashcroft objected to the proposed correction, it failed. The administration responded by instructing federal administrators to note that pervasively sectarian organizations were ineligible to receive government funds.

During 1996 - 1997, the Clinton administration took at least two other significant steps regarding federal financial assistance and religious organizations. First, its Acting Solicitor General Walter Dellinger filed a brief on behalf of the Secretary of Education in the 1997 case of *Agostini v. Felton*, asking the Supreme Court to reverse its decision in the 1985 case of *Aguilar v. Felton*. The *Aguilar* and *Agostini* cases involved a program created by a federal statute, Title I of the Elementary and Secondary Education Act of 1965. Title I aid is made available to all students in need of remedial instruction, regardless of whether they attend public or private schools, including religious schools. The 1985 *Aguilar* decision held that public school teachers could not deliver federal education aid to students on the premises of religious schools. In its 1997 *Agostini* decision, the Court reversed that ruling. The Court noted that its “Establishment Clause jurisprudence ha[d] changed significantly” since the mid-1980s. (See online Legal and Policy Backgrounder #1).

In another effort to reach out to religious communities, then-secretary of the Housing and Urban Development Department Henry

Cisneros established a program within that agency called the “Religious Organizations Initiative.” Cisneros’ saw religious and other community organizations as key to the development of affordable and adequate housing.

In 1997 the new Secretary of Housing and Urban Development (HUD), Andrew Cuomo, established HUD’s Center for Community and Interfaith Partnerships. According to the late Father Joseph Hacala, who directed the center, its objectives were to listen to community and religious groups, educate them about the department’s activities and resources, and build partnerships with them when possible. Hacala said that HUD administered almost \$1 billion in assistance to community and faith-based organizations in fiscal year 2000 and made 230 grants to religious providers of homeless services and a similar number to groups working with people with HIV/AIDS. Hacala noted that the HUD center sponsored eight regional conferences on these issues, and it created a guide on best practices and sources of funding.

President Clinton signed into law other measures that included some version of the charitable choice provision, including the reauthorization of the Community Services Block Grant (CSBG). In 1998, the Clinton administration issued a signing statement to accompany this bill, noting that the Department of Justice advised that the CSBG provision would be unconstitutional to the extent it was interpreted to allow government funding to flow to “pervasively sectarian” organizations “as that term has been defined by the courts.” The Clinton administration thus construed the provision to forbid government funding of such entities and “as permitting Federal, State, and local governments involved in disbursing CSBG funds to take into account the structure and operations of a religious organization in determining whether such an organization is pervasively sectarian.”

In late 2000, Clinton signed two bills containing charitable choice provisions for sub-

stance abuse and mental health services. By the time President Clinton signed these bills, the Supreme Court had handed down another important decision, *Mitchell v. Helms*, that further loosened Establishment Clause restrictions on government funding and religious institutions and activities. The Court issued its decision in the *Mitchell* case on June 28, 2000. While six justices on the Court supported the ruling in the case, they fractured badly over the reasoning that supported the result. Four justices, Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas, took a much narrower view of the Establishment Clause than Justices O'Connor and Breyer, who concurred in the judgment in this case. (See online Legal and Policy Backgrounder #2).

The 2000 *Mitchell* decision caused the Clinton Justice Department to retool some of its positions in this area. When President Clinton signed the laws containing charitable choice provisions in the wake of the *Mitchell* decision, he attached a revised signing statement. It differed from his administration's earlier signing statements in important respects. Most prominently, after the *Mitchell* decision, the Clinton administration abandoned use of the term "pervasively sectarian." Instead, it said religious organizations were eligible on the same basis as nonreligious organizations for Substance Abuse and Mental Health Services Administration (SAMHSA) grants. Harkening back to one of the two definitions of "pervasively sectarian," however, the signing statement also said that "[t]he Department of Justice advises . . . that this provision would be unconstitutional to the extent that it were construed to permit governmental funding of organizations that do not or cannot separate their religious activities from their substance abuse treatment and prevention activities that are supported by SAMHSA aid." Thus, the signing statement noted, government officials should construe the law to bar the funding of such organizations.

Part Two

The 2000 Election and the George W. Bush Years (2001–2008)

During the election of 2000, both presidential candidates explicitly embraced the concept of charitable choice. Vice President Gore announced his support for the idea in a speech delivered on May 24, 1999. Gore proposed a “new partnership” that would help clear bureaucratic hurdles in the way of religious social service providers. He referred favorably to charitable choice.

At the same time, Gore also set forth some “clear and strict safeguards.” He emphasized that there must always be a secular alternative for those who wanted one and that no one should be required to participate in religious activities in order to receive government services. Gore stressed that “government must never promote a particular religious view,” and that “we must continue to prohibit direct proselytizing as part of any publicly funded efforts.” Accountability for results was crucial for Gore. He called for more nongovernmental support of religious organizations and declared his belief that the “separation of church and state has been good for all concerned — good for religion, good for democracy, and good for those who choose not to worship at all.”

On July 22, 1999, then-Governor George W. Bush made a similar speech on the campaign trail in Indianapolis, Indiana. As governor of Texas, Bush had been an ardent promoter of charitable choice at the state and local level. He implemented the federal law and formulated his own Faith in Action plan for Texas. In Bush’s presidential campaign, he touted his record on these issues and sketched a plan of action for the White House. His efforts in this area lay at the heart of his call for “compassionate conservatism.”

In his 1999 speech, Bush promised that his administration would “never ask an organization to compromise its core values and spiritual mission to get the help it needs.” Bush not only promised to “expand charitable choice” by applying it to all federal laws that authorized the government to work with nongovernmental entities to provide social services, but also pledged to remove other “barriers” to “faith-based action.” Bush cautioned that his administration would make sure “that participation in faith-based programs is truly voluntary” and that “there are secular alternatives.” He also vowed to dedicate about \$8 billion to his initiative — \$6.3 billion in tax incentives and another \$1.7 billion per year in new funding for federal social service programs. He promised to allocate another \$200 million for a Compassion Capital Fund, which would provide technical assistance and small grants to nongovernmental social service providers. Bush pledged to “value effectiveness above red tape and regulation,” and promoted alternative licensing regimes that would “recognize religious training as an alternative form of qualification.” He said he would accomplish all this by establishing an Office of Faith-Based Action in the executive office of the president, and encouraging similar state offices by providing federal matching funds for this purpose.

In 2001, President Bush began to make good on these promises. He opened the new White House office with much fanfare, although the name had changed a bit. It became the White House Office of Faith-Based and Community Initiatives (OFBCI), created through an executive order on January 29, 2001. The order acknowledged that government could not be replaced by religious and other community organizations, “but it can and should welcome them as partners.” The focus should be on results, the executive order said, and the government “should value the bedrock principles of pluralism, nondiscrimination, evenhandedness, and neutrality.” According to the executive order, the job of the OFBCI was to set policy, priorities and goals by developing and coordinating the administration’s

agenda on these issues, implementing it across the federal government, coordinating public education, and working with state and local policymakers. President Bush named Professor John Dilulio, a highly respected scholar and activist in this area, as the first director of this new White House office.

On the same day, the Bush administration issued another executive order creating Centers for Faith-Based and Community Initiatives in five federal agencies: the Departments of Justice, Education, Labor, Health and Human Services, and Housing and Urban Development. These centers would coordinate the efforts of each department to eliminate obstacles to the participation of faith-based and community groups in delivering government-funded social services. The order charged each of the centers with doing 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” and submitting a report on these issues to the OFBCI within 180 days.

Early in the Bush administration, and contrary to the wishes of the first director of the OFBCI, the White House and House of Representatives began an effort to pass legislation in this area. (See online Legal and Policy Backgrounder #3). When its legislative exertions hit a roadblock, the administration turned its focus to actions it could take unilaterally — promulgating executive orders, making corresponding administrative rule changes, holding White House conferences and events, and establishing additional centers of faith-based and community initiatives within various federal agencies.

In August 2001, the OFBCI released the report that the earlier executive order had mandated. Entitled *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*, the report asserted there was “a widespread bias against faith and community-based organizations in Federal social service programs” and declared that very few federal programs had been evalu-

ated as to whether they produced results for people in need. Upon the publication of this report, the first director of the OFBCI, John Dilulio, left to return to academia, having fulfilled the six-month obligation he made at the beginning of the Bush term.

“When its legislative exertions hit a roadblock, the administration turned its focus to actions it could take unilaterally...”

The next major milestone in the operation of the OFBCI was the issuance of another executive order in December 2002 on a range of church-state issues connected to financial partnerships between religious service providers and the federal government. The section of the executive order entitled *Fundamental Principles and Policymaking Criteria* became the template for scores of regulations promulgated in subsequent years across an array of federal agencies. Generally speaking, this section of the executive order hews closely to the basic principles of charitable choice, but there are some significant alterations and additions.

For example, like charitable choice, the Bush executive order insisted that all religious organizations be permitted to compete for federal social service funds. The December 2002 executive order also promised religious organizations that they could receive federal funds while also “retain[ing] [their] independence” from government, including the ability of organizations to control “the definition, development, practice and expression of [their] religious beliefs.”

Like charitable choice, the Bush order prohibited organizations receiving government aid from discriminating against beneficiaries on the basis of religion, although it did not require that beneficiaries be notified of their rights. Unlike some versions of charitable choice, the Bush principles did not guaran-

tee an alternative provider for beneficiaries who requested one.

The December 2002 executive order also set up a regime of different treatment of direct aid and indirect aid. According to the executive order, “direct Federal financial assistance [may not be used] to support any inherently religious activities, such as worship, religious instruction, or proselytization.” While charitable choice did not use the term “inherently religious activities,” it did prohibit the use of direct federal funds for “sectarian worship, instruction, or proselytization.” Both the Bush faith-based initiative and charitable choice quite purposefully did not place any similar bar on the use of indirect aid, such as vouchers or certificates.

One significant difference between charitable choice and the Bush initiative is that Bush required organizations offering privately funded “inherently religious activities” to separate those religious activities “in time or location from any programs or services” subsidized with direct aid. The Bush rule also said that participation in religious activities must be voluntary for social service beneficiaries. This constituted an important step away from the charitable choice model and toward greater protection for beneficiaries’ religious liberties. It recognized that government must prohibit the use of direct funds to advance or endorse religion.

The Bush administration followed charitable choice’s lead on employment discrimination on the basis of religion with regard to government-funded jobs. And it used many other approaches to advance its view. For example,

- The Bush administration included this policy in scores of new regulations.
- It amended a 1965 executive order on discrimination in government contracting to carve out an exemption that allowed religious organizations to engage in religious discrimination with regard to jobs subsidized by government contract funds.

- It issued a publication entitled *Protecting the Civil Rights and Religious Liberty of Faith-based Organizations: Why Religious Hiring Rights Must be Preserved*.
- The Bush administration launched a campaign to amend laws that prohibited all social service providers from making religion-based distinctions in government-funded employment. It proposed to exempt religious organizations from this requirement.
- When its attempts to amend these laws were unsuccessful, the Bush Department of Justice issued a determination saying it had “concluded that the Religious Freedom Restoration Act (RFRA) is reasonably construed, on a case-by-case basis, to require that its funding agencies permit faith-based organizations (FBOs) both to receive federal funds and to continue considering religion when hiring staff.” The Bush Justice Department said this was true even when a statute contained an explicit non-discrimination provision that prohibited religious and other nongovernmental organizations from discriminating on the basis of religion in government-funded jobs.
- The Department of Justice filed an *amicus curiae* brief on behalf of a religious social service provider in a case involving discrimination on the basis of religion for jobs subsidized by direct government aid.

Some of these issues are discussed in more detail in Part Three of this paper.

In another December 2002 executive order, the administration created two new centers for faith-based and community initiatives in the Department of Agriculture and the Agency for International Development. This executive order was followed by two more — one in June 2004 and another in March 2006 — creating faith-based centers in the Departments of Commerce, Veterans Af-

fairs, Homeland Security and the Small Business Administration.

In February 2006, the Roundtable on Religion and Social Welfare produced a report that examined the recipients of discretionary grant awards made by the federal government as part of the Bush faith-based initiative during the years 2002 - 2004. The report noted that “[t]his period coincided with a time of significant reductions in total spending under these federal discretionary programs.” It determined that “[w]hile the number and share of grants made to [faith-based organizations (FBOs)] increased [during these years], and the share of total funding under these programs going to FBOs was relatively stable, the total value of grants to FBOs declined.” It also found that “overall results looking across nine federal agencies show a decrease in the share of funding and awards made to small faith-based organizations.”

In March 2006, the Bush administration released its own data based on a review of more than 23,000 grants provided by the U.S. Departments of Health and Human Services, Housing and Urban Development, Justice, Labor, Education, and Agriculture, and the U.S. Agency for International Development. These data focused on whether religious social service providers received funding increases under the Bush administration. According to its report, the Bush administration increased awards to faith-based organizations from \$2.004 billion in grants in FY 2004 to more than \$2.1 billion in competitive grants in FY 2005. It also said that, since 2003, these agencies had seen a 38 percent increase in the number of grants to faith-based groups, an increase of more than \$239 million. The Bush administration claimed that faith-based organizations were “[c]onsistently winning a larger share of competitive funding.” These findings did not address the issue of whether there was an overall increase or decrease in money invested in social services during these years.

David Kuo, a former official in the White House Office of Faith-Based and Commu-

nity Initiatives, addressed some of these issues in his book *Tempting Faith*, a reflection on the years he spent working for the president’s faith-based program. Kuo criticized the White House for failing to deliver new money for social service programs. It borrowed from some programs to pay for others, spun budget baselines, and subdivided certain funds into smaller grants, Kuo said. Kuo saw the White House as sacrificing tax measures that would have benefited charitable endeavors and described instances of religious bias in the award of social service grants.

The White House responded by denying political bias in its grant making, pointing to a study by the Joint Center for Political and Economic Studies concluding that most of the money from the faith-based initiative had gone to “blue states.”

Toward the end of its time in office, the Bush White House claimed “remarkable progress” in its efforts to date. It noted in a report in February 2008 that it had brought about “sixteen agency-level rule changes and a myriad of smaller scale policy reforms...” The report also said that 35 governors, 19 Democrats and 16 Republicans, had offices or liaisons “dedicated to strengthening faith-based and community organizations and extending their work within the community,” and that more than 100 mayors had similar offices or liaisons. At the time the report was written, the White House said over 100,000 Americans had received in-person training and technical assistance, and many more had received such information and assistance through webinars and teleconferences. The OFBCI claimed credit as well for increasing the number and type of “measurement mechanisms” that could be used to evaluate governmental policy in this area.

In June 2008, the Bush administration hosted a research conference that produced a set of scholarly papers on a variety of subjects related to the faith-based initiative. In connection with this conference, the White House Office of Faith-Based and Commu-

nity Initiatives established a Web site that serves as a clearinghouse for research on evaluation and best practices in the field.

The 2008 Presidential Election

Barack Obama announced his plan for government partnerships with religious and neighborhood-based social service organizations on July 1, 2008. Noting that his work as a community organizer had been financed by the Catholic Campaign for Community Development, Obama declared his view that “change comes not from the top-down, but from the bottom-up, and few are closer to the people than our churches, synagogues, temples, and mosques.”

While criticizing aspects of President Bush’s initiative and scoring the administration for having “underfunded” programs for “the poor and the needy,” Obama went on:

I still believe it’s a good idea to have a partnership between the White House and grassroots groups, both faith-based and secular. But it has to be a real partnership — not a photo-op. That’s what it will be when I’m President. I’ll establish a new Council for Faith-Based and Neighborhood Partnerships. The new name will reflect a new commitment. This Council will not just be another name on the White House organization chart — it will be a critical part of my administration.

Now, make no mistake, as someone who used to teach constitutional law, I believe deeply in the separation of church and state, but I don’t believe this partnership will endanger that idea — so long as we follow a few basic principles. First, if you get a federal grant, you can’t use that grant money to proselytize to the people you help and you can’t discriminate against them — or against the people you hire — on the basis of their religion. Second, federal dollars that go di-

rectly to churches, temples, and mosques can only be used on secular programs. And we’ll also ensure that taxpayer dollars only go to those programs that actually work.

With these principles as a guide, my Council for Faith-Based and Neighborhood Partnerships will strengthen faith-based groups by making sure they know the opportunities open to them to build on their good works. Too often, faith-based groups — especially smaller congregations and those that aren’t well connected — don’t know how to apply for federal dollars, or how to navigate a government website to see what grants are available, or how to comply with federal laws and regulations. We rely too much on conferences in Washington, instead of getting technical assistance to the people who need it on the ground. What this means is that what’s stopping many faith-based groups from helping struggling families is simply a lack of knowledge about how the system works.

Obama’s address was significant because it was part of a series of speeches attempting to redefine the relationship of religious faith to politics and public life. He declared that faith had a robust role to play in public life and insisted upon respect for believers. But he also insisted on respect for non-believers and for church-state separation.

Senator John McCain said less about these issues than Obama did — and he noted that he and his opponent agreed on many of them. Unlike Obama, however, McCain gave unqualified praise to President Bush’s faith-based initiative, saying that Bush’s efforts in this area were “one of the more successful parts of the Bush administration.” More specifically, McCain said he would continue the Bush policy of allowing religious groups to make employment decisions on the basis of religion with regard to gov-

ernment-funded jobs. This created an important point of contrast between the candidates, particularly for some of the more conservative advocates of President Bush's approach. While this issue never played a large role in the public debate, it simmered beneath the surface as both sides campaigned hard for the affections and allegiances of religious voters. The next president would do well to keep these tensions in mind. Building a new consensus and creating the new balance the incoming president is clearly seeking will require both adherence to principle and sensitivity to the fears as well as the hopes that animate all sides of this debate.

Part Three

Looking Forward: Recommendations for the New Administration

What should the incoming administration's policies be on social service partnerships between the government and religious and other nongovernmental organizations? How should the new administration institutionalize its policies? The following section provides recommendations on what we see as some of the most important questions that cut across this field.

Recommendation One:

Welcome Religious Organizations to Partner with Government

The federal Constitution certainly allows the government to form social service partnerships with religious groups, whether financial or nonfinancial. In one form or another, these partnerships have been part of the country's fabric for many years.

President-elect Obama has concluded that continuing these partnerships is good public policy. There are at least three reasons why government should welcome them.

The first is fairness. The government works with a wide range of nongovernmental organizations to achieve secular ends in the social service arena. If religious organizations wish to compete for government funding and are willing to abide by the relevant rules, there is no valid reason to bar them from seeking funds available to other nongovernmental groups. And when religious organizations wish to form similar nonfinancial relationships with government, there is no legitimate reason to exclude them from such partnerships, either.

If other nongovernmental organizations have particular strengths in reaching and serving certain populations, so do religious organizations. The church has played a crucial role in the African-American community

for centuries. In the days of slavery and racial segregation, the church was often the only institution in society over which the black community enjoyed a considerable degree of control. African-American churches have served not only as centers of worship and ministry but also as trusted sources of information about society and government. As a result, African-American churches often have unique standing and reach within their communities.

More broadly, religious organizations often have the ability to tap "financial and human capital in the form of donations and volunteers from associated congregations," as Chris Pineda wrote in a paper published by Harvard University's Kennedy School of Government. They frequently serve as "community and cultural anchors," Pineda noted, meaning they often function as hubs of community activities. These strengths — which, to be sure, also characterize many nonreligious organizations — are quantifiable in secular terms.

We hasten to add that the research does not establish that religious providers are, as a category, more successful than nonreligious providers as a category. The reverse is also unproven. Without doubt, some religious providers are among the best qualified for particular government grants using secular standards. When they are, they should receive those grants. When they are not, they should not.

The third reason government should welcome religious social service providers as partners rests on the long and productive history of these partnerships. A study published in 2003 by the Roundtable on Religion and Social Welfare found that "in at least 25 states there were longstanding relationships between state government and [religious social service organizations]." In many cases, the government simply could not accomplish its work without the help of religious groups.

Where eligibility for federal funds is concerned, the government must treat religious organizations in the same way it treats secu-

lar partners — not better and not worse. It is essential both to welcome religious providers and to insist on compliance with the First Amendment.

We are not advocating that more government assistance be distributed through a proxy system, whether through faith-based or secular groups, and less through direct government assistance. Our view is that the decision on whether services are best delivered by government or third parties should be made, service by service, on a pragmatic basis related to what works best. At the same time, the work of community groups, faith-based and secular, should be seen as part of a larger effort to promote bottom-up problem-solving that engages citizens in the work of self-government.

We also believe — though this issue is beyond the scope of this report — that it is time for the government to undertake a comprehensive study of the practice of contracting out government responsibilities. It is important to see where this process may have been abused and to determine which services are most usefully contracted out and which should be offered directly by government itself. We believe in a strong third sector of not-for-profit groups, including religious organizations. But some responsibilities are best undertaken directly by government itself. A comprehensive look at the entire contracting system could enhance public confidence in the work of government and the nonprofit sector alike.

Of course, saying the government should welcome partnerships with religious social service providers is not the same as saying religious providers should enter into these arrangements. There are risks for religious groups in working with the government, particularly in financial partnerships. For example, there are concerns about becoming dependent on government and being co-opted by it. Religious organizations should carefully consider these issues as they entertain the notion of seeking government funds. Religious bodies should make these decisions for themselves.

In sum, the incoming president should mobilize a coalition of the willing, including willing religious organizations, to meet needs, whether through financial or nonfinancial partnerships with government. That mobilization should keep faith with the unique American commitment to religious freedom for all.

Recommendation Two: **Increase Funding for Programs that Work**

The current financial crisis will put new pressure on government, and especially on social service programs. Nevertheless, current circumstances should prompt government to move quickly to assist those most threatened by the economic downturn. The incoming administration must take steps to strengthen the social safety net. An administration cannot claim to be compassionate while it makes deep cuts in effective social service programs — some of which finance the work that religious and other nongovernmental groups do.

The next administration needs to make the case against the flawed notion that government can be replaced by private charity. As John Dilulio has noted: “Even if every religious congregation in America, over 350,000 strong, gave every penny it collected each year to health and human services for people in need (forget keeping the heat on in the church or fixing the organ), the total would still be billions of dollars short of what the federal government alone spends each year on these services.” The need for both more compassionate and more effective government should be a high priority for an administration taking office in the wake of the Katrina disaster.

The incoming administration must demonstrate a serious dedication to distinguishing between effective and ineffective interventions. As Olivia Golden, a former agency leader during the Clinton administration has said, “It is not good enough to simply involve religious groups in the provision of social services.” Instead, we must ask questions such as: How well are particular religious

organizations matched to the need at hand?
Are they accountable for government funds?
Are they producing results?

A rich body of research has developed on the effectiveness of social service programs and grantees, but this research is not without its difficulties. As Professors Stephen Monsma and Christopher Soper have said, “[t]o specifically identify the contribution of any particular organization, or sector of organizations, toward measurable improvement in the lives of individuals is tricky business indeed.” Yet, as Monsma and Soper conclude, developing tools that accurately and thoughtfully measure effectiveness in the delivery of social services is essential.

Monsma and Soper also note that it makes little sense to try to demonstrate that religious organizations are better or more effective on the whole than nonreligious organizations. They conclude:

Our experience as social science researchers indicates that we would be very unlikely to find that a certain type of program — whether faith-based, government run, for-profit, or nonprofit — is generally effective or ineffective across the board. In the social science field at least, the real world is rarely that simple and unidimensional.

President-elect Obama should steer clear of unproductive conversations about whether religious or nonreligious entities are categorically better.

Like the last administration, the incoming administration has indicated an interest in overcoming obstacles that often thwart the ability of smaller community and faith-based organizations to compete for government funding. President-elect Obama has suggested that many of these groups have clear strengths in providing social services, yet often lack the tools to be effective competitors for government funds. As the Obama administration works to open doors to these groups, it should see to it that the efforts of

these organizations are evaluated in appropriate ways.

More broadly, President-elect Obama has promised that all government-funded social service programs — religious and secular — would be evaluated for effectiveness. Again, the rule should be clear: religious providers should not be held to a higher standard of effectiveness, but neither should they be held to a lower standard. Once completed, those evaluations should, as much as possible, be made public so that they can be subject to wide discussion and vigorous debate.

Recommendation Three: *Use the Tools of Both the Executive Branch and Congress to Create a Consensus for a Durable Policy*

The incoming administration should revise existing federal policies on social service partnerships between the government and religious providers with an eye toward correcting certain constitutional deficiencies in current rules. It should make applicable rules as clear and practical as possible for social service providers and create maximum predictability and stability in law and policy. A core goal should be to promote an appropriate accommodation of religion — religious entities do have a right to preserve their essential character — while also safeguarding a sensible separation between church and state. In certain areas, we believe a new administration can build upon what the last administration did. In other areas, we believe reforms are in order.

Because the faith-based program has become so controversial, the process through which changes are made could be as important as the changes themselves. We believe the new administration should make essential changes while causing as little disruption as possible to existing partnerships that work.

More broadly, it is important to consider whether the new president should promote his agenda simply by amending the relevant Bush executive orders and calling for corre-

sponding regulatory reform, or seek another path. He could revise existing policies by working with Congress to put new principles in legislation. Or he could begin with some essential revisions in the Bush policies through executive order while also calling for legislation to establish the broad lines of policy for the future.

We believe the last course is the most promising. While we favor certain immediate changes in policy, we believe a legislative solution has the best chance of being durable. It is unfair to expect social service providers to adjust to a new set of policies in this area with each new president. Flip-flopping from one regulatory regime to another every four or eight years is confusing and costly, both for providers and taxpayers. Providers should concentrate on their work, not on the imperative of learning new rules whenever a new president enters the White House. The executive and legislative branches should work together to enact changes in policy rooted in broad consensus.

We also believe the legislative path is — despite its messiness — more open and accessible to average citizens. It is certainly true that the legislative process sometimes lacks transparency. But uses of executive and administrative power are typically more opaque. The Bush administration's focus on executive and administrative changes created an environment in which some damaging allegations of partisan abuse and religious bias have been left to linger without any government-led inquiry or investigation. Going back to Congress on this issue is the first step toward remedy.

Moreover, the legislative process typically offers more opportunities for give-and-take, evidence gathering, an exchange of views and deliberation than do executive rule-makings. Again, we are under no illusions about Congress, and it is certainly true that no hearings were held on the charitable choice provision in the 1996 welfare reform package before it became law. But when the legislative path works properly, and particu-

larly when public hearings are part of the process, legislators and the public have the opportunity to hear diverse voices and perspectives.

“[T]he question of how the government and religious groups should partner...does not cleanly separate people by political party, religion, denomination, or ‘seriousness’ about their faith commitments.”

More and better deliberation is badly needed because the question of how the government and religious groups should partner in the provision of social services involves balancing a number of core values. It does not neatly divide Americans into diametrically opposed camps. It does not cleanly separate people by political party, religion, denomination, or “seriousness” about their faith commitments.

President Bush set forth his faith-based initiative with much fanfare, and parts of that initiative were admirable. But too often the administration oversimplified the issues and refused to recognize good faith differences. After the six months of John Dilulio's tenure as head of the faith-based office, the administration rarely invited those with different views on church-state issues to play any significant role in the many roundtable discussions and conferences it sponsored. This heightened the lack of trust among stakeholders and stunted our national understanding of the controversies. There is much common ground in this area. But when the executive branch controls the agenda and keeps those who have concerns about parts of it at bay, it does not serve the cause of enlisting all who would help those in need. The new administration can and should do better here.

The Bush administration made some attempts to engage the legislation process early in its first term. It got off on the wrong foot in this arena, however, by acquiescing to an aggressively partisan approach in the House of Representatives in 2001. The new administration should set a different tone from the start.

During the campaign, Barack Obama promised to establish a new President's Council for Faith-Based and Neighborhood Partnerships within the White House. Obama said the Council "will work to engage faith-based organizations and help them abide by the principles that federal funds cannot be used to proselytize, that they should not discriminate in providing their services, and they should be held to the same standards of accountability as other federal grant recipients." As president, Obama should task this group with launching a consensus process to fashion proposed federal legislation on the relevant issues. The process should engage those of diverse views, hold hearings, gather evidence and foster constructive debate. Once this process is complete, the body could send proposed consensus legislation to Congress for hearings and further debate.

It's true the Obama administration would preserve maximum flexibility by pursuing a strategy involving executive orders and regulatory changes. But after eight years of contention and division, we believe a process that highlights the search for consensus holds more promise.

Recommendation Four: **Clarify Restrictions on Direct Aid and Religious Activities**

Bush administration policies prohibit the use of direct government aid for "inherently religious activities, such as worship, religious instruction or proselytization." As Professors Ira "Chip" Lupu and Robert Tuttle have noted, however, the Supreme Court's use of the term "inherently religious" has not indicated the boundary of what the government may subsidize with direct aid. "If understood too narrowly," Lupu and Tuttle have said,

"the [Bush] regulatory proscription on direct government financing of religious instruction significantly understates" the relevant constitutional principle.

In contrast to the Bush standard, the Court has determined that the government cannot directly subsidize "a specifically religious activity in an otherwise substantially secular setting." This terminology is fairly interpreted to mean any explicitly religious activity, including any activities that involve explicit religious instruction, devotional exercises, worship, prayer, and evangelism. It would not include, however, serving meals to the needy, teaching children to read, and training the unemployed in a trade. All of the latter activities may be profoundly religious for some, even if an outsider would not recognize them as having religious content. Their religious content is implicit rather than explicit. As long as this is true, such activities may be funded directly by government.

Thus, the next administration should advocate rules that prohibit the use of direct aid to subsidize "explicitly religious activities." Accompanying materials should use examples to explain what the term "explicitly religious" means and note that any explicit religious content must be privately subsidized and offered separately, in time or location, from programs funded by direct government aid.

Recommendation Five: **Protect the Identity of Religious Providers**

The next administration should take steps to protect the identity of religious providers that receive government funds. This would keep faith with the dictates of the First Amendment and a tradition that encourages government to accommodate religion but not endorse it. The Obama administration should protect the ability of religious organizations that receive government funds to provide services in rooms or buildings where religious symbols or scriptural passages are displayed, to retain religious terms in their organizational names, to select board mem-

bers on a religious basis, and to include religious references in their mission statements and other organizational documents. Trying to limit the number and type of religious symbols in a building or change the name of an organization could require the government to reach beyond the government-funded program. Rather than taking this intrusive step, the administration should address any concerns in this area by working diligently to strengthen protections for the religious liberty rights of beneficiaries.

Like the Bush administration, the new administration should continue the policy of allowing religious providers that receive direct aid to offer privately funded religious activities as well, as long as those activities are separated from government-funded activities by time or location and are purely voluntary for beneficiaries. This provides a constitutionally sound way for religious providers to claim and retain their religious identity and practices while also administering government-funded programs properly. More broadly, the incoming administration should ensure that the regulation that follows federal funds does not affect matters beyond the boundaries of the government-funded program.

In sum, religious organizations that receive government funding for a certain purpose do not have to stop being religious organizations. They do not have to end or alter activities situated outside government-funded programs. Religious organizations should be free to be religious even as they respect the rules that apply to government-funded programs.

Recommendation Six:
Provide Guidance on Separation between Religious Activities and Activities Funded by Direct Government Aid

The Obama administration should direct the Department of Justice to draft clear and practical guidance on the required separation between activities funded by direct government aid and any privately funded religious activities. All relevant federal agencies

should adopt and disseminate these instructions. If a provider cannot or will not agree to such separation, it should not seek or receive direct government aid.

Guidance on these issues is needed in part because there is evidence that some religious providers are confused about the requirements. In 2006, for example, the General Accounting Office found that all 26 of the religious social service providers it interviewed said they understood this prohibition, but it also found that four of the providers acted in ways that appeared to violate that rule. Further, Professors Lupu and Tuttle noted in 2005 that “[a]most all of the lawsuits challenging aid to [faith-based organizations] have involved faith-intensive social services, and each decision in these cases has reaffirmed the principle that direct public aid may not be used for social services with that character.”

When it announced in its separation requirements regarding privately funded religious activities and government-funded activities in its December 2002 executive order, the Bush administration created a new and important policy. It should have spent as much time explaining and educating providers about this provision as it did promoting its policy on employment. The latter topic merited the production of a nine-page booklet by the White House in June 2003 as well as detailed opinions and at least one court appearance by the Department of Justice. In contrast, the White House only offered a brief description of the separation requirement in a December 2002 publication. Finally, after a lawsuit highlighted a clear violation of this requirement by a religious provider, the federal agency responsible responded in a helpful, albeit relatively low-key way.

The Department of Health and Human Services (HHS) released a document entitled *Safeguards Required*. The document notes that any program “with religious content must be a separate and distinct program from the federally funded...program, and the distinction must be completely clear to the

consumer.” The guidance says “all religious materials” should be eliminated from programs funded by direct aid. Further, if the government program and the religious program are separated by time rather than location, the document says, “one program must *completely* end before the other program begins.” The document also declares that in such cases, participants from the government program should be dismissed and an interval should occur before any privately funded religious activities commence. The HHS guidance states that the provider may issue an invitation to beneficiaries to attend the privately funded religious activities, but “[t]he invitation should make it very clear that [the religious activities are] a separate program from the federally-funded...program, that participants are not required to attend, and that participation in federally-funded programs are not contingent on participation in other programs sponsored by the grantee organization.” Additionally, the guidance provides examples of other ways in which the government-funded program and privately funded religious activities may be differentiated, including developing different names for the programs and different promotional materials for them. Such detailed and practical guidance, along with widespread training and sensible monitoring, is absolutely essential.

Confusion about the separation rules was apparently more acute among subawardees under the Compassion Capital Fund (CCF), according to Dr. Fredrica Kramer and colleagues at the Urban Institute. (The CCF is a special discretionary federal program administered by the HHS. It finances nongovernmental intermediary organizations to provide training and technical assistance to smaller social service providers and allows those intermediaries to make small subawards to nongovernmental providers.)

A 2005 Urban Institute report found that in the case of one awardee “Bible study and church attendance were mandatory components of a reentry program for ex-offenders aimed at personal transformation that had received a [Compassion Capital Fund]

subaward.” More generally, the Urban Institute researchers concluded: “Our observations suggest that some [CCF] subawardees operate programs that are more faith-infused than programs operated by traditional faith-based social service providers, and may need to be sensitized to the boundaries of religiosity that apply to publicly funded programs.” This raises an important point: constitutional limits do not disappear because an organization gets a subaward from an intermediary.

According to campaign materials, the Obama administration plans to use hundreds of intermediaries “to train thousands of local faith-based and community-based organizations on best practices, grant-making procedures, service delivery and limitations.” The continued emphasis on intermediaries is a welcome one for service providers like Esperanza, according to the Rev. Danny Cortes, who serves as executive vice president and chief of staff of the organization. Cortes describes the use of intermediaries as “essential” to the delivery of services and the management of smaller providers. This underscores the need for training to emphasize the constitutional obligations of both intermediaries and subawardees with respect to direct government aid.

Recommendation Seven: **Strengthen Protections for Beneficiaries’ Religious Liberty Rights**

Current administrative rules that apply to nongovernmental providers of government-funded social services require religious providers to refrain from discriminating against social service beneficiaries “on the basis of religion or a religious belief.” This is the right policy, but protections for the religious liberty rights of beneficiaries need to be strengthened.

First, the new administration should ensure that social service beneficiaries have the right to an alternative provider if they object to the religious character of the provider offering services to them. This alternate pro-

vider should be equally valuable and accessible to the beneficiary. While these guarantees are explicit in the charitable choice provisions in the welfare reform and substance abuse programs, they do not appear in President Bush's 2002 executive order and do not apply to other federal programs. They should be incorporated in the new administration's executive order and federal legislation.

Second, steps must be taken to protect beneficiaries' right to refuse to participate — actively or passively — in any privately funded religious activities the provider offers separately from government-funded services. Better training on and monitoring of church-state safeguards are some of these steps.

Third, the new administration should require that beneficiaries be notified of their rights in this area. It is difficult for a beneficiary to exercise rights of which he or she is unaware. The charitable choice provisions that apply to federal substance abuse programs do require that beneficiaries be given this notice. The next president should insert similar language in an executive order and call for its inclusion in federal legislation and regulations. Such notices should be given to religious providers by the relevant governmental body as well as the government grantee. This belt-and-suspenders approach is appropriate in light of the importance of these issues and because social service beneficiaries are often fearful that exercising their rights might endanger their access to assistance. Requiring providers to give this notice could also create a teachable moment for providers and offer greater insurance against coercion along religious lines within the context of the government program.

Fourth, the next administration should encourage each state to establish an ombudsman whom social service beneficiaries could contact with questions and concerns about the services they receive, whether those questions relate to services provided by secular or religious providers. Marc Stern of the American Jewish Congress has sug-

gested that such an ombudsman could be particularly helpful in addressing church-state issues. In states where a social service ombudsman already exists, his or her office should be aware of the religious liberty issues at stake in these programs and should have the authority to address problems in the system. Contact information for the ombudsmen should appear in all notices given to beneficiaries.

Recommendation Eight: **Improve Monitoring of Compliance with Church-State Safeguards**

The government must monitor taxpayer funds to make sure they are used in appropriate ways. When an organization offers religious activities as well as activities funded by direct government aid, the Constitution requires the government to verify that there is a meaningful separation between the two. At the same time, the constitutional command against excessive entanglement between government and religion must be honored. Excessive entanglement would include things like "pervasive monitoring" by the government of a religious entity.

There is room between these two constitutional goalposts for sensible monitoring of church-state safeguards. For example, the Supreme Court has found that government review of educational materials and programs coupled with periodic site visits is a sound way of meeting constitutional requirements in this area. In the 2000 *Mitchell v. Helms* case, the Court found that the government discharged its responsibilities in a constitutional and effective manner when various levels of government that administered an educational program: 1) required participating religious schools to sign assurances that they would use state funds only for approved purposes; 2) conducted random reviews of materials used in the government programs; 3) required religious organizations to submit applications with project plans for approval; and 4) visited religious bodies once a year and conducted follow-up visits when necessary.

Accordingly, an effective and constitutional monitoring system in this area could include the following elements:

1. Grant documents that describe relevant church-state safeguards.
2. A requirement that all grantees sign assurances they will abide by applicable laws and policies. The assurances should spell out the relevant church-state safeguards.
3. Reporting documents that ask grantees to describe:
 - the method by which they separate any privately funded religious activities from programs funded by direct aid and steps they have taken that help beneficiaries understand they are not in any way required to participate in any privately funded religious activities, whether actively or passively;
 - steps they have taken so beneficiaries understand they have the right to obtain benefits from an alternate provider if they object to the religious character of their current provider;
 - how they use government funds.

These questions should appear on reporting forms required of all providers. If some of these questions are inapplicable because the provider does not offer privately funded religious activities, a provider would so note.

4. After receiving the reporting documents from the grantee, government employees would follow up with phone calls to discuss the reports. On-site visits would occur where necessary.

The Obama administration should also direct the Office of Management and Budget to include references to the church-state safeguards where appropriate in the audits of providers expending \$500,000 or more annually in federal funds. When audits of other providers occur, checking for compli-

ance with church-state safeguards should be a standard part of the process.

As a general matter, we believe it would be important for the next administration to speak of “church-state safeguards” or “religious liberty safeguards” rather than “equal treatment regulations.” Calling these regulations “equal treatment regulations” is misleading. The relevant rules require government to treat religion both equally and specially in this context. Some of that special treatment consists of particular limits on the use of government funds, and some of it involves particular accommodations for religious entities. These rules work together to protect religious freedom.

We understand there are limits to government’s ability to monitor every program it funds. Moreover, government monitoring of programs that offer privately funded religious activities separate from government-funded activities should not be pervasive, and these programs certainly should not be harassed. On the other hand, the limits on government’s ability to monitor programs underscores why it is so important for the church-state rules governing these programs to be clear in the first place. And it is a reminder that beneficiaries who complain about religious rights violations should be able to count on having their complaints taken seriously.

Recommendation Nine: **Address Religion-Based Employment Decisions in Government-Funded Jobs**

The most contentious debate related to social service partnerships between the government and religious organizations is over whether the government must or may permit religious bodies to make employment decisions on the basis of religion with regard to government-funded jobs. Indeed, even the words used to discuss these issues are contested. Those who favor policies that would prohibit religious providers from making religion-based decisions when jobs are financed with government funds talk about “religious discrimination.” Those who favor policies that would allow religious providers

to prefer job applicants within their denomination or tradition speak of “permitting religious employers to take religion into account” in government-funded jobs. While we have tended to use the term “discrimination” in this section for reasons of economy, we have also referred to “taking religion into account” in an effort to acknowledge both views.

President-elect Barack Obama said during the campaign that “[r]eligious organizations that receive federal dollars cannot discriminate with respect to hiring for government-funded social service programs.” This statement is straightforward, yet it still leaves some complex issues for the Obama administration to address. To assess this issue, the incoming administration will need to consider federal constitutional, legal and policy principles.

We offer more detail on this recommendation than on most of the others for a simple reason: this is the issue on which both supporters and critics of these programs are most likely to dwell. There are principled reasons for this. Some believe that any job discrimination on the grounds of religion in government-funded programs is unacceptable. Others believe that religious organizations should be exempted from religious nondiscrimination conditions on aid because the application of these rules to religious organizations would so alter their religious character. Still others fall somewhere in between these two camps. (See online Legal and Policy Backgrounder #4).

This is a serious debate. But we worry that the passions surrounding this issue could be exploited for narrow political purposes. This single argument could overwhelm many other concerns that are important to the programs involved and to the individuals they help. It is also an issue about which we could profit from gathering more information.

Religious Discrimination in Government-Funded Jobs: Some Constitutional and Legal Issues

The Supreme Court has never addressed the specific issue of whether it is constitutional to allow religious organizations to engage in employment discrimination on the basis of religion for government-funded jobs, and there are differences among constitutional scholars on these issues. (See online Legal and Policy Backgrounder #5). The Court has ruled, however, that it is constitutionally permissible for Congress to attach nondiscrimination conditions to government funding, even to funding received by religious organizations. In the 1984 case of *Grove City v. Bell*, the Supreme Court rejected a religious college’s arguments that conditioning federal financial assistance on compliance with gender nondiscrimination provisions infringed the First Amendment rights of the college and its students. The Court found that this argument merited “only brief consideration.” It said: “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that [recipient institutions] are not obligated to accept.” The Court noted that the college could refuse to participate in the program and thereby avoid any requirement to comply with the statutory nondiscrimination requirements. Thus, the Court concluded that mandating compliance with nondiscrimination conditions on certain federal funds did not violate any of the college’s First Amendment rights or those of its students.

The Bush administration argues that requiring religious organizations to abide by religious nondiscrimination obligations in government-funded employment would at least sometimes conflict with the demands of the federal Religious Freedom Restoration Act (RFRA). RFRA reflects a more expansive interpretation of free exercise principles than the Court currently recognizes. The statute requires the federal government to justify substantial burdens on religion with a narrowly tailored compelling governmental interest. In other words, this federal statute states that, when a claimant demonstrates his religious exercise has been substantially burdened by the government, the government must prove that such a burden is the unavoidable result of its pursuit of a compel-

ling government interest, such as health or safety. With respect to the application of RFRA to this issue, the debate focuses first on whether a refusal by government to allow religious organizations to use direct aid to subsidize job positions that are religiously restricted constitutes a substantial burden. If a religious organization cannot demonstrate a substantial burden on its religious exercise, then its claim fails. Because the Bush administration's interpretation of RFRA is so significant to the employment issue and could have wider implications, it is worth taking a closer look at the Bush Department of Justice's 2007 opinion on this matter.

“We offer more detail on this recommendation than on most of the others for a simple reason: this is the issue on which both supporters and critics of these programs are most likely to dwell.”

In a memorandum opinion dated June 29, 2007 and released in October 2008 from John Elwood, the Justice Department's deputy attorney general, the Bush administration considered a grant to an evangelical group known as World Vision. The opinion indicates that the Office of Justice Programs awarded World Vision a \$1.5 million grant that represented approximately 10 percent of the entire budget of World Vision's "domestic community-based programs." The opinion states that the grant "would fund a portion of the salary and benefits of fourteen existing World Vision employees, each of whom would spend part of his or her time managing the Vision Youth Program funded by the grant." The opinion also notes that the grant would fund "all or part of the salary and benefits of eight World Vision employees" who were assigned to another initiative designed to keep teens from getting involved in gangs.

In order to receive the grant, the authorizing statute required World Vision to promise not

to discriminate on the basis of religion in "employment in connection with any programs or activity funded in whole or in part" by grant money. World Vision sought an exemption from that prohibition and received it as a result of the 2007 Justice Department opinion. The opinion argued that "RFRA is reasonably construed" to require the federal government to exempt World Vision from the nondiscrimination requirement of the Juvenile Justice and Delinquency Prevention Act of 1974. It claimed that doing otherwise would substantially burden World Vision's religious exercise and that the federal government had no compelling interest to justify such a burden.

It is certainly true that World Vision's provision of social services pursuant to this grant is a sincere exercise of that body's Christian faith. The Bush Justice Department was quite right to say the provision of social services that appears secular to the government "nevertheless may well be 'religiously inspired,'" and play an important part in the "furtherance of an organization's religious mission." This makes it constitutionally possible for the government to provide direct funding for such social services, even though they constitute sincere religious exercise. But neither the First Amendment's Free Exercise Clause nor RFRA require the government to fund such services. Even under its most expansive interpretation, the interpretation on which RFRA is based, the Court never read the Constitution's Free Exercise Clause to require the government to provide grants to subsidize the free exercise of religion.

To be sure, Congress modeled RFRA in part on cases in which the Court struck down the denial of unemployment benefits to employees dismissed because they refused to perform certain work that conflicted with their religious beliefs or obligations. While the Court found that the unemployment compensation benefits in these cases could not be denied, it mandated the extension of these funds for the subsistence of the unemployed worker. Endangering a person's ability to pay for food and housing is not the same as endangering the ability of a religious organization to receive a government grant. As Professor Michael Dorf has

explained, “unemployment benefits are a form of insurance, to which employers have contributed premiums on behalf of their employees, and so the withholding of such benefits may be more akin to a penalty than a pure failure to subsidize.” Even the Justice Department’s World Vision memo recognizes that “[t]he denial of a grant to an institution such as World Vision may not be as important as the denial of unemployment compensation to an individual...” The government is not required, either under the First Amendment or RFRA, to extend direct subsidies in ways that allow organizations to discriminate on that basis of religion with respect to government-funded jobs.

Religious organizations would always remain free to reject the funding and thus avoid any burden at all. There is a large and important difference between government regulation that a religious individual or entity cannot escape and regulation that only follows the willing receipt of government funds.

Some have argued that Congress intended with RFRA to block laws such as certain nondiscrimination conditions that follow government funds. In this same Department of Justice memo, the Department correctly notes that a July 1993 Senate Committee Report on RFRA said a provision of the measure “confirms that granting Government funding, benefits or exemptions, to the extent permissible under the establishment clause, does not violate the act; but the denial of such funding, benefits or exemptions may constitute a violation of the act, as was the case under the free exercise clause in *Sherbert v. Verner*.” What the Department of Justice memo does not report, however, is that another section of that very same Senate report states: “[P]arties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in *Sherber[t]*. The act does not, however, create rights beyond those recognized in *Sherbert*.” The *Sherbert* case involved a denial of unemployment compensation, a situation that is markedly different than a denial of a government grant or contract for the provision of social services.

Taking Religion into Account in Government-Funded Jobs: Some Policy Considerations

These matters must be considered not only as constitutional and legal matters but also as policy. There has long been broad support for the general policy of mandating equal opportunity in federally financed employment, regardless of religion or creed. This principle guards against the use of core convictions and sacred identities as screens to deny otherwise qualified people jobs in federally supported programs. Because religion is a category recognized for special constitutional protection, it has always been particularly easy to justify the inclusion of religion among those protected classes. Our country’s history has been marred by invidious discrimination based on religious identity, belief or practices, and this has often affected the livelihoods of individuals of minority faiths. Thus, the question becomes whether there are good reasons to deviate from this tradition when religious organizations receive federal financial assistance.

Carl Esbeck, Stanley Carlson-Thies, and Ron Sider, are among those who have argued that the rules should be different for religious groups. They insist that “[t]he terms of the government funding must be free of requirements that undermine the very religious character that inspires and animates faith-based organizations.” Allowing religious providers to prefer job applicants on the basis of religion for government-funded jobs, they argue, “is an essential element of this protection of institutional integrity.” Indeed, “[a] prohibition on religious staffing [in government-funded jobs] cuts the very soul out of a faith-based organization’s ability to define and pursue its spiritual calling, as well as its ability to sustain its vision over generations.”

Those who offer these arguments make a strong case that prohibiting religious discrimination with respect to certain jobs within a religious organization could seriously affect the religious group’s character. When government subsidies are *not* in-

volved, the answer is easy — the principle of religious autonomy certainly should control. When government grants are extended for programs, however, these values can no longer be viewed as the only values at issue. They must be weighed against others, including equal employment opportunity to federally financed jobs and an interest in the most qualified workforce in government-funded employment.

As Professors Alan Brownstein and Vikram Amar have argued, it is one thing to be denied a job within a religious community to which one does not belong. When one is denied a government-funded job, however, one is denied entrance to a community to which one does belong — the civic community. “It is a particularly egregious affront to one’s status in the community when religious organizations discriminate on the basis of religion in hiring staff for publicly-funded programs,” Brownstein and Amar say. “Here, individuals are denied employment, because of their religion, in government programs their own tax dollars were used to create.”

Some argue that exempting religious organizations from bans on religious discrimination in government-funded employment simply levels the playing field. On this point, they argue by analogy. They say environmental groups that receive government funds, for example, are permitted to make employment decisions in government-funded jobs based on the prospective employee’s commitment to the environment. The argument is that these groups would not hire someone who is hostile to environmentalism, and they do not have to do so, even when they make decisions about government-funded jobs. Therefore, Carl Esbeck says, “[t]o deny this same freedom to religious organizations would itself be discriminatory, not the promotion of a society where all are equal before the law.”

Yet Professor Martha Minow has noted that there is a distinction between government endorsement of a mission it sees as secular and support for a religious mission. She ex-

plains that it certainly would be permissible for a religious organization that operates a government-funded feeding ministry to discriminate in employment based on whether a job applicant agreed with the specific mission of feeding the hungry. Even though this mission is religious for some, it is a mission that can be seen as secular as well. But it is quite different to allow the same religious organization to discriminate in awarding a government-funded job based on an applicant’s beliefs about God or sin. The government may and sometimes must treat religion differently than it treats other beliefs and activities.

If one were to focus solely on this special limit regarding government funding, it could well appear that religion is being subjected to more restrictive treatment than secular pursuits. But doing so ignores the special protection religion enjoys. The government is often required to observe stringent limits that result in unique protection for free exercise and religious autonomy. The federal Religious Freedom Restoration Act, as we have seen, prohibits unnecessary and substantial burdens on religious exercise and provides no similar protections for secular environmentalism or any other secular activity. Many are happy to recognize the validity of this kind of special treatment by government. It certainly is not a “level playing field,” but advocates of religious freedom welcome this “unequal treatment.” Some of these same people balk, however, at certain special treatment that might limit religious organizations’ use of governmental funds. A strong case can be made that the more equitable and consistent position is to recognize there is a rough symmetry of exemption and limitation under First Amendment principles.

Sometimes proponents of a government policy to allow religious organizations to discriminate on the basis of religion for government-funded positions stress that the religious organizations they have in mind are not motivated to exclude people from employment because of their faith. We accept this statement at face value. Nonetheless,

that is cold comfort for those who are denied the ability to compete for a job their tax money subsidizes because of their religious views. As Alan Brownstein has explained, various forms of employment discrimination traditionally have been prohibited for at least two independent reasons. We have objected not only to bad motive that drives discrimination, but also to the exclusionary impact created by such discrimination. Even if an employment decision is made without any animus on the part of the employer, an otherwise qualified applicant still faces exclusion because of his or her religious identity and beliefs.

Carl Esbeck has also suggested that a ban on employment discrimination “would require a drastic, widespread change in current practice” by religious organizations. It is unclear how “drastic” or “widespread” a shift this would be, since we do not have data on the number of religious groups that discriminate on the basis of religion in government-funded positions. We do know that some religious organizations do not engage in this practice even when legally permitted to do so.

Some organizations affiliated with certain faith groups say they typically draw members from their own tradition as applicants for jobs, even when the religious bodies advertise job openings widely. Thus, in practice, the issue never arises for them. And since a number of policies currently prohibit religious discrimination in all government-funded programs and activities, some religious organizations that receive government funds have already accommodated themselves to this standard.

Nevertheless, it is certainly true that implementing a nondiscrimination policy in this area would require some religious organizations currently receiving government aid to change their employment policies for certain job positions. Good public policy should take this fact into consideration.

It is also true that law and policy are not uniform on the issue of religious discrimination in federally-funded jobs, and have not been

for some time. (See online Legal and Policy Backgrounder #6). Some laws and policies have long prohibited this kind of discrimination, while others have not. The fact that the relevant policy precedents do not speak in one voice is a factor to consider in the policymaking process.

How to Address the Employment Issue

Both of us recognize the difficulty of this issue. We understand and appreciate the concerns of some religious groups that their efforts to cooperate with the government in carrying out works of justice and mercy could be compromised by certain forms of regulation. But we also are concerned that allowing religious groups to discriminate on the basis of religion in government-funded programs could lead to improper use of government money and unfairly discriminate against some share of taxpayers whose money is being used in this good work.

We believe that religious organizations should have full freedom on this issue when they do not receive government funds. As a pragmatic matter, we also agree that religious organizations should be permitted to discriminate on the basis of religion for jobs currently funded by indirect government aid. Nondiscrimination obligations that attach to direct aid should certainly not affect the entire religious institution. They should essentially be specific to jobs funded by the government, not program-wide. We would also urge that, in order not to disrupt the delivery of service, current religious grantees should be permitted to continue to take religion into account with regard to employees whose salaries are paid with direct federal funds for the course of the grants. This would only apply to grants where such discrimination is already permitted.

On the other hand, we agree that the government should not allow religious organizations to discriminate on the basis of religion for all jobs subsidized by direct federal funds. The administration should instruct its Department of Justice to review the Bush policy holding that the Religious Freedom Restoration Act requires the government to

allow at least some religious organizations to discriminate in all government-funded jobs. This policy sets a faulty legal standard, and it could have ramifications far beyond this setting. We also agree that the federal government should not attempt to preempt employment nondiscrimination conditions that states and localities place on government funds.

As to jobs subsidized exclusively or partially with direct federal funds, we differ slightly. In this context, Rogers believes the balance tips strongly toward equal employment opportunity for people of all faiths and none. Dionne shares Rogers' concern about religious discrimination but worries that this rule, if enforced without any exceptions, could upset some longstanding partnerships in which little discrimination actually takes place. His concern is that a rigid regime of enforcement might shut down relationships that have worked well — and with little controversy — in the past.

But both of us believe that more needs to be known on the actual employment practices of religious institutions in federally-funded programs. We recommend that the new administration commission a study on this issue. It would look both at programs in which religious providers are permitted to discriminate on the basis of religion for government-funded jobs and those that are not. The study should seek to learn what practical impact a ban on religious discrimination has had on the actual functioning of programs run by religious organizations and on job seekers of all faiths and none. The study would focus on such questions as: When they are permitted by law or policy to do so, how many religious organizations actually do discriminate in employment matters on the basis of religion in federally-funded programs and activities? To what extent do they do so? Does such discrimination affect a small number of positions, or a larger share? Do religious providers view nondiscrimination obligations to be a hindrance or a help to their work? What does state and local law say on these matters, or what has been common practice? How easy is it for

religious providers to segregate government funds from private funds for the payment of employees' salaries? Under various kinds of policies, how many federally-funded jobs would be off-limits to potential employees who did not share the organization's faith commitments?

We lack data on these and related issues. This tends to make the debate highly theoretical. Data of this nature would shed light on the experiences and struggles of actual providers and job seekers and may point to a practical resolution of the problem. The report should be completed not later than a year after it is commissioned. Upon release of the study, the next administration should invite people of various perspectives to comment on the report, and these deliberations would inform the consensus process aimed at drafting proposed legislation.

It is conceivable this data would point toward a workable compromise allowing religious organizations an exemption from religious discrimination rules for a limited number of positions, largely funded by the organization itself, that link the funded program to the organization's broader mission. It is also conceivable that the data would reveal that anti-discrimination rules have far less impact on religious providers than the current acrimony over the issue would suggest. But to arrive at such conclusions, we need to know more than we now do.

When it commissions this study, the incoming administration could also take one of two steps. It could allow religious groups some leeway with respect to religion in hiring for federally-funded positions until the study is finished, and have the study completed relatively quickly (in perhaps six months). Or it could prohibit religious organizations from discriminating on the basis of religion in jobs funded by direct government aid with respect to all grants made after January 20, 2009, but allow such discrimination to continue where it is already permitted for grants made before January 20, 2009. Rogers supports the latter approach, while Dionne supports the former. But both of us believe that these policies should be revisited upon com-

pletion of the study.

It is time to move toward a resolution of this issue that shifts the focus from conflict to compassionate service. We believe these approaches would help us do so.

Recommendation Ten:

Keep the Government Out of the Church and Simplify the Process of Forming Separate 501(c)(3) Organizations

The version of the pervasively sectarian test that requires courts to look at multiple factors of religious institutions and make some overall assessment of their religiosity is a flawed doctrine that seems to have been placed in history's dustbin. It was unpredictable and created great uncertainty in this area. It left room for various forms of bias. Further, there was never any convincing rationale for the particular set of factors the courts chose to use (or not use) in administering the test.

The other definition of "pervasively sectarian" — the version that notes there are some institutions in which "secular activities cannot be separated from sectarian ones" — has merit. The Bush administration adopted a variation on this rule by requiring all religious organizations that received direct government assistance to separate privately funded religious activities from government-funded ones. If religious organizations could not do so, presumably they were ineligible for government funding.

It is quite true that some congregations are able to separate secular from sectarian activities. Accordingly, the Bush administration made grants to some churches and other houses of worship. Indeed, it actually prohibited the federal government from refusing to make a grant to a religious entity simply because it was a church.

For the good of both religion and government, however, the next administration should change course with respect to houses of worship. The government should not give direct aid to these bodies. It should take this position to steer clear of interfering with churches and other houses of worship.

A large number of congregations most active in social service work — and almost all large-scale recipients of government funds — have already set up separate 501(c)(3) entities to receive government funds. They do so to protect themselves from government intrusion and liability. The Rev. Floyd Flake, senior pastor of the Greater Allen African Methodist Episcopal Cathedral in New York, noted in 2001 that his church was "a \$29 million operation" and had set up eleven separate corporations for its various social service undertakings. "Generally, a firewall is maintained by having a congregation's service arm incorporate separately as a 501(c)(3) corporation that speaks specifically to its needs," he said. "My childcare component is a totally separate corporation. If the day care center is involved in a law suit because a child got hurt, I do not want the lawsuit to affect the church." Flake continued: "I know of too many churches that do not have adequate accounting or bookkeeping procedures. If you commingle federal, state, and city dollars with church dollars, you are headed for disaster."

The former chief operating officer of the Abyssinian Development Corporation, Darren Walker, agrees. His first "rule of engagement" for social service partnerships between the government and religious organizations is: "Always protect the integrity and independence of the church." Walker explains: "As some congregations have found out the hard way, when a church accepts direct grants from government, it places itself under the direct *supervision* of government."

It is our view that far from discouraging congregations from undertaking social service work with government, an energetic effort by the federal government to encourage and help religious organizations to build 501(c)(3) "firewalls" could foster such work by reducing the risks congregations take and by protecting their religious mission from government interference.

The law already treats houses of worship and their integrated auxiliaries differently

from other religious organizations. Congregations and their integrated auxiliaries are automatically considered tax exempt by the Internal Revenue Service and do not have to apply for and obtain recognition of that status by the IRS. These entities are not required to file annual Form 990s with the IRS, although other religious organizations are required to do so. Thus, while one could easily find the 990 of other religious organizations on the Web, one could not necessarily do so for a body that classifies itself as a church or the integrated auxiliary of a church. This special treatment is quite appropriate for these core religious bodies, but it raises genuine difficulties where the receipt of public funds is concerned.

We recognize the extraordinary community and charitable work done by local congregations, from the store-front churches to megachurches. Our broad sympathy for constitutionally grounded government partnerships with faith-based institutions is rooted in our belief that in some of our communities, and particularly our poorest neighborhoods, local congregations are among the most vibrant, active and committed agents of change and advocates of justice. As we have noted throughout this report, we recognize that government has worked with these institutions throughout our history. We also recognize that houses of worship and the government have formed a variety of productive nonfinancial relationships that do nothing to threaten church autonomy and do incalculable good for communities.

But we are also concerned about the integrity of our religious institutions and the inevitable intrusion into their religious work that accountability for the receipt of government funds would impose. It is not possible for the government to give institutions taxpayer money on the one hand and then be told that if it engages in reasonable oversight in the spending of this money on the other, it is interfering with the free exercise of religion. Separating social service work from the institution of the congregation itself is a way of avoiding this dilemma. We should not want

government to engage in direct oversight of core religious bodies, and we should guard against intrusive governmental inquiries into churches' records and treasuries.

There is also a danger to the prophetic integrity of our congregations if they became directly dependent upon government funds. At their best, religious communities have served as an independent, prophetic voice. As Rabbi David Saperstein has noted, the Jewish and Christian prophetic traditions date back to at least the eighth century B.C.E., when Amos railed against corrupt political leaders and governments. Saperstein observes that "[t]his sense of mission has animated centuries of Christian and Jewish social justice thought and activity, and remains a powerful theme of religious obligation today." Indeed, this has been a signal contribution of religious communities to American public life. Protecting the prophetic integrity of our congregations should be a high public goal.

If the new administration adopted this policy, there would be no need for the government to engage in intrusive inquiries or make decisions about which organizations are churches and which ones are not. An organization self-designates as a church when it holds itself out as a church or other house of worship and claims the tax benefits and other benefits of this special categorization. Asking congregations to form separate 501(c)(3) organizations in order to receive a government grant does not target them for discriminatory treatment. On the contrary, the goal is to prevent governmental intervention in religious matters.

We believe this requirement should be coupled with legislative and regulatory changes to make it far easier for houses of worship and other organizations to set up separate 501(c)(3) entities under the tax code. As the Working Group on Human Needs has recommended, fees should be waived for smaller entities that file for this status. The government should offer them all the help they need to obtain it. The next administration should encourage attorneys and law

firms to help these groups establish 501(c)(3) organizations.

The new administration ought to call attention to the fact that some congregations have joined together to form collective 501(c)(3) organizations to receive and administer government social service funds. These entities are separate from their own respective congregations. Congregations may do this across interfaith lines, forming what is sometimes called an “interfaith-based organization,” or IFBO. Alternatively, congregations of the same faith group may unite to form a 501(c)(3) organization separate from all of their respective houses of worship. As John Dilulio has pointed out, these arrangements can make it possible for small congregations to play a role in administering government social service programs without having to bear the full burden of establishing their own separate 501(c)(3) body.

We emphasize that this proposal would not affect indirect government aid to houses of worship — for example, through the federal child care program. We believe that even in the case of indirect aid, congregations would be wise to receive funds through separate 501(c)(3) entities. But we see substantial risks in disturbing existing arrangements under indirect aid programs, particularly in the area of child care.

These separate 501(c)(3) organizations would not necessarily be formed until a government grant is made, and they would be free to use physical space in houses of worship, assuming the houses of worship agree.

Some might argue the government should not impose this limit on churches because it is not clear the Constitution requires it. But the political branches of government often take steps to protect religion that the Constitution permits but does not require. The Religious Freedom Restoration Act is a prime example.

Some churches, as we’ve noted, currently receive direct government funding for their valuable work. We think it makes sense to

ensure the provision of service under current arrangements is not disrupted. It seems to us, however, that the expansion of this practice to many more houses of worship creates a large danger for religious autonomy and religious freedom. Thus, the government should refrain from directing aid to houses of worship in the future while easing the process of forming separate 501(c)(3) organizations.

Recommendation Eleven:

Avoid Cronyism and Religious Patronage By Highlighting Peer Review, Evaluation and Accountability

Paul Light, one of the country’s leading scholars of public administration, begins his book *A Government Ill Executed* with Alexander Hamilton’s words from *Federalist No. 70*: “A feeble execution is but another phrase for bad execution; and a government ill-executed, whatever it may be in theory must be in practice a bad government.”

So much of the debate about government partnerships with faith-based groups has focused on what is or is not constitutional, what should or should not be permitted, that other central questions that should be asked of *all* government programs are raised only intermittently: How well do these partnerships work? How can taxpayers know the programs they are funding are, in fact, effective? How can government money be distributed in ways that avoid cronyism and corruption? How can administrators make decisions about which applicants for government money should be funded? How can good programs be rewarded and inadequate or failing programs be terminated? This should not be the occasion for a new kind of pork-barrel project involving religious pork — a term we use guardedly and with respect to our friends who keep kosher.

As we have said throughout, religious programs should not be held to a higher standard than secular programs, but they should certainly not be held to a lower standard, either. No one should pretend that programs involving religious congregations are immune from the potential for corruption. To

say this is to pay no disrespect to religion. It is simply to be mindful of a moral realism that all of our great religious traditions teach.

In the case of government grants to faith-based organizations, we believe transparency is especially important. Although there is a long history of such partnerships, allegations arose during the Bush administration of favoritism toward particular religious traditions, types of congregations, and politically sympathetic churches. In *Tempting Faith*, David Kuo said that even when such favoritism was not exercised explicitly, it was built into evaluation processes that seemed tilted toward particular kinds of organizations with particular religious and political sympathies. He described the process this way:

The faith-based policy world is fairly small. There are, at most, a hundred people in think tanks, foundations, major nonprofits, and the like who really work on these issues and who support the president. Virtually all of them are very compassionate and dedicated evangelical Christians who tend to be politically conservative. That meant that the group that gathered to review the applications was an overwhelmingly Christian group of wonks, ministers, and well-meaning types. They were supposed to review the applications in a religiously neutral fashion, and assign each applicant a score on a range of 1 - 100. But their biases were transparent.

Kuo illustrated his assertion by noting that highly respected religious organizations received relatively low scores. Big Brothers/Big Sisters of America scored 85.33 in the rating process, and Public/Private Ventures — as Kuo writes, “arguably the nation’s leading organization for maximizing program efficiency” — scored 78. But an organization called Jesus and Friends Ministry from California, “a group with little more than a post office box,” according to Kuo, scored 89.33. Kuo also notes:

Even more bizarre, a new organization called “We Care America” received a 99.67 on its grant review. It was the second-highest score. They called themselves a “network of networks,” an “organizer of organizations.” They had a staff of three, all from the world of Washington politics, and all very Republican.

We do not pretend to have direct knowledge of the smaller groups Kuo describes, but we think his point should stand as a warning to the new administration about the need for a fair and rigorous evaluation process.

The best partnerships will withstand scrutiny. The most successful programs will be singled out for more support. Questionable programs should be rooted out. Bias would be exposed. Peer review panels should not be dominated by either religious or secular voices, or by advocates of a particular faith, theology or political ideology — and the members of such panels should have genuine expertise in the program areas being funded.

Put simply, it won’t do to trade one set of religious friends and cronies for another. The next president should direct agency heads to ensure that peer reviewers are instructed about their legal and ethical obligations and that all agency employees have confidential ways to raise concerns in this area. The incoming president should promise that his administration will promptly investigate any allegations of impropriety in this area.

President-elect Obama should also call on Congress to enact legislation he and Senator Tom Coburn have introduced to expand the information appearing on the searchable Web site that discloses to the public all federal grants and contracts. This expansion would include details on earmarks, competitive bidding, and other government information. Access to this information would allow civic-minded individuals to raise questions not only about particular groups that receive government aid, but also about certain patterns of aid distribution.

Recommendation Twelve: **Promote Nonfinancial Partnerships as Much as Financial Partnerships**

The rich potential for nonfinancial partnerships between the government and religious organizations to serve those in need is often overlooked in the debate over government's relationship with faith-based organizations. Yet many levels of government across the country regularly work with religious organizations when no money is passed from the government to the religious entity. The next president would do well to call attention to the best of these partnerships and encourage their flourishing nationwide.

Some of the best partnerships in this area have been alliances between congregations and public schools. David Hornbeck, the superintendent of the public school district of Philadelphia from 1994 to 2000, helped initiate Project 10,000 with the goal to recruit 10,000 new school volunteers within five years. It surpassed that target, reaching 15,000 volunteers in less than three years, and “[f]aith communities were a central recruiting ground,” Hornbeck said. Congregations had long been involved with Philadelphia schools before Project 10,000, but the effort gave both sides an opportunity to strengthen their ties. Congregants regularly “tutored, provided after-school programs, created and staffed computer labs in churches, monitored hallways and lunchrooms, and performed various administrative tasks in the school office,” according to Hornbeck. The Department of Education under the Clinton administration issued guidelines for efforts of this sort. The next administration should revisit these guidelines and consider how they could be updated and adapted for use by other federal agencies.

In community development efforts, churches are often the best link poor neighborhoods have to other institutions, particularly private as well as public institutions with the capacity to invest capital. Congregations frequently play a critical role in persuading public and private investors that a project is

worthy and has authentic community support.

Churches have also served as outposts for Benefit Banks, programs that work within communities to help people claim state and federal benefits often left unclaimed, including Earned Income Tax Credit, food stamps, medical benefits (including children's health insurance) and heating/cooling assistance. These “banks” were pioneered by religious groups, including the National Council of Churches (NCC) and the Jewish Council on Public Affairs, in cooperation with several other national groups. The NCC designated Ohio as a pilot state for the Benefit Bank, and the Ohio Benefit Bank (OBB) began operation at 16 sites in January 2006. At the end of the 2008 fiscal year, the OBB had outposts at more than 700 sites in the state, which were sponsored by nearly 400 religious and community groups. It helped over 20,000 citizens of that state to claim more than \$26 million in tax credits and government benefits.

Benefit Banks also are operational in Arkansas, Florida, Maryland, Mississippi, Pennsylvania, Kansas, and the District of Columbia. In the current financial crisis, the administration could lift up this program as a model for other states.

Another example of nonfinancial collaboration is Ohio Governor Ted Strickland's Call to Action project, which asks nongovernmental groups to consider launching new service projects, or expanding old ones. It has asked community partners, including congregations, to recruit 100 foster care or adoptive parents. These partnerships connect the government's specialized knowledge about needs with a congregation's ability to disseminate messages to a caring and active community. This effort is similar to Philadelphia's Amachi program, which sought mentors for the children of prisoners. Religious congregations are natural partners for such endeavors.

When it identifies best practices and disseminates that information, the Obama administration should promote nonfinancial

partnerships between religious groups and government that exist in great variety across the United States. These partnerships should no longer be an afterthought. They should move to the forefront of the next administration's agenda in this area.

Recommendation Thirteen: **Create New Incentives for Charitable Giving**

President-elect Obama should call for enhancing incentives for charitable giving that will help congregations and other nonprofits. Congress has come very close to enacting legislation allowing nonitemizers to deduct a portion of their charitable giving in recent years. The new administration should push for this approach, either as part of new legislation on partnerships with faith-based and community organizations or, perhaps more logically, as part of a tax reform program. Americans with modest incomes — a disproportionate share of nonitemizers — are among the country's most generous donors to charity, as measured by the share of the income they give. It is both unfair and dysfunctional in a nation so rightly proud of its not-for-profit sector that these taxpayers are not allowed to deduct their gifts.

The new administration should also encourage corporations to review their charitable giving policies, especially policies that reflexively prohibit gifts to religiously affiliated entities. The Constitution requires separation of church and state, but it does not require separation of church and corporations.

Recommendation Fourteen: **Establish Annual Hearings to Examine Progress and Problems**

The new administration should advocate annual hearings on the workings of these partnerships. Representatives of federal and state governments, social service beneficiaries, and nongovernmental — religious and nonreligious — organizations should be among the participants.

These partnerships involve complex and sensitive issues, and they have undergone

much change in recent years. We already know a number of matters will need to be monitored. There will be successes and failures we are unable to predict.

In addition to the issue of employment discrimination, we would suggest two other matters that should be considered at the first such annual hearing: the protection of the religious rights of beneficiaries and monitoring of church-state safeguards. In congressional testimony in the summer of 2001, Professor Douglas Laycock properly noted that beneficiary rights in this area “may be very difficult to implement,” and the problem will be more acute in small towns and rural areas where there may be fewer alternative service providers. There is also a need to know whether the monitoring system is successful in ensuring that direct government funds are not being used to promote religion *and* in avoiding excessive church-state entanglement.

These hearings could be conducted by the White House and the President's Council on Faith-Based and Neighborhood Partnerships. They would require us to take stock of progress and address problems before they become crises. The hearings would also allow for the introduction of new proposals for congressional and executive action.

Recommendation Fifteen: **Develop New Strategies for Outreach and Training**

In addition to establishing a Council for Faith-Based and Neighborhood Partnerships, President-elect Obama has indicated his administration will maintain the Centers for Faith-Based and Community Initiatives currently housed within 11 federal agencies and “strengthen their effectiveness by increasing their coordination with the White House Council.” As Stanley Carlson-Thies of the Center for Public Justice has noted, each of these federal agencies “has its own culture,” and thus agency-specific emphases on these partnerships are sound. At the same time, aspects of the outreach and

training these bodies do needs to be reformed.

The outgoing administration frequently assembled hundreds of grant recipients at what sometimes seemed to be large rallies. These gatherings often proved to be a poor way to share information. Federal agencies should move toward smaller workshops and informational seminars, focused more on passing along useful knowledge than on rallying the faithful.

The incoming president's remarks in this area are promising. In his speech on faith-based organizations in July, he called for an effort to "train the trainers" by

giving larger faith-based partners like Catholic Charities and Lutheran Services and secular nonprofits like Public/Private Ventures the support they need to help other groups build and run effective programs. Every house of worship that wants to run an effective program and that's willing to abide by our Constitution - from the largest mega-churches and synagogues to the smallest storefront churches and mosques - can and will have access to the information and support they need to run that program.

This effort should include offering grantees guidance on church-state safeguards. The available evidence — from a 2006 GAO report, for example — indicates that such training is sometimes missing from government-sponsored informational sessions.

When the Bush administration did speak to these issues, it sometimes did so in ways that seemed to conflict with its own rules. The administration's regulations declared that "inherently religious" activities cannot be funded by direct aid and required a separation between those activities and government-funded activities. Aspects of these rules are confusing, as we've noted. This problem was compounded when the president seemed to suggest that religious activities *should* be integrated into government-

funded programs. For example, in a January 2004 speech to religious and community leaders at Union Bethel AME Church in New Orleans, President Bush declared: "Faith-based programs are only effective because they do practice faith." He added: "Government oftentimes will say, yes, you can participate, but you've got to change your board of directors to meet our qualifications, you've got to conform to our rules. The problem is, faith-based programs only conform to one set of rules, and it's bigger than government rules." President Bush also referred to the Bible as a handbook for these programs.

Of course, government officials should reach out to faith communities by attending religious conferences and gatherings, and they need not scrub their messages of any religious references. Government officials certainly may recognize the power of faith as a motivating force for many who are engaged in the lives of our poorest citizens. But they also need to be clear that government-funded programs must respect the Constitution and other rules that follow government aid.

Cheryl Hill of the Maryland Governor's Office of Community Initiatives offers some helpful suggestions about the messages government officials should send. "We are not here to build your ministry," she reminds potential grantees. Hill emphasizes the difference between government programs and religious ministries and encourages religious providers to think about their relationship with government as partners for a certain purpose, not for all purposes. Like Hill, those in the next administration should make sure that those within its ranks talk about these issues in ways that are both welcoming to religious communities *and* consistent with the letter and spirit of the Constitution.

Jill Schumann of Lutheran Services in America has suggested that the new administration organize training sessions for government employees in the various federal agencies on the relevant church-state safeguards. This training should reflect an affirming message about both the participation of religious entities and the special rules to

apply to their participation. Appropriate church-state restrictions are rooted in benevolence toward religion and religious liberty, but an inadequate articulation or implementation of these principles could suggest otherwise. Well-organized training sessions can help civil servants not only regulate appropriately, but also work more effectively with both religious and secular partners.

Recommendation Sixteen:
Establish a Diverse Council and Integrate Efforts into Domestic Policy Agenda

In his July 2008 speech on these issues, Barack Obama said he would establish a Council for Faith-Based and Neighborhood Partnerships, and he promised it would be “a critical part of [his] administration.” President-elect Obama should structure this body so that people who have good-faith disagreements with parts of his initiative may serve on it. President Bush missed an opportunity when he failed to reach out to those on the political center and left who had church-state concerns about some of his proposals, but who sympathized with many of the stated purposes of his initiative. The next administration should not make a similar mistake, and should reach out across the political and church-state spectrum.

By reaching out to those who have some differences with the administration on these issues, President-elect Obama will make sure that he has a full understanding of the debate and the options. That will be essential as his administration makes decisions about complex matters where reasonable people may disagree. The Obama administration also should include a substantial number of representatives of secular organizations in this council. These organizations also play vital roles in serving people in need. It should always be borne in mind that, ultimately, the purpose of this effort is to promote the work of groups deeply rooted in their neighborhoods and localities — non-religious and religious alike. We would emphasize here what we said at the outset: that the broader purpose of these initiatives

should be to strengthen community ties and build on the practical work of social uplift that the voluntary sector in the United States has undertaken since the republic’s founding.

The Obama administration should at least consider integrating the staff for the White House Council on Faith-Based and Neighborhood Partnerships and any separate White House office dedicated to these issues into the Domestic Policy Council. In a 2002 study of the first year of the Bush faith-based office, Kathryn Dunn Tenpas said that “[w]hile the desire to showcase a presidential priority [through a new White House office] was understandable, removing it from the auspices of the Domestic Policy Council isolated both the office and its efforts.” Tenpas noted that the initiative “was never fully integrated” into the White House, and the initiative suffered for this reason.

At the same time, we urge that the chair of the council be given a very senior title within the White House staff, and that his or her work be separate from that of the White House religious liaison. The new president’s goal should be to attract a chair with wide experience in this area and the ability to command attention to the council’s work. A high rank would underscore the importance the president attaches to these initiatives and ease the way for coordinating the council’s work with other parts of the administration. For the sake of the long-term success of his efforts, the new president must encourage his White House staff and Cabinet to speak with one voice on these issues and act in concert.

Finally, particularly because the Obama White House plans to use the term “faith” in the name of its council, that body and associated White House activities need to uphold the highest level of legal and ethical integrity. Here again, a cloud may linger from the previous administration. David Kuo noted that the Bush administration held faith-based outreach conferences in the districts of certain endangered Republican legislators to shore up their election prospects and

then denied doing so when asked about this by the press. The White House never investigated these charges. While any administration certainly hopes that its work in the White House wins votes in the next election, the new administration should avoid politicizing this effort.

Conclusion

Toward Common Ground

Evangelical writer Don Miller recently said that our culture war over abortion had become a “cultural Vietnam.” In many senses, the argument over President Bush’s faith-based initiative became a kind of “cultural Vietnam” as well. We need not and should not remain locked in unproductive battles that do absolutely nothing for those we say we seek to serve.

The next administration has an opportunity to lead the exodus from this particular cultural Vietnam. It should do so by encouraging open deliberation of these issues. It should look honestly at the history and the evidence, and do much more than has been done in the recent past to seek common ground. The new president should encourage us to recognize that people of good will disagree on many questions related to politics, theology and belief itself, and still find ways to work in common on behalf of those in need, and thereby strengthen the bonds of community and mutual responsibility.

Appendix

We would like to thank the following people for speaking with us about these issues. They do not endorse the report — indeed, some will no doubt disagree with different parts of it, and none is responsible for our conclusions. But we are very grateful that knowledgeable people with diverse views shared their thoughts and criticisms in good faith. It made us hopeful that some common ground might be found on the issues we discuss here. They helped shape our thinking and expanded our understanding. Their affiliations are listed for identification purposes only.

Jerilynn W. Armstrong, Buckner Foundation

Stanley Carlson-Thies, Center for Public Justice & The Institutional Religious Freedom Alliance

Lisa Carr, Lutheran Services in America

Danny Cortes, Esperanza

Nathan Diament, Union of Orthodox Jewish Congregations

John Dilulio, University of Pennsylvania

Richard T. Foltin, American Jewish Committee

William Galston, The Brookings Institution

Olivia Golden, The Urban Institute

Steven K. Green, Willamette University Law School

Jim Guenther, Guenther, Jordan and Price

Stephen Hess, The Brookings Institution

Candy S. Hill, Catholic Charities USA

Cheryl Hill, Maryland Governor's Office of Community Initiatives

K. Hollyn Hollman, Baptist Joint Committee for Religious Liberty

Stanley Heuisler, Board Member, Afghans for Civil Society

Andrea Kane, The National Campaign to Prevent Teen and Unplanned Pregnancy

Fredrica Kramer, The Urban Institute

Greg Landsman, Ohio Office of Faith-based and Community Initiatives

Michael Lieberman, Anti-Defamation League

Ira "Chip" Lupu, George Washington University

William Marshall, University of North Carolina Law School

Stephen Monsma, Calvin College

Jason Rogers, Belmont University

David Saperstein, Religious Action Center for Reform Judaism

Aaron Schuham, Americans United for Separation of Church and State

Jill A. Schumann, Lutheran Services in America

Manjit Singh, Sikh American Legal Defense and Education Fund (SALDEF)

Marc Stern, American Jewish Congress

Romal Tune, Clergy Strategic Alliances

Robert Tuttle, George Washington University Law School

Seymour Weingarten, Guilford Publications, Inc.

Adam Woods, Wake Forest University Divinity School

David Wright, The Roundtable on Religion and Social Welfare Policy