

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.