# The American Recovery and Reinvestment Act and Faith-based Organizations

*By Stanley Carlson-Thies**

The American Recovery and Reinvestment Act[1] (ARRA or "stimulus plan") allocates nearly 800 billion federal dollars for federal, state, and local government expenditures. As usual in the American "third-party government"[2] system, much of the money for products and services will not be spent directly by government agencies but instead will be awarded to private organizations. It will be these entities that expend the federal funds for many of the purposes specified in the law: construction companies that contract to complete some "shovel-ready" project, private businesses that receive federal dollars to fund a "green" product, and nonprofit organizations that win grants to carry out one or another of the social service and education programs that ARRA funds. Among those nonprofit organizations will be many faith-based organizations.

In what ways can faith-based organizations obtain ARRA funds? That is, are they eligible to apply for the funds, and if so, what church-state "strings" are attached to those dollars? The Act includes some specific language about religion and faith-based organizations. But most of the rules that apply to faith-based participation in stimulus spending are implicit, or rather specified outside of ARRA, in the standards associated with the Faith-Based and Community Initiative—rules first formulated during the Clinton administration and extended during the Bush administration.

## ARRA to be Pro-Poor and to Utilize Faith-Based Organizations

That the stimulus plan is intended not only to promote economic "recovery" but also to change society and the economy through a range of "reinvestments" has been controversial. Less remarked upon have been two additional goals of the spending plan: "to alleviate the poverty made worse by economic crisis"[3] and to do so specifically by engaging grassroots organizations, both secular and faith-based.

Faith-based organizations, on the other hand, have given these latter aspects close attention.[4] Catholic Charities USA, which worked in the Senate to fend off cuts to social-service funds authorized in the House-passed stimulus bill, celebrated ARRA as "an economic recovery package that assists and protects the least among us,"[5] and provides various tools on its website to help nonprofit organizations identify grant opportunities and track ARRA spending.[6] Similarly, "lawmakers in heavily black districts," according to one report, "are already expressing hope about the [stimulus plan's] boost to religious-based organizations."[7]

Indeed, the twin goals of fighting poverty and engaging grassroots organizations via ARRA expenditures are key concerns of the Obama faith-based initiative. The press release announcing the President's Office of Faith-Based and Neighborhood Partnerships emphasized that its "top priority will be making community groups an integral part of our economic recovery and poverty a burden fewer have to bear when recovery is complete."[8] Similarly, one of the task forces of the new Advisory Council on Faith-Based and Neighborhood Partnerships will focus on "the role of community organizations in economic recovery."[9]

In assessing ARRA expenditures, then, the Obama administration intends to consider not only whether funds are spent "as quickly as possible consistent with prudent management," as specified in the Act,[10] but also whether the funds intended for social purposes flow out to needy neighborhoods and grassroots organizations and are not diverted or retained by state and local agencies for other purposes. To monitor the expenditures the Administration is counting not only on extensive reporting requirements and such "transparency" tools as the Recovery.gov website, but also on its connections to grassroots religious and secular organizations through its faith-based Office and Advisory Council. As Melody Barnes, director of the Domestic Policy Council, has said, President Obama wants "one of the functions" of his faith-based office to be "implementation of the Recovery Act," and one way the office will be useful is by "being the connection between the bill and the reality."[11]

Given all that can happen to federal intentions and funds in the long journey between Washington, D.C., and the place and agency where the money finally ends up, such a monitoring role can be seen as administratively wise.[12] In any case, it surely is a sign of the Administration's seriousness about extensively engaging with faith-based and community-based organizations through its revised faith-based initiative.

## Specific FBO Provisions

Most of the ARRA language specifically related to religious organizations concerns educational institutions. Ironically, those provisions are hardly uniformly welcoming of their participation.

**Bias against Private and Religious Education.** ARRA allocates $53.6 billion to a State Fiscal Stabilization Fund (SFSF). Some of these funds can be used to repair and upgrade public schools, including bringing them up to "green" standards, but not, despite efforts to eliminate the restriction, to aid private and religious schools.[13] Similarly, SFSF funds will be used to restore education funding that has been cut due to states' budget crises, but these compensatory funds can go only to public school districts and to public higher education.[14] The limitation is expected and understandable, and yet, as advocates of private schooling have pointed out, expenditures on private school facilities are just as stimulative as spending on public school buildings.[15]

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**Restrictions on Religious Higher Education.** A small portion of the SFSF funds can be used for the "modernization, renovation, or repair" of higher education facilities—including those at private and faith-based colleges and universities. However, these funds cannot be expended on facilities "used for sectarian instruction or religious worship," or where "a substantial portion of the functions of the facilities are subsumed in a religious mission."[16] Federal higher education construction funds have long been excluded from use on structures with a specifically religious use, such as chapels. However, the ARRA restrictive language seems overly broad (for example, it could say expenditures are not permitted on facilities "used *primarily* for sectarian instruction or religious worship," but does not) and thus could be interpreted to exclude certain religious higher education facilities or, in the future, to ban student religious clubs from buildings renovated with SFSF funds.[17] An amendment by Senator DeMint (R-SC) to jettison the restriction failed.[18]

**A Puzzling Impediment to Private and Religious Schools.** ARRA allocates some $25 billion extra dollars to federal programs for disadvantaged and special needs students by greatly increasing the funding of special services authorized in the Elementary and Secondary Education Act (ESEA) and the Individuals with Disabilities Education Act (IDEA). These statutes have an equitable expenditure requirement that ensures that local school districts receiving the federal funds support special needs students, whether they attend public schools or private or faith-based schools.[19]

However, ARRA also allocates additional billions of dollars for special services without including the equitable expenditure mandate. Many of the billions of dollars of SFSF money that is flowing to public school districts must be spent on the special services authorized by ESEA and IDEA, and other special services authorized by the Adult Education and Family Literacy Act and the Perkins Act. All of these programs permit or require participation by private entities, including faith-based schools. However, the ARRA language is written such that there is no requirement that this additional money adhere to an equal opportunity or equitable participation standard.[20]

**Inclusive and Restrictive Early Childhood Programs.** ARRA allocates extra funding for child care. The federal child care program was crafted in 1990 to encourage states to extensively use vouchers, rather than only to contract with providers. Because of the vouchers—a form of "indirect" government funding of private organizations—parents are able to select the provider of their own choice, including faith-based providers whose programs include religious activities.[21]

Extra funding is also allocated to Head Start, which utilizes many nonprofit organizations. But the Head Start statute prohibits hiring on the basis of religion by its grantees, thus excluding those faith-based organizations that regard religious staffing to be an essential way to maintain their organizations' mission focus.[22] An effort in the 110th Congress to eliminate this restriction failed.[23] ARRA leaves the barrier intact.[24]

**Welfare and Social Spending.** ARRA allocates additional funds to both the federal welfare program (Temporary Assistance for Needy Families, TANF) and the Community Services Block Grant (CSBG) program. These sections of ARRA say nothing about faith-based organizations. However, what governs is language about faith-based organizations in the statutes for those programs: during the Clinton administration, Congress adopted and President Clinton signed into law Charitable Choice provisions for these two block grant programs—language directing state governments to allow faith-based organizations to compete in the provision of services without being excluded because of their religious character.[25]

**A New Version of the Compassion Capital Fund.** The stimulus plan includes one other arrangement specifically related to faith-based organizations. The Bush administration annually requested and received appropriations for a Compassion Capital Fund (CCF) that awarded grants to private intermediary organizations to provide capacity-building technical assistance to grassroots groups, both faith-based and secular, and minigrants to some of these groups for the purchase of equipment or additional training.[26] Church-state separationist groups challenged CCF assistance given to faith-based organizations[27] and they protested the proposed extension of CCF via the stimulus plan.[28] Indeed, AARA did not continue CCF. However, it created in its place a new program, not named in the Act, to expand the capacity of nonprofit organizations that serve "individuals and communities affected by the economic downturn."[29] Nothing in the ARRA language or in the section of the Social Security Act which governs these expenditures restricts participation by faith-based organizations—or even provides guidance about their participation.

### Federal Guidelines for Faith-Based Involvement

ARRA allocates additional billions of federal dollars for other social service programs in which the services can be provided by private organizations, such as Senior Nutritional Services, the Emergency Shelter Grant program, the Energy Efficiency and Conservation Block Grant program, and the Violence Against Women program.[30] The Act itself does not specify the conditions under which faith-based organizations might receive these billions of dollars nor even whether they are eligible at all, so we must look elsewhere for that answer.

Of course, these two questions—the eligibility of faith-based organizations for government funding, and the terms of their participation—have been central issues for the federal faith-based initiative. Advocates of the initiative have spoken of desiring greater involvement by faith-based organizations because of their proximity to people in need or because of the moral and spiritual values these organizations exemplify. Jay Hein, the director of the White House Office of Faith-Based and Community Initiatives in the latter years of the Bush administration, often spoke of reorienting the federal government to become a support for bottom-up solutions to social problems. Whatever these large aims, a key focus throughout has been to assess and improve the rules that govern federal financial partnerships with faith-based organizations. The principle reform, tracking the development of the Supreme Court's Religion Clause jurisprudence that culminated in *Mitchell* v. *Helms* (2000),[31] has been to shift federal policy and practice from excluding "pervasively sectarian" organizations from funding to requiring "equal opportunity" or "equal

treatment"—no bias against (or for) faith-based organizations—while requiring that funds provided "directly" to a religious organization may not be used to pay for "inherently religious activities."[32]

**Charitable Choice.** The first major instance of this change of policy was the incorporation of the Charitable Choice principles into federal law during the Clinton administration—into the TANF program in 1996, Welfare-to-Work in 1997, the CSBG program in 1998, and the substance-abuse prevention and treatment programs of the Substance Abuse and Mental Health Services Administration (SAMHSA) in 2000.

The Charitable Choice provisions, which are all similar but not identical, specify that faith-based organizations are eligible to seek government funds on the same basis as their secular counterparts, without being barred because they are religious; protect their religious character (e.g., display of religious symbols; conduct of privately funded, voluntary, religious activities; clergy on the governing board; a religious mission) notwithstanding the receipt of federal funds; prohibit the expenditure of government funds for "inherently religious activities" such as "sectarian worship, instruction, or proselytization"; and require that all eligible beneficiaries be served, without discrimination on religious grounds. Additionally, under Charitable Choice, government officials are generally required to ensure that an alternative is available for beneficiaries who object to receiving services from a faith-based organizations, and most versions of Charitable Choice specifically state that the Title VII freedom of religious organizations to make employment decisions on a religious basis is preserved notwithstanding the receipt of federal funds.[33]

The Bush administration, responding to evidence that state and local governments had not uniformly aligned their funding policies with the Charitable Choice provisions in these federal block-grant programs, adopted Charitable Choice regulations in 2003 to provide specific guidance.[34] The Administration also undertook a variety of informational and technical assistance steps to promote understanding of and compliance with Charitable Choice by state and local officials, such as the publication of a handbook, *Partnering with Faith-Based and Community Organizations: A Guide for State and Local Officials Administering Federal Block and Formula Grant Funds*.[35]

**Equal Treatment Regulations.** As noted, Charitable Choice only applies to a few federal social-service programs. To ensure that federal expenditures in the other programs would follow the same constitutional principles, President Bush promulgated an executive order in 2002 setting out guidelines similar to Charitable Choice.[36] The main difference with Charitable Choice is that no right to an alternative service provider was created in these other programs and, because among the federal programs the executive order covers are some that prohibit religious employment discrimination, there could not be a general statement that faith-based organizations would retain their freedom to consider religion in hiring and firing when receiving federal funds.[37]

During the course of 2004, the Bush administration proposed and then adopted Equal Treatment regulations for many federal departments to guide the expenditure of their funds, whether by federal, state, and local government officials, in programs that utilize private social-service providers. The Department of Health and Human Services regulations, for example, are entitled, "Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Participants," and apply both to discretionary grants and to block and formula grants awarded to state or local governments.[38]

**Non-Profit Status.** In a reform important especially to smaller faith-based organizations, the Bush administration took note of the expense and time required for organizations to obtain IRS 501(c)(3) designation. Several federal programs had limited applicants to only those with 501(c)(3) status, but the Bush administration declared that such status should be an eligibility condition only when specifically required by a program's governing statute. Typically those statutes say only that applicants must be "nonprofit organizations." In regulations such as the SAMHSA Charitable Choice rules, the Administration listed several ways that an organization could prove its nonprofit character without needing the IRS designation.[39]

**Staffing on a Religious Basis.** The Bush administration clarified one other important and controversial matter: the freedom of faith-based organizations to consider religion in their employment decisions notwithstanding the receipt of federal funds. When Congress, more than forty years ago, established in the Civil Rights Act of 1964 federal employment non-discrimination standards, it included an exemption so that faith-based organizations can make employment decisions on the basis of religion, even though other employers are prohibited from doing so. Although there seems to have been a presumption by many officials, legislators, and activists to the contrary, there is no requirement in the 1964 Civil Rights Act that a religious organization that receives government funds thereby must give up its Title VII exemption that permits it to hire and fire by religious criteria.[40] However, the religious staffing freedom is lost if a faith-based organization receives funds from a program that includes a ban on religious (and other) employment discrimination. Some federal programs, such as the Head Start program, as noted above, do have a provision that prohibits religious hiring by funding recipients. On the other hand, most versions of Charitable Choice explicitly preserve the Title VII religious exemption for participating faith-based organizations. And the laws governing most federal social-service programs have no employment provisions at all, thus leaving intact the religious exemption. The Bush administration laid out these facts and this argument in a document it issued in 2003,[41] and it worked to ensure that federal practice followed this understanding. The Office of Legal Counsel in the Department of Justice further issued a ruling that under the Religious Freedom Restoration Act, in programs that ban religious staffing, a faith-based organization that can show that adhering to the ban would impose a substantial burden on its religious practice can be excused from complying with the ban.[42]

**Standards for Faith-Based Organizations in Summary.** These church-state standards for religious organizations interested in collaborating with federal programs and receiving federal funds can be summarized in these points:

- Faith-based organizations, whether "pervasively sectarian" or religiously affiliated, are eligible to participate in federally funded programs on the same basis as their secular counterparts, being neither favored nor disfavored because of their religious character;
- The faith-based organizations may retain their religious character despite receiving government funds: they may have a religious name and religious language in their mission statement, they may display religious symbols, they may select their governing board on a religious basis;
- They may continue to offer voluntary, privately funded, religious activities;
- In the federally funded program all eligible beneficiaries must be served without religious discrimination;
- If the federal funding is "direct," then "inherently religious activities" must be kept separate in time or location from the federally funded program (if the funding is "indirect"—e.g., by means of vouchers—then religious activities can be mixed into the federally funded services);
- The faith-based organization retains its exemption that permits religious staffing, unless the program statute forbids religious employment discrimination;
- State and local government agencies that receive the federal funds and then award it to private providers are bound to the Equal Treatment or Charitable Choice rules when they expend the federal funds, required matching state or local funds, and state or local funds that are voluntarily commingled with the federal funds.

These standards apply to social service funding distributed by ten Federal agencies—the Departments of Agriculture, Commerce, Education, Health and Human Services, Housing and Urban Development, Labor, Justice, and Veterans Affairs, the Agency for International Development, and the Small Business Administration[43]—absent new statutory language to the contrary or superseding regulations.

### Federal Guidelines and the Obama Administration

As a presidential candidate, Barack Obama said he would revise the Bush faith-based initiative by stressing more strongly the dividing line between church and state and by banning religious staffing in every social-service program that a faith-based organization funds with federal dollars. However, when he announced his Office of Faith-Based and Neighborhood Partnerships and an accompanying Advisory Council as President, these changes were downplayed. The current standards, including those on religious hiring, are to remain in place, subject to legal review.[44]

Interestingly, ARRA's creation of a new version of the Bush Compassion Capital Fund has required to the Administration to state explicitly how it understands the church-state rules that must apply to faith-based recipients of federal funds. In mid-May, the Department of Health and Human Services announced the creation of the new Strengthening Communities Fund (SCF).[45] One component of SCF will award grants to mature nonprofit organizations to provide capacity-building services to grassroots groups working in distressed communities to encourage economic recovery; the other component will fund a number of state, county, city, and tribal offices that reach out to faith-based and community-based groups to pay for capacity-building help to grassroots groups and to help the offices improve their own ability to assist those grassroots organizations. Unlike the other federal programs, this is not a grant program that was already designed and operating when the new administration took over.

What, then, are the Obama administration's church-state standards for SCF? They are the standards promulgated by the Bush administration in the HHS Equal Treatment regulations.[46] No new religious staffing ban is imposed. Faith-based organizations do retain their religious character and private religious practices. Officials and grantees cannot discriminate either for or against individuals or applicant organizations on the basis of religion. The direct federal funds cannot be used to support "inherently religious activities."

In short, the unspoken rules that govern the receipt of ARRA money by faith-based organizations remain the rules developed during the Clinton and Bush administrations.

### Subsidiarity

A final word on faith-based organizations and the stimulus plan. Among the richest bodies of thought on relations between church and state, and between civil society and government, is the Catholic social doctrine of "subsidiarity" and the lesser-known but similar neo-Calvinist concept of "sphere sovereignty."[47] Both of these religiously inspired socio-political frameworks stress that for collaboration between faith-based organizations and government to flourish, the relationship must be a true partnership. A partnership requires that the government respect the unique—*the distinct*—character of religious civil-society institutions, instead of requiring them to fit into a secular mold or to downplay their own initiative and to mimic the government's way of operating. The faith-based initiative, now in its third phase or third version, can be interpreted, among other things, as an intensive effort to redesign the federal relationship with faith-based organizations to match this partnership ideal.[48]

Both frameworks also carry another message, however: the government must leave adequate social space, adequate opportunity, for private organizations to exercise their own responsibilities. A flourishing society will not be achieved if the government takes responsibility for all social endeavors, but makes sure that it respectfully partners with private groups to carry out all those tasks. Rather, simply by occupying all of that space the government already has undermined the civil society organizations, because it has robbed them of a full opportunity to define their own sense of what should be done and how to do it, and eliminated their chance to seek voluntary support that allows them to be independent of government.

The American Recovery and Revitalization Act, for all the hundreds of billions in new federal spending—and

notwithstanding its impact widely in the economy, society, education, and health care—comes nowhere near causing government to smother civil society. Still, the very scope of this intervention and its spending has created a useful occasion to think carefully not only of the appropriate relationship between government and faith-based service providers but more broadly about which entities in society can best accomplish which purposes.

## Endnotes

1 P.L. 111-5.

2 Lester M Salamon, Partners in Public Service: Government-Nonprofit Relations in the Modern Welfare State (1995).

3 The quotation is from the entry on "Poverty" from the Issues section of the White House website: http://www.whitehouse.gov/issues/poverty/ (May 19, 2009).

4 Suzanne Perry, "Nonprofit Groups Seek to Influence Senate Spending Plan," a Feb. 3, 2009, entry in the Government and Politics Watch section of the Chronicle of Philanthropy website, http://philanthropy.com/news/government/index.php?id=6997 (May 13, 2009).

5 "Catholic Charities USA Praises Congress for Providing Economic Relief," Feb. 13, 2009, News Release, http://www.catholiccharitiesusa.org/NetCommunity/Page.aspx?pid=1592 (May 13, 2009).

6 See the Economic Recovery pages, http://www.catholiccharitiesusa.org/NetCommunity/Page.aspx?pid=1578 (May 19, 2009).

7 Dayo Olopode, "A Faith-Based Fix: Can Obama's makeover of Bush's faith initiatives Speed the Economic Recovery?" posted March 3, 2009, at "The Root," http://www.theroot.com/views/faith-based-fix (May 13, 2009).

8 White House Office of the Press Secretary, "Obama Announces White House Office of Faith-based and Neighborhood Partnerships," Feb. 5, 2009, http://www.whitehouse.gov/the_press_office/ObamaAnnouncesWhiteHouseOfficeofFaith-basedandNeighborhoodPartnerships/ (May 13, 2009).

9 Mark Silk, "OFANP Redux," March 25, 2009, blogpost at Spiritual Politics, http://www.spiritual-politics.org/2009/03/ofanp_redux.html (May 19, 2009).

10 ARRA, § 3(b).

11 Quoted in Olopode, "Faith-Based Fix."

12 *See, e.g.,* Jeffrey L. Pressman & Aaron B. Wildavsky, Implementation (1974).

13 ARRA, Sec. 14003(a) specifies the use of funds for "public school facilities." See also comments of Nathan Diament, director of public policy for the Union of Orthodox Jewish Congregations, quoted in "Stimulus bill gives $1 billion to Jewish social service providers," JTA, Feb. 17, 2009: http://jta.org/news/article/2009/02/17/1003063/stimulus-bill-gives-1-billion-to-jewish-social-service-providers (May 19, 2009).

14 U.S. Department of Education, "Guidance on the State Fiscal Stabilization Fund Program," April 2009, III.A. Eligible Entities.

15 Council for American Private Education (CAPE), "Private Schools and the American Recovery and Reinvestment Act," April 2009: http://www.capenet.org/pdf/CAPE-ARRA.pdf (May 10, 2009).

16 ARRA, Sec. 14004(c)(3).

17 *See* Robert Shibley, "Stimulus Bill Presents Possible Conflict with Freedom of Religion on Campus," Feb. 6, 2009, FIRE.org: http://www.thefire.org/index.php/article/10200.html (Feb. 22, 2009).

18 http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00047 (May 22, 2009).

19 CAPE, "Private Schools and the American Recovery and Reinvestment Act," at 2-3.

20 See U.S. Department of Education, "Guidance on the State Fiscal Stabilization Fund Program," III-D-15.

21 HHS Child Care Bureau, "What Congregations Should Know about Federal Funding for Child Care": http://www.acf.hhs.gov/programs/ccb/providers/faithbased.pdf (May 22, 2009).

22 See the discussion in White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* (June 2003), at 5-6.

23 The bill was HR 1429. The amendment was offered by Congressmen McKeon (R-CA) and Fortuno (R-PR). In the 109th Congress, the House removed the existing ban on religious hiring in adopting HR 27 to reauthorize the Workforce Investment Act, but the Senate did not take up the bill. Some $4 billion of ARRA funds are allocated to programs governed by WIA.

24 As discussed later, the Religious Freedom Restoration Act of 1993 was interpreted by the Bush administration to permit a religious organization that engages in religious staffing to accept funds in such a program despite the hiring restriction, if having to cease the religious hiring would constitute a substantial burden on the organization's religious freedom.

25 On Charitable Choice's provisions and intention, *see* Stanley W. Carlson-Thies, *Charitable Choice for Welfare & Community Services: An Implementation Guide for State, Local, and Federal Officials* (Washington, DC: Center for Public Justice, Dec. 2000), and Carlson-Thies, "Charitable Choice: Bringing Religion Back into American Welfare," *in* Religion Returns to the Public Square: Faith and Policy in America, eds. Hugh Heclo & Wilfred M. McClay (2003), at 269-97.

26 The White House, *Innovations in Compassion: The Faith-Based and Community Initiative. A Final Report to the Armies of Compassion* (Dec. 2008), at 35.

27 They were only successful in an instance in which the grantee favored faith-based subgrantees, violating the rules put in place by the Bush Administration. *Freedom from Religion Foundation* v. *Montana Office of Rural Health*, __ F. Supp. __ (200_) (finding Establishment Clause violation in limiting subgrants to parish nursing programs).

28 See, for example, the protest by Americans United for Separation of Church and State, http://www.commondreams.org/newswire/2009/01/29-15 (May 22, 2009).

29 U.S. House of Representatives Report 111-16, *Conference Report to Accompany H.R. 1* (Feb. 12, 2009), at 454-55.

30 See, for example, the Catholic Charities USA analysis of ARRA allocations: http://www.catholiccharitiesusa.org/NetCommunity/Document.Doc?id=1569 (May 14, 2009).

31 530 U.S. 793 (2000).

32 On the significance of *Mitchell*, *see* Carl H. Esbeck, Statement Before the United States House of Representatives Concerning Charitable Choice and the Community Solutions Act, *reprinted in* 16 Notre Dame J. Law, Ethics, & Pub. Pol'y, 16 (2002), at 568ff, and Ira C. Lupu & Robert W. Tuttle, *The State of the Law 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* (Roundtable on Religion and Social Welfare Policy, Dec. 2008), at 17-18.

33 Carlson-Thies, *Charitable Choice for Welfare and Community Services*.

34 The Welfare-to-Work program by then was over. The TANF Charitable Choice regulations are codified at 45 C.F.R. part 260; CSBG: 45 C.F.R. Part 1050; SAMHSA: 42 C.F.R. Parts 54 and 54a.

35 Published in 2008. *Available at* http://www.hhs.gov/fbci/Tools%20&%20Resources/Pubs/guide.pdf (May 19, 2009).

36 Executive Order 13279, December 12, 2002, Equal Protection of the Laws for Faith-Based and Community Organizations, 67 Fed. Reg. 77141 (Dec. 16, 2002).

37 Sec. 4 of the executive order did modify an earlier executive order so that faith-based organizations that hire on a religious basis would be eligible for federal procurement contracts. These contracts are for services for the federal government (submarines, research, mops)—distinct from federally funded

grants, contracts, and cooperative agreements for private organizations to provide services to needy individuals, families, or communities. Many critics of the Bush policy on religious hiring have mistakenly supposed that by means of this executive order President Bush unilaterally created a right for faith-based organizations to engage in "federally funded job discrimination." To the contrary, aside from the modification of the executive order relating to contracting (a provision created by a President and therefore subject to modification by a President), the hiring protections the Bush Administration embraced were those endorsed by Congress (e.g., faith-based organizations who accept federal funds do not automatically lose the hiring protections recognized by Congress in Title VII) and the courts (e.g., the Supreme Court has abandoned the "pervasively sectarian" standard, under which religious hiring practices had been one of the factors that might show a faith-based organization to be "too sectarian" to receive federal funds).

38 The regulations were published on July 16, 2004, 69 Fed. Reg. 42586, and codified at 45 C.F.R. Part 87.

39 45 C. F. R. § 54a.14, Determination of nonprofit status. Requiring IRS 501(c)(3) status without statutory authority was identified as one of 15 barriers making it unnecessarily difficult for faith-based and community-based organizations to participate in federal programs in the White House report of August 2001, *Unlevel Playing Field*.

40 For extensive detail on the Title VII exemption and the constitutional, legal, and policy considerations related to religious hiring, *see* Carl H. Esbeck, Stanley W. Carlson-Thies & Ronald J. Sider, The Freedom of Faith-Based Organizations to Staff on a Religious Basis (Washington, DC: Center for Public Justice, 2004). Note that Title VI, which specifically concerns discrimination in programs that receive federal funds, does not prohibit religious discrimination by any recipient.

41 White House Office of Faith-Based and Community Initiatives, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations*.

42 The OLC opinion is discussed in Lupu and Tuttle, *State of the Law 2008*, pp. 33ff. The OLC opinion can be found at: http://www.usdoj.gov/olc/2007/worldvision.pdf (May 22, 2009).

43 The Bush Administration also proposed regulations covering the Department of Homeland Security, but those regulations have not yet been finalized.

44 The executive order is here: http://www.whitehouse.gov/the_press_office/AmendmentstoExecutiveOrder13199andEstablishmentofthePresidentsAdvisoryCouncilforFaith-BasedandNeighborhoodPartnerships/ (May 20, 2009).

45 *See* http://www.acf.hhs.gov/programs/ocs/scf/ (May 19, 2009).

46 See, for example, the announcement for the nonprofit capacity building program (http://www.acf.hhs.gov/grants/pdf/HHS-2009-ACF-OCS-SI-0091.pdf; viewed May 22, 2009), at 6, 8, 13-14, 19, 29.

47 Jeanne h. Schindler, ed., Christianity and Civil Society (2008).

48 Stanley W. Carlson-Thies, *Faith-Based Initiative 2.0: The Bush Faith-Based and Community Initiative*, Harv. J. Law & Pub. Pol'y vol. 32, no. 3 (Summer 2009), 931-947. (http://www.harvard-jlpp.com/wp-content/uploads/2009/05/Carlson-ThiesFinal.pdf ).