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Charitable Choice, Faith-Based Initiatives, and TANF

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Summary

After the death of the Charitable Choice Expansion Act of 2001 (Title II of H.R. 7), President Bush issued an executive order directing several Cabinet departments to adopt charitable choice rules in their social service programs. These rules seek to promote the use of religious groups as providers of social services while protecting the religious freedom of beneficiaries. In response to the order, several departments have made final regulatory changes, and other departments have proposed changes in rules. For faith-based initiative projects during FY2004, Congress appropriated $103 million (P.L. 108-199); and for FY2005, the President's budget requests $165 million. The 108th Congress resumed efforts to pass tax incentives for private giving (S. 476, passed by the Senate, and H.R. 7, passed by the House). However, these bills do not contain basic charitable choice rules. Opposition to charitable choice has brought together a coalition of religious and secular groups who, for different reasons, want to maintain separation of church and state — the former to protect their independence and sense of mission, the latter to guard against use of public funds for religious activities. In two cases concerning a Wisconsin faith-based program for drug addicts (Faith Works), direct government funding of religious activity has been found unconstitutional, but indirect funding (by voucher) has been found constitutional. In a related case, the U.S. District Court for the District of Columbia on July 2, 2004, found unconstitutional awards made to AmeriCorps participants who were placed as teachers in sectarian schools and who engaged in religious instruction and activities during the school day. For legal and constitutional issues raised by charitable choice, see CRS Report RL32195. This report will be updated for developments.

Charitable Choice Option in TANF Law. If a state chooses to administer and provide TANF services or benefits through a contract with a nongovernmental entity or to provide TANF recipients with certificates or vouchers redeemable with a private entity, it must allow religious organizations to participate on the same basis as any other nongovernmental provider without impairing the religious character of the organization and without diminishing the religious freedom of TANF beneficiaries. The law (Section 104 of P.L. 104-193) imposes the following basic charitable choice rules:

- Direct government aid may not be used for sectarian worship, instruction, or proselytization (Subsection j);
- Government is barred from discriminating against an organization that applies to administer and provide services on the basis that it has a religious character (c);
- The religious organization must implement the benefit/service program in a manner "consistent with the Establishment Clause of the United States Constitution" (c);[1]
- The religious grantee or contractor retains control over the definition, development, practice, and expression of its religious beliefs (d)(1);
- Government is barred from requiring the organization to alter its form of governance or to remove religious art and other symbols as a condition of eligibility (d)(2);
- If a welfare recipient objects to the religious character of an organization providing services, the state must provide an alternate and accessible provider (e)(1);
- The religious organization retains freedom to hire on the basis of religion (the organization's exemption from Civil Rights Act rules about employment practices is not affected by its administration of welfare benefits) (f);
- Except as otherwise provided in law,[2] a religious organization shall not discriminate against a beneficiary on the basis of religion, a religious belief, or refusal to actively participate in a religious practice (g); and
- Nothing in the charitable choice section of the law shall be construed to preempt any provision of a state constitution or law that prohibits or restricts expenditure of state funds in or by religious organizations (k).

Two other provisions are implicit: Religious contractors and grantees may use their own funds for sectarian worship, instruction, and proselytization (an explicit rule against using funds for sectarian purposes applies to public funds provided "directly" for welfare benefits or services, but not to aid received in the form of vouchers). Government may require religious grantees to be separately incorporated from their sponsoring institution.

P.L. 104-193 also applies charitable choice rules to other programs modified by its Title I or Title II that permit contracts with organizations to provide services or permit use of certificates, vouchers or other forms of disbursement to provide aid.[3] However, other provisions of law preclude use of private organizations to perform some basic

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[1] The First Amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... "It has long been interpreted to allow religious organizations to participate in publicly funded social service programs. But in the past it has generally been interpreted to forbid religious activities or proselytizing in the publicly funded programs and to require religious providers to set up a corporation separate from their religious sponsor and to remove religious symbols from the premises where services are provided (see CRS Report RL30388, *Charitable Choice: Background and Selected Legal Issues*, by David Ackerman).

[2] Legal researchers say they have found no instance of a law providing "otherwise," but this phrase is regarded as a loophole by some; an effort to delete it failed during debate on H.R. 4678.

[3] These programs are food stamps, Medicaid, and Supplemental Security Income (SSI).

administrative activities (such as eligibility determination for food stamps and Medicaid). (In 1998 and 2000 Congress extended charitable choice rules to the Community Services Block Grant and to substance abuse treatment and prevention services under the Public Health Services Act.).

Funding of Faith-Based Initiative Proposals. President Bush on January 29, 2001, launched a "faith-based initiative" with executive orders that established an Office of Faith-Based and Community Initiatives (OFBCI) in the White House and directed five Cabinet departments, Education, Justice, HHS, Labor, and Housing and Urban Development to set up similar offices, called centers (in December 2002, he directed the Department of Agriculture and the Agency for International Development also to establish centers; and in June 2004, he announced creation of three new agency centers — in the Departments of Commerce and Veterans Affairs, and the Small Business Administration). This brought the total number of federal agency centers to 10. In his initial call for faith-based initiatives, the President advocated expansion of charitable choice law, tax incentives to promote charitable giving, and several specific projects. Although Congress has not expanded coverage of charitable choice law or established tax incentives for charitable giving, it has funded four of the latter proposals: It established a new matching grant program to mentor children of prisoners ($10 million appropriated for FY2003 and $50 million for FY2004); provided $5 million for an ex-offender pre-release program for FY2004; appropriated $30 million for FY2002 to create a Compassion Capital fund to provide technical aid and start-up costs for small groups and increased Compassion Capital funding to $35 million for FY2003 and to $48 million for FY2004. Congress also voted to allow state educational agencies to award 21st Century Community Learning Center grants to groups other than schools, including community based organizations. The FY2005 budget requests $165 million for four faith-based projects: compassion capital fund, $100 million; mentoring children of prisoners, $50 million; maternity group homes, $10 million; and a 5-city pilot project to increase participation of a faith-based and community organizations in community development programs, $5 million.

Over three years, a total of almost $101 million has been awarded from the Compassion Capital Fund, and over two years, a total of $45/6 million has been awarded for mentoring children of prisoners. For guidance to FBOs on partnering with the government, see [http://www.whitehouse.gov/government/fbci/].

Legislative Action in the 107th Congress. In July 2001, the House passed H.R. 7 (the Community Solutions Act), which extended charitable choice rules to 9 new program areas. In the Senate a bipartisan group then introduced S. 1924, the Charity Aid, Recovery, and Empowerment Act (CARE), which was welcomed by the White House as representing an agreement "to move a faith-based initiative" out of the Senate. It omitted the most disputed provisions of H.R. 7 (religious discrimination in employment and possible "voucherization" of social services). Instead, in a Title called *Equal Treatment for Nongovernmental Providers,* it provided that a nongovernmental organization "involved" in the delivery of a federally funded social service could not be required to remove art, icons, scripture, or other symbols, or to alter its name, because the symbols or name were religious, or to alter or remove provisions in its chartering documents that were religious, or to alter or remove religious qualifications of membership on governing boards. These equal treatment provisions applied to all social service programs administered by the federal government (excepting educational assistance under major federal education acts) or by a state or local government using federal financial assistance

(not counting tax credits, deductions, or exemptions). The bill also proposed to establish tax incentives for charitable giving more generous than those of the House bill, establish a new Individual Development Account (IDA) program financed by business tax credits to financial institutions, and, in a title called *compassion capital fund*, authorize $150 million for technical assistance in FY2003 to small nonprofit community groups. Before scheduled Finance Committee markup in mid-June 2002, the equal treatment title of the original CARE bill was deleted. The committee then incorporated modified versions of some of the CARE provisions into its substitute for H.R. 7 and called it *Care Act of 2002*. This bill did not reach the Senate floor.

Legislative Activity in the 108th Congress. On April 9, 2003, the Senate passed a new bill S. 476 (entitled CARE) without provisions that Senator Santorum had sought to add to require equal treatment of religious and other nongovernmental organizations as providers of federally funded social services. To win passage of the CARE Act, which contains tax incentives for charitable giving, increases funding for the Social Services Block Grant, and establishes new tax credit-financed Individual Development Accounts, Senator Santorum agreed to a compromise that added technical assistance ("compassion capital fund") grants for community-based organizations and funding for maternity group homes, but lacked the "equal treatment" title.

On September 17, 2003, the House passed a new version of H.R. 7, entitled Charitable Giving Act. It contains tax incentives for charitable donations, and it authorizes new Compassion Capital Fund grants and funding for maternity group homes. It also extends the expiring program of IDAs (under the Assets for Independence Act) for five years. However, it does not contain charitable choice provisions; nor does it increase funding for the Social Services Block Grant. In December, the House-passed H.R. 7 was referred to the Senate Finance Committee. In passing separate bills to reauthorize the Workforce Investment Act (WIA) and Head Start, the House voted to remove provisions in current law prohibiting employment discrimination on grounds of religion, but the Senate-passed WIA bill and the Senate Committee Head Start bill retain current law.

Executive Action to Expand Charitable Choice. On December 12, 2002, after the death of H.R. 7 in the 107th Congress, President Bush issued Executive Order 13279 stating that all agencies that administer federally funded social service programs "to the extent permitted by law," should be guided by fundamental charitable choice principles. The order directed the Secretaries of Agriculture, Education, Health and Human Services, Housing and Urban Development, and Labor, the Attorney General, and the Administrator of the Agency for International Development to review policy policies and ensure compliance with these principles. It said that an organization that received a grant or contract to provide federally funded services could not offer "inherently religious" activities unless they were separated in time or location from other directly funded services and participation was voluntary for the beneficiary.

Origin of Charitable Choice. In June 1995, the Senate Finance Committee reported an amended version of the House-passed *Personal Responsibility Act*, H.R. 4, which proposed to replace the program of Aid to Families with Dependent Children (AFDC) with a block grant. The Finance Committee bill added two sentences concerning religious organizations. They provided that religious organizations who participated in the new state block grant program were to retain their independence from government and that the organizations could not deny aid to needy families with children "on the basis of

religion, a religious belief, or refusal to participate in a religious practice." This language was adapted from another AFDC block grant bill (S. 842, sponsored by Senator Ashcroft). In August, 1995, Senator Dole introduced *The Work Opportunity Act*, the Republican leadership alternative to the House-passed H.R. 4. Responding to growing interest in "privatization" of welfare services,[4] the section on provision of aid by religious organizations was enlarged to deal with "services provided by charitable, religious, or private organizations." Also, it stated affirmatively that *states had an option* to administer and provide block grant services through contracts with religious organizations and by means of certificates, vouchers or other forms of disbursement redeemable with them. Before passage the Senate adopted a two-part amendment proposed by Senator Cohen. The first added the requirement that programs be implemented consistent with the Establishment Clause of the Constitution; the second removed a provision that would have barred government from requiring a religious organization to form a separate nonprofit corporation in order to be eligible to provide assistance. Senate-House conferees added a stipulation that religious organizations would not lose their right to consider religion in their hiring practices because of participating in welfare programs or receiving funds from them. H.R. 4 was vetoed, but the charitable choice rules of the final 1996 welfare reform law are virtually identical to those of the conference report on H.R. 4.

Use of Charitable Choice in TANF. In their 2000-2001 plans, more than a dozen jurisdictions mentioned plans to use religious or "faith-based" organizations, usually along with other groups, in providing services (Arkansas, Delaware, District of Columbia, Georgia, Indiana, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, South Dakota, Tennessee, and Washington). Some spoke of service "partnerships" that included the "faith community" and community based/action agencies. Congress in 1997 added special welfare — to-work (WtW) formula and competitive grants to TANF for FY1998 and FY1999. As parts of TANF, the new grants were subject to charitable choice rules. The Labor Department awarded six competitive WtW grants (out of 188) to faith-based groups. Most projects were to provide employment services; some focused on persons with limited English proficiency. The House-passed TANF reauthorization bill, H.R. 4, requires stateTANF plans to describe strategies and programs to engage religious organizations in the provision of TANF-funded services.

Dr. Amy Sherman, Hudson Institute, told a research conference of the Roundtable on Religion and Social Welfare Policy in April 2002 that a survey about implementation of charitable choice in 15 states found 726 contracts totaling about $124 million. (For nine states this was a followup survey.) She said more congregations are "getting involved" in contracting to provide services, that roughly half of the faith-based organizations and congregations identified in the survey were "new players," and that some states showed a dramatic increase in contracting with faith-based groups. The survey found much more contracting activity with faith-based groups under TANF than in the other programs covered by charitable choice. She also said the new survey found a decline in the use of

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[4] The state of Texas then was seeking permission to have a private contractor administer an integrated state eligibility system for TANF, Medicaid and food stamps, but in May 1997, the Clinton Administration refused, holding that Medicaid and food stamp law required eligibility to be determined by a public official A Texas 2003 law requires use of private contractors to operate call centers to determine eligibility, if cost effective; and in April 2004, Florida requested waivers from law to permit privatization of eligibility determination across programs..

indirect financial contracting by way of intermediary organizations. An Urban Institute study of persons who left AFDC/TANF between 1995-1997 found that 72% did not seek help from nongovernmental sources. However, of those who did, about one-third used a faith-based provider, about one-tenth used a secular provider; and the rest relied on families and friends for help.

Litigation. On June 17, 2004, the *Freedom from Religion Foundation,* Madison, Wisconsin, brought suit in a federal court against several Cabinet officers and the director of the White House Office of Faith-Based and Community Initiatives. The suit charges that the faith-based initiative, by helping religious groups apply for federal contracts to deliver social services, has the effect of favoring these groups over secular organizations in violation of the First Amendment. In July and October 2000, two court suits were filed challenging the constitutionality of TANF charitable choice programs. One suit charged that a job training and placement program for TANF recipients funded by the Texas Department of Human Services and operated by the Jobs Partnership of Washington County was "permeated" by Protestant evangelical Christianity in violation of both the state and federal constitution (*American Jewish Congress and Texas Civil Rights Project v. Bost*, filed July 24, 2000, but dismissed in February 2001 as moot after Texas discontinued the program). The second suit, (*Freedom from Religion Foundation, Inc. vs. McCallum,* filed October 12, 2000) charged that a job placement and support services program for drug addicts in Milwaukee, Wisconsin, violated the state and federal constitutions by giving welfare-to-work funds directly to a "pervasively sectarian" organization [Faith Works] and using the funds to indoctrinate clients in the Christian faith. A federal judge on January 8, 2002, ordered Wisconsin to cease this direct funding as unconstitutional. Later, on July 26, 2002, the judge ruled on a second issue in the Faith Works case. She found a contract between Faith Works and the Wisconsin Department of Corrections to be constitutional because the religious organization received public funds only when offenders chose to receive treatment there.

In a related case (*American Jewish Congress vs. Corporation for National and Community Service and University of Notre Dame),*the U.S. District Court for the District of Columbia on July 2, 2004, found unconstitutional awards made to AmeriCorps participants who were placed as teachers in sectarian schools and who engaged in religious instruction and activities with students during the school day.

Conclusion. Advocates of charitable choice maintain that faith-based organizations have special ability to help persons toward self-respect, healthy family dynamics and independence. They maintain that existing charitable choice rules give protection against religious discrimination both to religious organizations providing welfare services and to beneficiaries of the services. However, many religious spokesmen have expressed concerns that government grants could diminish their vitality and religious commitment. For a discussion of areas of agreement and disagreement about charitable choice issues, see In Good Faith at [http://www.temple.edu/feinsteinctr].