



# The Faith-Based Initiative Through the Years

(202) 466-3234  
(202) 898-0955 (fax)  
americansunited@au.org

1301 K Street, NW  
Suite 850, East Tower  
Washington, DC 20005

## Charitable Choice: The 1990s

*Establishing the program and undermining the separation of church and state*

**Pre-1990s** –For decades, religiously affiliated organizations have partnered with the government to perform social services. These religious organizations were separate from the church or house of worship itself and they played by same rules as secular social service providers when using government funds—they did not discriminate in hiring or proselytize beneficiaries. Churches and houses of worship also performed religiously based social service programs, but they did so with funds from their own congregations and other private donations.

**1996** – Beginning in 1996 and extending into the early 2000s, Congress enacted “charitable choice” laws, dramatically changing the dynamics of federal funding of faith-based social services. Under the guise of “leveling the playing field” for religious organizations wishing to compete for government grants, Senator John Ashcroft drafted charitable choice laws to weaken the church state protections that had usually accompanied federal grants. Among other things, charitable choice allows federal funds to flow directly to houses of worship and allows religious providers to engage in religious hiring discrimination.

Congress passed charitable choice, in part, because there was little debate on or notice of the language. Many voiced vocal opposition, but still others let the language pass, never believing that the language could be used the way the Bush Administration later used it. The Clinton Administration, in particular, opposed the charitable choice laws. President Clinton issued signing statements indicating that his Administration would interpret the language as offering only minor changes to current law, as any other interpretation would violate the Constitution. Moreover, the Clinton Administration did not actively promote the charitable choice provisions and never promulgated policies or regulations for those laws.

Ultimately, Congress added charitable choice provisions to four statutes:

- [Assistance for Needy Families \(TANF\)](#) in 1996
- [Community Services Block Grant \(CSBG\)](#) in 1998
- [Substance Abuse and Mental Health Services Administration Act \(SAMHSA\)](#) in 2000
- [State Children’s Health Insurance Program \(S-CHIP\)](#) in 2009

## Faith-Based Initiative: The 2000s

*Applying the charitable choice language to nearly every federal social service program and creating the White House Office of Faith-Based and Community Initiatives*

**2001** – The Bush Administration took its first step in creating its “Faith-Based Initiative.” On January 29, President George W. Bush issued [Executive Order 13199](#), establishing the White House Office of Faith-Based and Community Initiatives and to help its new “national effort to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America's communities.” The new White House Office was tasked with paving the way toward a “level playing field” by identifying federal laws, policies, and regulations that imposed “barriers” and “obstacles” to government partnerships with religious organizations. Of course, the Administration identified important church state protections as barriers and obstacles.

**2002** – The [Administration then began working with Congress](#) to pass [H.R. 7](#), the Community Solutions Act, which would expand charitable choice to apply to every federal social service program. Although the legislation passed in the House, it failed to pass in the Senate.

Frustrated but undeterred by this defeat, the Bush Administration decided to cut out Congress and resort to executive action. President Bush signed [Executive Order 13279](#), adopting charitable choice language as the “principles” that would guide partnerships between religious organizations and the government, sweeping away many vital church-state protections that were previously required when the government funds faith-based organizations.

The executive order called for extending charitable choice language by agency regulation to every federally funded social service program. The only protections included in the executive order were to prevent organizations from discriminating against those receiving their social services and to prevent federal dollars from going to inherently religious aspects of the program. In practice these safeguards have proven difficult, if not impossible, to fulfill.

**2003** – The White House Office of Faith-Based and Community Initiatives issued the [report](#) entitled, “Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Must Be Preserved,” outlining the Administration’s Faith-Based Initiative and setting out its ill-conceived arguments as to why allows organizations should be allowed to discriminate with government funds. In reality, such government-funded employment discrimination can never be justified.

AU continued to critique the Administration’s position on religious hiring, noting that Executive Order 13279’s protections for religious hiring by organizations receiving government contracts were unprecedented. Indeed, this Executive Order amended a [previous executive order](#) issued by Lyndon B. Johnson, which required all federal contractors, including faith-based organizations, to hire without regard to religion. The Bush executive order represented a drastic departure from existing law and a dramatic shift away from equality toward religious preference.

**2003-2004** – The Bush Administration fulfilled Executive Order 13279 by adopting regulations that applied charitable choice to nearly every federally run social service program. At this point, the only

social service programs under which religious organizations were not allowed to not discriminate in hiring with program funds were the few that had statutory bans in place.

**2007** – The Office of Legal Counsel (OLC) for the Department of Justice issued a [memo](#) asserting that faith-based organizations have a right under the Religious Freedom Restoration Act (RFRA), to engage in employment discrimination with federal funds. The memo concluded that RFRA could be “reasonably construed” to allow a faith-based organization providing social services to be exempt from statutory restrictions on religious hiring, even if the statute contained an explicit anti-discrimination provision. This OLC memo was wrongly decided and [strongly opposed](#) by AU and other religious liberty organizations.

## **Faith-Based Initiative: Recent Developments**

*Amending the Bush-era Faith-Based Initiative through Executive Order and creating the White House Office of Faith-Based and Neighborhood Partnerships*

**2008** - On the campaign trail in Zanesville, Ohio, then-candidate Barack Obama [stated](#): “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.”

**2009** – On February 5, the President signed [Executive Order 13498](#). It amended Executive Order 13199 by renaming the White House Office of Faith-Based and Community Initiatives the White House Office of Faith-Based and Neighborhood Partnerships and it called for “strengthen[ing] the constitutional and legal footing” of the program. The executive order also created the President’s Advisory Council for Faith-Based and Neighborhood Partnerships (Advisory Council) to guide the President on policy questions. Although AU [questioned](#) the creation of an advisory Council formed mostly of clergy members, AU’s Executive Director Rev. Barry Lynn served as one of the church-state experts on the taskforce for reform of the President’s Advisory Council. He urged the Council to adopt greater constitutional protections for the program. Disappointingly, the issue of hiring discrimination was removed from the Council’s purview.

**2010** – The Advisory Council issued a [report](#), “A New Era of Partnerships: Report of Recommendations to the President.” One section of the report detailed 12 unanimous recommendations for how the Administration should reform the Office of Faith-Based and Neighborhood Partnerships. AU, and Barry Lynn as a member of the task force, supported all of these unanimous recommendations. AU was [critical](#) of the report, however, in so far as the Advisory Council’s report failed to recommend that religious providers remove religious symbols in areas where they provide federally funded services or that houses of worship be required to form independent non-profit entities in order to receive federal funds.

**2010** – President Obama signed [Executive Order 13559](#), setting out several principles, based on the Advisory Council report, to govern partnerships between the federal government and faith-based social service providers. The Executive Order also created an Interagency Working Group on Faith-Based and Other Neighborhood Partnerships (Working Group), which was required to submit “a report to the

President on amendments, changes, or additions that are necessary to ensure that regulations and guidance documents” were properly executed.

**2012** – The Working Group issued its [report](#), “Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations” to the President. The report failed to adequately address the problems raised by the Advisory Council. [AU offered criticism](#) of the report as not fully fulfilling the recommendations of the Advisory Council recommendations.

**2013** – The Office of Management and Budget (OMB) issued a [memo](#) advising federal agencies to develop regulations and guidance on how to implement President Obama’s Executive Order 13559 consistent with the Working Group’s model guidance.

**2014** – The Department of Justice offered an [FAQ](#) on the Violence Against Women Act (VAWA) stating that the still-in-place Bush Era OLC memo allowed religious organizations receiving VAWA funds to ignore the law’s hiring nondiscrimination provision in so far as it applies to religious discrimination. The document reiterated the reasoning set forth in the 2007 Bush memo that RFRA exempts faith-based organizations from hiring nondiscrimination provisions. VAWA explicitly contained a hard-fought employment anti-discrimination provision. AU, along with 90 other groups [wrote to the Obama Administration](#) opposing its use of the poorly reasoned 2007 OLC memo.

**Looking Ahead-** OMB and Office of Faith-Based and Neighborhood Partnerships have been meeting to develop a plan to implement new regulations and guidance. After that plan is created, each agency will then have 120 days to create a plan to draft and promulgate regulations. After approval of those plans, the agencies will begin to re-write the regulations. In the meantime, AU will continue to advocate for reform, including that faith-based programs should contain protections for beneficiaries; faith-based employers should not be allowed to discriminate with federal funds; and faith-based policies should contain better protections to keep government money from funding explicitly religious activities.