PERFORMANCE, ACCOUNTABILITY, AND REFORMS AT THE CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

HEARING

BEFORE THE

SUBCOMMITTEE ON SELECT EDUCATION

OF THE

COMMITTEE ON EDUCATION AND THE WORKFORCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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Tuesday, April 1, 2003

Subcommittee on Select Education,

Committee on Education and the Workforce,

U.S. House of Representatives,

Washington, D.C.

The subcommittee met, pursuant to notice, at 2:13 p.m., in Room 2175, Rayburn House Office Building, Hon. Peter Hoekstra [chairman of the subcommittee] presiding.

Present: Representatives Hoekstra, Porter, Burns, Hinojosa, Davis, and Ryan.

Staff present: Julian Baer, Legislative Assistant; Kevin Frank, Professional Staff Member; Melanie Looney, Professional Staff Member; Sally Lovejoy, Director of Education and Human Resources Policy; Alexa Marrero, Press Secretary; Krisann Pearce, Deputy Director of Education and Human Resources Policy; Deborah L. Samantar, Committee Clerk/Intern Coordinator; Rich Strombres, Professional Staff Member; Ellynne Bannon, Minority Legislative Associate/Education; Denise Forte, Minority Legislative Associate/Education; Ricardo Martinez, Minority Legislative Associate, Education; and Joe Novotny, Minority Staff Assistant/Education.

OPENING STATEMENT OF CHAIRMAN PETE HOEKSTRA, SUBCOMMITTEE ON SELECT EDUCATION, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES

Chairman Hoekstra. A quorum being present, the Subcommittee on Select Education will come to order.

We are meeting today to hear testimony on performance, accountability, and reforms at the Corporation for National and Community Service.

Under Committee Rule 12B, opening statements are limited to the chairman and the ranking minority member of the subcommittee. Therefore, if other members have statements, they may be included in the hearing record.

With that, I ask unanimous consent for the hearing record to remain open 14 days to allow member statements and other extraneous material referenced during the hearing to be submitted in the official hearing record.

Without objection, so ordered.

I would like to welcome each of you to the hearing on performance, accountability, and reforms at the Corporation for National and Community Service.

The purposes of today's hearing are to learn about our nation's national service programs, to evaluate the performance and efficiency of the Corporation for National and Community Service, and to discuss various perspectives on legislation to reauthorize programs administered by the Corporation.

The major federally funded national service programs in this country are authorized under two states, the National and Community Service Act and the Domestic Volunteer Service Act.

In general, the programs authorized by these statues are administered by the Corporation for National and Community Service, an independent federal agency. Although authorizations for these programs expired at the end of fiscal year 1996, they continue to be funded through appropriations legislation.

Last Congress, the Subcommittee on Select Education and the Committee on Education and the Workforce reported H.R. 4854, the Citizen Service Act of 2002, to reauthorize programs administered by the Corporation through fiscal year 2007.

The purposes of H.R. 4854 were to reform and strengthen national service programs administered by the Corporation, implement first-time accountability measures for grantees under the national service laws, and make the Corporation an effective outlet for leveraging volunteers and community service activities among the many service organizations across the country.

In addition to the many important reforms within last year's Citizen Service Act, the Subcommittee on Select Education will work to build on last year's progress and address several issues to better our chances at completing a reauthorization bill that will improve our nation's national service laws and, more importantly, a reauthorization bill that President Bush can sign into

law.

Today I am looking forward to hearing testimony about religious staffing rights as they pertain to the Constitution and whether the protection of religious staffing rights is prudent and good public policy for programs administered by the Corporation for National and Community Service.

This is a matter of concern for some of us, because under the current national service laws, faith-based groups are denied the protections of the Civil Rights Act that would otherwise allow them to hire employees or accept participants on a religious basis while accepting federal funds.

I also hope to review living stipends and other supplemental benefits provided to program participants by the Corporation. Under current law, programs receiving AmeriCorps funding must provide full-time participants with a living stipend of at least $9,900 in which the Corporation provides a maximum of 85 percent of the living allowance, and the grantees pay at least 15 percent.

Full-time participants that do not otherwise have health care coverage also qualify for health coverage in which the Federal Government covers up to 85 percent of the cost. While the federal share varies among the many national service programs, CRS reports that the average amount spent on health coverage per participant for program year 2002 for AmeriCorps grants was $893.

In addition, child care is provided to full-time, low-income participants. CRS reports that the average amount spent on child care per qualified participant for program year 2002 was $3,324.

Finally, the Corporation provides an educational award in the amount of $4,725 to qualified participants who serve for a full term of service, which is 1,700 hours over a period of 10 to 12 months.

In light of the significant federal share of costs associated with the national service laws, there are some tough questions we need to ask about various ways to control spending while maximizing the federal contribution to national service programs:

Should the Federal Government provide a living stipend for national service participants?

If there is a living stipend provided, should it and other benefits, such as health coverage and childcare, be awarded based on financial need?

Should there be a cap on the federal share of benefits provided to AmeriCorps participants?

If programs are operating indefinitely with full-time, federally supported participants, should the Congress limit the number of years a grantee may receive funds to support full-time participants to help encourage long-term program sustainability with non-federal funds?

In light of the many issues and programs associated with the Corporation and the fact that the national service laws have not bee authorized since fiscal year 1996, this subcommittee has a

lot of work to do. I look forward to crafting legislation that builds on last year's progress and focuses on improved performance, accountability, and reforms at the Corporation.

I would like to thank our distinguished witnesses for appearing before the subcommittee today. I look forward to hearing your testimony and the unique perspective that each of you brings to this discussion.

At this time, I would like to yield to my colleague from Texas, Mr. Hinojosa, for his opening statement.

WRITTEN OPENING STATEMENT OF CHAIRMAN PETE HOEKSTRA, SUBCOMMITTEE ON SELECT EDUCATION, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES – SEE APPENDIX A

OPENING STATEMENT OF RANKING MEMBER RUBEN HINOJOSA, SUBCOMMITTEE ON SELECT EDUCATION, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES

Mr. Hinojosa. Good afternoon. I also want to join Chairman Hoekstra in welcoming you before our subcommittee today.

The Corporation for National and Community Service provides opportunities for Americans of all ages and income groups to serve their communities through three groups and programs: Senior Corps, AmeriCorps, and Learn and Serve America.

Volunteers for these programs serve with national and community non-profit organization, faith-based groups, and local agencies to help meet local needs in education, the environment, public safety, homeland security, and other critical areas.

I strongly support the national legislation and the Corporation in its administrative endeavors and want to recognize some of the successful programs within my own district in South Texas.

Some of these programs include: the Boys and Girls Clubs of Edinburg; the Center for Economic Opportunities; and the Hidalgo County Bar Association; the Nuestra Clinica del Valle in Pharr; Sunset Dreams in Donna; the Lower Rio Grande Valley Development Council in McAllen; and several others I could name.

I would emphasize, though, that the strength of these programs resides in how much they are able to contribute towards bettering the lives of individuals at the local level. In my district, AmeriCorps volunteers are making positive contributions to the success of these programs, and I am sure that is true in districts throughout the country.

Today we will hear from Dr. Lenkowsky, CEO for the Corporation, along with several outstanding witnesses—Dr. Carl Esbeck, Dr. Matthew Spalding, John Pribyl, and Richard Foltin. Welcome to all of you.

Last Congress, the legislation reauthorizing our national service programs was carried through in a bipartisan manner. Indeed, the measure passed by voice vote at the subcommittee and at full committee.

I am committed also to replicating those efforts and to working with you, the chairman, members of the committee, and our Senate colleagues, to send a good, bipartisan reauthorization bill to the President. National service is something that we all value. I am confident that if we work in a bipartisan way, we can successfully reauthorize this important program.

The war in Iraq shows us vivid images every day of the thousands of young Americans who proudly serve their country in uniform. There are also thousands of men and women who want to contribute towards improving the lives of our citizens across America. These programs will give them the opportunity to do so.

I look forward to the testimony, and I yield back the balance of my time.

Chairman Hoekstra. Thank you, Mr. Hinojosa, and I am hopeful that we can duplicate the success that Mr. Roemer and I had last year in getting a bipartisan piece of legislation through the subcommittee and through full committee, and will look forward to working together in getting that done.

To kick off that process, we will begin with the doctor, Dr. Lenkowsky. I guess I do not ever treat you with enough respect, because I always call you Les, but doctor, welcome.

As many of you know, Dr. Lenkowsky is the Chief Executive Officer for the Corporation for National and Community Service. He was appointed to this position by President Bush and served as CEO since October 2001. Prior to his appointment, Dr. Lenkowsky served the Corporation as a member of its board of directors since its creation in 1993.

Dr. Lenkowsky, welcome, and the floor is yours.

Push the button, Les. There you go.

STATEMENT OF LESLIE LENKOWSKY, CHIEF EXECUTIVE OFFICER, CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Mr. Lenkowsky. Thank you very much, Mr. Chairman, Congressman Hinojosa, members of the Select Education Subcommittee.

I am pleased to be here this afternoon to report to you on the operations of the Corporation for National and Community Service and to discuss the Bush administration's proposals for improving and enhancing its programs. In a more profound sense, I am here and you are here because at this critical moment in our nation's history, millions of Americans are asking the same question: what can I do to help?

While our country is rich in ways to answer this question, we are responsible for an important group of them, the programs of the agency I am privileged to lead. These programs provide opportunities for some 2 million Americans of all ages and backgrounds to serve the United States.

Working together, it is up to us now to make these programs more effective in helping our fellow citizens fulfill their desire to pitch in at a time of great national need.

For nearly 40 years, the Corporation's programs have been enlisting Americans in full-time and part-time service, sometimes with a small living allowance in return, and sometimes with nothing more than the satisfaction that comes from doing a good deed.

Presidents of both parties have endorsed and improved these programs, as have members of both parties in Congress. Last year, all 50 governors backed their renewal; as did our country's most respected charities, including Habitat for Humanity, Teach for America, and Communities and Schools.

In 2002, when he established the USA Freedom Corps, a coordinating council and White House office to help build a culture of service, citizenship, and responsibility that strengthens our country and offers help to those in need, President Bush made the programs of the Corporation a major component of it.

Since several of you are new to the subcommittee, let me briefly describe these programs.

In terms of the number of Americans involved, Learn and Serve America is our largest program. Through grants to state education agencies, colleges, universities, and community-based groups like the YMCA, over 1.5 million young people learn the habits of good citizenship through

volunteering related to their classwork.

This year, we are giving special emphasis to programs that focus on American history and civics so that the rising generation of Americans can become better informed citizens while they serve their communities.

At the other end of the age range is our Senior Corps, which is really three programs: Foster Grandparents, whose members work up to 20 hours each week with needy children; Senior Companions, who assist family caretakers to look after frail elderly relatives; and the Retired Senior Volunteer Program, which engages people 55 years of age or older in activities ranging from tutoring and mentoring to assisting police departments and other emergency service workers.

All together, 500,000 Americans at over 70,000 different locations are part of Senior Corps, staying active and healthy after their working years by helping others.

Our final program is AmeriCorps, which last year enrolled nearly 50,000 people 17 years of age or older in assignments requiring up to 40 hours per week working to help meet unmet needs in education, health, public safety, the environment, and other areas.

All of them were volunteers, but 75 percent received a full or partial living allowance from the Corporation, and most an award that could be used for further education or to repay student loans, and they received this not because they were needy, though many are, but because they had given up other ways of earning a living to do something substantial and valuable for their country.

All served with front-line units in the armies of compassion, charities large and small, faith-based and secular, helping build their capacities to better achieve their goals, including by recruiting other Americans to give a few hours each week.

Each of these programs has a long record of accomplishment that we at the Corporation and many others are proud of, but as you know, the management of these programs has often not been one we could be proud of.

Indeed, last November, because of a serious weakness in our controls over obligations from the National Service Trust, I had to take the drastic but necessary step of instituting a pause in AmeriCorps enrollments, which I was only recently able to lift.

Since taking office, this administration has been pursuing a comprehensive management improvement agenda, emphasizing outcome-based performance measurement, financial transparency, re-engineered procedures, and accountability from Corporation, staff, and grantees.

We have made a great deal of progress, symbolized by the clean opinion the Corporation received for the third consecutive year from its independent auditors. However, we still have a great deal more to do, which I look forward to discussing with you.

Management changes will not be enough to ensure that the Corporation's programs can respond effectively to the desire of Americans to serve.

We also need to make changes in the laws establishing our programs to foster greater engagement of citizens in volunteering, make federal support for service more responsive to state and local needs, strengthen our efforts to make federal funding more accountable and cost effective, and provide great assistance to faith-based and secular community organizations.

These were the principles and reforms for a Citizen Service Act proposed by President Bush almost exactly one year ago. They were embodied in H.R. 4854, which as you noted, was approved by the House Education and the Workforce Committee on a bipartisan voice vote last June.

Unfortunately, time ran out before the Citizen Service Act could be enacted. As the President said in his State of the Union address, we hope that the Congress will complete the work it began last year on this long overdue set of improvements in the Corporation's programs.

That would be the best way we can answer the question, ``What can we do to help?''

My written testimony, which I have submitted for the record, goes into more detail about our proposals for the Citizen Service Act. I look forward to discussing these further with you.

Mr. Chairman, that concludes my oral testimony. I would now be glad to answer your questions.

WRITTEN STATEMENT OF LESLIE LENKOWSKY, CHIEF EXECUTIVE OFFICER, CORPORATION FOR NATIONAL AND COMMUNITY SERVICE – SEE APPENDIX B

Chairman Hoekstra. Thanks, Les.

Can you explain to me exactly what the current status is of the $64 million that you have asked for? I thought that with the money in the omnibus bill we would have sufficient money in the trust and we were going to be done with it.

Mr. Lenkowsky. We had hoped that would be the case, too, but unfortunately, some information was not submitted in a timely enough manner for you to take action on it in the Congress.

The $64 million reflects a procedural program that the Office of Management and Budget discovered as they were reviewing the situation with our National Service Trust that I discussed earlier.

Essentially, we had been handling our books in a way that led everybody to think we had surpluses. As you may remember those surpluses were rescinded at various times by our appropriations committees.

In fact, by using proper accounting procedures and recognizing our obligations properly, we would not have had as much of a surplus as people thought.

So the $64 million, in effect, is to un-rescind some of the money that was rescinded, and we are going forward using proper accounting procedures so that this problem will not recur again.

Chairman Hoekstra. But you're still $64 million short in the account?

Mr. Lenkowsky. We need the $64 million to make up a shortfall in our national trust.

Chairman Hoekstra. Then how did you start re-signing students again?

Mr. Lenkowsky. We have a ruling from the Office of Management and Budget that said, ``The $100 million that you appropriated for the National Service Trust in the 2003 omnibus appropriation act was designed to pay for educational awards,'' and as you know, the President has submitted a request to Congress not only for the $64 million as a supplemental to deal with this accounting issue, but also some other changes that would help us avoid future problems.

Chairman Hoekstra. Now, we have given $100 million in the trust in the omnibus bill, right?

Mr. Lenkowsky. Correct.

Chairman Hoekstra. Why does that not take care of the $64 million?

Mr. Lenkowsky. It does not because the $64 million is, in effect, for past obligations. The $100 million is for current obligations.

Chairman Hoekstra. For the new people you enlist?

Mr. Lenkowsky. The people we will enlist in 2003.

Again, we did have money in the trust to cover those. It was reported in the wrong way. The money had been rescinded in prior years by the Appropriations Committee.

This was largely the result of improper accounting practices that had been in place going back to the beginning of the Corporation, which we discovered as part of our effort to remedy another problem in the National Service Trust.

Chairman Hoekstra. So the only way you are going to fix the $64 million is for a special appropriation for $64 million?

Mr. Lenkowsky. That is correct.

Chairman Hoekstra. Even though we have just given you $100 million?

Mr. Lenkowsky. That is correct.

Chairman Hoekstra. Why do you not take $64 million out of the $100 million and say it is done, and allocate new positions for the $36 million?

Mr. Lenkowsky. I think it is the Office of Management and Budget position that, barring some future enactment by this Congress, that the $100 million was intended for education awards for the 50,000 AmeriCorps members that we are scheduled to enroll in 2003.

The $64 million does not apply to that group, but un-rescinds the earlier year rescissions to put the trust in a proper balance.

Chairman Hoekstra. So what are you going to do when those young people want money out of that $64 million, and you do not have it?

Mr. Lenkowsky. We have ample money in the trust to cover the obligations we anticipated incurring immediately. We think that with the $64 million on hand, recognizing our obligations properly, the trust will be completely solvent.

Chairman Hoekstra. For how long will it be?

Mr. Lenkowsky. Long enough to handle all obligations that we have made under the trust.

Chairman Hoekstra. So then why do you need $64 million?

Mr. Lenkowsky. In effect, this is a bit like your bank account. We had been accumulating funds for a rainy day. We had surpluses in the trust.

Those surpluses, though, appeared to be larger than they really were.

Chairman Hoekstra. Right. You rescinded some of those.

Mr. Lenkowsky. We rescinded over $100 million of them.

Chairman Hoekstra. So do you need $64 million or not?

Mr. Lenkowsky. We do need $64 million to make good for the rescissions that were done.

Chairman Hoekstra. Yes, to make good for the rescissions.

Mr. Lenkowsky. There are incorrect obligations.

Chairman Hoekstra. Do you have the money to make good to the people that have worked, or who have earned the award? If everybody who earned the award today walked in and said, ``I want it," do you have the money or not?

Mr. Lenkowsky. I would want to check with our finance people on that, but my understanding is we need to have the $64 million in the trust to pay for the obligations we have incurred in prior years.

Chairman Hoekstra. So you are not, you are still not solvent in that area?

Mr. Lenkowsky. Money was rescinded. The President has requested $64 million.
Chairman Hoekstra. I know what he has requested.

Mr. Lenkowsky. That request is to make up a shortfall.

Chairman Hoekstra. You do have a shortfall?

Mr. Lenkowsky. There is a shortfall.

Chairman Hoekstra. Hmm. I think that is an interesting decision on your part, and the part of OMB, to say go ahead and award 50,000 more without an agreement or even a leadership position that says Congress is going to give you $64 million.

Mr. Lenkowsky. Well, this is the opinion we have, which we will be glad to submit for the record.

Chairman Hoekstra. You have explained the opinion. You have explained the opinion very, very well. I just find it interesting.

Mr. Lenkowsky. I think what is behind this is while, hypothetically, everybody could claim their education award tomorrow if they wanted to, the trust of the matter is that people have seven years in which to claim those education awards, and we would expect that to occur over a seven-year period.

So we think that getting the $64 million in place will ensure that out over that period we will have the adequate funds to meet all obligations.

Chairman Hoekstra. So we can give you $9 million a year for the next seven years and you would be happy?

Mr. Lenkowsky. Well, not if, as you suggested, Mr. Chairman, people start coming in at a higher rate than we expect. I think it is the sort of thing we want to get done right now so we do not have to be asking these questions at future hearings.

Chairman Hoekstra. That is what I thought we were going to do, and I am tremendously proud of the work that you have done there. You got a clean audit. I believe it is a clean audit, right, maybe two or three in a row?

Mr. Lenkowsky. It is the third in a row.

Chairman Hoekstra. The third in a row means, that you have done a tremendous job in cleaning up the books there.

This is that kind of dark cloud on the horizon, and it is kind of like you could have taken care of it by taking $64 million out of the $100 million that we gave you and saying, ``This covers our past transgressions, that is now behind us, and yeah, it is painful, but I only have $36 million in awards to offer this year, and if Congress wants to enroll more students or participants in the program, then there is going to have to be an additional appropriation to make that happen."

With the track record that you and the board have established at the Corporation for not keeping funny books, having it pass muster, I love what you are doing. However, I do not agree with your decision on the $64 million. I wish you would clean that off your books, bite the bullet, and as painful as that is for this year in enrolling students, recognize that this is the bite you have to take to get this issue off of the books and to have us stop talking about it.

Mr. Lenkowsky. Well, we had certainly hoped that that would happen in the 2003 omnibus bill as well, but if I may use the phrase, "the fog of the appropriations process" at that end, led to a certain amount of confusion.

We really did not have much to do with that, as you know. That is something that goes on between the Office of Management and Budget and the appropriations committees, and I think that we have to abide by their decisions.

Chairman Hoekstra. Yes, but it is your decision as to whether you are going to transfer that $64 million.

Mr. Lenkowsky. Well, I think the OMB ruling reflects the understanding, which seems fairly clear in the language accompanying our appropriation, that the appropriations committees expected us to use the money to enroll 50,000 members in 2003.

That seems clear, and I think that is the basis of the OMB ruling. So we are going to do that.

So you might say that we are sort of caught between two different things here. We have a congressional appropriation with accompanying language that directs us to enroll 50,000 members in 2003, and we have a shortfall that we have to cure, and we are intending to do that, and I think President Bush's request to Congress is meant to enable us to do this.

Mr. Hoekstra. Right. Thank you. Mr. Hinojosa.

Mr. Hinojosa. I am new to this committee, and I find it very difficult to understand how this Corporation, possibly prior to your coming in, could have used accounting procedures that would produce a $64 million shortfall. That is a huge amount. It reminds me of Enron and it reminds me of all of these awful things that happened last year.

Can you briefly tell me what kind of accounting procedures and what kind of accountants would have allowed such a mess?

Mr. Lenkowsky. Well, I wish I could, but I must say that I have asked at OMB as well as had our own files searched, and I cannot tell you conclusively.

The problem basically was that, as we requested funding for the trust, our request was based on how much we expected to spend out of the trust in any given year. The proper procedure is to request funds based on your obligations, which in our case involves a calculation based on the number of AmeriCorps enrollments.

We do not know conclusively whether or not the prior accounting method had received OMB approval. We do have testimony from previous CEOs to our appropriations committee that seems to suggest that it had been approved. On the other hand, OMB tells us they have no records that it has been approved.

Rather than spend my time looking at the past, I want to look forward, get this thing done right, keep it done right, deal with any shortfalls that are a consequence of prior practices, and go on from there.

Ultimately, we have to make sure, as I said in my opening statement, that we are in a position to respond to the desire of Americans to serve.

I should point out, by the way, that during the whole period there was a lot of bad publicity about the Corporation, including stories saying we were not enrolling members. Our on-line applications actually went up 15 percent. People were still anxious to come into this program.

I regard my responsibility to make sure that we clean up whatever I have inherited and go forward in a proper manner.

Mr. Hinojosa. So the clean audits that you have, apparently OMB is telling you that the accounting procedures are acceptable to them and to everyone, so that we won't have this happening anymore?

Mr. Lenkowsky. Currently, that is correct. I do not want to get too deeply into the language of audits, though I do have a fair amount of experience with that. We have a new chief financial officer who has been very instrumental in helping work through these problems.

We believe now we have established procedures with regard to our accounting for the National Service Trust and are relating those accounts to the obligations we are making in AmeriCorps that will keep us on a solid footing going forward.

Mr. Hinojosa. Well, tell me this. Was there any fraud, was there any embezzlement found in those $64 million that is causing this shortfall?

Mr. Lenkowsky. No, Congressman, there was not. We have both the inspector general investigating and the GAO is investigating. We will await the final outcome of that, but at the moment, no one has suggested to me that there was any fraud, embezzlement, or other illegal activities under way.

Mr. Hinojosa. Well, I feel like I'm looking at a situation with a fog that I just can't see through it, and I would reserve the right to come back and ask more questions, because I am not satisfied with the explanation on the $64 million shortfall.

Last Congress, you and the chairman of your board, as well as President Bush, supported the bipartisan efforts that passed our subcommittee as well as the full committee. This Congress, you have fairly significant changes that may discourage similar cooperation on certain provisions, especially civil rights and religious rights issues. Could you please elaborate on some of the specific reasons for your changes now and why they were not included last year?

Mr. Lenkowsky. When I testified last year, Congressman Scott, who was a member of this subcommittee at that time, asked me about this. We had an interesting, if inconclusive, discussion. I made quite clear that we have a provision relating to religious liberty that is unique to the Corporation.

There were discussions elsewhere in Congress about different provisions, and certainly the courts have been speaking on this, as well.

We have continued to study this throughout the entire year, talking to members. You will hear later in this hearing from a very distinguished lawyer we have consulted on these matters. We have concluded that both as a matter of law, but also to make our programs more amendable to the organizations that we are trying to reach, and particularly the faith-based organizations. It is better to reduce the confusion by amending the provision we currently have. It is known as Section 175C. We should amend this instead of relying on the civil rights law of 1964 as well as the President's recent executive order in this matter, Executive Order 13279.

We believe this provides full coverage with respect to the existing standards of law and it is also consistent with the law in other programs of the Federal Government. Therefore, it will be less confusing to potential grantees and more likely to be helpful to our reaching out to the small grassroots faith-based groups, like some of the ones you mentioned, that we want to reach.

Mr. Hinojosa. Are you prepared for the division that this is going to cause in our committee?

Mr. Lenkowsky. Well, we would hope there would not be a division.

We stand strongly behind the civil rights laws, the existing civil rights law. The civil rights laws are a great monument of our democracy. We believe they provide more than adequate protection for individuals as well as balance that with protection for organizations, religious organizations in this particular case, and we support those completely, and think that is also reflected in the President's executive order.

So we hope that, at this point in our history, that support would not be divisive.

Mr. Hinojosa. Well, Les, if you don't have evidence of how the $64 million shortfall occurred, what evidence do you have that faith-based organizations are experiencing confusion or having difficulties?

Mr. Lenkowsky. We have heard that faith-based organizations are concerned about this Section 175C in our program. They are not quite sure what it means. Some are afraid, as you know, as you will hear testimony later.

Part of the impetus for clarification in this area is the concern on the part of potential grantees that there would be, through the regulatory process, undue involvement with the religious liberties of those organizations. We have heard from constituency groups who tell us that 175C creates that fear.

We do not think it is necessary to create it. To reiterate it, we think the civil rights laws, as they are currently interpreted through our courts, provide the kind of protection that both individuals want against being discriminated against and organizations need in order to maintain their character, in this case, their religious character.

Mr. Hinojosa. Mr. Chairman, my time is up, and I will stop at this point.

Chairman Hoekstra. Good. Thank you.

Just to clarify, Mr. Hinojosa, in the late 1990s, there were a number of cases of fraud and abuse within the department, but I believe there were also problems in the trust with tracking who was eligible for what amount and who would actually pull out their dollars and those types of things, but those issues are a separate issue from the $64 million question. They are two different things.

The waste and the fraud within the Corporation and some of the lack of information within the trust, existed, and they were documented; but the $64 million problem is something that came out once they applied proper accounting procedures to the trust to figure out exactly what potential liabilities might be.

You asked if there had been fraud, and there had been, but it does not relate to the $64 million.

All right. Mr. Porter.

Mr. Porter. Thank you, Mr. Chairman.

Also being a new member, I realize this situation is an A through Z problem, and I am coming in the middle at P and Q, so bear with me as I ask you a couple questions.

Regarding the $64 million, and I know that we are spending a lot of time on this, but explain to me again how you determined this problem, and how it came about? Because I am not really clear on that at this point.

In fact, is it an ongoing problem over the last decade, or is it something that has just happened?

Mr. Lenkowsky. We believe it is an ongoing problem that goes back pretty much most of the decade, since the Corporation was started.

Each year when we request, and the President requests funds for the Corporation, there are two parts to the request for AmeriCorps. One part is for program funds that would enable us to enroll AmeriCorps members. The other part is for an appropriation to the trust.

The practice we had been using was requesting as much for the trust as we felt we needed to meet the expenditures of the trust in that particular year.

The official way of doing it would probably be a better way to characterize it. The way to do it is to request in funding from the trust the amount you expect to obligate that year, even if all of it will not be expended that year, which is true in our case.

As I mentioned earlier, a member of AmeriCorps has seven years after completing his or her service to claim an education award.

So we have been using annual outlays. OMB feels we should properly be using amounts obligated. We have accepted that. That will mean in each particular year we will be requesting more for the National Service Trust than we have in prior years.

Mr. Porter. Excuse me. So what you are saying is that you are going to establish a reserve?

Mr. Lenkowsky. That is correct, and we had been building a reserve, anyway.

Mr. Porter. What you were talking about earlier, that may cover you in the short term, but you are trying to build a larger reserve?

Mr. Lenkowsky. Well, it will cover us. It will balance out over the seven years so that we should have in the trust enough to cover our expected obligations over the seven-year period.

Mr. Porter. How can we be assured this will not happen again? Would you suggest, or shall we suggest some standards to be put in place to prevent it from happening again?

Mr. Lenkowsky. Well, I think certainly we would be very open to doing that.

I think the critical standard is to recognize that we have put in a number of procedures in place already, which again I will be glad to submit for the record.

The critical one is to make sure that the chief financial officer has to approve, and has to certify that there are funds for the trust before we start making awards for AmeriCorps. I think that is a fairly straightforward procedure.

It is so straightforward that, frankly, I am amazed it did not go into place before, but as I said, I ca not really explain a number of things that happened before. All I can do is fix them and get them done right.

Mr. Porter. We expect you should have this crystal ball so you can answer things that happened before.

I appreciate your answer.

Thank you, Mr. Chairman.

Chairman Hoekstra. Mr. Ryan.

Mr. Ryan. Thank you, Mr. Chairman.

Chairman Hoekstra. Welcome to the subcommittee.

Mr. Ryan. Glad to be here.

Chairman Hoekstra. All new faces surround me.

Mr. Ryan. That is right. It'll keep you young, Mr. Chairman.

Thank you very much for showing up today. I'm also new and may ask a few elementary questions, but I hope that you can bear with us.

Looking through your testimony and listening a little bit to it, under the National and Community Service Act, there's a part near the bottom of your testimony that says you're going to be getting tough on prohibited political activity.

Can you just kind of let me know what was going on that is not going on anymore, or maybe is still going on but will not be happening anymore?

Mr. Lenkowsky. A lot of this was in the past, as the chairman suggested. We have very stringent restrictions on AmeriCorps members, some of which actually are tougher than the rules governing 501C non-profit organizations.

For example, AmeriCorps members on AmeriCorps time are not allowed to engage in voter registration efforts, even non-partisan ones. That is simply a rule that we have adopted.

As you probably know, non-profit organizations are allowed to do that, as long as it is non-partisan.

We want to continue to enforce this. In the past, these rules have been administrative in nature. We really want to make them part of our regulations, and to the extent necessary, part of the existing law.

We think that this is a program, and getting to Congressman Hinojosa's point, this is a program that deserves strong bipartisan support, and to do that, we want to make sure there is not the slightest suspicion of a doubt that any of our AmeriCorps or Senior Corps or Learn and Serve members are engaged in any sort of partisan political activities.

Mr. Ryan. Thank you. So no voter registration?

Mr. Lenkowsky. That is our existing rule. That is correct.

Mr. Ryan. Okay. Also, I had an opportunity, down by the earmarked section, you talked a little bit about the organizations that do receive earmarks: Teach for America, Points of Light Foundation, and America's Promise.

And then at the bottom, it says, ``Limit the use of earmarking funds through the appropriations process.''

Can you talk to me a little bit about what, in a general sense, in a nutshell, what each of those do, maybe what their level of funding is now, and why it's going to be capped or limited or whatever your plans are for it?

Mr. Lenkowsky. The Points of Light Foundation has been a long-time partner of this organization, going back to our earliest days under the first Bush administration.

The Points of Light Foundation was contained in, created in the same law, and it provides a variety of things to help promote volunteering in the United States. The one that you are perhaps most familiar with would be the support of the national network of volunteer centers. There are such centers all over the country, and they provide a way by which people in your community and many other communities who want to volunteer can find organizations that are looking for volunteers, and that is a principal activity of the Points of Light Foundation, along with others.

America's Promise was created a few years later, in the middle of the 1990s, following the bipartisan Presidential Summit on Volunteering and National Service that occurred in Philadelphia.

You may recall that General Colin Powell was the chairman of that, and out of that, to implement the work of the summit, came America's Promise. It focuses on mobilizing volunteers, again, in communities throughout the United States to help young people.

It has a list of five promises to young people, that every young person should have a safe place to go after school and so on, and America's Promise is a vital link in the nation's voluntary infrastructure trying to assist the realization of those promises in our communities.

Teach for America also is one of our oldest national service grantees and one of the most successful. What Teach for America does is recruit students from some of our nation's finest colleges and universities, gives them some training, and then places them in underserved school systems, including in the Rio Grande Valley, where they will spend a year or two in public schools teaching students who are anxious to get an education.

It is one of the most heralded innovations in the non-profit world over the last decade, and this particular earmark in this year's budget is designed to deal with something I believe we will be talking about, which is to promote sustainability on the part of these organizations.

Teach for America receives 15 times as many applications, I believe, as it has spaces for. More students, the story goes, at Yale University went into Teach for America last year than went down to Wall Street. That tells you something about Wall Street, too, I expect.

Mr. Ryan. Right.

Mr. Lenkowsky. But they are poised to grow. They want to triple the number of people in the program, and this is meant to help them as part of their expansion plans, while also maintaining the ratio of private money to our money.

They raise significant amounts of private money, so you might think of this as a kind of investment, a venture capital kind of investment in a program that has proven itself. Their teachers already teach hundreds of thousands of students, and I can testify firsthand to the quality of them, since some of my best students have gone into teach for America.

Mr. Ryan. Thank you very much.

So the Points of Light, just so I can try to keep this organized, the Points of Light is more of a promotional volunteer piece?

Mr. Lenkowsky. Network.

Mr. Ryan. Network. You use the Internet, I would imagine.

Mr. Lenkowsky. That is right.

Mr. Ryan. To try to recruit volunteers. The American Promise is a way to maybe mobilize some of these volunteers?

Mr. Lenkowsky. Yes, it is, particularly youth-serving ones.

Mr. Ryan. Youth-serving ones, and then the Teach for America is obviously geared towards recruiting people to come and teach in under-served areas?

Mr. Lenkowsky. That is correct.

Mr. Ryan. You said there was a ratio of private-public money for the Teach for America?

Mr. Lenkowsky. They have raised substantial amounts of public-private money. They have a lot of very generous supporters, a number of major foundations, plus they get support from local school systems where they are operating.

The earmark in this year's appropriation does not change the ratio of non-corporation dollars to corporation dollars at all, but it is meant to get them on a faster growth path.

Mr. Ryan. Mr. Chairman, if you don't mind, one final?

Chairman Hoekstra. All right.

Mr. Ryan. Thank you. As far as the appropriations and the earmarks, what are you going to be asking for each of these? You said they wanted there to be an increase for Teacher for America, is that correct, and if so, what are you asking for the other two?

Mr. Lenkowsky. I do not have our appropriations request in front of me, but I believe we have requested $10 million for the Points of Light Foundation; $7.5 million for America's Promise, and $3 million for Teach for America, but we will double check those to make sure we have the accurate figures in the record.

Mr. Ryan. Are those increases over the past year?

Mr. Lenkowsky. Well, Teach for America has not been an earmark. Well, it was a $1 million earmark before, so it is somewhat an increase, but again, as part of a growth plan for Points of Light Foundation and America's Promise. Those are the same numbers that we requested in the past.

I would have to double check, but I believe the 2003 appropriation provided 5 million for America's Promise, although the President's request had been 7.5 million and that is what we again request for 2004.

Mr. Ryan. Okay. Thank you very much. Thank you, Mr. Chairman.

Chairman Hoekstra. Thank you. Let us not create too many earmarks, okay?

Mr. Lenkowsky. That is not our intent. As you know, Mr. Chairman, one of the most important things we do is our competitive process, and when I spoke about re-engineering procedures, that has been a lot of our focus.

Chairman Hoekstra. I think in some of the other programs there are areas where we got too many earmarks or too many programs that have become authorized. They lose some of their edge and some of their vitality.

Mr. Lenkowsky. We agree.

Chairman Hoekstra. Yes. Mr. Burns.

Mr. Burns. Thank you, Mr. Chairman.

Like so many others, we need a bit of education as we move through this process.

Help me understand how the Corporation establishes full-time participant slots. What is the total number authorized, and then what is the total number filled?

Mr. Lenkowsky. We have a grant process each year. We are at the beginning of the grant process; and organizations, charities, over 2,000 of them, will apply.

There are several different routes by which they can apply. Some will apply directly to us nationally, some will apply through our state commissions, and some are kind of a hybrid. They apply in the first instances to the states and then the states apply their best ones for national.

Mr. Burns. Can we address just AmeriCorps?

Mr. Lenkowsky. Yes, those are all AmeriCorps programs.

Mr. Burns. Okay.

Mr. Lenkowsky. A reporter once referred to our organization as a dinky little organization by federal budget standards. Perhaps we are that, but we are very complex, which is part of the reason a lot of people have difficulty quite understanding what we are doing, and that is one thing we are trying to fix.

In terms of your question, the division of full-time, part-time, reduced part-time is really driven in the first instance by the applications of our grantees, so they will say, for example, that we need so many full-time members and so many part-time members to accomplish our objectives. It might be tutoring kids or recruiting tutors for kids or doing homeland security or anything else.

We will review this in light of the case they make for it, or this will occur at the state level, and we will reach judgment as to whether they have made a good case for the number of slots and the kinds of slots they are requesting.

That is also obviously affected by the amount of money available. A full-time slot costs more, for obvious reasons, than a part-time slot or education award only, where the only expenditure from the Corporation is a commitment for an education award and a very small administrative fee.

So we will, in our grant review process, try to match up how our grantees define their needs in terms of the kinds of slots they would like with the allocation available in the budget.

One of the things that is part of the Citizen Service Act request is to take this education award only program, which now accounts for about one out of four AmeriCorps members, and move it out of our demonstration authority, which is where it began. It was an innovation and we tested it and it works extremely well. We would like to move it into our general AmeriCorps program authority.

The reason for that is if you are running an organization that wants both regular AmeriCorps members and education award only AmeriCorps members, we now make you apply twice, once for each competition.

What we would really like to do is have you look at the needs of your organization, submit one application, and tell us what you want, and then, as I suggested before, we would review it in terms of the merits and against what is available in the budget, and make an award.

Mr. Burns. What does your budget establish as far as an upper limit for AmeriCorps or for full-time?

Mr. Lenkowsky. Right now, we do not have a cap per full-time member in AmeriCorps. In the Citizen Service Act that was passed by this subcommittee and the full committee last year, for the first time we established a cap of $16,000 for a full-time AmeriCorps member, not including our education award.

That cap will cover such things as the living allowance, health care, child care, administrative support, training, a very important part of what we do, since, unlike traditional volunteers, AmeriCorps members are going to be engaged, if they are full time, 35 to 40 hours a week. It gives us time to give them training in methods of tutoring or things like that, and that is part of the program budget, as well.

Mr. Burns. What I am trying to get at is the number of total volunteers, total participants, and full-time equivalents. I realize we have some part-time, some full-time, perhaps some reduced, and different types of categories.

But in the budget that you deal with on an annualized basis, how many volunteers, full-time equivalent participants would your budget support?

Mr. Lenkowsky. The 2003 appropriation will support 35,000 full-time equivalent members, roughly, in AmeriCorps.

Mr. Burns. What is the current level?

Mr. Lenkowsky. That is the current level.

Mr. Burns. That is the current level?

Mr. Lenkowsky. Right.

Mr. Burns. So you are saying it could not go above that?

Mr. Lenkowsky. Well, in 2004, the President has requested 75,000 slots, which, again, I would need to double check the figures, but I think that would be slightly in excess, in the 40 to 45,000 range for full-time equivalents, because we are also increasing the percentage devoted to the education award only program.

Mr. Burns. Over the past three, four, five years, have you experienced slots, actuals, higher than what you were able to support financially?

Mr. Lenkowsky. Oh, absolutely. That is exactly why we had to put in a request.

Mr. Burns. That is why we are in the middle of a shortfall?

Mr. Lenkowsky. Right. What happened was, in the year 2000, awards were made for somewhere in excess of 65,000 slots, not full-time equivalents. That was about a 125 percent increase over the prior year.

Mr. Burns. So 65,000 slots, but they were not all full-time?

Mr. Lenkowsky. Right. But it was a substantial increase.

Mr. Burns. Right.

Mr. Lenkowsky. This increase really put a lot of strain at a time we were budgeting for no particular change.

Now, because the demand for our programs was not as great as it became after 9/11, so immediately the actual enrollments were slightly above the budgeted number, not a lot, despite the fact that we had made awards significantly above the budgeted number.

But as we started going into 2001 and 2002, people were coming in to serve. In effect, we had left the door open, and initially, not many more people came through than we expected, but partly because of the great surge in enthusiasm to serve our country, more people started coming in, and that is when we realized we needed to put a pause in place.

Mr. Burns. Right. Certainly, we appreciate the volunteers and the people wishing to serve in this area, but you have a challenge of trying to pull together a budget that supports a certain number.

Mr. Lenkowsky. That is correct.

Mr. Burns. My final question is, "How are you now managing that process, where certainly the need is there?" We have a potential group of individuals who wish to be of service to America, we would hope to utilize their talents, but we still have to make sure that we live within certain constraints?

Mr. Lenkowsky. That is correct. Prior to the past few months, the folks who were making the awards for AmeriCorps slots, the program staffs, were not required to check whether or not as they made those slots they were actually creating obligations in our trust fund that went beyond what the trust fund could sustain.

That is why I suggested that it was a really simple fix to get this done right, and why it had not been done before, I do not know, but we have a list of procedures, including timelier notification of obligations, commitments to people to serve in AmeriCorps, than we have done previously that are now going into place, and we think they will prevent a recurrence of that problem.

Mr. Burns. You are confident those controls are in place?

Mr. Lenkowsky. I am as confident as I can be until I have actually tried them. As you know, you put the procedures in place, you try them, and then if we have to fix them, we will fix them again.

But I am very confident that we have the right procedures in place now.

Mr. Burns. Thank you. Thank you, Mr. Chairman.

Chairman Hoekstra. Mrs. Davis, do you have any questions?

Mrs. Davis. I'm going to pass now, Mr. Chairman.

Chairman Hoekstra. You are going to pass? All right.

Les, thank you. I think we are going to go to the second panel. I think there are a number of questions that members may still have. I am sure that if they are submitted to you in writing, you will be more than willing to answer those.

As we work and go through the reauthorization process, we may just have some meetings where we invite you down to sit down, on a bipartisan basis, to talk about some of these questions and these issues as we try to pull this together.

Mr. Lenkowsky. Thank you very much, Mr. Chairman. We would be delighted to do so.

Chairman Hoekstra. Great. Thank you.

I would then like to ask the second panel to move forward, and as we are doing that, let me introduce the second panel.

Rumor has it that we may have some votes in a few minutes. It is musical chairs up there. Find the right one. But we will get started.

The first member of our second panel is Professor Esbeck. He has been a faculty member at the University of Missouri since 1981. He also has practiced law in New Mexico. He has done a

number of things. He has been Senior Counsel to the Deputy Attorney General and Director of the Task Force on the Faith-Based and Community Initiatives in the U.S. Department of Justice.

Professor Esbeck has written numerous articles and essays on the issues of church-state relations and civil rights in addition to serving on several advisory boards and committees in those areas.

Welcome. Thank you for being here.

Mr. John Pribyl. Mr. Pribyl has been the Director of the Senior Companions Program of the Lutheran Social Service of Minnesota since 1974. In addition, he currently serves as the Director of the Foster Grandparents Program.

He has previously served as the President of the National Association of Senior Companions Program Directors and has been active in numerous facts of the community, including the school board, his church, and other volunteer activities.

Welcome. Thank you for being here.

Dr. Matthew Spalding is the Director of the Heritage Foundation's new Center for American Studies. Previously, he served as the Director of the foundation's Lectures and Educational Programs Division and as manager of the academic programs.

He serves in numerous other capacities, including as an adjunct fellow at the Clairmont Institute, a national board member of the Fund for the Improvement of Post-Secondary Education, and as a contributing editor to several publications.

Welcome. Good to see you here.

Then we have Mr. Richard Foltin. Mr. Foltin is the Legislative Director and Counsel for the Government and International Affairs Office of the American Jewish Committee. He serves as the co-chair of the ABA's Section on Individual Rights and Responsibilities Committee on First Amendment Rights, and is a member of the National Council of Churches Committee on Religious Liberty.

Mr. Foltin is also a faculty member at the Florida College of Advanced Judicial Studies.

That is our panel.

Welcome. Thank you for being here.

I ask each of you to limit your statements to five minutes. Your entire statements will be submitted for the record.

Professor Esbeck, we will begin with you.

STATEMENT OF CARL H. ESBECK, ISABELLE WADE AND PAUL C. LYDA PROFESSOR OF LAW, UNIVERSITY OF MISSOURI, COLUMBUS, MISSOURI

Mr. Esbeck. Thank you, Mr. Chairman and members of the subcommittee.

The Acts that are before you for reauthorization seek to capitalize on the principle of volunteerism. When the challenges are enormous but spirits are high, the voluntary principle manifests great power to do great good.

But these Acts, at least in their original construction, are in one crucial respect not consistent with the voluntary spirit. I speak here of Section 175C, where the government's hand falls unevenly, regulating some but not others. The section prevents religious organizations from staffing on a religious basis.

Now, our government is committed to religious pluralism, and that is commendable, but the government is inconsistent in implementing this commitment, and in two respects.

Let me illustrate the first one by a reference to an environmental group. An environmental group is every bit as much committed to a cause or mission, and it can hire and fire people based on devotion to environmentalism, but recollection groups do not have that kind of privilege because of the restriction of 175.

The government lacks consistency in its commitment to religious pluralism in a second respect, and this one perhaps is the more important. Some religious groups are eligible for assistance, but not others, and let me illustrate that, as well.

We have, for example, Reform, Conservative, and Orthodox Jewish charities, but it is only the Orthodox group which are not eligible under these Acts. Why? They are not eligible because they staff on a religious basis. That is not pluralism.

Similarly, we have liberal and mainline and evangelical Protestant groups, but only the evangelical groups, who staff on a religious basis, are not eligible under these Acts. That is not pluralism.

That Section 175 is inconsistent with religious pluralism has been obscured by a clever slogan, and the slogan, I am sure you have heard it or read it, and goes something like this:

“Well, to repeal 175 is to throw the door open,” and here is the slogan, “to government funding of religious discrimination.”

Well, that is a big deception, and it is repeated again and again and again, and those who do not know the principles of law or are sloppy in their reasoning begin to believe it.

So let me walk you through why it is a deception.

In my longer, written testimony, I begin with Congress's recognition of freedom for religious staffing rights dating back to Title VII of the Civil Rights Act of 1964, and as you know, Title VII provides for faith-based organizations to continue to staff on a religious basis.

The amendment that made that possible was introduced by Senator Sam Ervin. You recognize Ervin, because he became famous during the Watergate hearings, a Democrat from North Carolina, recognized by his Senate colleagues at the time as something of a constitutional scholar, and justly so.

In introducing his amendment, which passed, he said the following:

``This amendment is to take the political hands of Caesar off the institutions of God, where they have no place to be."

You see, Senator Ervin appreciated that his amendment reinforced, and buttressed, the separation of church and state. It did not undermine it. It was taking Caesar out of the regulatory mode.

The government does not establish religions by leaving it alone. That is common sense, and he saw that.

Now, Title VII has become the gold standard, and that is proper. It has become the standard not because it dates all the way back to 1972 in its present form, but because it is about freedom, and because it is about religious pluralism, and when it was challenged in the courts and it went all the way to the U.S. Supreme Court in the Amos case in 1987, the religious hiring rights provision was upheld, and by a unanimous, or nine/zero court.

Now, you are thinking, well, but perhaps Amos is somewhat different because it does not involve government funding, but under the Acts that are to be reauthorized here, the purpose of the government's grant funding is to host and train volunteers, so the applicable rule of law is found in cases like Rendell-Baker v. Cohen, a Supreme Court case in the 1980s.

Let me briefly describe Rendell-Baker. We had a private school. Ninety to 95 percent of the funding of the students in that school was from the government, but when a teacher was fired and then challenged it, the Court said it was not the government that had dismissed the teacher, it was the school, and the presence of overwhelming government funding did not change that fact.

Well, the parallel is pretty obvious to our situation here. A faith-based organization gets funding to do volunteerism, or to host AmeriCorps members and participants, and that then does not make all that that faith-based organization does, in particular its employment practices, the acts

of the government.

So it is wrong, it is just false to say that when the government funds a faith-based organization to do volunteerism, it is also funding religious discrimination.

So I call on the Congress to be consistent in its commitments to religious pluralism. Stop funding some religious groups and not others. All that we want here is a complete religious freedom to continue to hire those of like-minded faith. No group ought to be confronted with the cruel choice of either recanting its faith or to be denied at least the opportunity to compete for grant funding.

Thank you.

WRITTEN STATEMENT OF CARL H. ESBECK, ISABELLE WADE AND PAUL C. LYDA PROFESSOR OF LAW, UNIVERSITY OF MISSOURI, COLUMBUS, MISSOURI – SEE APPENDIX C

Chairman Hoekstra. Mr. Pribyl.

STATEMENT JOHN PRIBYL, SENIOR COMPANIONS AND FOSTER GRANDPARENTS DIRECTOR, LUTHERAN SOCIAL SERVICE OF MINNESOTA

Mr. Pribyl. Thank you, Mr. Chairman, and members of the committee.

I am here today to talk specifically about the Senior Corps programs of Foster Grandparents and Senior Companions, and I will focus my remarks on some specific innovations that we have been able to try in Minnesota with some state funding and some local funding, and we feel that those demonstration things have had some significant impact on our programs, and we would like to see them incorporated into the Act.

Dr. Lenkowsky already talked about the three Senior Corps programs, and I would just like to reinforce the impact on the society from those programs is immeasurable. Now, as we look at reauthorizing these time-tested programs, it is time to make some minor adjustments to keep them relevant as we approach this new phenomenon in our society of the aging of the baby boomers.

My involvement in service began early in my life as I served in the Catholic priesthood for four years, from 1970 to 1974. After much thought and prayer, I made a difficult decision to take another career path, which ended up in my developing and implementing the original Senior Companions grant in Minnesota back in 1974.

I currently now serve as the Senior Companions director and the Foster Grandparents director, operating under the sponsorship of Lutheran Social Service. In this position, I have had the opportunity to see firsthand the development and the growth of the programs and how this simple structure gives older adults the opportunity to give back to their community.

As I said, we have had some chances to do some demonstration activities to find out what are the barriers that limit recruiting in the current legislation, and they also end up limiting the volunteer participation.

So first of all, we would very much support the lowering of the age from 60 to 55 for Foster Grandparents and Senior Companions as the current law already states for the RSVP volunteers.

Secondly, we would like to see you remove the income eligibility limitations for Senior Companions and Foster Grandparents.

There are many challenges in encouraging people that are retired to volunteer, especially in the two programs with stipends.

When these programs started, the poverty rate among seniors was 33 percent, and the stipend amount was roughly 71 percent of minimum wage. As a result, many people that volunteered when I started with this program looked at it as more of a job to earn money, because the stipend was a higher amount in relationship to the minimum wage at that time.

Today, the stipend is about 50 percent of minimum wage, and the poverty rate among seniors is around 11 percent instead of 33 percent, so today if people come in that really desperately need the money, I think I have an ethical obligation to tell them to go down and get a job at Wal-Mart and be a greeter and get minimum wage, or work at a fast food chain, because they are basically going to get more money and it is going to help them in their very low income situation.

The stipend today is more of an incentive to encourage a regular commitment of time from people. I see that as a real asset. It is not just to get people out of poverty, as it was 30 years ago.

As a result, when the stipend is lower, programs are facing a major recruiting problem. During the last fiscal year, approximately two-thirds of the Senior Companions programs and Foster Grandparents programs had a difficult time filling their allotted slots of volunteers. They could not find enough people, and basically, that was because of the income guidelines.

There have been several ideas proposed to fix that problem. One was to raise the income guidelines to a higher percentage of poverty. Another one was to look at guidelines from other government programs. Another is to maybe allow a certain percentage of people to be over the income guidelines.

My suggestion is to support what the administration recommended last year, to remove the income criteria completely and put the responsibility on the individual projects to continue to focus on recruiting low-income older adults and make that determination based on the cost of living in

the area where the program is funded. The stipend then is based on somebody's commitment of time and not simply on what their income happens to be.

Since 1997, the Minnesota Senior Companions and four Foster Grandparents programs have had the opportunity to test this very idea with this demonstration grant of non-federal dollars. We set up an option for volunteer of any income to come and serve in our Senior Companions/Foster Grandparents program.

Volunteers who wanted to receive some financial reimbursement had to commit to at least 40 hours of service, 10 hours a week.

After conducting this demonstration for five full years out of the 900-plus volunteers we have in our Senior Companions/Foster Grandparents program, over 75 percent meet the current income criteria, and my point is, we have been recruiting without any income guidelines, and yet 75 percent still meet those income guidelines; so we can and we do focus on lower income volunteers.

The best part is, now, the people in our program do not have any stigma on their foreheads saying that ``Hey, I am a Foster Grandparent because I am low income.'' ``I am a Foster Grandparent because I make a major commitment of time,'' and I think that is a better representation, and it does not classify people at all.

Furthermore, if we did not have that flexibility over the last five years, we would not have been able to find enough seniors to provide the service to the growing list of children and older adults that have specific needs and want to be in program.

You know, there are many programs that provide this stipend, and they are not means tested at all, and I just do not see why the Senior Companions and Foster Grandparents programs today, in 2003, should have that means testing part of it.

Thirdly, I would have you look at promoting innovations in programming, looking at more flexible types of service, and I will sum up with the following propositions: allow a Foster Grandparent to serve with more than one child, and provide an incentive for an RSVP volunteer who wants to contribute a significant amount of time.

Finally, I would give you one example. We have got a volunteer leader that is currently allowed in our Senior Companions program. Arlene is one of our volunteer leaders in Minnesota. She not only serves her clients, but she also provides leadership and support to new volunteers and helps them in the introductory process to their new clients. She has a way about her to make everybody feel at ease.

Hopefully, this leadership option would be available in developing more flexible programming to be more attractive to those baby boomers that are coming into the programs today.

Thank you very much for the chance to testify. Thank you very much for the opportunity to talk to you about programs that I really feel can make a difference in our society.

WRITTEN STATEMENT JOHN PRIBYL, SENIOR COMPANIONS AND FOSTER GRANDPARENTS DIRECTOR, LUTHERAN SOCIAL SERVICE OF MINNESOTA – SEE APPENDIX D

Chairman Hoekstra. Thank you.

Dr. Spalding.

STATEMENT OF MATTHEW C. SPALDING, DIRECTOR, B. KENNETH SIMON CENTER FOR AMERICAN STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. Spalding. Thank you, Mr. Chairman. I thank you for the opportunity to testify in support of this Congress' and this administration's effort to foster service, citizenship, and responsibility.

I think that working with the Bush administration, Congress should propose a reformed legislative package that builds on the changes proposed in last year's session, takes additional steps to correct the infringement of religious liberty in current service laws, and fundamentally transforms the current government's international service into a true citizen service initiative.

I believe there are some principles that should be behind and at the heart of the Citizen Service Act, and I would like to go through those very briefly.

The primary goal of citizen service should be to protect and strengthen civil society, especially the non-governmental institutions at its foundation. Policymakers must recognize that President Bush's call to service will be answered not by a government program, but by the selfless acts of millions of citizens in voluntary associations, local communities, and private organizations.

Secondly, the goal of an authentic citizen service initiative should not be to engage citizens in a program, nor to create an artificial bond between citizens and the state or organization that coordinates that service, but to energize a culture of personal compassion and commitment to those in need.

Third, reform of the national service laws should redesign service programs as an opportunity for true voluntary service rather than a jobs program. Volunteerism that is paid and organized by the government belittles authentic volunteerism by presenting service as an employment option rather than a sacrificial giving of one's time and resources.

Fourth, where possible, reform should prevent government support and presumed public endorsement of frivolous, controversial, and special interest activities. It should focus instead on

encouraging traditional service opportunities that address real problems of those in need.

Fifth, reform should reduce government's financial, administrative and regulatory role in the voluntary sector.

There already exists between government and many large nonprofit organizations what Dr. Lenkowsky has called a dysfunctional marriage in which government money has led to significant loss of nonprofit independence. Expanding this relationship to include the voluntary sector generally, and especially those smaller organizations that have thus far eluded the federal reach, would only expand and intensify that problem.

The Citizen Service Act of 2002 contained many useful and innovative changes in existing programs and should serve as a basis for future reform. More fundamental changes are required, however, to transform today's national service into a true citizen service.

First, I believe that policymakers should eliminate the stipends and benefits for AmeriCorps participants, thus ending the program as an employment option and reorganizing it as a true volunteer service initiative.

You could allow AmeriCorps to continue to award modest educational grants, not as a financial incentive or an in-kind payment for volunteering, as a nominal award for service rendered.

Eliminating the financial stipend and pay benefits still leaves participants with a considerable education voucher that is nearly double the amount of the current Pell Grant.

Concerning VISTA, I would recommend focusing VISTA as much as possible, focusing it on helping to solve the most important poverty-related problems of the day.

VISTA could be focused on strengthening families through groups like Marriage Savers and the training of mentoring couples. Another possibility is to focus VISTA activity on mentoring in low-income communities.

Whatever focus is selected for the agency's service activities, in keeping with renewed interest in government accountability, VISTA programs should be subject to appropriate rigorous and regular methods of assessment and measurement.

I also believe VISTA should be changed from a federally operated program to a federally assisted program.

The problem with Learn and Serve America is more fundamental. It has to do with the methodology of service learning. I recommend that Congress end the Learn and Serve program, and if they do not, that at the very least, they back away from their support of the philosophy of service learning by changing some of the definitions in the legislation.

To conclude, now more than ever, at a time when Americans are volunteering and engaging in service to their country in unprecedented numbers and unprecedented ways, policy makers must reject the model of government-centered national service that undermines, in my opinion, the American character and threatens to weaken the private associations that have always been the engine of moral and social reform in this country.

The better course is to bolster President Bush's noble call to service by creating a true citizen service initiative that is consistent with principles of self-government, is harmonious with a vibrant civil society, and promotes a service agenda based on personal responsibility, independent citizenship, and civic volunteerism.

Thank you.

WRITTEN STATEMENT OF MATTHEW C. SPALDING, DIRECTOR, B. KENNETH SIMON CENTER FOR AMERICAN STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C. – SEE APPENDIX E

Chairman Hoekstra. Thank you.

Mr. Foltin, we are going to probably have to hold you as close to five minutes as we can, only because you got caught by the bells, which means we are going to have to vote, but let us get started.

STATEMENT OF RICHARD T. FOLTIN, LEGISLATIVE DIRECTOR AND COUNSEL, OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS, AMERICAN JEWISH COMMITTEE, WASHINGTON, D.C.

Mr. Foltin. Thank you. My name is Richard Foltin. I am the legislative director and counsel in the Office of Government and International Affairs of the American Jewish Committee, and I thank you, Mr. Chairman, and Mr. Ranking Member, for the opportunity to testify today about AJC's perspective on the need to retain protections against employment discrimination based on religions with respect to positions funded under the Corporation for National and Community Service.

We are here today discussing a proposal to eliminate Section 175C from the National and Community Service Act is really a testament to the power of an idea, and it is an idea that I have to give credit for to my distinguished colleague on the panel, Professor Esbeck. This idea is this notion of charitable choice and of ending what is called religious discrimination with respect to religious institutions that receive public funds to provide social services.

Now, the danger of having a big idea sometimes is that it tends to sweep aside competing concerns, and that it can sweep aside, as well, a pragmatic resolution of competing concerns in a particular program, and so we have, in 175C, a narrow and appropriate attempt to reconcile some

very crucial priorities within our constitutional system, and an appropriate attempt to do so.

The government and all citizens have a strong interest in not seeing taxpayers' dollars utilized to underwrite the funding of employment positions for which hiring decisions are made based on religion.

At the same time, any prohibition on religious discrimination by religious organizations when they operate programs for which they receive government funds must be carefully cabined so as not to encroach on the legitimate interests of religious organizations' autonomy with respect to their positions that are privately funded.

So if there is common ground, and I think there is, between those who have differing positions on 175C, it is this intense respect for the necessity of respecting religious autonomy, the autonomy of religious organizations.

It's grandfather clause aside, Section 175 of the National and Community Service Act of 1990 limits its prohibition on religious discrimination by a funded institution to a member of the staff of such project that is paid with funds received under this subchapter.

Thus, unlike the civil rights law that prevail in certain other circumstances, it does not apply to the entire institution, does not say that funds may not flow to an institution if somewhere else in some other program or with respect even to some other position that is funded with private funds, there is a preference based on religion. This restriction exists only with respect to those positions that are funded with federal money.

In so doing, as I discuss in my statement, Section 175 draws a careful line that seeks to safeguard the important interests of both the government and religious institutions.

Those arguing for deleting Section 175 point to the need to enable faith-based groups to promote common values, a sense of community, and shared experiences through service. These are all important values, but there is something inherently problematic as a matter of public policy, it is not as a matter of constitutional law, in the government funding what it itself cannot do. Namely, subject employment positions to a religious test.

Put more bluntly, applicants for a government-funded position should not be confronted with a sign, real or metaphoric, that says, ``No Jews need apply, no Baptists need apply.'' Neither the First Amendment nor any other provision of the Constitution requires religious institutions to be given unlimited autonomy in their employment decisions with respect to employment positions that are government funded.

Indeed, the presence of government funding implicates several clauses of the Constitution: the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause. All of which preclude government discrimination on the basis of religion.

But the importance of this principle of non-discrimination does not mean that it cannot be reconciled with another important priority, the autonomy of religious institutions and safeguarding

those institutions from undue government interference.

The discretion of religious organizations is, to be sure, a fundamental aspect of the religious freedom that is protected as our first liberty in the First Amendment, that religious organizations, the vehicle through which religious communities manifest their religious missions, should be able to demand, as a general principle, that the individuals that they hire to work for those organizations subscribe to the creed and practices of their faith.

But the case which established Congress's right to allow this broad zone of discretion for religious organizations involved a privately funded, not a government-funded position. Extension of the exemption upheld in Amos to cover employees providing publicly funded services is not required by concerns addressed in that decision.

Much of the Amos analysis, as amplified in concurring opinions, turns on the problems that would be posed in limiting the exemption to religious activities of a religious organization, not the least of which would be placing the state in the position of parsing which activities of the organization are secular and which are religious; but with respect to programs funded by the government, the state, as a matter of constitutional….

Chairman Hoekstra. Excuse me.

Mr. Foltin. Yes, sir.

Chairman Hoekstra. We are going to have to interrupt. We will let you finish your statement when we get back.

Mr. Foltin. Thank you.

Chairman Hoekstra. We now have a firmer gavel on the floor of the House than we have in this subcommittee, which means that if we do not get there soon, we will miss our vote.

[Recess.]

Chairman Hoekstra. The subcommittee will reconvene.

Mr. Foltin. Shall I restart, or not restart, but continue?

Chairman Hoekstra. Not from the beginning, that is right. Not that we did not think it was worthwhile or valuable.

Mr. Foltin. It sinks in better if I say it twice.

Chairman Hoekstra. Yes.

Mr. Foltin. It does for me, anyway.

Chairman Hoekstra. All right. Just wrap up.

Mr. Foltin. I will wrap up.

Just first, let me return, just to conclude the discussion about Amos, to say that with respect to programs funded by the government, however, the state, as a constitutional principle, may fund only the secular activities of a religious organization, which makes unnecessary an explicit extension of the Title VII exemption to cases involving government funding or by, on appropriate anti-discrimination provisions in particular, authorizing legislation with respect to employees providing publicly funded services.

To the contrary, such an approach runs counter to the fundamental civil rights principles of non-discrimination, as well as identifies the government with using religious criteria for employment.

This is even more the case when we are faced, as we are today, with an initiative that is premised on substantial expansion of the role of religious organizations in social services provision.

Of course, even if the Title VII exemption is not automatically waived with respect to a government-funded employment position, this is far from the end of the inquiry. Congress may determine, as it did in enacting Section 175C, that as a matter of policy, it does not want publicly funded employment positions to be subject to religious preference.

The Amos court did not rule that the broad exemption from Title VII carved out by Congress so as to extend even to employees with no religious duties was constitutionally required, only that it was constitutionally permitted, and this was with respect to a privately funded position.

So what I want to conclude by saying is that to be sure, any effort to prohibit religious discrimination by religious organizations when they operate programs for which they receive government funds must be carefully cabined so as not to encroach on the legitimate interests of religious organizations in autonomy with respect to positions that are privately funded.

Any such positions should be crafted so that even while it prohibits discrimination on the basis of religion with respect to an employment position funded with federal financial assistance, it does not encroach upon such exemption from the federal prohibition on religious discrimination as a religious organization may enjoy in the use of its own or privately donated funds.

That is the careful line that 175C seeks to draw, unlike the case, as I said at the outset, with civil rights laws that generally cover federally funded institutions, and recognizing the particular constitutional concerns that are presented by religious organizations, the anti-discrimination provision of Section 175 does not extend to the entire institution nor even to all staff employed in connection with the funded activity, but only to those who are actually paid with federal funds.

By thus limiting its reach, Section 175 takes an appropriate approach in seeking to protect the important interests of both the government and of religious institutions when the latter receive

government funds.

Thank you.

WRITTEN STATEMENT OF RICHARD T. FOLTIN, LEGISLATIVE DIRECTOR AND COUNSEL, OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS, AMERICAN JEWISH COMMITTEE, WASHINGTON, D.C. – SEE APPENDIX F

Chairman Hoekstra. Thank you.

What happens if the reauthorization is silent on 175, meaning 175 is eliminated, Mr. Foltin?

Mr. Foltin. Well, I think what will happen is that there will be an argument as to what the implications of the government funding are, as there is an argument generally now.

There are cases in the courts, not having to do with federal legislation, but with state legislation, I think, at this point, which test whether or not when there is a government-funded position there is allowed to be discrimination with respect to that position.

A particular case arises out of the State of Georgia, in which a Methodist social service was about to hire a very qualified person for a position. The interviewer discovered during the interview that this person was Jewish, and basically said to that person, “I'm sorry, we just do not hire Jews."

Whether or not that can constitutionally be done with state funding is now under debate.

Chairman Hoekstra. You would think there would be a court challenge?

Mr. Foltin. Well, I cannot say there necessarily would be, but there might be. I would hope, as well, that, in implementing the programs, which many religious organizations, as they do now, would see fit not to discriminate on the basis of who they hire.

But it is very important that this provision, which is very limited and very modest, I think, be part of this program.

I would note here that this is not the only social service legislation that includes this kind of religious protection against discrimination with respect to publicly funded programs.

Chairman Hoekstra. The question is just what happens if it is not, and you think the question as to whether a religious organization could or could not discriminate would be determined through the courts?

Mr. Foltin. I think that that might be one route that that might occur.

Chairman Hoekstra. All right. Does anybody else want to take a shot at what they think would happen if 175 were not in?

Mr. Esbeck. Mr. Chairman, I would like to speak to that if I could.

Chairman Hoekstra. Okay.

Mr. Esbeck. Then, of course, we fall back on Title VII, which as I characterized, is the gold standard here that applies pretty much throughout all federal legislation, including social service legislation, and we would also have in place what was referred to earlier as the December 12, 2002 executive order of the President, and I think Dr. Lenkowsky referred to that. We would have that in place as well as protecting religious hiring rights.

Of course, anybody can sue in this country. It is said that America is a litigious country, and we get all kinds of lawsuits.

The real question is not would there perhaps be a lawsuit, but would the lawsuit be successful. I think not.

Again, just go back to the Rendell-Baker case that I referred to. There, 90, 95 percent of the funding of that private school was from the government, but the court said, ``Look, we are funding in that case educational services. That does not make the employment practices of that private organization the responsibility of the government."

If 95 percent of the funding came from the government, you can bet that the teacher that was dismissed there was receiving some of those government funds to pay her salary.

So the fact that the government funding actually flows to the particular salary of the person that it alleges was improperly handled as an employee is a distinction without any merit.

Mr. Foltin. May I respond?

Chairman Hoekstra. You can, and I bet we are going to hear a whole lot more of this over the next three to five months. So yes.

Mr. Foltin. Yes, that certainly is a good argument for one side, but I think that these are issues that are not resolved at this point. It is an important Supreme Court case going back to 1973 that says that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish, namely, discrimination.

There is a case, and it is the closest thing to a case on point we have, from a district court in 1989, that suggests that it violates the Establishment Clause when the government, in effect, finances a position with respect to which there is discrimination.

But I would not be candid if I did not say that these are matters that are very much still in issue, and it is not at all clear how the courts will deal with this when they are faced with it.

I think the best course is for there to be a clear standard, in addition to the gold standard of Title VII, to have this bill, when reauthorized, continue to include the provision that it already had in place.

Chairman Hoekstra. Dr. Spalding?

Mr. Spalding. I will just add a practical point.

As I understand it, the status quo is not Section 175. Section 175 is really an unusual circumstance.

So making it consistent with existing law, going back to the 1964 Civil Rights Act, would seem to me to be the practical objective here, and so it is not a question of what would happen if you remove it. The question is what happens if you leave it in there, which is to leave something in there which is a sore thumb, to say the very least, in light of other legislation passed by Congress.

Chairman Hoekstra. Yes, we had this debate last week as to what the standard is and what is a retrenchment and what is current law.

It is hard to determine if it is current law or if it is in the authorizing statute. It is there, but should we let civil rights law be the standard and be the gold standard? That is what these actions should be measured against.

We heard the debate last week. We heard the debate today, and I am believing that, over the next few months, Mr. Hinojosa and I and others will be talking about it and hearing it a number of more times.

But thank you very much for that.

Mr. Hinojosa.

Mr. Hinojosa. Thank you, Mr. Chairman.

This question is for Mr. Foltin.

Many religious organizations that participate in federally funded programs have voiced their opposition to charitable choice provisions and continue to do so today.

Can you share with us some of the concerns of the religious community as it relates to charitable choice?

Mr. Foltin. Well, that is a whole other debate that, of course, is ongoing.

I think the concern that a number of religious organizations have is really concerns that many communities have about the implications of charitable choice, and I see this discussion today as part of that larger debate, and I alluded to that earlier, even in terms of constitutional analysis of the problem of this effort to remove 175C as being part of this larger effort to draw religious organizations into the charitable choice provision.

What does charitable choice do? For one thing, it allows organizations of a kind that I think even with recent Supreme Court decisions are problematic recipients of federal financial assistance to discriminate. Namely, these are pervasively religious organizations like churches, synagogues, mosques, and religious schools.

The reason that is problematic is because these are the kinds of organizations that it is intrinsically difficult to see how they are going to separate out their provision of the secular services that the government is supposed to be financing from their engagement in religion teaching activities, which are very worthy activities, of course, but the issue is that the government should not be funding them.

Once, and when they start to receive these funds, the question is whether or not there are going to be sufficient safeguards in place for beneficiaries of these services so they are not effectively coerced into participating in religious activities that they do not wish to be part of, even when there are some formal protections in place to guard against that.

There are, of course, the issues of whether or not there is going to be decisions made on the basis of religion in terms of who gets hired for providing these services, and perhaps most crucially, from the religious community's perspective, and of course, I only speak for those religious communities that are in agreement with these concerns, there are others on the other side, the most significant concern is what all of this means for the autonomy of these religious organizations on an ongoing basis.

The late Reverend Dean Kelly of the National Council of Churches used to say, “With the king's shilling comes the king."

As soon as you start to have great amounts of funding, of federal funding, government funding, going into religious organizations, particularly to these that are pervasively religions organizations, you more and more begin to run the risk that these organizations will have their religious autonomy interfered with, their ability to carry out their religious mission interfered with, and this, I think, is really an immense danger and one that we ought to be very careful about as we look to expanding the ways in which government funds the provision of services by religious organizations.

Mr. Hinojosa. My next question goes to Mr. Pribyl.

Mr. Pribyl. Yes.

Mr. Hinojosa. Is that the correct pronunciation?

Mr. Pribyl. Close enough.

Mr. Hinojosa. Thank you for your many years of service and for the set of recommendations you have put forth today.

I'd like to know how you have dealt with the issue of providing these services to individuals who do not speak English or who are limited English proficient? What is your recommendation for how Senior Corps could work in my congressional district along the Texas-Mexico Southern Borders?

Mr. Pribyl. Thank you, Congressman.

Maybe one way I could answer that is, one of my best friends in the Senior Corps business is the Senior Companions director in your district, Jose Perez from Alamo, Texas, just a great gentleman, and I have learned a lot from him about diversity and how the Hispanic population is served in his community.

What we have done in Minnesota, we have a lot of diversity in our program with a lot of the new Americans, and translating is a major problem when we are dealing with a Somali population, a Liberian population, a Hmong population, a Vietnamese population, a North Korea, or South Korean population. We have all these groups in our program.

We are able to do it because we rely on the agencies that we contract with that are the experts with those particular populations.

For instance, the Women's Association of Hmong and Lao in St. Paul is our volunteer station for Senior Companions there, and they help us with the translation, to do the training, and gather the time sheets, and work with that population, and it works very well.

It does take some time, it does take some effort; and I think we have proven that we can do it.

Mr. Hinojosa. Thank you.

Mr. Chairman, I yield back the balance of my time.

Chairman Hoekstra. Mr. Porter? No questions? I have no additional questions.

I thank the panel for being here. I appreciate the input. Now I have got to find out whether I have got a script here as to any formal things here I have to get right at the end.

I think that is it.

So thank you. We look forward to working with individuals like yourselves over the coming months, learning about the programs and the things that you have in place.

Obviously, we have a number of reform ideas that have been proposed, and we have got some issues here dealing with Section 175. We may call on you again to help us work through that maze, but the commitment is here to try to build on the bill that we had in the last session and to move forward and get this reauthorized.

I know that just about everybody agrees that a reauthorized program with some level of reforms is much better than to continue funding the program under the old authorization.

So thank you very much, and with that, the subcommittee will stand adjourned.

[Whereupon, at 4:30 p.m., the subcommittee was adjourned.]

APPENDIX A – WRITTEN OPENING STATEMENT OF CHAIRMAN PETE HOEKSTRA, SUBCOMMITTEE ON SELECT EDUCATION, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES

Hearing of the Subcommittee on Select Education
Committee on Education and the Workforce
House of Representatives

"Performance, Accountability, and Reforms at the Corporation for National and Community Service"

Opening Statement of Chairman Pete Hoekstra (R-MI)
April 1, 2003

Good afternoon. I would like to welcome each of you to our hearing on "Performance, Accountability, and Reforms at the Corporation for National and Community Service."

The purposes of today's hearing are to learn about our nation's national service programs, to evaluate the performance and efficiency of the Corporation for National and Community Service, and to discuss various perspectives on legislation to reauthorize programs administered by the Corporation.

The major federally funded national service programs in this country are authorized under two statutes: the National and Community Service Act and the Domestic Volunteer Service Act. In general, the programs authorized by these statutes are administered by the Corporation for National and Community Service, an independent federal agency. Although authorizations for these programs expired at the end of fiscal year 1996, they continue to be funded through appropriations legislation.

Last Congress, the Subcommittee on Select Education and the Committee on Education and the Workforce reported H.R. 4854, the Citizen Service Act of 2002, to reauthorize programs administered by the Corporation for National and Community Service through fiscal year 2007. The purposes of H.R. 4854 were to reform and strengthen national service programs administered by the Corporation; implement first-time accountability measures for grantees under the national service laws; and make the Corporation an effective outlet for leveraging volunteers and community service activities among the many service organizations across the country.

In addition to the many important reforms within last year's Citizen Service Act, the Subcommittee on Select Education will work to build on last year's progress and address several issues to better our chances at completing a reauthorization bill that will improve our nation's national service laws – and more important – a reauthorization bill that President Bush can sign into law.

Today, I am looking forward to hearing testimony about religious staffing rights as they pertain to the Constitution and whether the protection of religious staffing rights is prudent and good public policy for programs administered by the Corporation for National and Community Service. This is a matter of concern for some of us because under the current national service laws, faith-based groups are denied the protections of the Civil Rights Act that would otherwise allow them to hire employees or accept participants on a religious basis if they accept federal funds.

I also hope to review living stipends and other supplemental benefits provided to program participants by the Corporation for National and Community Service. Under current law, programs receiving AmeriCorps funding must provide full-time participants with a living stipend of at least $9,900 in which the Corporation provides a maximum of 85 percent of the living allowance – or $8,415 – and the grantees pay at least 15 percent – or $1,485 – from non-federal funds.

Full-time participants that do not otherwise have health coverage also qualify for health coverage in which the federal government covers up to 85 percent of the cost. While the federal share varies among the many national service programs, CRS reports that the average amount spent on health coverage per participant for program year 2002 for AmeriCorps grants was $893. In addition, childcare is provided to full-time, low-income participants. CRS reports that the average amount spent on childcare per qualified participant for program year 2002 was $3,324.

Finally, the Corporation provides an educational award in the amount of $4,725 to qualified participants who serve for a full term of service – which is 1,700 hours over a period of 10 to 12 months.

In light of the significant federal share of costs associated with the national service laws, there are some tough questions we need to ask about various ways to control spending while maximizing the federal contribution to national service programs.

- Should the federal government provide a living stipend for national service participants?

- If there is a living stipend provided, should it – and other benefits such as health coverage and childcare – be awarded based on financial need?

- Should there be a cap on the federal share of benefits provided to AmeriCorps participants?

- If programs are operating indefinitely with full-time, federally-supported participants, should the Congress limit the number of years a grantee may receive funds to support full-time participants to help encourage long-term program sustainability with non-federal funds?

In light of the many issues and programs associated with the Corporation, and the fact that the national service laws have not been authorized since fiscal year 1996, this Subcommittee has a lot of work to do. I look forward to crafting legislation that builds on last year's progress and focuses on improved performance, accountability, and reforms at the Corporation for National and Community Service.

I would like to thank our distinguished witnesses for appearing before the Subcommittee today – I look forward to hearing your testimony and the unique perspective that each of you brings to this discussion. At this time, I would yield to my colleague from Texas, Mr. Hinojosa, for any opening statement he may have.

APPENDIX B – WRITTEN STATEMENT OF LESLIE LENKOWSKY, CHIEF EXECUTIVE OFFICER, CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

National and Community Service Legislation:
National and Community Service Act of 1990 and the
Domestic Volunteer Service Act of 1973

Testimony by Leslie Lenkowsky
Chief Executive Officer
Corporation for National and Community Service

Before the House Education and the Workforce Committee
Select Education Subcommittee

April 1, 2003

Mr. Chairman and Members of the Committee,

Thank you for the opportunity to discuss the views of the Administration concerning reauthorization of the Corporation for National and Community Service, the National and Community Service Act of 1990 and the Domestic Volunteer Service Act of 1973. As you are aware, HR 4854, The Citizen Service Act of 2002, was introduced last year in response to the "Principles and Reform For a Citizen Service Act" introduced by President Bush on April 9, 2002. On June 12, 2002, the Education and Workforce Committee approved the Citizen Service Act. My testimony will highlight many of the reforms recommended by the President and those reflected in the Citizen Service Act.

In 2002, President Bush launched the USA Freedom Corps - a coordinating council and White House office - to help build a culture of service, citizenship, and responsibility that strengthens our country and offers help to those in need. The President has called on all Americans to serve their country for the equivalent of two years during their lifetimes. The programs and activities of the Corporation for National and Community Service are a major component in this citizen service initiative.

In the President's State of the Union Address this year, he called on Congress to pass the Citizen Service Act. He mentioned it again during a January 30 speech at the Boys and Girls Clubs in Washington, DC during a ceremony recognizing the first anniversary of the USA Freedom Corps. His commitment to promote volunteer service is resounding and the importance he has placed on the work of the USA Freedom Corps echoes that support.

In the past year, we have instituted a number of critical management reforms in our agency and our programs, but we are open to working with the Congress on legislative changes that would promote even more effective management.

We are proud of the service the volunteers and members of AmeriCorps, Senior Corps, and Learn and Serve America have provided over the past ten years. We look forward to working with Congress to see to it that their commitment to serving their nation is matched by strong legislation and strong management on the part of the Corporation. My remarks today are an extension of the Principles released by President Bush last April, and added emphases on management and performance that have come to light in the last several months. We look forward to working with the committee as you develop and introduce a Citizen Service Act to reauthorize the Corporation and further the President's vision.

Principles of Reform and Administration Goals

A number of fundamental principles guide the President's vision for reauthorizing the Corporation and improving its three main programs, AmeriCorps, Senior Corps, and Learn and Serve America. They are outlined in the following narrative:

Support and encourage greater engagement of citizens in volunteering. Reforms will mandate that programs must generate more volunteers for each federal dollar expended by making volunteer mobilization an explicit criterion for grants to service organizations; reduce

age and income limits that restrict volunteer opportunities in our Senior Corps programs; increase incentives for service in AmeriCorps by eliminating obstacles to the use of the education award, including eliminating its taxability, permitting its transfer, providing greater flexibility to attend schools and pay off loans, and exploring ways to support the inclusion of individuals with disabilities; provide for greater financial support from the private sector through a stronger challenge grant program; eliminate barriers to participation by individuals with disabilities; and set higher authorized funding levels for each of the programs, while reducing per-member costs - so that, over time, more people can enroll in these programs at a lower per participant cost.

Make federal funds more responsive to state and local needs. Reforms will provide greater resources and flexibility to grantees and state commissions in the use of grant funds within a framework of high performance standards and national priorities; direct more national service participants to engage in capacity-building activities such as recruiting volunteers and increasing the technological and management capacity of nonprofit organizations.

Make federal funds more accountable and effective. We ask you to help go beyond the management changes that have already been implemented and mandate that the Corporation work with grantees to establish outcome-oriented performance measures; require corrective plans for meeting those goals; and reduce or terminate grants if corrections are not made. In addition, we suggest that you enact statutory ceilings on cost per members, and believe that reforms to strengthen management of the Corporation, including the National Service Trust, should be incorporated in our authorizing statute.

Provide greater assistance to community organizations, both secular and faith-based. The reforms in the Citizen Service Act should reduce the administrative burdens that small grassroots and faith-based groups face in accessing federal funds; allow for greater flexibility in placing members in such groups; provide additional incentives for serving with grassroots and faith-based groups; and ensure consistency with the Civil Rights Act of 1964 and Executive Order 13279, signed by President Bush on December 12, 2002.

The Corporation's programs-AmeriCorps, Senior Corps, and Learn and Serve America-will support the President's call to all Americans to serve their neighbors and their nation by helping to provide flexible opportunities for Americans to serve at all stages of their lives, from when they are elementary-school students through their retirement years. We will also work closely with our nation's many worthwhile charities, not only to help them accomplish their missions, including providing security for our homeland, but also to help them recruit and manage additional volunteers for long-term sustainability. Now I would like to describe some specific reforms we hope will be contained in the Citizen Service Act.

Management and Administration

After a decade of experience in operating a community-based program of national service, we have learned a good deal about what works and what does not. In "Principles and Reforms for a Citizen Service Act," the President proposes a variety of changes to administrative and management procedures that would allow the Corporation's programs to operate with

increased efficiency and transparency, while ensuring the responsible expenditure of taxpayer funds.

Performance and Accountability

At the heart of any service program should be serious financial accountability and performance measures that define specific outcomes and quantifiable goals for national service grantees. This is crucial to ensure not just proper stewardship of taxpayer funds, but also that the programs designed to help meet the nation's unmet human needs - and renew the ethic of civic responsibility - are really achieving their desired results.

From the very beginning of the Corporation, performance evaluation has been a key requirement for its grantees. Many of them have made substantial efforts to collect measures of "outputs" - for example, the number of hours of service provided or clients processed - or commissioned third-party evaluations of their work. Since 1996, Senior Corps has been implementing "Programming for Impact," a system designed to focus grantees on documenting what volunteers actually accomplish. The Corporation itself has also published two major evaluations of Learn and Serve America programs, which identified a number of positive results - and limitations - in its K-12 and higher education programs. A new evaluation of the Senior Companion Program is about to be completed, which will show that the program has had a number of beneficial effects on the people served (and their families), but can be strengthened through better training and recruitment. Not least important, the Corporation has underway a unique longitudinal study of AmeriCorps members that seeks to gauge scientifically how participation in the program affects lifetime civic participation.

In the past year, the Corporation has intensified its efforts in this area and directed all its grantees to develop performance measures of "outcomes" - that is, the definable effects of their programs, such as improved reading scores or increases in community volunteers. More work needs to be done and these performance measures need to be linked more consistently with funding decisions.

The Citizen Service Act would give explicit statutory direction to the Corporation to work with grantees to establish performance goals with clear, definable measurements; allow the CEO of the Corporation to require corrective action if these goals are not met; and allow for modification or termination of funding for non-performing grantees.

Reducing Administrative Burdens and Confusing Regulations

Because the programs of the Corporation were formed at different times and under different pieces of legislation, programs are beset by a hodge-podge of inconsistent and confusing rules and regulations, which require additional administrative efforts for compliance. For example, there are inconsistent rules about whether an AmeriCorps member may hold a part-time job or pursue an educational opportunity while serving.

Most AmeriCorps programs prohibit members from developing resources, performing routine administrative tasks, and engaging in other activities that help nonprofit organizations

increase their capacity to carry out their service mission. Unfortunately, that is precisely the kind of help that small grassroots charities need. The Corporation needs to support them as they build capacity while continuing strong prohibitions on the use of support for any political activities.

In Senior Corps, some programs have age and income limits for participation, while others have no or different limits. We ask the committee to ensure that the Citizen Service Act will streamline and simplify regulations and requirements across AmeriCorps, Senior Corps, and Learn and Serve America, making them consistent whenever possible.

States and nonprofit organizations need greater flexibility to respond to local needs. For example, community and faith-based organizations have told us that the rules and requirements for receiving a federal grant often are too complex and costly. Many small programs cannot effectively compete with larger organizations for federal support without hiring a professional grant writer, which places an enormous strain on operating budgets. States have told us that we can do even more to devolve decision making, particularly on grant selection, to the state level, bringing decision making closer to the need.

Sustainability

The Citizen Service Act should create new benchmarks for sustainability; allow all national service participants to engage in capacity-building activities such as recruiting volunteers and improving technology, which help to build sustainability; and empower the Corporation to reward those organizations that are moving toward sustainability.

Building the sustainability of grantees has always been an aim of Corporation funding, but in the past, it has not always been well-articulated and backed up by the kinds of programmatic efforts necessary to achieve it. Under current law, in fact, most AmeriCorps members (though not VISTAs) are precluded from helping the organizations with which they serve take the steps, such as mobilizing resources that would help build capacity and create sustainability. Through the Citizen Service Act, resource mobilization would be added as a fundamental purpose of AmeriCorps and AmeriCorps members would be able to provide a wider range of services, depending on the particular needs of grantees.

One potentially important tool for promoting sustainability is the Corporation's "challenge grant" program, which enables the Corporation to make grants competitively to non-profit organizations that have a plan for expanding opportunities for Americans to volunteer using private funds. For the first time, the Corporation's 2003 appropriation provided funding for challenge grants and we are currently soliciting applications for the first round of grants. The Citizen Service Act would enhance this program by authorizing a change in the matching requirement that would increase the private dollars generated for each dollar of federal support.

The Education Award Program is our most cost-effective AmeriCorps mobilization program. The Education Award Program fulfills several goals including encouraging the sustainability of the nonprofit organization, releasing more funds for smaller community and faith based organizations and making our programs more cost effective by reducing the per member cost.

Religious Liberty Provisions

In the area of religious liberty, we think that organizations receiving federal grants should be entitled to the same protections afforded other religious organizations under the Civil Rights Act of 1964, informed by the principles stated in Executive Order 13279, signed by President Bush on December 12, 2002. For that reason, we support repealing religious discrimination provisions, like those that currently govern Corporation grant recipients, that require these recipients to forego their Title VII protections in order to receive Corporation funds.

National and Community Service Act

The National and Community Service Act funds AmeriCorps*State and National, AmeriCorps*NCCC (National Civilian Community Corps), the National Service Trust, Learn and Serve America, and various earmarks. The President proposes a number of reforms to this legislation in his "Principles and Reforms for a Citizen Service Act."

The National and Community Service Act envisioned a decentralized, community - based system of federal support for national service, channeled through local and national nonprofit groups, with a large measure of responsibility and program direction devolved to governor-appointed state service commissions. The system was - and is - an unusual and ambitious attempt to combine the best practices of government, the private sector, and the nonprofit community.

After ten years of working to realize the vision of NCSA, the Corporation now has a better idea of which portions of this vision work well - and which do not. Since it was created in 1993, AmeriCorps has compiled an impressive list of accomplishments. Members have helped recruit and supervise additional volunteers for nonprofit organizations; they have tutored and mentored disadvantaged children; they have established or expanded neighborhood safety programs; and they have helped communities rebuild after dozens of natural disasters and emergencies - including the September 11th terrorist attacks - in more than 30 states. Project reports have consistently shown that AmeriCorps members are meeting community needs in education, health and human services, public safety, and the environment.

The Corporation has faced its share of challenges over the last several years, culminating with the recent issues concerning the National Service Trust. The members of this committee and other concerned members of Congress have documented those challenges and problems and encouraged us to continue improvements. We've moved forward on many of those issues - reducing costs per member through the Education Award Program, getting tough on prohibited political activity, and tightening management procedures. Upon becoming the Chief Executive Officer, I established a new Department of Research and Policy Development, specifically for the purpose of strengthening accountability. In addition, we have hired a new Chief Financial Officer, Inspector General, and new senior AmeriCorps officials, among other additions to our top management team.

But challenges remain, and for us to continue moving forward in making our programs operate with the utmost effectiveness and accountability, we need Congressional approval of the Citizen Service Act to correct shortcomings in our authorizing legislation and empower the

Corporation to streamline and rationalize the program's operations. We hope that this Committee will consider the proposals presented today - all of which aim to reshape AmeriCorps in the light of past challenges and position it for future successes - as you develop a new Citizen Service Act.

*AmeriCorps*State and National*

AmeriCorps*State and National presently grants funds through several mechanisms: through formula grants to governor-appointed state service commissions; to state commissions through a national competitive process; and directly to national nonprofits through a competitive process. The Citizen Service Act, consistent with the Administration's general principles of reform, should place a priority on capacity building, especially volunteer leveraging and recruitment as a basis for awarding grants. This would maximize the effectiveness of the service provided by AmeriCorps members and help to build the sustainability of grantees. Performance measures would be required of all grantees.

Presently, a number of cost-effective approaches are employed to test new models of AmeriCorps service. Among the most effective, which I mentioned earlier, has been the Education Award Program, where members receive only an education award and grantees receive a small administrative payment per full-time member. We are working on ways to simplify the application process to enable more AmeriCorps members to participate. We anticipate further discussion with the committee on this subject.

The Corporation's Board of Directors and I remain committed to this and would like to explore additional approaches including the possibility of establishing new relationships with a wider range of nonprofit organizations that will provide greater flexibility for individuals to do their service at the organizations of their choice. The Citizen Service Act should permit the Corporation to allocate up to ten percent of AmeriCorps program funds to these demonstration projects.

*AmeriCorps*NCCC*

Modeled after the Civilian Conservation Corps and the United States military, the AmeriCorps National Civilian Community Corps (NCCC) is a ten-month, full-time, team-based residential program for men and women ages 18 to 24. The mission of AmeriCorps*NCCC is "to strengthen communities and develop leaders through team-based national and community service."

AmeriCorps*NCCC deploys teams to communities in every state to respond to pressing needs identified by local project sponsors. Members are also ready for deployment to communities that are impacted by natural and other disasters. Working in cooperation with the American Red Cross, the Federal Emergency Management Agency, the National Park Service and the U.S. Forest Service, AmeriCorps*NCCC members and teams can be deployed at a moment's notice to address national crises. During the course of a year, members complete approximately 600 projects and invest more than 2 million service hours in local communities in

the areas of education, public safety, disaster preparedness and response, homeland security, the environment, public health, housing and other unmet human needs.

In 2003, AmeriCorps*NCCC will operate five regional campuses located in Charleston, South Carolina, Denver, Colorado, Sacramento California, Perry Point, Maryland and the District of Columbia. To meet the growing demand in disaster assistance and need for greater efforts in homeland security, we proposed the creation of a satellite campus to be based in either the Gulf Coast or Midwest regions in our 2004 budget. This will enable a more cost-effective deployment of AmeriCorps*NCCC members to those areas of high need. Homeland security, working with faith-based and community-based organizations and leveraging volunteers will continue to be high priorities for project activities.

As I have said earlier in my testimony, accountability related to the cost per member continues to be a concern of the Corporation. The residential structure of AmeriCorps*NCCC provides opportunities for increased member availability for disaster relief operations and contributes to a far more intense citizenship development experience for the young people who participate. However, with these added benefits come higher per member costs. While we will continue to work with the members of this committee on reducing the cost per member, we also intend to use our commitment to innovation to develop other, more cost-effective models of AmeriCorps*NCCC that can be emulated by other public agencies and nonprofit organizations that support public safety, public health, and emergency response efforts.

Learn and Serve America

We suggest that service activities under the Learn and Serve America program continue to be funded within subtitle B of Title I of the National and Community Service Act. But as we have examined our programs to support service and citizenship education at our nation's schools and colleges, we believe it is important to clarify and sharpen the purpose of federal support at the elementary and secondary education level, as well as in higher education. The measures proposed in the Citizen Service Act of 2002 would allow the Corporation to improve the quality of these programs through teacher development and other means; ensure that grantees emphasize the teaching of civic knowledge and practice of civic skills through service and service-learning; and authorize the testing of innovative approaches to school-based service.

One of the continued areas of emphasis for our Learn and Serve America programs in higher education will be to welcome applications submitted by Historically Black Colleges and Universities, Hispanic-serving institutions, and Tribal Colleges and Universities. This was emphasized and supported by members of this committee in their report on the Citizen Service Act last year.

National Service Trust

The recent challenges concerning the National Service Trust stemmed, in part, from inadequate tracking procedures. Most of the Corporation's grant awards were made with the expectation that the positions would be renewed for two additional years unless the grantee performed in an unsatisfactory manner. In the last three years, the Corporation planned for an

AmeriCorps enrollment of 50,000 positions in the National Service Trust and exceeded targeted enrollments.

By law, AmeriCorps cannot enroll new members unless funds are available in the National Service Trust to cover the costs of their education award. To comply with this requirement, and as a result of the increased enrollments, in November 2002 the Corporation instituted a pause in enrollments until new appropriations could be deposited in the Trust. The pause has since been lifted.

As a response to this enrollment problem, the Corporation has instituted a number of reforms around Trust management and accounting procedures. I am pleased to submit a list of these for the record and am happy to comment on them. We look forward to working with Congress to make sure that those reforms, including the requirement for certification by the Chief Financial Officer that sufficient funds are available in the National Service Trust to support AmeriCorps program awards before those awards are made, are adequate so that the recent difficulties with the Trust do not recur.

In addition, as a safeguard consistent with the President's request to Congress in connection with the Corporation's 2003 appropriation, we also recommend that the Citizen Service Act give the CEO of the Corporation authority, with appropriate oversight from Congress, to transfer a limited amount of funding from AmeriCorps program areas to the National Service Trust should the need arise.

We also need to reform some of the benefits we offer through the Trust. Many AmeriCorps members have been disappointed because they have found the education award to be less valuable than they had believed it to be. Currently, the awards are taxable. Although AmeriCorps members are eligible for education tax credits and deductions that may reduce tax liability, some do not qualify or face restrictions that limit their value. We also believe that more seniors and others who do not seek additional education can be encouraged to participate in AmeriCorps if they were permitted to earn education awards that could be transferred to their children, grandchildren, or a needy individual (such as a child they mentor). We look forward to working with Congress through other legislative vehicles to exempt the award from taxation and to allow its transferability as well as providing greater flexibility in its use.

Earmarks

The Corporation's proposed FY 2004 budget includes allocations for three organizations: Teach for America, the Points of Light Foundation, and America's Promise - The Alliance for Youth. The Corporation has had a long relationship with each of these and believes each merits such treatment because of its ability to meet performance goals and deliver effective services. However, as a general rule, consistent with Administration policy, the Corporation seeks to limit the use of earmarking funds through the appropriations process.

Domestic Volunteer Service Act

The Domestic Volunteer Service Act authorizes AmeriCorps*VISTA and the three programs of the Senior Corps: RSVP, Foster Grandparents, and Senior Companions. The Citizen Service Act, as passed by this committee last year, contains a number of reforms of these programs consistent with the Administration's general principles for citizen service. These include placing a priority on volunteer leveraging and recruitment as a basis for awarding grants and requiring performance measures of all grantees. We ask the committee to include these again in the Citizen Service Act.

*AmeriCorps*VISTA*

AmeriCorps*VISTA has had a longstanding emphasis on building the self-sufficiency of low-income communities through asset development, building the capacity of programs that serve the poor, and strengthening faith-based and grassroots organizations. In conjunction with an Administration-wide focus on mentoring at-risk children, we suggest adding mentoring to the list of activities AmeriCorps*VISTA members are explicitly authorized to do.

The Corporation also seeks to allow other AmeriCorps members to engage in activities that AmeriCorps*VISTA members have long undertaken, including raising funds, leveraging volunteers, and building the technological and management capacity of organizations. Meanwhile, the President's Principles propose that AmeriCorps*VISTA members should assume some of the attributes of other AmeriCorps members, transitioning the program from a federally operated program in which the Federal Government ultimately selects and supervises members, to a federally assisted program in which sponsoring organizations have the principal responsibility for selecting and supervising members, similar to other AmeriCorps programs. This change would give nonprofit organizations, especially smaller community and faith-based entities, greater ability to match VISTA members with their programs.

Senior Corps

The programs of the Senior Corps are among the oldest programs the Corporation administers, each of them springing from the War on Poverty of the 1960s. They were expanded during the Nixon and Ford Administrations, and have continued to grow in subsequent administrations. These programs provide critical resources to communities across the nation, from assisting local police forces and tutoring at-risk kids, to reducing health care costs by enabling seniors to live independently.

But the programs of the Senior Corps need to be re-examined and enhanced in light of shifting demographic and cultural trends. All three programs need to become better equipped to take advantage of the coming wave of retirees- 70 million Baby Boomers, most of whom do not (and will not for some time) think of themselves as being "seniors." The Hudson Institute Workplace 2020 study showed that the retirement of this unprecedentedly large group will have a significant impact on the labor force available to the nation's nonprofit organizations, unless they become engaged in community service activities to a greater degree than they have been. Moreover, other studies, including some by the Corporation, have also shown that since the rising generation of retirees is bringing a different set of values and expectations to their

retirement activities, Senior Corps will have to find more creative ways to attract newly retired citizens to senior service.

Our studies, and those of others, are clear: younger retirees want flexibility in their service. They want to be able to work with as few or as many people as they think they can handle. They want to be able to choose the time, duration, and method of their service, within broad guidelines. They want to be compensated for significant service and recognized in other ways as well. They want to be able to engage in service that has clear, definable results in people's lives. And they want to be as free as possible of red tape, regulations, and bureaucratic barriers. The reforms contained in last year's Citizen Service Act would revamp the programs of Senior Corps along these lines.

In addition to increasing the choice of service opportunities for seniors, the Citizen Service Act, passed last year by your committee, met the President's request to remove the income eligibility ceiling and reduce the minimum age requirements to 55 in the Foster Grandparent and Senior Companion programs. This would allow all Americans over 55 to serve as mentors or tutor a vulnerable child or to serve as a companion to the frail and vulnerable elderly. Removing the 20 hour a week limit on these programs would allow Foster Grandparents and Senior Companions to work with more than one child or senior and allow local flexibility in setting program goals.

However, last year's Citizen Service Act went only part-way toward removing the income limits that restrict eligibility for Foster Grandparents and Senior Companions to individuals with incomes below 125 percent of the poverty line. These income restrictions are the most important reason, our grantees tell us, that our programs are unable to recruit enough seniors to meet the need for their services. We would urge the committee to eliminate the income test altogether in this year's version of the Citizen Service Act, as proposed by the President in the "Principles and Reforms for a Citizen Service Act."

In addition to the age and income requirements for the Foster Grandparent and Senior Companion programs, there is a need to provide more rigorous training for our volunteers. One of the findings from a recent study of the Senior Companion program was that more refined training is needed to increase the overall skill level of Senior Companions. In particular, the study indicates that skills in "communicating with family members, serving as client advocates, and listening skills would likely increase the quality of services being provided."

The programs of the Senior Corps offer a clear example of the need to update and improve the Corporation's programs. Provisions that may have been appropriate when they were enacted decades ago need to be revised if the programs are to fulfill their missions in the future. And if the programs are to attract the next generation of senior volunteers, the efforts of the Corporation to require grantees to demonstrate clear and objective results need to be strengthened. Strong statutory language will allow us to make these vitally important changes.

RSVP

The President's Principles and the Citizen Service Act, as introduced last year, place a greater emphasis within RSVP in the areas of public safety and homeland security, as well as a priority on volunteer leveraging and recruitment as a basis for awarding grants and

augmentations of existing grants. In FY 2003, funds to support 4,450 additional volunteers will go to new and existing projects, a significant portion of which will go to homeland security activities. Senior Corps is continuously exploring new ways to engage volunteers of diverse backgrounds, interests, and experiences and will continue to encourage its grantees, especially in RSVP, to reach out to and develop assignments that appeal to retired professionals.

The Citizen Service Act should ensure consistency in performance requirements for RSVP programs with those for other Corporation programs. We look forward to working with the Congress in developing effective performance measures.

Foster Grandparents

The Citizen Service Act, as introduced last year, and the President's Principles, contain a number of reforms that would add flexibility and accountability to the Foster Grandparent Program.

Presently, the age of eligibility for Foster Grandparents is 60, and an income eligibility ceiling restricts participation to low-income individuals. These requirements place a severe restriction on participation in the programs. In fact, approximately 60 percent of program directors in the Foster Grandparent Program report problems recruiting participants. About 70 percent of Foster Grandparent grantees report that they have had to turn away people because their incomes were too high. For children in need of a Foster Grandparent, our programs' inability to fill slots is not just a matter of differing views about eligibility standards; it is a personal and very serious loss.

Senior Companions

The Citizen Service Act, as passed by your committee last year, contains a number of reforms that would add flexibility and accountability to the Senior Companion Program.

Presently, the age of eligibility for Senior Companions is 60, and an income eligibility ceiling restricts participation to low income individuals. These requirements place a severe restriction on participation in the programs. In fact, approximately 60 percent of program directors in the Senior Companion program report problems recruiting participants. About 70 percent of Senior Companion grantees report that they have had to turn away people because their incomes were too high. At the same time, 95 percent of Senior Companion projects reported having client waiting lists, and 67 percent said those lists have increased over the past year.

We have just concluded a rigorous, three-year study of the impact Senior Companions have on the quality of life of clients, caregivers and local agencies. Initial results are impressive: Senior Companion clients function with greater independence, manifest fewer depressive symptoms and report higher life satisfaction, compared to their counterparts who are not assigned a Senior Companion. Caregivers are better able to cope with their responsibilities, while agencies report that Senior Companions help lighten administrative and other burdens. However, the study also points out that the number of Senior Companions is insufficient to meet the

demand and that better training would produce even better results. The Citizen Service Act should address these concerns to enhance the program.

Projects of National Significance

The Citizen Service Act should ensure consistency in performance requirements for RSVP programs with those for other Corporation programs. To the extent funds will be set aside for "Projects of National Significance," these projects should be in areas that are the same as the priority areas for other Corporation programs: homeland security, environment, public health, education, and other unmet human needs.

Conclusion

Mr. Chairman, that concludes my statement. We are clearly at an opportune moment in the history of federal support for service. In preparing this statement-and in all of our operations-we at the Corporation have kept constantly before us the vital importance of the commitment made by our members, their response of the heart to the needs of their nation and their neighbors.

Members like Lenwood "Lenny" Compton. Born and raised in Pontiac, Michigan, he is a senior at Oakland University majoring in education. Mr. Compton just completed his second year as a member in the AmeriCorps Oakland program, serving a total of 1,800 hours at a local Pontiac elementary school tutoring students in grades 1-3 in reading and writing. He also worked at Pontiac Area Transitional Housing, providing academic help to children in their after-school program. Mr. Compton was presented with the Mr. AmeriCorps award by his program as the male member of the corps who most exemplifies the qualities desired in an AmeriCorps member. After graduating, he plans to teach middle school math and social science.

In addition to his AmeriCorps service, Mr. Compton has been an active volunteer with the Michigan Association for Leadership Development, a program that provides positive role models and mentors for young African-American men ages 10 to 16. Since volunteering with this program, Mr. Compton has adopted two young men as little brothers, checking in with them daily, bringing them to church with him on Sundays, and taking them to sporting events and other activities. Most recently, Mr. Compton was the guest of First Lady Laura Bush at the 2003 State of the Union Address, where he was honored for his dedication to volunteer service.

Mr. Chairman, it is the example set by members like Lenny Compton that help to inspire and motivate our work. Your consistent efforts to support and strengthen the national service programs through reauthorization are important and they do make a difference-in our communities, in the lives of those served and who serve, and for our nation as a whole. They deserve to be run as well as we possibly can. You have my commitment that we will work ever hard to do this, because the public expects us to-and because our members need us to.

I look forward to working with you and with the other Members of Congress to pass reforms and extend national service legislation this year. I am available to address any questions that the Committee may have.

APPENDIX C –WRITTEN STATEMENT OF CARL H. ESBECK, ISABELLE WADE AND PAUL C. LYDA PROFESSOR OF LAW, UNIVERSITY OF MISSOURI, COLUMBUS, MISSOURI

Testimony of:

Carl H. Esbeck
Isabelle Wade and Paul C. Lyda
Professor of Law
University of Missouri-Columbia

Before the
Subcommittee on Select Education
of the
Committee on Education and the Workforce

April 1, 2003

* My academic title and affiliated institution are given only for the purpose of identification. The views expressed here are not necessarily those of the University of Missouri-Columbia.

Testimony of Professor Carl H. Esbeck:

The attention being given to section 175(c) of the National and Community Service Act (42 U.S.C. § 12635(c))[1] is but of a piece of a larger fabric, the whole cloth being widely known as the Bush Administration's Faith-Based and Community Initiative. On the question of religious staffing rights of faith-based grantees, the President has been clear on his position. For example, on April 4, 2002, when appealing for support for faith-based legislation, President Bush said, "people should be allowed to access that money without having to lose their mission or change their mission."[2] Again, when announcing on December 12, 2002, two new Executive Orders in support of the Faith-Based and Community Initiative, he said, "faith-based programs should not be forced to change their character or compromise their mission."[3] If President Bush's goal is to protect the mission integrity of faith-based charities as they reach out to the poor and needy, including the right to choose staff of like-minded faith, then consistency requires that his Administration do likewise by seeking to amend section 175(c).

Religious nonprofit organizations that provide welfare services to the poor and needy have the legal right to staff (hire, promote, and discharge) on a basis that takes into account the organization's religious beliefs and practices. That right ought not to be lost when an organization becomes a recipient of federal financial assistance.

1. IN THE CAUSE OF RELIGIOUS FREEDOM, CONGRESS DECIDED TO PROTECT RELIGIOUS STAFFING RIGHTS WHEN IT AMENDED SECTION 702(A) OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

Title VII of the Civil Rights Act of 1964[4] prohibits employment discrimination on the bases of race, color, religion, sex, and national origin. The legislation initially applied to employers with 25 or more employees. The law was binding on religious organizations as well, at least insofar as Title VII prohibited employment discrimination on the bases of race, color, sex, and national origin. Religion was different. Pursuant to section 702(a), religious organizations were not subject to charges of religious discrimination brought by employees with religious responsibilities.[5] The 1964 act was amended by the Equal Employment Opportunity Act of 1972,[6] which among other changes increased the coverage of Title VII by making it applicable to employers with 15 or more employees. More importantly, 702(a) was broadened in its scope. With passage of the 1972 act, religious organizations were free of all charges of religious discrimination by any applicant or employee, regardless of whether the nature of the job in question entailed religious responsibilities or tasks.[7]

The 1972 act broadened 702(a) out of a concern that government regulators not be able to interfere with the religious affairs of religious organizations.[8] The congressional sponsors of the 702(a) amendment, Senators Allen and Ervin, couched its purpose in terms of a restraint on government power, thus keeping the desired distance between church and state. Senator Sam Ervin, a Democrat from North Carolina who was widely recognized as an expert on the Constitution, said of his proposal:

> [T]he amendment would exempt religious corporations, associations, and societies from the application of this act insofar as the right to employ people of any religion they see fit is concerned. . . .
>
> . . . In other words, this amendment is to take the political hands of Caesar off the institutions of God, where they have no place to be.[9]

For government regulators and, ultimately, the courts to have the power to pry into job descriptions, allocation of job assignments, lines of supervisory authority, and performance reviews at religious institutions, and to sift and sort as to the nature and degree of "religious" character as distinct from "secular" character for any given employment position, invites untoward government involvement with religious questions.[10] If the Establishment Clause deregulates the religious sphere, which it does, then there can be no jurisdiction in the government to determine which of a faith-based organization's [FBO's] jobs are "secular enough" to regulate and which are "too religious" to be overseen by government officials.[11]

A later court challenge in *Corporation of the Presiding Bishop v. Amos*,[12] took up the question of whether 702(a) was a "preference" for religious employers over secular employers. Without a single dissenting vote, the U.S. Supreme Court upheld the 1972 amendment that broadened 702(a).[13] What Congress did by passing 702(a) was to refrain from imposing a regulatory burden on religion, even though the burden was imposed on secular employers similarly situated. And it is elementary that the government does not "make [a] law respecting an establishment of religion" by leaving it alone.[14] As the Supreme Court observed:

> A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effect" under [the Establishment Clause], it must be fair to say that the *government itself* has advanced religion through its own activities and influence.[15]

Indeed, to have failed to open up the scope of 702(a) would likely have risked the narrower, pre-1972 version of 702(a) being challenged as inviting excessive entanglement between church and state. The highest court in Maryland has since handed down a ruling much to that effect.[16] The court sustained a constitutional challenge by a religious k-12 school to a county employment nondiscrimination ordinance. The school was sued when it dismissed two teachers because they were not members of the sponsoring church. The ordinance's accommodation for religious staffing by religious organizations, which was for jobs with "purely religious functions," was found too narrow, thereby inviting encroachment on the school's religious autonomy. Similarly, at one time the Federal Communications Commission (FCC) required radio stations owned by religious organizations not to discriminate in employment on the basis of religion. There was an exemption, but it was only for those jobs that had no substantial connection with a station's program content. Realizing that enforcement of the regulation interfered with the religious autonomy of these radio stations, in late 1998 the FCC announced that it would henceforth permit religious staffing as to all employees at a radio station.[17]

At this juncture, opponents of the President's Faith-Based Initiative make a rather supercilious argument. They chide supporters with questions like, "If your FBO is a Catholic soup kitchen, what difference does it make that a Baptist is hired to ladle the soup?" Similarly, "If you have a Lutheran homeless shelter, why can't a Jewish individual be just as effective in providing a clean bed to street people?" The argumentation is reductionist, paring down a faith-driven ministry to the mere provision of bread and beds. Writing separately in *Amos*, Justice William Brennan supplied these critics with the right response, one that more fully recognizes the rich and variant nature of what it means to be a faith community and that does justice to the spiritual prompting that motivates religious people to seek employment in a helping ministry:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.
>
> . . . [W]e deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.[18]

The desire by FBOs to employ those of like-minded faith is not inconsistent with the prohibition against direct government funds being diverted to activities such as proselytizing and worship. To employ only those of like faith does not mean that those same employees will be pressed into performing forbidden tasks when using public grant monies.[19] There is no contradiction in an organization, one of thoroughgoing religious *character*, that, in compliance with the law, refrains from engaging in practices of inherently religious *content*. This is an everyday occurrence. Groups that are more evangelistic can still worship or preach, they just must do so separated in time or location from their government-funded program.[20] Still other FBOs may, out of their faith, want to serve without any obvious evidence of religion because they understand their missionary call to entail outward neutrality when it comes to the symbols, sayings, and other externalities of the faith. As the California Supreme Court recently observed of a Catholic hospital that fired an employee for "soul saving" on the job, "[M]aintaining a secular appearance in its medical facility that is welcoming to all faiths, thereby de-emphasizing its distinctively Catholic affiliation, appears to be part of [the hospital's] religiously inspired mission of offering health care to the community."[21] New empirical data, which just recently has become available, shows that employees at FBOs are properly following the Court's first amendment interpretation prohibiting the diversion of direct public funding to inherently religious activities.[22]

Opponents of the Faith-Based Initiative concede, as they must after the decision in *Corporation of the Presiding Bishop v. Amos*, the applicability and constitutionality of 702(a) to

religious social service providers. But, they argue, 702(a) is somehow waived if an FBO applies for and is awarded a social service grant. Every court to rule on this argument has rejected it.[23] When an FBO does staff on a religious basis, such as requiring good standing in a particular church or doctrinal agreement with a particular moral teaching, the FBO's conduct is not within the scope of Title VII and thus is lawful. **It is not that religious staffing is unlawful but excused when the FBO falls back on 702(a). Rather, the conduct, in the first instance, is simply lawful. Because Title VII does not at all reach the conduct of religious staffing, the courts have said that no act or omission by the FBO could alter the Civil Rights Act so as to expand its scope to religious staffing. Only Congress can do that.[24] This widely adopted interpretation of Title VII would also apply to an FBO receiving government funds for a specific social service program wherein the challenged religious staffing is taking place, indeed, even for a job position made possible only by the government grant in question.**

II. PROTECTING THE STAFFING RIGHTS OF FUNDED FAITH-BASED SOCIAL SERVICE PROVIDERS DOES NOT VIOLATE THE FIRST AMENDMENT.

A. The "State" or "Federal Action" Requirement

Opponents to the Faith-Based Initiative argue that for a funded FBO to invoke 702(a) would violate that Establishment Clause. This makes no sense. What 702(a) does is keep government out of the business of religion, thereby honoring the Establishment Clause, not violating it. **That is why 702(a) was amended in 1972—to "take the political hands of Caesar off the institutions of God, where they have no place to be," as Senator Sam Ervin said.**

The opponents of the Faith-Based Initiative suppose a direct link between the government's decision to award a competitive social service grant and a non-governmental provider's employment practices. But **the purpose of the grant funding is not to create new jobs or to induce certain employment practices thought desirable by the government. Rather, the object of the government's welfare program is the funding of social services for the poor and needy. Whether or not a social service provider has employment policies rooted in its religious mission is probably not even known to the government. However, whether known or not, it is the non-governmental provider that is making the staffing decisions, not the government. It is elementary that the Bill of Rights, including the Establishment Clause, was adopted to restrain the government and only the government. Hence the Establishment Clause cannot be violated in the absence of an act or actions by the government.**[25]

Not all FBOs staff on a religious basis, and some that do so only use such criteria in selecting ministerial and other policy-forming or executive-level employees. Because there is no causal link between a social service grant and the employment practices of a grantee, an FBO's religious staffing decisions are not "state action" under the Fourteenth Amendment or "federal action" under the Fifth Amendment. In *Rendell-Baker v. Kohn*,[26] a teacher sued a private school

alleging denial of her constitutional rights as an employee. The Supreme Court held that just because the school received most of its funding from the state it was not thereby a "state actor." **If that is true of the employees of a private school, it is true of the employees of an FBO.** Similarly, in *Blum v. Yaretsky*,[27] the Supreme Court held that the pervasive regulation of a private nursing home, along with the receipt of considerable government funding, did not render the home's conduct "state action."[28]

The opponents of the Faith-Based Initiative argue that 702(a) is different, for by the enactment of 702(a) Congress expressly authorized FBOs to "discriminate" on the basis of religion. So, they reason, the discrimination is fairly attributable to Congress. That is not the law. In *Flagg Brothers, Inc. v. Brooks*,[29] for example, the Supreme Court turned back a constitutional challenge to a provision in a state's commercial code where the legislature expressly allowed for self-help by a creditor in collecting a debt. The Court found no "state action," notwithstanding the legislature's enactment of the law whereby the self-help acts of creditors were explicitly authorized to the detriment of debtors. The law was merely permissive, reasoned the Court, thus the actions of creditors utilizing self-help was not attributable to the state. Section 702(a) is likewise permissive. It allows religious staffing, but it does not require it.[30]

The Supreme Court has examined 702(a) and the religious staffing question and observed that it was not "federal action" attributable to the federal government. Quoted above is the passage from *Corporation of the Presiding Bishop v. Amos*, wherein the Court held 702(a) simply "allows" religious groups to advance religion, and hence it is not "fair to say that the government itself" is responsible for the religious staffing.[31] Moreover, in *Amos* the employee that lost his job because he had fallen into disfavor with his church, argued that the failure of 702(a) to protect him from job discrimination denied him rights under the Free Exercise Clause. The Court said:

> Undoubtedly, [the employee]'s freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.[32]

Thus, the Court thought it need not reach the merits of that free-exercise claim because, once again, the prior question of whether there was "federal action" must be answered in the negative. Only government can violate the Establishment Clause. An FBO is not the government, and the government is not involved in an FBO's staffing decisions.

B. The Establishment Clause is Not Violated

Opponents also argue that the Establishment Clause is violated when funded FBOs are permitted to staff on a religious basis. Although precedent for the Establishment Clause argument is thin to nonexistent, and the lack of "federal action" is an insurmountable hurdle, the opponent's enthusiasm for pressing forward is apparently

undeterred. Opponents persist in characterizing 702(a) as a religious "preference," and they point out that while we insist on neutral treatment in grant criteria between secular and religious providers, we also insist on keeping 702(a) which is of use only to religious providers. But this wrongly characterizes the principle of neutrality as a mere facial requirement. It is far more. For an FBO to have the right to staff on a religious basis is not a plea for preferential treatment, but an insistence on the same right that other ideological organizations have to ensure that their employees are committed to the organization's mission. The Sierra Club may hire only those who are committed to the environmental movement, the Libertarian Party may prefer those who are devoted to market solutions, and Planned Parenthood may screen for those who are pro-choice. It is a matter of simple justice that FBOs may employ those of like-minded faith. This is not a "preference" violative of the Establishment Clause. Rather, it is a principle of substantive equality. Equality in substance—not mere facial equality—reinforces the separation of church and state, as law professor Douglas Laycock has said in congressional testimony:

> To say that a religious provider must conceal or suppress its religious identity . . . or hire people who are not committed to its mission . . . uses the government's power of the purse to coerce people to abandon religious practices . . . . Charitable choice provisions that protect the religious liberty of religious providers are pro-separation; they separate the religious choices of commitments of the American people from government influence.[33]

A truly neutral social service program is one that does not skew the choices of beneficiaries toward or away from religious social service providers. If welfare beneficiaries are to have both secular and religious choices, then 702(a) is needed to attract the participation of FBOs and to safeguard their religious character from overly invasive regulation.

Opponents of the Faith-Based Initiative argue that their case is different. They insist that the situation is not simply that FBOs receive federal assistance unrelated to welfare delivery and that FBOs happen to discriminate in employment. Rather, say opponents, FBOs receive welfare program monies and then are discriminating in those very programs. But that is a distinction without a difference. The fact remains that the government makes its competitive grant awards on a basis that is wholly independent of an FBO's decision to staff on a religious basis. To again paraphrase the *Amos* decision, it is not unconstitutional for government to allow FBOs to pursue their own interests, which is their very purpose. For government to violate the Establishment Clause it must be the government itself that has advanced religion. All the government has set out to do here is to help the poor and needy by awarding its grant monies to the most effective and efficient applicants. If FBOs win some of these awards and deliver the secular services to the poor, while obeying first amendment restrictions on direct government funding, then that is the end of the government's oversight responsibilities.

A very similar Establishment Clause argument was made before a state court of appeals in *Saucier v. Employment Security Department.*[34] In *Saucier*, a state agency and a faith-based drug

rehabilitation center were sued by a former counselor at the center seeking unemployment compensation. As a religious organization, the drug rehabilitation center was exempt under state law from paying unemployment compensation tax, hence benefits were unavailable. The rehabilitation center was a recipient of federal and state welfare grants. When benefits were denied to the former employee, she argued that the welfare grants when juxtaposed with the tax exemption violated the Establishment Clause. The argument parallels the claim that a social service grant when juxtaposed with 702(a) violates the Establishment Clause. The court of appeals noted that the exemption for FBOs from unemployment taxes had been litigated elsewhere and found not to violate the Establishment Clause. The court in *Saucier* did not find any connection between the tax exemption and the center's receipt of welfare grant monies.[35] Hence, the former employee's claim was dismissed.

The constitutionality of 702(a) when an FBO is a recipient of a government grant parallels a dispute that arose over whether Congress could, without running afoul of the Establishment Clause, provide religious hospitals with funding under the Hill-Burton Act.[36] The Hill-Burton Act provides federal funding for capital improvements to hospitals. Hospitals are eligible, whether public or private, without regard to religion. Some of the funded hospitals refused to provide abortions and sterilizations because the performance of such procedures was contrary to the religious alignment of the hospital. Patients seeking these reproductive services argued that for government to fund these hospitals, under these circumstances, was promoting religious belief contrary to the Establishment Clause. Congress disagreed and modified the Hill-Burton Act by adopting an amendment offered by Senator Frank Church, a Democrat from Idaho. What came to be known as the "Church Amendment" provided that the receipt of any grant under the act by a hospital did "not authorize any court or public official to require . . . [s]uch entity to . . . make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions."[37] The Church Amendment was challenged as a violation of the Establishment Clause, with the claimants juxtaposing the government aid with the free exercise exemption. However, the federal courts found that Congress had only sought to preserve neutrality in the face of religious and moral differences, and thus they had little trouble upholding the amendment.[38] A religious hospital's refusal to provide certain reproductive services was a wholly private act, not "federal action." The Church Amendment simply permitted religious hospitals to be true to their beliefs. A legislature does not establish religion by leaving it alone.

Section 702(a) likewise places the government in a position of religious neutrality. With both discretionary and block grants, the objective of the federal government is to provide grant monies to the most effective and efficient social service providers. Whether or not a nongovernmental grantee staffs on a religious basis is a matter on which the government takes no position, hence the Establishment Clause is not implicated.

Opponents of the Faith-Based Initiative point to only one case, *Dodge v. Salvation Army*,[39] an unpublished opinion by a federal trial court in Mississippi. *Dodge* is truly an outlier. In *Dodge*, the Salvation Army had received federal and state grants to operate a domestic violence shelter. A new federal grant enabled the change in employment status of Ms. Jamie Dodge, from part-time to a full-time basis, as a Victims' Assistance Coordinator. When first hired Ms. Dodge said she was a Catholic. One day she was discovered using the office photocopy machine for unauthorized personal use. Moreover, the materials Ms. Dodge was copying were "manuals and information on Santanic/Wiccan rituals." The Salvation Army dismissed Ms. Dodge citing her unauthorized use of office materials and her "occult practices that are inconsistent with the religious purposes of the Salvation Army."

Neither the federal nor state agency that awarded the domestic violence grants were ever joined as party defendants. Hence, the government was not a party to be heard by the court and to defend the law. Moreover, because only government can violate the Establishment Clause and neither government agency was sued, the court never should have entertained an alleged violation of the clause. After that inauspicious beginning things only got worse. The *Dodge* court proceeded to hold 702(a) **unconstitutional as applied to the government-funded employment position of victims' coordinator. This holding in *Dodge* was of doubtful rationale when decided, and given later developments the opinion is clearly not the law today.[40] The court refused to follow the Supreme Court decision most directly in point, *Corporation of the Presiding Bishop v. Amos*, which just two years before had unanimously upheld the application of 702(a) as applied to a janitor with essentially secular duties at a church-related facility. Instead, *Dodge* reasoned from a fifteen-year-old case that was essentially irrelevant, *Lemon v. Kurtzman*.[41] *Lemon* held that the job of a teacher at a parochial school so integrates religious and secular functions that the government cannot fund even part of a teacher's salary. *Dodge*, however, involved a job that entailed secular functions that government could fund, so *Lemon* was not in point. The *Dodge* court went on to infer that if government could not fund a pervasively religious job like parochial school teachers, then any government-funded job must be secular. But the victims' coordinator job in *Dodge*, like the janitor in *Amos*, was secular. So 702(a) could have applied to Ms. Dodge's job of victim's coordinator without implicating *Lemon* and the Establishment Clause. Hence, *Dodge* should have been following *Amos*—not the factually irrelevant decision in *Lemon*.**

More import for our purpose, since *Dodge* was decided in 1989 the trend in the law has been strongly against *Lemon* and its rule of no-aid to pervasively religious organizations. Since the 1989 opinion in *Dodge*, five important cases upholding the distribution of government benefits on a neutral basis to nongovernmental organizations, including the pervasively religious, have come down.[42] Four other important cases restricting the distribution of government aid to religious organizations, good law at the time of *Dodge*, have since been overruled in whole or substantial part.[43] None of these post-*Dodge* developments squarely address the constitutionality of applying 702(a) to an private employer providing government-funded services. However, this broad trend in the

Supreme Court in favor of the rule of neutrality fatally undermines the *Dodge* court's suspicious reaction to government-funded welfare services administered by pervasively religious providers.

III. THE RELIGIOUS FREEDOM RESTORATION ACT RELIEVES FAITH-BASED SERVICE PROVIDERS FROM FEDERAL PROGRAM-SPECIFIC EMPLOYMENT NONDISCRIMINATION PROVISIONS SUCH AS SECTION 175(C).

Where program specific employment nondiscrimination clauses, such as sec. 175(c), apply to federally assisted social service providers, FBOs that employ staff on a religious basis are to that extent protected by the Religious Freedom Restoration Act of 1993 [RFRA].[44] RFRA excuses federally funded[45] FBOs[46]—those that have a sincerely held religious practice of employing those of like-minded faith—from having to incur a substantial religious burden when the burden is impose by a generally applicable federal law.[47] Being prohibited from staffing on a religious basis is most assuredly a burden on the free-exercise of religion. It is no answer to argue, as some opponents of the Faith-Based Initiative do, that an FBO can just avoid the burden by foregoing its ability to compete for grants under the welfare program in question. Just as the government cannot justify restricting a particular form of speech merely by pointing to other opportunities that a person has to express herself, so government cannot restrict a particular exercise of religion by pointing to another course of action whereby the organization's religious practices are not penalized. Indeed, RFRA explicitly contemplates that a "denial of government funding" because of a service provider's religion or religious practice can trigger RFRA.[48] That only makes sense. The congressional passage of RFRA was about "restoring" a standard of protection for religious free-exercise as reflected in *Sherbert v. Verner*,[49] a case about a denial of government funding.[50] Just as the Supreme Court held in *Sherbert* that an individual refusing to take a job entailing work on her Sabbath could not be put to the "cruel choice" of forfeiting her claim for unemployment compensation or violating her religious day-of-rest, an FBO cannot be put to the "cruel choice" of forfeiting its ability to compete for valuable program grant monies or violating its religious practice of employing only those of like-minded faith.

In RFRA itself the term "religious exercise" is broadly defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[51] Nonetheless, opponents further argue that for government to decline to facilitate the free-exercise of religion is not a "religious" burden. The Free Exercise Clause is written in terms of what the government cannot do to an FBO, observe these opponents, not in terms of what an FBO can exact from the government. This is true, but that line of argumentation does not describe what is occurring here. The government may choose to itself deliver all social services to the poor and the needy. If that occurs, then the denial of funding to an FBO is indeed not a free-exercise burden.[52] The government, however, has not chosen that path. Rather, the government has chosen to award grants to nongovernmental providers who in turn deliver the social services. Having chosen to deliver services via providers in the private sector, government cannot now pick and choose among those providers using eligibility criteria that has a discriminatory impact adverse to FBOs. A discriminatory impact from an otherwise neutral law is the very type of occurrence that Congress sought to stop by enacting RFRA. *See* 42 U.S.C. § 2000bb-1(a) ("Government shall

not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability").

Conceding, as they must, that by its terms a denial of grant funding can trigger RFRA, opponents of the Faith-Based Initiative argue that RFRA cannot be invoked by FBOs because the loss of grant monies is not a "substantial" religious burden. This makes no sense. It is true that religious organizations making claims of increased financial burden, without more, have not been excused from compliance with general regulatory and tax legislation. That is, it is not always enough to simply show that a neutral law increases an FBO's cost of operating. But those cases have no resemblance to the claim of burden here. Rather, these program-embedded nondiscrimination provisions uniquely harm FBOs by preventing them from maintaining their religious character by hiring co-religionists to perform the ministry. The harm is not financial or economic, the harm is religious. As with the abridgment of free-speech rights, the impairment of the free-exercise of religion is a cognizable harm *per se* and thus "substantial." A bar on religious staffing cuts the very soul out of an FBO's ability to define and pursue its spiritual calling, as well as sustain itself over generations.[53]

RFRA can be overridden, of course, upon a showing of a "compelling governmental interest." But it is absurd to claim, as some opponents do, that the eradication of religious staffing by FBOs is a compelling interest. Congress sought to achieve just the opposite when it provided in 702(a) that Title VII's ban on religious discrimination should not apply to FBOs. Permitting FBOs to staff on a religious basis does not undermine social norms or constitutional values. Just the opposite is true. This freedom minimizes the influence of governmental actions on the religious choices of both welfare beneficiaries and religious organizations. Safeguarding an FBO's freedom of religious staffing advances the Establishment Clause value of noninterference by government in religious affairs. Senator Sam Ervin said it more colorfully in stating that the aim is to "take the political hands of Caesar off of the institutions of God, where they have no place to be." In *Corporation of the Presiding Bishop v. Amos*, the Supreme Court put its seal of approval on that congressional judgment. And this is the judgment not just of Congress in 702(a) and a unanimous Court in *Amos*, but also of President Bush as he spoke while instituting his Administration's Faith-Based Initiative:

> We will encourage faith-based and community programs without changing their mission. We will help all in their work to change hearts while keeping a commitment to pluralism. . . . Government has important responsibilities for public health or public order and civil rights. . . . Yet when we see social needs in America, my administration will look first to faith-based programs and community groups, which have proven their power to save and change lives. We will not fund the religious activities of any group. But when people of faith provide social services, we will not discriminate against them.
>
> As long as there are secular alternatives, faith-based charities should be able to compete for funding on an equal basis, and in a manner that does not cause them to sacrifice their mission.[54]

The President's speech has all the right elements: effective help for the poor as the paramount concern and objective, equality between secular and religious providers, and respect for civil rights within a framework of respecting everyone and thus not forcing a change in the religious mission of charities who serve out of faith. Additionally, Senator John Ashcroft, now U.S. Attorney General, has observed that the Faith-Based Initiative results in the poor and needy having more choices when it comes to welfare providers to serve them, some of whom want to seek out assistance at robustly faith-centered providers.[55] These are the social norms to be upheld and the constitutional values to be reinforced. In the face of these affirmations from all three branches of the government, the opponent's audacious assertion that resistance to religious staffing rights holds the high ground of "social norm" is little more than personal opinion.

We hasten to add that reliance on RFRA in no way excuses compliance with federal civil rights laws when it comes to employment discrimination on the bases of race, national origin, sex, age, disability, and the like.[56] RFRA guards only against burdens on religion.

IV. POLICY CONSIDERATIONS

Safeguarding the right to religious staffing is at the heart of any attempt to protect the religious character of charitable and social service providers. The following public policy considerations support religious staffing rights for FBOs.[57]

1. A religious organization's decision to employ staff who share its religious beliefs is not an act of shameful intolerance but a laudable and positive act of freedom.

In a pluralistic society that enjoys full freedom of association, a wide variety of ideology-based organizations rightly are at liberty to select employees who share their core commitments. Environmental organizations, feminist groups, unions, and political parties, all are free to choose staff who subscribe to their central ideology. This freedom should not disappear if governments invite these private sector organizations to perform some public task. Planned Parenthood, for example, does not lose its freedom to hire pro-choice staff simply because it has a government contract. To deny this same freedom to religious organizations would itself be discriminatory, not the promotion of a society where all are equal before the law.[58]

It is confusion to equate this positive good with the evil of discrimination on the basis of race or gender. Whether one thinks that religion is a backward superstition that modern folk ought to abandon or an inherent trait of humanity and generally positive contributor to societal well-being, all who believe in freedom of expressive association for cause-oriented groups should insist that religious hiring rights by FBOs is a good thing to be protected by law rather than an evil to be restricted and suppressed.

2. The ability to choose staff who share a religious organization's beliefs is essential to that organization retaining its core identity.

As noted earlier, Justice William Brennan in *Corporation of the Presiding Bishop v. Amos* observed that determining whether "certain activities are in furtherance of an organization's religious mission and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself."[59] Having staff that share a religious organization's religious beliefs profoundly shapes the character of an organization in a variety of ways. Similar values, a sense of community, unity of purpose, and shared experiences of prayer and worship (outside program time) all contribute to an *esprit de corps* and common vision. A Jewish organization forced to hire Baptist staffers will not long remain a significantly Jewish organization. The sense of religious community and spirit on which success of the organization's efforts depend will be crippled is a faith-based charity is forced to hire those who do not share then organization's vision and mission.

Hiring rights are essential even when a faith-centered organization separates by location or time (and pays for with private money) worship, religious instruction, and proselytization from its government-funded program. This is so for multiple reasons. First, by experience these organizations have learned that religious activities are important to the success of a social service program even when voluntary, privately funded, and segregated from "secular" government-funded activities. In such programs, certain religious beliefs and practices are legitimate qualifications for a staff position, equally as valid as having the right technical skills or educational credentials.

Second, forced religious diversity has the effect of stifling religious expression within the agency, creating a climate where employees fear offending other staff with their religious speech or practices. Since personal faith is often important to those who choose to work in a religious organization, such a climate will diminish staff motivation and effectiveness. A forced diversity will sap a program's spiritual vitality and lead to its secularization.

Third, staff often hold multiple roles, especially in small organizations or those with tight budgets. For example, an agency might seek someone as half-time youth minister and half-time social worker for their youth mentoring program. A law in which religion can be a factor in hiring for some jobs but not others within the same agency will lead to complicated and impermissibly entangling regulation.

3. Religious charities that wish to retain staffing rights are not trying to foist their religion on others, but ask only that others not impose alien values on their internal operations.

Religious charities who choose to select staff that share their religious beliefs want other cause-oriented organizations to have the same freedom to staff based on the group's ideology. FBOs are not foisting their religious beliefs or morality on others. Rather than imposing their own worldview on unwilling others, they simply want each cause-based organization to be free to make employment choices based on its deepest commitments. It is those seeking to deny the staffing safeguard to religious groups who are trying to use the coercive power of the state to foist their ideological beliefs on FBOs.

4. Removing the right of religious organizations to staff on the basis of religion would require drastic, widespread change in current practice.

Religious colleges and universities, religious hospitals, religious retirement and nursing homes, religious foster care homes, and many other religious organizations receive government funding to assist in their educational, health care, and social service activities.[60] Many of these organizations consider the existing, long-recognized staffing safeguard to be essential to any continuing provision of services. Those who oppose religious staffing protection as part of the Faith-Based Initiative, if they are consistent, will seek to overturn and outlaw a vast range of situations where government currently cooperates with faith-based organizations. Such a radical disruption of existing education, health care, elder care, and foster care would be tragic.

5. Prohibiting government assistance for religious social service providers that staff on a religious basis will hurt the poor and needy.

In an op-ed in *The Wall Street Journal*, Andrew Young asked: "Why should the [religious] organizations that are best at serving the needy be excluded from even applying for government funding?"[61] Urging Senate passage of legislation that would expand charitable choice to additional federal welfare programs, Young warned opponents not to play politics with the poor and needy.

Young's premises of course may be wrong. His argument assumes that the poor need both moral/spiritual as well as material transformation, and that FBOs often are more effective. We do not yet have extensive, comparative quantitative studies demonstrating that (other things being equal) intensely faith-centered welfare providers produce better results. A lot of anecdotal data, however, clearly suggest that thoroughly faith-centered programs are producing remarkable outcomes in contexts where almost nothing else seems to work—a finding that fits with the vast number of quantitative studies demonstrating that for many people religion contributes positively to emotional and physical well-being.[62] These success stories often come from religious organizations which are very certain that the faith-factors in their programs are a crucial cause of their success. If they are right, then refusing to fund such agencies means denying many of our most needy citizens the best available help.

6. Because government is now asking religious groups to provide more social services, the government should reciprocate by respecting the integrity of these organizations.

Religious organizations have been caring for the poor and needy for millennia. They will continue to do so regardless of what government says, or funds. Today, however, federal, state, and local governments are asking faith-based groups to provide more social services and offering public support to expand their capacity. Partly this is because the available data suggest that FBOs produce better results and partly because religious organizations are frequently the only institutions still functioning in depressed neighborhoods. If government wants additional help,

then it should respect and preserve the integrity of FBOs rather than destroying the very features that makes them uniquely effective. The right to staff with individuals that share the religious group's beliefs is the single most important way to ensure that FBOs can deliver on the government's call for expanded assistance to the needy.

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1. Also implicated is Section 417(c) of the Domestic Volunteer Service Act (42 U.S.C. § 5057(c)).

2. *President Promotes Faith-Based Initiative*, White House Press Release, (Apr. 4, 2002), at http://www.whitehouse.gov/news/releases/2002/04/20020411-5.html.

3. *President Bush Implements Key Elements of his Faith-Based Initiative*, White House Press Release (Dec.12, 2002), at http://www.whitehouse.gov/news/releases/2002/12/20021212-3.html.

4. 42 U.S.C. § 2000e *et seq*. *See* Pub. L. No. 88-352, 78 Stat. 253 (1964).

5. Section 702(a) originally read, in relevant part, as follows:

> This title shall not apply to . . . a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities . . . .

Pub. L. No. 88-352, 78 Stat. 255 (1964).

6. Pub. L. No. 92-261, 86 Stat. 103 (1972).

7. Section 702(a) presently provides, in relevant part, as follows:

> This title shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

42 U.S.C. § 2000e-1(a).

Federal law prohibits employment discrimination on additional protected bases. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34, prohibits employment discrimination on the basis of age. It applies to employers of 20 or more employees. There is no exemption set forth in the act for religious organizations. The Americans with Disabilities Act, 42 U.S.C. §§ 12101- 12213, prohibits discrimination against otherwise qualified individuals with disabilities. The employment protections are found at §§ 12111 - 12117. The ADA applies to employers of 15 or more employees. Nothing in the ADA prohibits religious organizations from staffing on a religious basis. *Id.* at § 12113(c). Finally, the Equal Pay Act of 1963, 29 U.S.C. 206(d), requires equal pay for equal work without regard to sex. It applies to employers who are also subject to the federal minimum wage. There is no statutory exemption for religious organizations.

8. *See* Little v. Wuerl, 929 F.2d 944, 949-51 (3d Cir. 1991) (giving a brief account of the congressional purpose behind broadening 702(a)).

9. 118 Cong. Rec. 4503 (Feb. 17, 1972) (Senator Sam Ervin).

10. A long line of Supreme Court cases admonish government, including the courts, to avoid probing into the religious meaning of words, practices, and events by religious organizations. *See* **Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 843-44 (1995) (university should avoid distinguishing between evangelism, on the one hand, and the expression of ideas merely approved by a given religion); Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987), and *id.* at 344-45 (Brennan, J., concurring) (recognizing a problem when government attempts to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties is desirable); Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30 (1983) (avoiding potentially entangling inquiry into religious practice); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981) (holding that inquires into the religious significance of words or events are to be avoided); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981) (not within judicial function or competence to resolve religious differences); Gillette v. United States, 401 U.S. 437, 450 (1971) (Congress permitted to accommodate "all war" pacifists but not "just war" inductees because to broaden the exemption invites increased church-state entanglements and would render almost impossible the fair and uniform administration of selective service system); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (avoiding entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs is desirable); Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940) (petty officials not to be given discretion to determine what is a legitimate "religion" for purposes of issuing permit); *see also* Rusk v. Espinosa, 456 U.S. 951 (1982) (aff'd mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations). The concern is threefold: the lack of judicial competence to resolve doctrinal questions, the potential for interference by the state in religious affairs, and the potential for "establishment" when a court favors one religious interpretation of words or events over others. For similar reasons, courts are to avoid making a determination concerning the centrality of the religious belief or practice in question to an overall religious system. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988) (rejecting free-exercise test that "depend[s] on measuring the effects of a governmental action on a religious objector's spiritual development"); United States v. Lee, 455 U.S. 252, 257 (1982) (rejecting government's argument that free-exercise claim does not lie unless "payment of social security taxes will . . . threaten the integrity of the Amish religious belief or observance"); Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981); *cf.* City of Boerne v. Flores, 521 U.S. 507, 513 (1997); Employment Div. v. Smith, 494 U.S. 872, 886-87 (1990).**

11. The plurality in Mitchell v. Helms, 530 U.S. 793 (2000), referred with approval to this line of precedent as reason for abandoning the "pervasively sectarian" test.

> [T]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs. See *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 887 (1990) (collecting cases). Yet that is just what this factor requires, as was evident before the District Court. Although the dissent welcomes such probing . . . , we find it profoundly troubling.

Id. at 828. In reliance on this passage in *Mitchell*, the D.C. Circuit overturned an NLRB policy. *See* Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (refusing to issue collective bargaining order against Catholic college because NLRB's "primarily religious" versus "not primarily religious" test was violative of religious autonomy doctrine of first amendment). *See also* Columbia Union College v. Oliver, 254 F.3d 496, 504 (4th Cir. 2001) (finding that *Mitchell* abandon the "pervasively sectarian" test); John D. Ashcroft, *Statement on Charitable Choice*, Proceedings and Debates of the 105th Cong., 2d Sess., 144 Cong. Rec. S12686 (Oct. 20, 1998) (disapproving, for constitutional reasons, of the "pervasively sectarian" test).

12. 483 U.S. 338 (1987).

13. *Id.* Justice White wrote the majority opinion. Justice Brennan wrote an opinion concurring in the judgment, joined by Justice Marshall. *Id.* at 340. Justice Blackmun wrote an opinion concurring in the judgment, joined by Justice O'Connor. *Id.* at 346.

14. The first amendment provides, in relevant part, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. AMEND. I.

15. 483 U.S. at 337. This was not a new development. The Supreme Court had previously sustained religion-specific exemptions from regulatory burdens in the face of challenges under the Establishment Clause. *See* **Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military draft for those who oppose all war does not violate Establishment Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release-time program for students to attend religious exercises off public school grounds); Arver v. United States, 245 U.S. 366 (1918) (upholding, *inter alia*, military service exemptions for clergy and theology students).**

16. Montrose Christian School Corp. v. Walsh, 770 A.2d 111 (Md. App. 2001). The court held that governmental interference with the internal management of religious organizations would result from an ordinance prohibiting employment discrimination on the basis of religion where religious organizations were exempt but only as to employees with "purely religious functions." *Id.* at 124. The Supreme Court's church autonomy doctrine was relied upon, a line of cases that has its origin in the separation of church and state. *Id.* at 123-24.

17. The FCC's proposed rules revising the equal employment regulations for religious broadcasters appears at 63 Fed. Reg. 66104 (Dec. 1, 1998). The final regulation is codified at 47 C.F.R § 73.2080(a), and provides: "Religious radio broadcasters may establish religious belief or affiliation as a job qualification for all station employees."

18. *Amos*, 483 U.S. at 342-43.

19. Section 702(a) should not be confused with the first amendment's "ministerial exemption" to Title VII and similar civil rights laws. The "ministerial exemption" is in one respect more narrow and in one respect more broad than 702(a). It is more narrow in that it only applies to staff that are clergy or otherwise religious ministers. It is more broad in that it permits discrimination not just on the basis of religion, but on any basis such as sex or national origin. *See, e.g.*, Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1165 (4th Cir. 1985) (holding that for first amendment reasons court could not consider sex discrimination claim by assistant minister against her church); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (holding that seminary need not submit employment reports on its faculty to the EEOC because they are "ministers"); McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (holding that for first amendment reasons Title VII does not regulate the employment relationship between church and its minister). For more recent cases, see EEOC v. Roman Catholic Diocese of Raleigh, 213 F.3d 124 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc. 203 F.3d 1299 (11th Cir. 2000); EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Young v. N. Ill. Conf. of United Methodist Church, 21 F.3d 184 (7th Cir. 1994); Natal v. Christian & Missionary Alliance, 878 F.2d 575 (1st Cir. 1989); Hutchison v. Thomas, 789 F.2d 392 (6th Cir. 1986).

An FBO's employees working in a government-funded social service program would not be subject to the "ministerial exemption." This is because their job tasks would not fit the description of clergy or other "minister." From the viewpoint of the government, an FBO's staff is performing secular work, i.e., the delivery of social services. This is so, albeit from the viewpoint of the FBO and its staff they are religiously motivated in their vocation of helps to the poor.

20. The Bush Administration has recognized that current first amendment law on direct funding requires financial separation of government funded activities by FBOs and any inherently religious activities. For example, H.R. 7, as passed by the House and backed by the Administration, provides for this separation. *See* Community Solutions Act

of 2001, H.R. 7, Title II, § 201(Sec. 1991(j)), 107th Cong., 147 Cong. Rec. H4242 (July 19, 2001). The restriction does not, however, apply to indirect funding. The former head of the White House Faith-Based Office, John DiIulio, has said that if the provider is an "indivisibly conversion-centered program that cannot separate out and privately fund its inherently religious activities, [it] can still receive government support, but only via individual vouchers." John J. DiIulio, Jr., Speech Before the National Association of Evangelicals, *Compassion "In Truth and Action": How Sacred and Secular Places Serve Civic Purposes, and What Washington Should and Should Not Do to Help*, available at http://www.whitehouse.gov/news/releases/2001/03/20010307-11.html.

21. Silo v. CHW Medical Foundation, 45 P.3d 1162, 1170 (Cal. 2002) (dismissing employee's claim of religious discrimination as a matter of Catholic hospital's first amendment autonomy to control the religious speech of its employees).

22. *See* John C. Green and Amy L. Sherman, *Fruitful Collaborations: A Survey of Government-Funded Faith-Based Programs in 15 States* (Hudson Institute, September 2002), available at www.hudsonfaithincommunities.org.

23. *See* Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) (dismissing religious discrimination claim filed by employee against religious organization because organization was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); Siegel v. Truett-McConnell College, 13 F. Supp.2d 1335, 1343-45 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995) (table) (dismissing religious discrimination claim filed by faculty member against religious college because college was exempt from Title VII and the receipt of substantial government funding did not bring about a waiver of the exemption); Young v. Shawnee Mission Medical Center, 1988 U.S. Dist. LEXIS 12248 (D. Kan. Oct. 21, 1988) (holding that religious hospital did not lose Title VII exemption merely because it received federal Medicare payments); *see also* Arriaga v. Loma Linda University, 13 Cal. Rptr.2d 619 (Cal. App. 1992) (holding that religious exemption in state employment nondiscrimination law was not lost merely because religious college received state funding). In addition, a legal opinion by the Office of Legal Counsel at the U.S. Department of Justice also concluded that 702(a) is not forfeited when an FBO receives federal funding. Memorandum for Brett Kavanaugh, Associate White House Counsel, from Sheldon Bradshaw, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (June 25, 2001).

24. Little v. Wuerl, 929 F.2d 944, 951 (3d Cir. 1991), was the first reported case to observe **categorically that 702(a) cannot be waived.**

25. The lack of "federal or state action" here is analogous to the Supreme Court's rationale for sustaining the constitutionality of "indirect" funding cases such as those involving public school vouchers. *See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding state public school voucher program open to a broad class of schools, including religious schools). When the parents of a school-age child, empowered with an educational voucher, make an independent choice of where to enroll their child, the Establishment Clause is not implicated when the aid goes to a religious school as a result of the private choice. Like the choice of these parents, the private choice by an FBO concerning religious staffing does not implicate the government/grantor as the "causal actor." Hence the staffing decision does not incur Establishment Clause scrutiny. This is just another way of demonstrating that the opposition's argument here proves too much, for if FBOs are "federal actors" for purposes of their employment practices then they are "federal actors" for all other things that they do. Yet there is wide agreement that such a result is absurd. The mere receipt of a government grant cannot be the legal equivalent of "nationalizing" a private sector charity.

26. 457 U.S. 830 (1982).

27. 457 U.S. 991 (1982).

28. The Supreme Court's holdings in *Rendell-Baker* and *Blum* clearly overturned the result in an earlier, lower court decision involving a private, secular social service provider. *See* Robinson v. Price, 553 F.2d 918 (5th Cir. 1977) (reversing dismissal on the pleadings and remanding for factual inquiry into whether a private, secular social service provider was a "state actor" because, *inter alia*, it received government grant monies). *Robinson* is also distinguishable because eight members of the provider's board of directors were appointed by local government and all funding requests had to first be approved by local officials. Those facts, alleged the plaintiff, arguably made the provider a joint public/private program. Such heightened government involvement does not occur with the Faith-Based Initiative.

29. 436 U.S. 149, 164 (1978). *Accord* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 54 (1999).

30. Opponents of the Faith-Based Initiative cite to Norwood v. Harrison, 413 U.S. 455 (1973). *Norwood* is not applicable. The case came at a time when Southerners were opening private, segregated academies to avoid public school desegregation. Eradication of racially segregated public schools is a constitutional duty of the state. In response, the Court was aggressive in piercing through paper veils that purported to erect public/private distinctions. The Court's aim was, of course, to reverse the larger pattern of racially segregated schools. In that vein, *Norwood* held unconstitutional a program for loaning textbooks to private k-12 schools, including religious schools, because the program undermined the duty to desegregate public schools. The circumstances before us concerning the Faith-Based Initiative are different. To permit FBOs to staff on a religious basis undercuts no duty of the state to ensure that it refrain from religious discrimination. Indeed, the aim is to stop past religious discrimination against the funding of FBOs. Additionally, to read *Norwood* as applicable here puts it at odds with *Amos, Rendell-Baker, Blum*, and *Flagg Brothers*, all more recent decisions. That would call into question whether *Norwood* even survives. *Norwood* remains good law, but it is confined to its facts and its times.

31. 483 U.S. 327, 337 (1987).

32. *Id.* at 337 n.15.

33. *The Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds*, Hearing Before the House Subcomm. on the Constitution, House Judiciary Comm., 107th Cong., 23 (June 7, 2001) (testimony of Douglas Laycock).

34. 954 P.2d 285 (Wash. App. 1998).

35. *Id.* at 288-89. The court relied on Rojas v. Fitch, 127 F.3d 184 (1st Cir. 1997), holding that an exemption for religious organizations from unemployment tax did not violate the Establishment Clause.

36. The full title of the Hill-Burton Act is the Hospital Survey and Construction Act of 1946, 42 U.S.C. §§ 291 - 291o-1.

37. Section 401(b) of the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 95 (codified at 42 U.S.C. § 300a-7).

38. *See* Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308, 311-12 (9th Cir. 1974) (holding that Church Amendment reflects the congressional view that Hill-Burton grantees are not acting under color of law). *See also* Taylor v. St. Vincent's Hospital, 523 F.2d 75, 77 (9th Cir. 1975) (same); Seale v. Jasper Hospital Dist. and Jasper Memorial

Hospital Foundation, Inc., 1997 WL 606857 * 4 - *5 (Tex. App. Oct. 2, 1997) (finding religious hospital does not waive its right to refuse to perform sterilizations and abortions merely because it had a lease with the government on its building). The cases further observe that religious hospitals have free-exercise rights, and those rights cannot be forfeited as a condition for qualifying for federal funding. *See* Doe v. Bellin Memorial Hospital, 479 F.2d 756, 761 (7th Cir. 1973).

39. 1989 WL 53857 (S.D. Miss. 1989).

40. The criticism of the *Dodge* case that appears in the text was taken in substantial part from a July 2001 letter from Douglas Laycock, Professor of Law at the University of Texas - Austin, to Senator Patrick Leahy, Chair of the Senate Judiciary Committee.

41. **403 U.S. 602 (1971).**

42. ***See* Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).**

43. ***See* Wolman v. Walter, 433 U.S. 229 (1977), *overruled in* Mitchell v. Helms, 530 U.S. 793, 835, 837 (2000); Meek v. Pittenger, 421 U.S. 349 (1975), *overruled in* Mitchell v. Helms, 530 U.S. 793, 835, 837 (2000); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled in* Agostini v. Felton, 521 U.S. 203, 235 (1997); School District of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled in part in* Agostini v. Felton, 521 U.S. 203, 235 (1997).**

44. 42 U.S.C. §§ 2000bb to 2000bb-4.

45. RFRA does not excuse compliance with the normative operation of state and local laws, only compliance with federal laws, as well as the actions of federal agencies and officials. City of Boerne v. Flores, 521 U.S. 507 (1997).

46. RFRA reads in terms of protecting the rights of "persons," but under the U.S. Code the term "persons" includes organizations, thereby including protection for FBOs. *See* 1 U.S.C. § 1(b).

47. In one sense RFRA is case specific, responding to each individual's or organization's sincerely held claim of religious burden. But for FBOs that staff on a religious basis RFRA will always grant relief from generally applicable employment laws prohibiting discrimination on the basis of religion. Because RFRA will grant relief without fail to FBOs with sincerely held religious staffing practices, it is proper to presume, as we have in the text, that there is a presumption that RFRA excuses FBOs from the religious burden imposed by these program-embedded nondiscrimination provisions. As with any presumption, the government, of course, can inquire into the bona fides of the FBO's claim and rebut the operation of RFRA by evidence of insincerity.

48. *See* 42 U.S.C. § 2000bb-4 ("Granting government funding . . . shall not constitute a violation of this chapter. As used in this section, the term 'granting,' used with respect to government funding, . . . does not include the denial of government funding . . . ."). *See also* Senate Report No. 103-111, at 13 ("parties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in *Sherber[t]*"); *id.* at 15 ("the denial of [government] funding . . . may constitute a violation of the act, as was the case under the free exercise clause in *Sherbert v. Verner*"). Senate Report No. 103-111, is reprinted at 1993 U.S.C.C.A.N. 1892.

49. 374 U.S. 398 (1963) (claimant cannot be disqualified from unemployment compensation because she refused to take job entailing Saturday work because it was her religious Sabbath).

50. RFRA states, as one of its purposes, "to restore the compelling interest test" of *Sherbert v. Verner*. *See* 42 U.S.C. § 2000bb(b)(1). The denial of funding in *Sherbert* was slightly different from the denial of a social service grant to an FBO. But RFRA was not drafted to restore the holding of a single case. *Sherbert* was illustrative of the problem, not the whole problem. The terms of the RFRA legislation read in general principles, with the object being the provision of a remedy for a variety of religious burdens—no matter how or where the burdens occur.

51. 42 U.S.C. § 2000bb-2(4) (incorporating by reference the definition of "religious exercise" in 42 U.S.C. § 2000cc-5(7)).

52. In Brusea v. Board of Education, 405 U.S. 1050 (1972) (decision below summarily aff'd), the Supreme Court affirmed that a state's provision of free public school education only does not compel the state to have to provide an equal benefit to religious school parents. Similarly, Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974) (decision below summarily aff'd), affirmed that a state may choose to provide free bussing to government schools alone without providing an equal benefit to religious schools. But *Brusea* and *Luetkemeyer* are inapposite to the situation here where the government has elected to involve private charities in welfare delivery.

53. The dollar amount, large or small, of any particular available grant is not relevant to RFRA's "substantial burden" requirement. A promise to comply with these program-embedded nondiscrimination provisions is an essential criteria of grant eligibility. To not accommodate sincerely held religious employment practices is thus a categorical bar, from here to eternity, to an FBO's eligibility for any such federal grant program. That unquestionably is a substantial burden or "cruel choice," and the burden is uniquely religious rather than monetary.

54. *Remarks by the President in Announcement of the Faith-Based Initiative* (Jan. 29, 2001), available at http://www.whitehouse.gov/news/releases/print/200110229-5.html.

55. *See* John D. Ashcroft, *Statement on Charitable Choice*, Proceedings and Debates of the 105th Cong., 2d Sess., 144 Cong. Rec. S12686, S12687 (Oct. 20, 1998) ("Demanding that religious ministries 'secularize' in order to qualify to be a government-funded provider of services hurts intended beneficiaries of social services, as it eliminates a fuller range of provider choices for the poor and needy, frustrating those beneficiaries with spiritual interests.").

56. Opponents argue that our use of RFRA would excuse racial discrimination rooted in religious belief. Not true. We have seen no RFRA case where racial discrimination was excused under the guise of religion. Moreover, the Supreme Court has already held that the denial of benefits to a religious organization in the interest of eradicating racial discrimination is a compelling governmental interest. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602-04, 604 n.29 (1983). RFRA claims are overridden, of course, by compelling state interests. 42 U.S.C. § 2000bb-1(b).

57. The points that follow are drawn in many respects from Ronald J. Sider, *The Case for "Discrimination,"* FIRST THINGS 19 (June/July 2002).

58. ***See* Nathan J. Diament, *A Slander Against our Sacred Institution*, THE WASHINGTON POST A23, May 28, 2001.**

59. 483 U.S. 327, 342 (1987).

60. **Stephen V. Monsma, WHEN SACRED AND SECULAR MIX: RELIGIOUS NONPROFIT ORGANIZATIONS AND PUBLIC MONEY 70-77 (1996).**

61. **THE WALL STREET JOURNAL (July 23, 2001).**

62. **Byron Johnson, *Objective Hope: Assessing the Effectiveness of Faith-Based Organizations: A Review of the Literature* (Center for Research on Religion and Urban Civil Society at Univ. of Penn., 2002).**

APPENDIX D – WRITTEN STATEMENT JOHN PRIBYL, SENIOR COMPANIONS AND FOSTER GRANDPARENTS DIRECTOR, LUTHERAN SOCIAL SERVICE OF MINNESOTA

Testimony before the
House Education and the Workforce Committee,
Subcommittee on Select Education
April 1, 2003

John Pribyl
Senior Companion and Foster Grandparent Director
Lutheran Social Service of Minnesota

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to submit testimony supporting the Citizen Service Act, reauthorizing the Corporation for National and Community Service. For today's hearing my remarks will focus on some specific innovations that we have worked on in Minnesota that I would suggest be considered by the Committee as you develop the Citizen Service Act.

The three Senior Corps Programs, Foster Grandparent Program, Senior Companion Program and the Retired and Senior Volunteer Program began during the late 1960's and early 1970's.

The Foster Grandparent Program was started in 1965 by President Johnson as one of the war on poverty programs. The poverty rate among seniors at that time was around 33%. One out of three retired people met the income eligibility requirements and were eligible to receive a stipend and volunteer as a Foster Grandparent. The program has developed a great reputation by providing volunteer opportunities for low income retired people to serve children.

Soon after, RSVP was developed under President Nixon in 1971 and Senior Companions followed in 1974. These programs with Congress' ongoing support expanded over the next 30 years to where we are today with approximately 34,000 Foster Grandparents, 17,000 Senior Companions and 489,000 RSVP Volunteers.

The impact on society is almost immeasurable as over a half million retired volunteers give back to their communities by serving children, at risk frail elderly and community agencies across the country. Now as we look at reauthorizing these time tested programs it is an opportunity to make some minor adjustments to keep them relevant as we approach this new phenomenon in our society of the aging of the baby boomers.

My involvement in service began early in my life as I served in the Catholic Priesthood for 4 years from 1970 – 74. After much thought and prayer I made a difficult decision to take another career path which ended up in my developing and implementing the original Senior Companion Program grant in Minnesota.

I serve as a Director of both a Senior Companion Program (28 years) and a Foster Grandparent Program (8 years) in Minnesota operated under the sponsorship of Lutheran Social Service. In this position I have seen first hand the development and growth of these programs as they provide the simple structure to give older adults the opportunity to give back to their community.

In Minnesota we have had the opportunity to participate in some demonstration initiatives to find out what the barriers are in the current legislation that limit volunteer participation. Based on these experiences, the following are some changes that I feel could benefit these programs nationwide.

- **Lowering the eligibility age from 60 to 55**
  Currently the eligibility age for RSVP is 55 and we support lowering the age to 55 for FGP and SCP, as is called for in the proposals under consideration in the Citizen Service Act.

- **Remove income eligibility limitations for Senior Companions and Foster Grandparents**
  There are many challenges today in encouraging more retired people to volunteer, especially in the two stipended programs (SCP and FGP). When these programs started, the poverty rate among seniors was 33%. The stipend the volunteers received was 71% of minimum wage. As a result many participants became Foster Grandparent volunteers because it was a "job" to earn money. Today we have a much different scenario where the stipend is only 50% of the minimum wage and the poverty rate among seniors is around 11%. Potential volunteers who really need income will get a job that pays at least minimum wage (ie, a greeter at fast food chains or discount store). The stipend today is an incentive to encourage regular commitments of time but will not help someone out of poverty as was one of the intentions 30 years ago. As a result, programs are facing major recruiting problems, yet the demand for the service they provide continues to increase.

  During the last fiscal year approximately two-thirds of the Senior Companion Programs and two-thirds of the Foster Grandparent Programs nationwide could not meet their goals as far as the number of volunteers that they planned on enrolling in their respective programs.

  The major barrier hindering this proposed enrollment was the current income guideline criteria. There have been several ideas proposed to fix this problem, from raising the guidelines, using guidelines from other government programs or allowing a certain percentage of the volunteers enrolled to be over the guidelines. Our suggestion is to support what the Administration recommended last year, that is, to remove the income criteria as a nationwide barrier and put the responsibility on the individual projects to continue to focus on recruiting low income older adults and make that determination depending on the cost of living in a particular area. The President goes on to say that the stipend should be based, not one someone's income, but on the intensity of their commitment of service.

  Since 1997 the Minnesota Senior Companion Program and the four Foster Grandparent Programs in Minnesota have had the opportunity to test this idea by conducting a Demonstration Grant with non- federal dollars. With this demonstration we set up an option for volunteers of any income to serve and their stipend would be based on their commitment of time. Volunteers who wanted to receive some financial reimbursement for service had to commit to at least 40 hours a month (10 hours a week). After conducting this demonstration and testing this idea for 5 years, out of the 900+ volunteers enrolled, 75% are considered low income and meet the current income requirements. So my point is that without any income guidelines we were still able to focus our recruiting on the lower income retirees and took away any stigma

that was formerly associated with FGP and SCP because previously everyone had to be low income to even apply. Furthermore, if we hadn't had this flexibility, we would have had great difficulty in finding seniors to provide services to children and older adults with special needs.

- **Permit innovations in programming**
  The Citizen Service Act is proposing to add flexibility to the type of service and the hours that Senior Corps volunteers can provide; such as allowing a Foster Grandparent to serve with more than one child and providing a financial incentive for an RSVP volunteer who contributes a significant amount of time. We support this initiative, which will reflect what the actual practice is in most programs today. One example of this flexibility is the Volunteer Leader role that is in the current SCP language. Arlene is one of our volunteer leaders in Minnesota. She not only serves her assigned homebound clients, but also provides leadership and support to new volunteers and helps them in the introductory process to their clients. She has a way about her to make everyone feel at ease. Hopefully this leadership opportunity will apply to both RSVP and FGP in the future.

- **Demand accountability for results**
  We support the Administration's call for more accountability. Through the Corporation for National and Community Service, all Senior Corps projects have been trained on "Programming for Impact" which is a results oriented process which demonstrates that these programs do make a difference in their communities. This process gives us the tools to document these successes.

We now have the opportunity, through the Citizen Service Act, to make some significant changes that strengthen and expand opportunities in the Senior Corps and build upon the important foundation we have developed over the last several decades to permit more seniors to serve in our communities. I thank you for accepting this testimony and ask for your support to get this legislation passed this year.

APPENDIX E – WRITTEN STATEMENT OF MATTHEW C. SPALDING, DIRECTOR, B. KENNETH SIMON CENTER FOR AMERICAN STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

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Congressional Testimony

Testimony before the Subcommittee on Select Education of The Committee on Education and the Workforce

Principles and Reforms for Citizen Service

April 1, 2003

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My name is Matthew Spalding. I am the Director for the B. Kenneth Simon Center for American Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

In his 2002 State of the Union Address, President George W. Bush issued a call to all Americans to commit 4,000 hours to service and volunteerism over the course of their lifetime. President Bush renewed his challenge in this year's State of the Union address and urged Congress to reconsider the Citizen Service Act of 2002, which would reform and reauthorize several programs—including AmeriCorps, VISTA and Learn & Serve America—as part of his Administration's effort to foster service, citizenship, and responsibility.

Policymakers now have an important opportunity to rethink America's national service programs as they design a reformed version of the Citizen Service Act for consideration by the new Congress. Working with the Bush Administration, lawmakers should propose a reformed legislative package that builds on the changes proposed in the 2002 legislation, takes additional steps to correct the infringement of religious liberty in the current service laws, and fundamentally transforms the current government-centered national service agenda into a true citizen service initiative that is compatible with the highest principles and traditions of American self-government.

THE WRONG DIRECTION

The idea of national service has its origins in the theories of progressive reformers at the beginning of the 20th century and is today a key aspect of modern liberalism's theory of citizenship. Progressive thinkers such as Herbert Croly and John Dewey argued that the forces of industrialism and urbanization had shattered America's traditional social order and that these conditions in the modern world required a new administrative state to better manage political life and human affairs.

These thinkers further argued that such an unprecedented situation required nothing less than a new relationship between citizens and the federal government that emphasized a public-spirited devotion to a collective social ideal—what Dewey called "the Great Community" and Lyndon Johnson later proclaimed a "Great Society"—and transferred the traditional, local functions of civil society to a progressive, national government focused on social reform. This new idea of citizenship, and in particular the concept of national service, was meant to replace the old-fashioned notion of an independent, self-governing citizenship with an updated civic bond to an activist nation-state.

In recent years, this national service agenda received renewed interest in the ideas and policies of former President Bill Clinton, who called for a "new covenant" that would revive a sense of national community and civic-mindedness in response to what he saw as the "gilded age" of the 1980s. The Clinton Administration used these themes as a way to include civic life as an aspect of reinventing government, making government more "user-friendly" for citizens and communities while preserving—if not expanding—bureaucratic control of social programs.

This agenda was pursued within the philosophic assumptions and political goals of modern liberalism. The spirit and intentions of this paradigm were epitomized in the program Clinton proclaimed as "citizenship at its best"—AmeriCorps, the largest government program for national service since the Civilian Conservation Corps of the New Deal.[1]

PRINCIPLES OF CITIZEN SERVICE

The government-oriented view of national service contrasts sharply with the idea of a "citizen service" that protects and strengthens civil society, focuses on service rather than social change, promotes true volunteerism, and addresses real problems—while minimizing the role of government. The following five principles of citizen service should be at the heart of the Citizen Service Act.

PRINCIPLE #1: Protect and strengthen civil society.

The primary goal of citizen service should be to protect and strengthen civil society, especially the non-governmental institutions at its foundation. The great social commentator Alexis de Tocqueville observed that one of the leading virtues of American society is its tendency to create local voluntary associations to meet society's most important needs. In other nations, these needs were addressed through and by government; in the United States, private individuals of all ages, all conditions, and all dispositions formed associations to deal with societal problems.

"I often admired the infinite art with which the inhabitants of the United States managed to fix a common goal to the efforts of many men and to get them to advance it freely," Tocqueville wrote in *Democracy in America*. "What political power could ever be in a state to suffice for the innumerable multitude of small undertakings that American citizens execute every day with the aid of an association?"[2]

The traditional associations of civil society—families, schools, churches, voluntary organizations, and other mediating institutions—sustain social order and public morality, moderate individualism and materialism, and cultivate the personal character that is the foundation of a self-governing society. All of this occurs without the aid of government bureaucracies or the coercive power of the law. Unlike government programs, the personal involvement, individual generosity, and consistent participation that are the hallmarks of private philanthropy have a ripple effect of further strengthening the fiber of civil society.

Policymakers must recognize that President Bush's call to service will be answered best not by a government program but by the selfless acts of millions of citizens in voluntary associations, local communities, and private organizations that are at the heart of American charity. In 2001, according to Independent Sector and the

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[1]See John Walters, "Clinton's AmeriCorps Values: How the President Misunderstands Citizenship," *Policy Review*, No. 75 (January–February 1996).

[2]Alexis de Tocqueville, *Democracy in America*, ed. and trans. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), Book II, Chapter V, "The Use Which The Americans Make of Public Associations in Civil Life," pp. 489–492.

American Association of Fundraising Counsel, 83.9 million adults volunteered time to a formal charity organization and 89 percent of American households gave a total of $212 billion to charity.[3] That same year, the Knights of Columbus alone raised and distributed $125.6 million (half the AmeriCorps budget) and volunteered 58 million hours of service (almost 90 percent of AmeriCorps participants' service time).[4]

These private voluntary organizations thrive today precisely because their work is privately organized, highly decentralized, and directly focused on community needs and local conditions. If policymakers are serious about promoting a thriving civil society, they should emphasize not only volunteering, but also private philanthropy by promoting proposals such as the Charity Aid, Recovery, and Empowerment (CARE) Act, which would boost both private volunteerism and charitable giving.[5]

PRINCIPLE #2: Focus on service.

Americans have always exemplified a strong sense of civic responsibility and humane compassion toward their neighbors and the less fortunate in their communities and traditionally have supported and participated in a vast array of private service activities. The objective of citizen service legislation should be to promote a renewed commitment to this great tradition of individual service as a way of strengthening the natural grounds of citizenship and civic friendship. As Tocqueville noted, "Sentiments and ideas renew themselves, the heart is enlarged, and the human mind is developed only by the reciprocal action of men upon one another."[6]

The goal of an authentic citizen service initiative should not be to engage citizens in a government program, nor to create an artificial bond between individuals and the state or organization that coordinates their service, but to energize a culture of personal compassion and civic commitment to those in need of service. Citizen service should not be a tool for an educational reform agenda, a platform for political or social activism, or a method of reinventing government. A true citizen service initiative should recognize and support the dynamic and diverse nature of civil society: It should not promote one particular form of service or suggest that public service in a national, government-sponsored program is in any way better or more dignified than traditional, and nongovernmental, forms of community service.

PRINCIPLE #3: Promote true volunteerism.

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[3]Independent Sector, "Giving and Volunteering in the United States 2001—Key Findings," at *http://www.independentsector.org/PDFs/GV01keyfind.pdf*, and AAFRC Trust for Philanthropy, *GIVING USA 2002: The Annual Report on Philanthropy for the Year 2001*, "2001 Contributions: $212.00 Billion by Source of Contributions," at *http://www.aafrc.org/images/graphics/chart1.gif* (June 26, 2002). Charissa Kersten and Tim Holbert did research for this paper.

[4]Knights of Columbus, press release, "Knights of Columbus Reports New All-Time Highs in Charitable Giving, Volunteerism in 2001," June 7, 2002, at *http://www.kofc.org/announce.cfm?thisrecord=138* (June 19, 2002).

[5]See Joseph Loconte and William W. Beach, "The Senate's Response to the President's Faith-Based Agenda: An Analysis of the CARE Act," Heritage Foundation *Backgrounder* No. 1555, May 24, 2002.

[6]Tocqueville, *Democracy in America*, p. 491.

President Bush's first objective for a Citizen Service Act is to "support and encourage greater engagement of citizens in volunteering."[7] To be truly voluntary, an action must be intentionally chosen and done by one's own free will, without compulsion or external constraint and "without profit, payment or any valuable consideration."[8] It is this altruistic process by which individuals choose—without coercion or economic benefit—to help others that has the character-forming effect of habituating and strengthening citizens' sense of duty to help their neighbors.

By contrast, "volunteerism" that is paid for and organized by the government belittles authentic volunteerism both by presenting service as an employment option rather than as the sacrificial giving of one's time and resources and by implying that money and guidance from the government is necessary if Americans are to help their neighbors. "Dependence," Thomas Jefferson noted, "begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition."[9] Reform of the national service laws should redesign service programs as an opportunity for true voluntary service rather than a federal jobs program.[10]

PRINCIPLE #4: Address real problems.

There are many social problems in America that are and will continue to be addressed most effectively by voluntary service efforts, with or without the help of government. Historically, these efforts focused primarily on helping those who could not help themselves. Rather than the handouts of charity, citizen service meant personal involvement and "suffering with" (i.e., compassion toward) the poor to provide them with opportunities through which they could rise out of poverty.[11] "I think the best way of doing good to the poor," Benjamin Franklin noted, "is not making them easy in poverty, but leading or driving them out of it."[12]

If the federal government is to encourage citizen service, and if policymakers want to foster a culture of responsibility toward the less fortunate, service programs should be targeted to address serious problems where there is authentic need for

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[7]The White House, Executive Office of the President, "Principles and Reforms for a Citizen Service Act," at *http://www.nationalservice.org/about/principles/principles_reforms.html* (June 24, 2002).
[8]Webster's Dictionary, Unabridged, 2nd Ed., 1958, Vol. II, p. 2049.
[9]Thomas Jefferson, *Notes on the State of Virginia*, Query XIX, 1787, as quoted in *The Founders' Almanac: A Practical Guide to the Notable Events, Greatest Leaders & Most Eloquent Words of the American Founding*, ed. Matthew Spalding (Washington, D.C.: The Heritage Foundation, 2002), p. 184.
[10]A distinction must be made between voluntary service in America's armies of compassion—which are the backbone of the private, voluntary sector—and in the United States military. National service in the armed forces is not volunteerism, or part of the voluntary sector, but is nevertheless voluntary in the sense that no one is conscripted. Housing, paying, feeding, and training individuals to defend the United States as part of a constitutionally authorized activity that is necessary for national security in no way detracts from the duty and honor of voluntary military service; nor does it justify by analogy paying citizen service participants in traditional voluntary (i.e., voluntary-sector) activities.
[11]For a general explanation of the virtues and history of compassion, see Marvin Olasky, *The Tragedy of American Compassion* (Wheaton, Ill.: Crossway Books, 1992).
[12]Benjamin Franklin, "On the Price of Corn and Management of the Poor," November 1766, as quoted in *The Founders' Almanac*, pp. 183–184.

assistance. In addition, such assistance should be provided in accordance with the larger traditions of compassionate service.

In determining which programs to recognize, support, and commend, policymakers should make practical distinctions between programs that meet critical needs and those that are not vital to societal well-being. Programs that help the elderly and serve the poor are on a different level than those that provide wardrobe tips,[13] dance instruction,[14] knitting lessons,[15] art appreciation,[16] or bike clubs.[17]

Policymakers should also think twice about validating controversial activities (e.g., teaching sex education[18] or working for programs that promote abortion or refer individuals to abortion providers,[19] or that raise awareness about dating in lesbian, bisexual, transgender, and gay communities[20]). Nor should they allow as "citizen service" policy advocacy activities (such as VISTA participants' working for groups that organize opposition to welfare-reform policies,[21] or AmeriCorps participants' coordinating Peace Education camps and student activities[22] or engaging young people "in struggles against racism, sexism, meanness and meaninglessness"[23]).

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[13]AmeriCorps*VISTA participants help Dress for Success collect garments for low-income women with job interviews. See *http://www.dressforsuccess.org/who_we_are/partners.asp* (February 26, 2003).

[14]A service-learning program at Governor's School for Arts and Humanities in South Carolina uses dance to teach abused and neglected children the basics of expression. See *www.leaderschools.org/2002profiles/south.html* (July 17, 2002).

[15]A service-learning program in a math class at Nicholas Senn High School in Chicago knits scarves and hats for a local homeless shelter. See *http://www.isbe.state.il.us/learnserve/pdf/LSWinterNews03.pdf* (January 30, 2003).

[16]AmeriCorps*VISTA participants help Art for Inner City Youth in San Francisco teach low-income students visual skills and self-esteem and "to view art with a critical eye." See *http://www.artspan.org/youth.html* (February 26, 2003).

[17]AmeriCorps participants work with JustServe in Seattle, Washington, to coordinate bike-based clubs. See *https://recruit.cns.gov/searchDetails.asp?listingid='94ASCWA047* (March 31, 2003).

[18]In Houston, Texas, six AmeriCorps participants make up the "Planned Parenthood of Houston Sexuality Education Team," which uses dance, rap, poetry, and role-playing to teach about sexuality. See *www.plannedparenthood.org/education/update_dec01.html* (March 20, 2003).

[19]A simple Internet search suggests the extent to which Planned Parenthood makes use of AmeriCorps workers. The Delaware chapter of Planned Parenthood, for instance, currently advertises that it uses an AmeriCorps grant for 20 participants "to provide human sexuality education and referrals for services to teens and their parents." See Planned Parenthood of Delaware, "PPDE Partners With AmeriCorps," at *http://www.ppdel.org/partnerships.html* (June 24, 2002).

[20]An AmeriCorps position in Seattle, Washington, organized community action teams to "build consensus, raise awareness, and develop innovative community-based solutions to dating and domestic violence in Lesbian, Bisexual, Trans and Gay communities." See *https://recruit.cns.gov/searchDetails.asp?listingid='94ASCWA0471901-3'&* (March 31, 2003).

[21]VISTA participants work for the National Student Campaign Against Hunger and Homelessness in Amherst, Massachusetts, to "educate and expand the anti-poverty movement" through conferences, on-campus workshops, and community training sessions. See *http://www.americorps.org/joining/vista/vista_ma.html* and *www.nscahh.org* (February 12, 2003).

[22]AmeriCorps participants work with the Peace Learning Center in Indianapolis, Indiana, to organize school peace activities as part of a "proactive force for transformative and positive change in the community through holistic peace education." See *www.peacelearningcenter.org/americorps.asp* (March 20, 2003).

[23]AmeriCorps participants work with the Institute for Community Service in Seattle, Washington. See *https://recruit.cns.gov/searchDetails.asp?listingid='00ASCWA470101-3'&* (March, 31, 2003).

Wherever possible, reform should prevent government support (and presumed public endorsement) of frivolous, controversial, and special-interest activities; it should focus instead on encouraging traditional service opportunities that address the real problems of those who are in need.

PRINCIPLE #5: Minimize the role of government.

Any expanded government role in the voluntary sector is unwise and counterproductive. "The more [government] puts itself in the place of associations," Tocqueville argued, "the more particular persons, losing the idea of associating with each other, will need it to come to their aid: these are causes and effects that generate each other without rest. Will the public administration in the end direct all the industries for which an isolated citizen cannot suffice?"[24]

Citizen service that is paid for and organized by the government encourages individuals and associations to look to the state for assistance. Likewise, the government's funding of charitable organizations to pay for volunteer time reduces the need for private-sector support, making it more likely that citizens will abdicate their civic responsibilities. Institutionalized federal funding and government administration also will have the effect of further reshaping the voluntary sector, as public money and oversight inevitably pushes aside private philanthropy and sets the stage for increased lobbying and public advocacy. The long-term effect would be to shift the center of gravity within the volunteer community from civil society to the public sector.

There already exists between government and many large nonprofit organizations what Leslie Lenkowsky has called a "dysfunctional marriage," in which government money has led to a significant loss of nonprofit independence. "The partnership has been a Faustian bargain that ought to be reexamined and renegotiated," Lenkowsky concluded.[25] Expanding this relationship to include the voluntary sector generally, and especially those smaller organizations that have thus far eluded the federal reach, would only expand and intensify the problem.

Reform should reduce government's financial, administrative, and regulatory role in civil society. Government can play an important role in revitalizing citizen service, but that role, of necessity, will be limited and indirect. Policymakers must keep in mind that government can best promote civil service not by creating any particular service programs (given that there is a vast network of private service activities that exist without government oversight or subsidies), but by launching a high-level bully-pulpit initiative to encourage, motivate, and honor the efforts of private citizens.

THE CITIZEN SERVICE ACT OF 2002: A GOOD START

The Citizen Service Act of 2002 (which was approved in committee but was never acted on by Congress) contained many useful and innovative changes in existing programs and should serve as the basis for future reforms.

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[24]Tocqueville, *Democracy in America*, p. 491.

[25] See Leslie Lenkowsky, "Philanthropy and the Welfare State," in Peter L. Berger and Richard John Neuhaus, *To Empower People from State to Civil Society*, 2nd Ed., ed. Michael Novak (Washington, D.C.: AEI Press, 1996), pp. 85–93. Lenkowsky, who is now the Chief Executive Officer of CNCS, was at the time the president of the Hudson Institute.

During the Clinton Administration, AmeriCorps participants were assigned to federal agencies and departments, and grants were used to subsidize political advocacy and activities. The Citizen Service Act of 2002 would have prohibited national service grants from going to federal agencies and would not have allowed the use of non-AmeriCorps federal funds to meet AmeriCorps' matching-funds requirements. The proposal also mandated that any programs that teach sex education must not encourage sexual activity or distribute contraceptives and that they must include discussion of the health benefits of abstinence and risks of condom use.

In addition, the bill required recipients to certify that any participants who serve as tutors had earned, or were on track to obtain, a high school diploma. It further required that, to qualify, literacy programs must be rooted in scientifically based research and the essential components of reading instruction as defined in the No Child Left Behind Act of 2001.

In designing a reformed Citizen Service Act, lawmakers should go beyond these particular proposals to consider prohibiting state government and political advocacy groups from receiving service grants and to consider prohibiting sex education instruction as a valid "service" of AmeriCorps participants. Nevertheless, lawmakers should carefully review and include as a starting point these and other useful reforms proposed in the 2002 legislation.

REMOVING BARRIERS TO RELIGIOUS LIBERTY

Regrettably, the Citizen Service Act of 2002 failed to remove a fundamental obstacle to the religious liberty of faith-based organizations. Current laws for national service programs specifically prohibit any individual operating a national service project from making employment decisions or choosing volunteers on the basis of religion.[26] The Citizen Service Act of 2002 recognized that this was a problem but did not adequately address it. The bill merely proposed that faith-based organizations be given notice (and acknowledge in writing) that, by participating in national service programs, they would be subject to "anti-discriminatory" hiring policies and would not be protected by the 1964 Civil Rights Act, which grants exemptions for religious groups.

This policy undermines a faith-based organization's ability to select only staff and volunteers who strongly support the values and mission of the organization—factors that are often key to the success of an organization's outreach. This restriction on an organization's staffing decisions directly contradicts existing federal law (the 1996 Charitable Choice legislation): Its application to volunteers is equally debilitating and, in fact, may be unconstitutional.[27] Many faith-based organizations depend heavily on

[26]See Section 175(c) of the National and Community Service Act of 1990 (Public Law 101–610, 42 U.S.C. 12635) and Section 417(c) of the Domestic Volunteer Act of 1973 (42 U.S.C. 5057). The Citizen Service Act is intended to amend these laws.

[27]In *Boy Scouts* v. *Dale*, 530 U.S. 640 (2000), the Supreme Court of the United States held that the Boy Scouts, despite access to public facilities, is a private organization and may indeed "discriminate" in choosing volunteer scout leaders that agree to the Scouts' mission statement.

volunteer manpower, and many ask volunteers as well as paid staff to agree to a statement of faith.[28]

These provisions go against President Bush's recent executive order protecting faith-based organizations. They also conflict with regulatory language proposed by a number of federal agencies to encourage faith-based organizations' participation with social service programs and undermine efforts to reduce barriers to such participation. Allowing this language to stand in national service laws would set a disturbing precedent for other programs.[29] Any new citizen-service legislation should remove these barriers in their entirety and re-establish full legal protections for faith-based groups involved in community service.

FROM NATIONAL SERVICE TO CITIZEN SERVICE

More fundamental changes are required, however, to transform today's national service into a true citizen service. Reforms should be implemented in the three major activities coordinated by the Corporation for National and Community Service (CNCS).

AmeriCorps

AmeriCorps was created in 1993 as a major initiative of the Clinton Administration. Today, over 50,000 individuals aged 17 and older participate in various AmeriCorps programs for 20 to 40 hours a week.[30] Most participants are selected and serve with local and national nonprofit organizations, as well as smaller community organizations, in areas such as education, public safety, housing, health and nutrition, disaster relief, and environmental needs.[31]

During the Clinton Administration, AmeriCorps was essentially nothing more than a federal jobs program. The current argument on behalf of AmeriCorps is that it is a managerial program needed to provide the infrastructure necessary to recruit other volunteers. An emphasis on the potential fruits of the program, however, does not change

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[28]See, for example, "Churches, Charity and Children: How Religious Organizations Are Reaching America's At-Risk Kids," by Joseph Loconte and Lia Fantuzzo (Philadelphia: Center for Research on Religion and Urban Civil Society, 2002).

[29]Representative Barney Frank (D–MA), working with the Human Rights Campaign and the Lambda Legal Defense Fund, lobbied to add language similar to that in the national service laws to the faith-based initiative in the Senate last year. Mary Leonard, "Some Target Bias in Faith Initiative Bill," *The Boston Globe*, September 25, 2002, p. A10.

[30]A little over half of AmeriCorps participants are full-time, most are white, and 75 percent are under the age of 30. Ann Lordeman and Alice Butler, "Community Service: A Description of AmeriCorps, Foster Grandparents, and Other Federally Funded Programs," Congressional Research Service, updated March 18, 2002.

[31]About three-quarters of AmeriCorps grant funds goes to state service commissions, which then make grants to local groups and state agencies. Most of the remainder is distributed directly by the Corporation for National and Community Service to support various service activities and national programs through a competitive grant process. In fiscal year (FY) 2002, Congress spent $257 million to support the AmeriCorps program. In 2003, the Administration asked Congress to increase the size of the program from 50,000 to 75,000 participants and increase funding for the program to $315 million, but the final budget for 2003 appropriated $275 million for the program at its current participant level. For FY 2004, the Administration has requested $364 million, as well as an additional $75 million to support education grants in the National Service Trust.

the basic fact that individuals are paid by the federal treasury to "volunteer" for government-approved service programs.[32]

For a full term of service (1,700 hours over 10 to 12 months), AmeriCorps participants currently receive a stipend of at least $9,600 and an educational grant of $4,725. This combined income amounts to $8.43 per hour of service, which is 163 percent of the current minimum wage, and adds up to a compensation package of $14,325. This is approximately the poverty level for a two-parent family with one child[33] and is only slightly less than the annual basic pay and food allowance of an entry-grade recruit in the United States armed forces.[34]

According to the U.S. Department of Labor, the amount paid to an AmeriCorps participant in 2001 exceeded the average hourly wages of maids and housekeepers, farm workers and laborers, child-care workers and personal and home-care aides, and the nearly 10 million individuals who work in food-preparation and serving-related occupations. AmeriCorps participants also made more per hour than the majority of cashiers, retail salespersons, and everyone in personal care and service occupations.[35] In addition, full-time AmeriCorps participants are eligible for health-care benefits (which averaged $766 but ranged as high as $2,500 per eligible participant in 2002) and, as necessary, child-care benefits (which averaged $3,785 per eligible participant in 2002).[36]

Recommendations for AmeriCorps Reform

- **End AmeriCorps as a jobs program.** Policymakers should eliminate the stipends and benefits for AmeriCorps participants, thus ending the program as an employment program and reorganizing it as a true volunteer service initiative. A smaller AmeriCorps organization could become a catalyst for volunteerism by promoting and removing barriers to volunteerism, identifying needed resources and distributing important information about volunteerism, giving out service awards, and providing a clearinghouse to identify and bring volunteers together with service opportunities.[37]
- **Keep an education voucher.** Policymakers could allow AmeriCorps to continue to award modest educational grants, not as a financial incentive or an in-kind payment for volunteering, but as a nominal award for service completed. Indeed, there is already a separate account for AmeriCorps education grants called the National

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[32]For an earlier analysis, see Matthew Spalding and Krista Kafer, "AmeriCorps: Still a Bad Idea for Citizen Service," Heritage Foundation *Backgrounder* No. 1564, June 28, 2002.

[33]U.S. Bureau of the Census, "Poverty Thresholds for 2002 by Size of Family and Number of Related Children Under 18 Years," updated February 3, 2003, at *http:/www.census.gov/hhes/poverty/threshold/thresh02.html* (February 20, 2003).

[34]An 18-year-old, single, high-school graduate, Grade E-1 recruit in the continental United States makes a basic annual pay of $13,809.60 and receives food worth $2,913.72. "Regular Military Compensation Calculator," Office of the Secretary of Defense, at *http://militarypay.dtic.mil/militarypay/cgi-bin/rmc.pl* (February 20, 2003).

[35]U.S. Department of Labor, Bureau of Labor Statistics, "Occupational Employment Statistics," at *http:/www.bls.gov/oes/2001* (February 20, 2003).

[36]"Memo on Healthcare and Childcare for Program Year 2002," prepared by the Congressional Research Service, March 11, 2003.

[37]The Administration has recently taken an important step in this direction by announcing the creation of a President's Council on Service and Civic Participation modeled on the President's Council on Physical Fitness and Sports.

Service Trust.[38] At current funding levels, eliminating the financial stipend and paid benefits still leaves participants with a considerable educational voucher of $4,725—nearly double the amount of the average Pell Grant in 2002.[39] This change would allow Congress to maintain the program at its current participant level while achieving a substantial budget savings or, alternatively, would allow some expansion of the program at current funding levels.

- **Invest in learning.** Rather than have the Corporation for National and Community Service hold the money and collect the interest on AmeriCorps educational grants, as is now the case, policymakers should direct that the education voucher be transferred to an individual Coverdell Education Savings Account or be used as the basis for an individual Thrift Savings Plan (similar to that which is available to federal employees) that would automatically place funds in a bond account or other safe investment. To encourage participation by individuals who have completed their education, participants could be allowed to transfer their education voucher to an education account for a family member. To retain the objective of the service award, Congress should not allow the education voucher to be traded for a smaller cash stipend (as is currently an option in VISTA) or applied to non-educational expenses or programs.
- **Increase part-time participation**. As a way to help lower-income citizens who cannot afford to participate in AmeriCorps full-time, policymakers should consider allowing a longer period of part-time service to count toward qualifying for the full educational award. They might also consider lowering the entry-level age of AmeriCorps participants to include high school students who, for part-time voluntary service, could use the education vouchers to save for college or take college prep courses outside of their schools.

Overall, it would be consistent with the principles of authentic citizen service to discontinue AmeriCorps as paid employment but continue to give participants a modest educational award in the form of a voucher. Such a reform would also have the added benefit of removing most of the rules, regulations, and problems that typically follow government money. Furthermore, by decreasing dependence on large, nationwide organizations, reforming AmeriCorps would dramatically increase the scope of service opportunities and the range of charitable locations where participants could volunteer. Both of these additional benefits would make an educational voucher program much friendlier to faith-based organizations.[40]

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[38]Awards are made at the end of the term of service in the form of a voucher that must be used within seven years after completion of service; awards are paid directly to qualified post-secondary institutions or lenders in cases where participants have outstanding loan obligations. Awards can be used to repay existing or future qualified education loans, or to pay for the cost of attending a qualified college or graduate school or an approved school/work program.

[39]The average Pell Grant in 2002 was $2,411, and the maximum was $4,000; 4,812 individuals received awards that year.

[40]In 2001, Senator Rick Santorum (R–PA) introduced the AmeriCorps Reform and Charitable Expansion Act (S. 1352) to voucherize the AmeriCorps program for this reason.

VISTA

President John F. Kennedy first envisioned a domestic Peace Corps program in the summer of 1962. His initial proposal was for a limited program that was service-oriented, decentralized in administration, and focused on substantive, short-term projects.[41] It was President Lyndon B. Johnson who incorporated the idea into the Economic Opportunity Act of 1964 and made it part of the Great Society's broad-based "War on Poverty." Along with initiatives such as Head Start, Upward Bound, and Job Corps, the new VISTA[42] program became part of a grand strategy to address "structural poverty" through government intervention and social activism.[43]

In the 1970s, policymakers tried to de-politicize VISTA by ending its focus on community organizing and poverty policy and directing its work toward specific projects to address problems in poor communities. However, during the Carter Administration, VISTA returned to its activist culture—supporting such things as a training school for Tom Hayden's Campaign for Economic Democracy, a lobbying effort for the American Civil Liberties Union, and the political-activist efforts of ACORN (the Association of Community Organizations for Reform Now)—and its focus on government programs. During the 1980s, the Reagan Administration tried to focus VISTA on youth participation and traditional community service, and particular self-help programs were added in the areas of drug-abuse prevention and public literacy.[44]

Today, VISTA is operated as a subset of AmeriCorps, although it maintains an independent status by focusing on eradicating poverty and helping communities to address problems such as illiteracy, hunger, unemployment, substance abuse, homelessness, and inadequate health care. The agency still emphasizes community organizing and supports such activities as recruiting and training, fundraising and grant writing, increasing public awareness, creating resource centers, and helping to design new programs. Currently, there are approximately 4,000 AmeriCorps*VISTA participants working in almost 900 programs.[45]

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[41]William H. Crook and Thomas Ross, *Warriors for the Poor: The Story of VISTA* (New York: William Morrow & Co., 1969), Chapter 2. The initial study on a national service program was written by then-Attorney General Robert F. Kennedy.

[42]The new program was called Volunteers in Service to America to give it the romantic acronym of VISTA, according to the House committee report, as in "the concept of a great new vista, free of poverty, which the Economic Opportunity Act seeks for all Americans." Crook and Ross, *Warriors of the Poor*, p. 45.

[43]The theory of structural poverty is that the root causes of poverty are not in barriers to opportunity, but in the inequalities and injustice systemic to capitalism and that the poor are powerless to break this cycle of poverty without government intervention and social activism. For an explanation of the shift from traditional approaches of alleviating poverty to an emphasis on structural poverty, see Charles Murray's classic *Losing Ground: American Social Policy 1950–1980* (New York: HarperCollins, 1984).

[44]By the mid-1980s, as many as one-quarter of VISTA participants focused on increasing literacy rates, most of them as reading tutors. T. Zane Reeves, *The Politics of the Peace Corps and VISTA* (Tuscaloosa: University of Alabama Press, 1988), Chapters 3–6, pp. 43–153.

[45]Participants serve full-time for at least one year (and no more than three) and receive a stipend of $9,300 and either an educational award of $4,725 or an additional stipend of up to $1,200. In addition, participants receive health insurance, training, child-care allowances, liability insurance, eligibility for student loan deferment and travel, and relocation expenses. Most participants are between 18 and 27 years old, 60 percent are white, and nearly 80 percent are women. Lordeman and Butler, "Community Service: A Description of AmeriCorps, Foster Grandparents and Other Federally Funded Programs." The program's

Recommendations for VISTA Reform

- **Focus VISTA on specific problems.** In keeping with VISTA's programmatic concentration on poverty, reform should focus VISTA on helping to solve the most important poverty-related problems of the day. One of the principal goals of the welfare reform of 1996 was to increase the number of married two-parent families. Research shows that 80 percent of poor single-parent families would escape from poverty if the single parents were married.[46] VISTA could be focused on strengthening families through groups such as Marriage Savers and the training of mentoring couples who could counsel engaged couples about key aspects of marriage. Another possibility is to focus VISTA activity on mentoring in low-income communities. The Bush Administration has proposed an additional $100 million per year to recruit and train mentors for disadvantaged children. If the need for mentors is a leading poverty-related dilemma, policymakers should consider focusing VISTA on efforts that address this need rather than creating or funding a new program. Whatever focus is selected for the agency's service activities, in keeping with renewed interest in government accountability, VISTA programs should be subject to appropriate, rigorous, and regular methods of assessment and measurement.
- **De-federalize VISTA.** Given the anti-poverty focus and longevity of the program, policymakers will probably choose to maintain VISTA's paid status and educational grant combination as an incentive to attract the skills and talents required for its particular work. Nevertheless, VISTA should be changed from a federally operated program (in which the federal government selects and supervises members) to a federally assisted program, similar to AmeriCorps. This would give sponsoring organizations greater control over recruiting and selecting participants and more flexibility in program design and delivery, as is appropriate for the civil society context in which VISTA operates, and would remove the status of VISTA participants as federal employees. It would also eliminate unfair advantages and benefits that accrue to VISTA "volunteers" but not to participants in other domestic service programs as a result of VISTA's unusual status as a federal employment program. (These benefits include worker's compensation, legal liability coverage, non-competitive hiring for federal jobs, and credit for service time toward a pension in the Federal Employees Retirement System.)

Learn & Serve America

Created in 1993, Learn & Serve America provides grants to schools, colleges, and nonprofit organizations to encourage, create, and replicate "service-learning" programs for students of ages five to 17. The Corporation for National and Community Service funds state education agencies, state commissions on national and community service, and nonprofit organizations, which, in turn, select and fund local service-learning programs.[47]

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budget for 2002 was $85 million; $94.3 million was appropriated FY 2003, and the Bush Administration has requested $95 million for FY 2004.

[46]Robert Rector and Kirk A. Johnson, Ph.D., "The Effects of Marriage and Maternal Education in Reducing Child Poverty," Heritage Foundation *Center for Data Analysis Report* No. 02–05, August 2, 2002.

[47]Seventy-five percent of the funding goes to school-based and community-based grants, and a smaller amount supports a higher-education program. In addition, Learn & Serve supports the National Service-

The problem with Learn & Serve America is fundamental and lies in the very concept of service learning that it promotes and funds. Service learning is a particular teaching methodology in which participants engage in "thoughtfully organized service" that "is integrated into and enhances the academic curriculum of the students, or the educational components of the community service program" and provides "structured time for the students or participants to reflect on the service experience."[48]

It is certainly possible to find good projects that are being done in the name of service learning (e.g., a service-learning project that has been initiated to celebrate the Ohio state bicentennial[49]), but the vast majority of service-learning programs promote social policies, many of which are controversial. In 2002, the Corporation for National and Community Service recognized service-learning "Leader Schools" with projects that built an eagle observation site and restored wetlands to teach environmentalism,[50] used tutoring and mentoring projects to teach multiculturalism and racial diversity,[51] and invited the homeless to read their poetry in the classroom as a way to teach about the evolution of homelessness.[52] The Nicholas Senn High School in Chicago used its Learn & Serve grant money to design programs that used food banks as the basis for teaching hunger policy in history class and taught geometry by having students knit scarves and hats for the homeless during math class.[53]

Moreover, while all education is strengthened by real-world experience and service is, in itself, educational, service-learning projects by their very nature push beyond the boundaries of service into the arena of advocacy. Integrated into the curriculum along with teacher-led reflection, most of these programs place less emphasis on an individual's service (and the virtues that may be acquired through such service) and more emphasis on societal problems, social messages, and policy conclusions that can be linked to a particular service experience.

Learning Clearinghouse (for information and assistance) and the National Service-Learning Exchange (a peer network of service-learning practitioners). In FY 2002, Learn & Serve America's budget was $43 million. Congress has appropriated the same amount for FY 2003, and the Bush Administration has asked Congress for the same amount in 2004, increasing to $65 million by 2006.

[48]See Section 101, Definition 23 of the National and Community Service Act of 1990 (Public Law 101–610, 42 U.S.C. 12511).

[49]See "The Ohio Bicentennial Service-Learning Schools Project," at *http://www.acs.ohio-state.edu/glenninstitute/obs.htm* (August 20, 2002).

[50]Wilkinson Junior High School, Middleburg, Florida, and Langley Middle School, Langley, Washington. See Corporation for National and Community Service, "List of Leader Schools: 2002 Leader Schools," at *www.leaderschools.org/2002profiles/wilkinson.html* (January 30, 2002) and *www.leaderschools.org/2002profiles/langley.html* (January 30, 2002).

[51]Elida High School, Elida, Ohio, and Greely High School, Cumberland, Maine. See *ibid.*, *www.leaderschools.org/2002profiles/elida.html* (January 30, 2003) and *www.leaderschools.org/2002profiles/greely.html* (January 30, 2003).

[52]Tamanend Middle School, Warrington, Pennsylvania. See *ibid.*, *www.leaderschools.org/2002profiles/tamanend.html* (July 17, 2002).

[53]Nicholas Senn High School, Chicago, Illinois. See *ibid.*, *www.leaderschools.org/2002profiles/nicholas.html* and *http://www.isbe.state.il.us/learnserve/pdf/LSWinterNews03.pdf* (January 30, 2003).

Advocates of service learning speak of advancing "tolerance," "diversity," and "social justice."[54] With roots in the experiential teaching theories of John Dewey and other early education reformers, the larger objective of service learning is not learning or service but engaging individuals in social and political change.

Recommendations for Learn & Serve Reform

- **Discontinue Learn & Serve America.** Congress should end the Learn & Serve America program. If they elect to keep a smaller program that awards grants to encourage and support traditional notions of community service, lawmakers should make it clear that they do not endorse the philosophy of service learning and its strategy of pushing a particular teaching method into the academic curricula of schools and colleges. Learn & Serve should not exclusively or primarily fund service-learning programs or projects that contribute to service-learning programs in states and local school districts. To the extent that it does fund service-learning activities, these programs should "enhance" but should not be "integrated into" academic curricula. At a time when the main focus of education reform is to improve the basics—reading, writing and arithmetic—policymakers should not be underwriting new pedagogical theories of questionable value.[55]
- **Refocus the program.** If policymakers choose to authorize a program to replace Learn & Serve America, they should make sure that it focuses on appropriate activities. One idea would be to focus on service that supports public safety, emergency response, and civil defense by educating and training students and younger Americans to teach others about the threats of terrorism and ways to defend and protect Americans from potential terrorist attacks. Another possibility would be to create a civic education and service program that would teach about citizenship as the basis of voluntary service. Given that the civic-education aspect of such a program would be of little consequence if it is badly designed (as was the case with previous pilot programs) or lost in an emphasis of service over citizenship, policymakers should consider whether the Corporation for National and Community Service is the right agency to assume this important function.

Administrative Problems

AmeriCorps has been plagued by administrative problems since its creation in 1993. During the Clinton Administration, several independent audits of the program pointed out mismanagement and serious cost overruns, with an actual per-participant cost that was considerably higher than reported.[56] Under the Bush Administration, the program has been run more efficiently and has passed several audits, and there is much more accountability in its activities. Nevertheless, serious problems persist.

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[54]See, for example, "Every Student a Citizen: Creating the Democratic Self," Report of the Education Commission of the States, Compact for Learning and Citizenship, Denver, Colorado, 2000.

[55]Even a recent sympathetic report notes that the claims of service learning are ahead of the scientific data, which have been short-term, have produced ambiguous results, and have not compared service learning to traditional forms of service. See *The Civic Mission of the Schools* (New York: Carnegie Corporation of New York and CIRCLE: The Center for Information & Research on Civic Learning & Engagement, 2003).

[56]See Kenneth R. Weinstein and August Stofferahn, "Time to End the Troubled AmeriCorps," Heritage Foundation *Government Integrity Project Report*, May 22, 1997.

A Corporation for National and Community Service decision last November to suspend enrolling new members and reassign two managers prompted investigations by the CNCS Inspector General and the U.S. General Accounting Office.[57] In 2000 and 2001, the CNCS surpassed its enrollment target and, as determined by the Office of Management and Budget,[58] improperly used interest on educational funds to pay for additional participant stipends, causing a $64 million shortfall in its $100 million educational trust fund for 2003.

Recommendations for Administrative Reform

- **Control Spending.** As the lawmaking and appropriating branch of government, Congress has a responsibility to investigate the use of federal funds at the Corporation for National and Community Service and consider the possibility of any misconduct or wrongdoing. Until these issues are addressed and the problems are corrected, policymakers should maintain a cap on participation and neither expand existing programs nor create new national service programs. Nor should Congress provide additional funds to cover program misallocations. As a budgetary matter, spending on citizen service should not exceed, and if possible should be less than, that provided by the fiscal year (FY) 2003 budget.[59]
- **Minimize the level of bureaucracy.** In general, Congress should act to organize and minimize an increasingly complicated and confusing national service bureaucracy; consolidate duplicative programs wherever possible (e.g., the National Civilian Community Corps, which emphasizes homeland security and disaster relief, and the new Citizen Corps, which focuses on homeland security efforts in local communities); streamline programs as much as possible (e.g., consolidating various state offices to better leverage resources); and exercise greater legislative oversight over the reformed programs.[60]
- **Treat citizen service programs as a short-term stimulus.** The aftermath of September 11 has presented an important moment to encourage Americans to help their fellow citizens by participating in voluntary service programs. While there is a strong case for government involvement at this time, policymakers should regard the government's role in promoting citizen service as a short-term stimulus package for revitalizing civil society rather than as a permanent federal program. Congress should limit the number of years that organizations can take AmeriCorps and VISTA participants, and should cap the number of years and amount of funds any one

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[57]"AmeriCorps Freeze Draws Two Investigations," *The Washington Post*, December 14, 2002, p. A4. At its Web site, the CNCS explains that although "it appeared to those preparing the budget that the funds on hand were adequate to support the requested AmeriCorps members," enrollments were suspended because it "did not have in place adequate procedures for tracking enrollments and estimating their [cost] impact." See "Background on the AmeriCorps Enrollment Pause," at *http://www.americorps.org/enrollmentupdate/background.html* (February 23, 2003).

[58]The Office of Management and Budget took the accounting move "to protect the integrity of the program" and "to operate programs within the law," according to an OMB spokesman. "Budget Glitch Shortchanges AmeriCorps," *The Washington Post*, February 27, 2003, p. A25.

[59]For further analysis of the importance of freezing non-defense discretionary spending, see Brian M. Riedl, "Balancing the Budget by 2008 While Cutting Taxes, Funding Defense, and Creating a Prescription Drug Benefit," Heritage Foundation *Backgrounder* No. 1635, March 12, 2003.

[60]One practical problem is that no one committee has authority over all of the many national service programs, which makes it difficult to legislate wisely and perform good oversight.

organization can receive through any of the programs authorized by the Citizen Service Act. A reformed Citizen Service Act should reauthorize citizen service programs for no more than five years, and any endorsement should include a sunset clause to emphasize the non-permanent nature of these programs. The citizen service programs of the federal government should go out of existence unless Congress acts to continue the programs within 60 days of a mandated General Accounting Office report evaluating the overall success of the programs according to the principles of citizen service.

CONCLUSION

The ideas of volunteerism, civic engagement, and community service have long been a part of conservative thought, from Edmund Burke's defense of the "little platoons" as the backbone of civil society to Ronald Reagan's Private Sector Initiative. The concept of citizen service has deep roots in the principles and practices of republican self-government envisioned by the American Founding Fathers and described by Alexis de Tocqueville.

From the beginning, citizen service has been at the heart of the "compassionate conservatism" of George W. Bush and the domestic policy agenda of the Bush Administration. "I ask you to be citizens," President Bush said in his inaugural address, "citizens, not spectators; citizens, not subjects; responsible citizens, building communities of service and a nation of character." The invitation acquired added meaning after September 11 as Americans throughout the nation displayed a degree of heroism, generosity, unity, and patriotism not seen in recent years.

Now, more than ever, at a time when Americans are volunteering and engaging in service to their country in unprecedented numbers and unprecedented ways, policymakers must reject the model of government-centered national service that undermines the American character and threatens to weaken the private associations that have always been the engine of moral and social reform in America. The better course is to bolster President Bush's noble call to service by creating a true citizen service that is consistent with principles of self-government, is harmonious with a vibrant civil society, and promotes a service agenda based on personal responsibility, independent citizenship, and civic volunteerism—all prerequisites for building what President Bush has called a "new culture of responsibility."

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APPENDIX F – WRITTEN STATEMENT OF RICHARD T. FOLTIN, LEGISLATIVE DIRECTOR AND COUNSEL, OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS, AMERICAN JEWISH COMMITTEE, WASHINGTON, D.C.

The American Jewish Committee

Advancing democracy, pluralism and mutual understanding

TESTIMONY OF RICHARD T. FOLTIN

LEGISLATIVE DIRECTOR AND COUNSEL

THE AMERICAN JEWISH COMMITTEE

OFFICE OF GOVERNMENT AND INTERNATIONAL AFFAIRS

HEARING OF

THE HOUSE EDUCATION AND THE WORKFORCE

SUBCOMMITTEE ON SELECT EDUCATION

on

"PERFORMANCE, ACCOUNTABILITY, AND REFORMS AT

THE CORPORATION FOR NATIONAL AND COMMUNITY SERVICE"

April 1, 2003

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Testimony on behalf of the American Jewish Committee
April 1, 2003

My name is Richard Foltin. I am Legislative Director and Counsel in the Office of Government and International Affairs of the American Jewish Committee, the nation's premier human relations organization, with over 125,000 members and supporters represented by 33 regional chapters across the United States. Thank you, Mr. Chairman and Mr. Ranking Member, for the opportunity to testify today about AJC's perspective on the need to retain protections against employment discrimination based on religion with respect to positions funded under the Corporation for National and Community Service.

The government, and all citizens, have a strong interest in not seeing taxpayers' dollars utilized to underwrite the funding of employment positions for which hiring decisions are made based on religion. At the same time, any prohibition on religious discrimination by religious organizations when they operate programs for which they receive government funds must be carefully cabined, so as not to encroach on the legitimate interests of religious organizations in autonomy with respect to positions that are privately funded. Its "grandfather clause" aside, Section 175 of the National and Community Service Act of 1990 limits its prohibition on religious discrimination by a funded institution to "a member of the staff of such project who is paid with funds received under this subchapter." In so doing, as I discuss below, Section 175 draws a careful line that seeks to safeguard the important interests of both the government and of religious institutions.

Discussion of Section 175

Section 175 of the National and Community Service Act of 1990 (42 U.S.C. §12635), signed into law by President George Herbert Walker Bush in November 1990, provides as follows:

> **(c)** Religious discrimination
>
> > **(1)** In general
> >
> > Except as provided in paragraph (2), an individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with funds received under this subchapter.
> >
> > **(2)** Exception
> >
> > Paragraph (1) shall not apply to the employment, with assistance provided under this subchapter, of any member of the staff, of a project that receives assistance under this subchapter, who was employed with the organization operating the project on the date the grant under this subchapter was awarded.

Testimony on behalf of the American Jewish Committee
April 1, 2003

With the Corporation for National and Community Service due for reauthorization, argument has been heard – following the arguments articulated by proponents of "charitable choice" (or the "faith-based initiative") – that a religious employer otherwise allowed by law to prefer members of that body's faith in employment decisions should not be subject to laws prohibiting employment discrimination on the basis of religion as a result of the receipt of government funding. Those arguing for this proposition point to the need to enable faith-based groups to promote common values, a sense of community and shared experiences through service. These are all important values, but there is something inherently problematic, as a matter of public policy if not as a matter of constitutional law, in the government funding what it itself cannot do, namely subject employment positions to a religious test. Put more bluntly, applicants for a government-funded position should not be confronted with a sign, real or metaphoric, that says "No Jews Need Apply" or "No Baptists Need Apply."

Neither the First Amendment nor any other provision of the Constitution requires religious institutions to be given unlimited autonomy in their employment decisions with respect to employment positions that are government funded. Indeed, the presence of government funding implicates several clauses of the Constitution – the Religious Test Clause, the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause – all of which preclude government discrimination on the basis of religion.

But the importance of the nondiscrimination principle does not mean that it cannot be reconciled with another important priority, the autonomy of religious institutions and safeguarding those institutions from undue government interference. If we have any common ground with those who would delete Section 175 it is in recognizing that religious organizations must, as a general rule, be allowed broad discretion in relying on religion in making hiring decisions.

In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the U.S. Supreme Court rightly upheld the constitutionality of the exemption for religious organizations from the provision of Title VII of the Civil Rights Act of 1964 prohibiting employment discrimination on the basis of religion, even in a case where the position in question entailed no discernible religious duties. In a concurring opinion, Justice Brennan, joined by Justice Marshall, citing an article by Professor Douglas Laycock, said, "[r]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: 'select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause.'" Justice Brennan went on, "[A religious] community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's

ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."

Thus, it is a fundamental aspect of the religious freedom that is protected as our first liberty in the First Amendment that religious organizations, the vehicle through which religious communities manifest their religious missions, should be able to demand, as a general principle, that the individuals they hire to work for those organizations subscribe to the creed and practices of their faith. Such a demand is a legitimate reflection of the need to maintain the integrity of the organization. But *Amos* involved a privately funded, not a government funded, position. And extension of the exemption upheld in *Amos* to cover employees providing publicly funded services is not required by the concerns addressed in that decision. Much of the *Amos* analysis, as amplified in the concurring opinions, turns on the problems that would be posed in limiting the exemption to religious activities of a religious organization, not the least of which would be placing the state in the position of parsing which activities of the organization are secular and which are religious. With respect to programs funded by the government, however, the state, as a matter of constitutional principle, may fund only the secular activities of religious organizations. This makes unnecessary an explicit extension of the Title VII exemption, or a bye on appropriate antidiscrimination provisions in particular authorizing legislation, with respect to employees providing publicly funded services.

To the contrary, such an approach (particularly, as we are faced with today, as part of an initiative premised on substantial expansion of the role of religious organizations in social services provision) runs counter to fundamental civil rights principles, as well as identifies the government with using religious criteria for employment. In one case, *Dodge v. Salvation Army*, 48 Empl. Prac. Dec. 38,619, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989), the court went as far as to extend the principle that the Establishment Clause prohibits the government from engaging in religious discrimination so as to prohibit direct financing by the government of a position with a private employer if the employer discriminates based on religion. And, in *Robinson v. Price*, 553 F.2d 918, 920 (5th Cir. 1977), *appeal after remand*, 615 F.2d 1097, 1099-1100 (5th Cir. 1980), the Fifth Circuit held that a violation of the Free Exercise Clause would be shown if facts presented at trial demonstrated that a state-funded, non-profit, anti-poverty agency discriminated based on religion in firing an employee.

Several cases have been cited for the proposition that a religious employer does not waive an otherwise applicable exemption from laws prohibiting employment discrimination on the basis of religion as a result of the receipt of government funding. See *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000); *Siegel v. Truett-McConnell College, Inc.*, 13 F. Supp. 2d 1335, 1344 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995); *Arriaga v. Loma Linda Univ.*, 13 Cal. Rptr. 2d 619, 622 (Cal. App. 1992). But these cases did not allege that the employment positions at issue had been directly funded with government dollars.

Of course, even if the Title VII exemption is not automatically waived with respect to a government-funded employment position, this is far from the end of the inquiry. Congress may determine, as it did in enacting Section 175, that, as a matter of policy, it does not want publicly funded employment positions to be subject to religious preference. The *Amos* Court did not, after all, rule that the broad exemption from Title VII carved out by Congress, so as to extend even to employees with no religious duties, was constitutionally required, only that it was constitutionally permitted – and this was with respect to a privately funded position.

To be sure, any effort to prohibit religious discrimination by religious organizations when they operate programs for which they receive government funds must be carefully cabined so as not to encroach on the legitimate interests of religious organizations in autonomy with respect to positions that are privately funded. Any such provision should be crafted so that, even while it prohibits discrimination on the basis of religion with respect to an employment position funded with federal financial assistance, it does not encroach upon such exemption from the federal prohibition on religious discrimination as a religious organization may enjoy in the use of its own or privately donated funds. That is the careful line that Section 175 seeks to draw – unlike the case with civil rights laws that generally cover federally funded institutions, and recognizing the particular constitutional concerns that are presented by religious organizations, the antidiscrimination prohibition of Section 175 does not extend to the entire institution, nor even to all staff employed in connection with the funded activity, but only to those who are actually paid with federal funds.

Conclusion

The "grandfather clause" aside, Section 175 limits its prohibition on religious discrimination by a funded institution to "a member of the staff of such project who is paid with funds received under this subchapter." By thus limiting its reach only to those who are actually paid with federal funds, Section 175 takes an appropriate approach in seeking to protect the important interests of both the government and of religious institutions when the latter receive government funds.

APPENDIX G – WRITTEN LETTER SUBMITTED FOR THE RECORD NY NATHAN J. DIAMENT, DIRECTOR, UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA WASHINGTON, D.C.

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INSTITUTE FOR PUBLIC AFFAIRS

March 31, 2003

Hon. Peter Hoekstra
Chairman
Hon. Robert Scott
Ranking Member
Members of the Subcommittee
on Select Education
U.S. House of Representatives
Washington, DC 20515

To the Chairman, Ranking Member &
Members of the Subcommittee,

I write to you on behalf of the Union of Orthodox Jewish Congregations of America, the nation's largest Orthodox Jewish umbrella organization, with regard to your review tomorrow of the practices and rules of the Corporation for National and Community Service ("CNCS").

In particular, I write with regard to the rules governing CNCS' interaction with America's religious communities and their institutions. As members of this Subcommittee must be aware, America's synagogues, churches and other faith-based institutions play a critical role in their communities and are a necessary component of any community service mission – including those targeted by CNCS' efforts. Houses of worship and other faith-based organizations engage in good works day in and day out; they feed the hungry, shelter the homeless, teach the illiterate and so much more.

America would be an impoverished society without the good works of its faith-based charities. For this reason, the Union of Orthodox Jewish Congregations is proud to have worked for the past several years with members of both political parties and the past and current Administrations to facilitate and expanded role for faith-based organizations in America's social and service network. We are proud of our close partnership with President Bush and leaders of this House in expanding the 'faith-based initiative.'

At its core, the faith-based initiative stands for two simple propositions: 1. that religious citizens and their institutions are invaluable partners for our public sector and 2. that while the U.S.

Constitution demands government neutrality toward religion, *the Constitution forbids government hostility toward religion.*

With regard to this latter point, *we believe that you should recognize Section 175 of the current law governing CNCS* (42 U.S.C. §12635) *for what it is – at odds with the religious liberties guaranteed by the U.S. Constitution in its discriminatory treatment of faith-based institutions. Moreover, §175 runs counter to the predominant number of federal statutes – whose lineage can be traced to nothing less than the* ***Civil Rights Act of 1964*** *– which address, implicitly or explicitly, the protected right of religious organizations to maintain their character through hiring people who adhere to the faith of that institution.*

By singling out faith-based organizations for disparate treatment, either through §175 or the equally troubling §189f proposed last year, this legislation undermines both the practical goals and noble spirit of America it seeks to foster.

As President Bush has demonstrated through the careful guidance documents and regulatory proposals he has made through his faith-based initiative, it is eminently possible, not to mention desirable, to allow and encourage faith-based organizations to participate in federally funded programs without violating the Constitution's "Establishment Clause."

As you review the many important activities of the CNCS, I urge you to consider this critical aspect of its structure and appropriate remedies thereto.

I, and the staff of the Union of Orthodox Jewish Congregations, stand ready to assist you in this endeavor in any way we can.

Sincerely,

Nathan J. Diament

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