

**More than Just Talk:  
George W. Bush, Faith-Based Initiatives and Presidential Lawmaking**

**Jessica M. Steiner**

**Department of Politics  
University of Virginia  
Charlottesville, VA 22904-4787  
[steiner@virginia.edu](mailto:steiner@virginia.edu)**

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A cornerstone of the Bush Administration's domestic policy agenda following the 2000 election was the Faith-Based Initiative. The Bush Administration claims, "Faith-based and community organizations (FBCOs) have a long tradition of helping Americans in need and together represent an integral part of our nation's social service network. Yet, all too often, the Federal government has put in place complicated rules and regulations preventing FBCOs from competing for funds on an equal footing with other organizations."<sup>1</sup> The President's objective was to place FBCOs on a level playing field with non-religious social service organizations.<sup>2</sup> From the standpoint of the Administration, "Federal funds should be awarded to the most effective organizations – whether public or private, large or small, faith-based or secular – and all must be allowed to compete on a level playing field." Bush flatly disavows the mindset "that if government would only get out of our way, all our problems would be solved."<sup>3</sup> Instead, Bush is a conservative who believes there are "some things the government should be doing."<sup>4</sup> Faith-Based and Community Initiative is an example of a domestic policy that the federal government should enact.

To achieve the central element of his domestic policy within the first term of his presidency, George W. Bush did not rely upon the legislative process alone to advance Faith-Based and Community Initiative (FBCI). Although FBCI made it to Congress's agenda, Bush also utilized the lawmaking power of the executive branch to help ensure the implementation of his policy preferences. Bush has adopted a two-pronged lawmaking approach in his effort to implement FBCI by utilizing executive orders, decrees, regulations, etc. while at the same time

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<sup>1</sup> Overview FBCI 2005

<sup>2</sup> Hanna Rosin, "George W. Bush: The Record in Texas; Putting Faith In a Social Service Role; Church-Based Providers Freed From Many Rules," *The Washington Post*, 05/05/2000.

<sup>3</sup> George W. Bush, "Duty of Hope," 07/22/1999.

<sup>4</sup> George W. Bush, "Duty of Hope," 07/22/1999.

pursuing congressional action. How Bush has chosen to deploy his resources to implement his faith-based policy agenda helps shed substantive light on the development of the institutional presidency and our understanding of presidential power.

Part I is a theoretical examination of a president's ability to formulate his domestic policy agenda within the executive branch by exercising his unilateral power and his use of the legislative process. A president has the ability to use both executive and legislative lawmaking avenues in order to move his policy agenda forward and successfully achieve his policy preferences. Too frequently, scholars of American institutions focus on the ability of a president to achieve his domestic policy agenda within the legislative arena, failing to recognize the dual importance of a chief executive's formal legal authority and ability to act unilaterally when pursuing his policy preferences.

Part II focuses on Bush's use of the institutional presidency as well as the legislative process to further his domestic policy agenda. This case study attempts to trace the decision-making process that led Bush to look to unilateral power as a complement to or in place of the legislative process to implement FBCI from 2001-2003. This approach, as defined by Lawrence Mohr, attempts to "present a series of occurrences in a sequence over time so as to explain how some phenomenon comes about."<sup>5</sup> In other words, this case study traces the use of executive and congressional action on FBCI in order to understand how Bush has been able to implement the greatest number of his preferences in this policy arena.

Part III evaluates the political implications of Bush's use of executive lawmaking power to establish many of the key components of FBCI. Is it a worthwhile use of resources for a president to advance American social policy through the executive branch, and if so under what conditions? Or is a president better served by entering the legislative arena? Is this a successful

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<sup>5</sup> Lawrence B. Mohr, *Explaining Organizational Behavior* (San Francisco: Jossey-Bass, 1982) p. 9.

bargaining strategy for presidents, or can unwillingness to cooperate with Congress backfire?

What constitutional questions arise when a president utilizes his executive authority to advance his policy preferences?

## PART I

### PRESIDENTIAL POLICY MAKING: THE TWO-PRONGED APPROACH TO LAWMAKING

Political institutions are an important intervening variable through which American public policy takes shape. However, a given political and social context also influences the range of choices a president has available to formulate his policy agenda. The story of American politics is rich with complexities, not reducible to a single theory of governance. In her 2006 APSA Presidential Address entitled “Why we need a New Theory of Government” Margaret Levi observes,

If the story is all in structure, geography, demography, initial conditions, path dependency, and exogenous shocks, then perhaps we should simply sit back and let history take its course. But to say that there are constraints and that some of those constraints are quite rigid is comparable to describing human mentality as only hard wiring. Humans learn, and so do societies.<sup>6</sup>

In a three-dimensional world, it is important to examine political phenomena from multiple perspectives. In this way, an analysis of FBCI depends upon on a two-pronged approach that appreciates the lawmaking powers found in both the executive and legislative branches.

The implementation of a president’s domestic policy agenda does not necessarily hang on a president’s ability to persuade Congress to enact legislation; a president can draw upon formal statutory authority and the constitutional powers of Article II, Sections 2 and 3 to establish his agenda. Along side of legislative action, former Clinton speechwriter Michael Waldman observes, “A president can always play solitaire. When Congress can’t or won’t act, there’s a lot Bush will be able to do on his own — executive orders, directives, regulations, all with the force of law.”<sup>7</sup> Despite Richard Neustradt’s contention, a president’s ability to persuade is not always

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<sup>6</sup> Margaret Levi, “Why We Need a Theory of Government,” *Perspectives on Politics*, 4 (2006): 6.

<sup>7</sup> Michael Waldman, “Bush’s Presidential Power,” *The Washington Post*, 12/26/2000.

the most effective method for policy implementation.<sup>8</sup> Executive orders, decrees, regulations, etc. are also successful ways for successfully implementing a president's domestic policy agenda, as FBCI shows. The implementation of FBCI serves as an instructive case for examining how a president learns to operate within a separated system and a political context.

The primary goal of FBCI was to expand the range of religiously associated social service groups that could receive financial help from the federal government. To achieve this end, Bush has pursued a two-pronged approach to implementing his policy preferences by making use of executive and legislative avenues. Examples of both legislative action (H.R. 7, the CARE Act of 2002 and 2003) and unilateral presidential action (primarily executive orders and regulatory change) make up the policy history of FBCI. An examination of FBCI helps us better understand the degree to which presidents have the ability to formulate their domestic policy agendas by drawing upon formal executive powers and the legislative process. John Gardner observes:

Whatever may be said for the parties and for Congress, the best hope of accomplishing the orchestration of conflicting interests, the building of coalitions and the forging of coherent national policy is the President. It is his natural role. He begins the process long before elections as he seeks to put together the constituencies he needs. In this day of media-dominated campaigns, the coalition of constituencies may appear to be less needed to gain electoral victory; but it is as needed as ever if the President is to govern effectively after victory. The President's capacity to balance conflicting forces and forge coherent policy and action should be substantially strengthened.<sup>9</sup>

An accurate assessment of presidential strength requires an examination of both congressional and executive lawmaking. The goal of this case study is to develop a deeper and contextualized view of the presidency as an institution by examining George W. Bush's use of executive lawmaking and appeals to Congress to implement a core element of his domestic policy agenda –

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<sup>8</sup> Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York, NY: Free Press, 1990)

<sup>9</sup> John Gardner, *Toward a Pluralistic but Coherent Society* (Queensstown: Aspen Institute for Humanistic Studies, 1980) pp. 20-21; See also Bradley H. Patterson, *The White House Staff: Inside the West Wing and Beyond* (Washington D.C.: Brookings Institution Press, 2000) pp. 434-435.

faith-based initiatives. In this case, the unilateral development of the FBCI by the Bush Administration validates Kenneth Mayer's belief that executive orders are often the most effective way for the President to get what he wants.<sup>10</sup> The ability of Bush to draw upon unilateral authority is a crucial element in an examination of FBCI. Without this dimension, the policy development of the initiative remains only in partial view.

The use of executive orders by presidents is an important exertion of presidential power. Yet, this assertion goes against the grain of the common perception among scholars of the modern presidency. The ability of a president to affect public policy extends beyond his ability to influence; presidents also have the ability to enact policy by way of executive directive. Presidential power is not reducible to personal leadership qualities. For many years, the study of presidential legal powers fell out of favor within the discipline of political science, leaving questions that examine the important connections between law and politics unattended. The informal powers of the president have strong explanatory power when attempting to understand behavioral aspects of the presidency. Yet this perspective reveals only one dimension of presidential power. To gain a more comprehensive view of the presidency as an institution, it is vital, as Richard Pious argues, to focus on "the constitutional authority that the president asserts unilaterally through various rules of constitutional construction and interpretation."<sup>11</sup> The legal authority to engage in executive lawmaking by way of unilateral action – the use of executive orders, pardons, presidential decrees, etc. – is just as important to our understanding of presidential leadership as the ability of a president to achieve a coalition in Congress.

Within the context of the modern presidency, leadership is defined in no small part by unilateral action. The personal leadership qualities of a president certainly facilitate his ability to

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<sup>10</sup> Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton: Princeton University Press, 2001)p. 22.

<sup>11</sup> Richard M. Pious, *The American Presidency* (New York: Basic Books, 1979) p. 16.

negotiate his agenda. But presidents need not enter Congress's den in order to achieve legislative success. It is true that the use of executive authority is not a recent innovation within the American political system.<sup>12</sup> The structural limitations instituted by the Constitution hindered the ability of a president to act unilaterally during George Washington's term in office – yet, as Hamilton had hoped, the ability of a president, even episodically, to gather the strength of the office and act without the authorization of Congress is an essential ingredient in the administration of good government. Presidents have drawn together the power necessary to use the energy of the office to take unilateral action and engage in executive lawmaking. However, with the development of the modern presidency and the institutional presidency, the ability of Congress or the Court to tame the scope of a president's lawmaking power appears to be far more limited than Hamilton would have guessed.

Since the time of Washington, the ability of presidents to act independently of Congress has grown substantially. In particular, the willingness of presidents to issue executive orders becomes a method by which presidents since Franklin Roosevelt by his establishment of the Executive Office of the President can gain a greater policymaking role.<sup>13</sup> In the modern administrative state, the influence of the president over the shape and direction of public policy has grown far beyond the limits the Founders had initially envisioned.<sup>14</sup> However, until recently,

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<sup>12</sup> George Washington, in 1793, was the first president to foray into executive lawmaking when his administration considered the merits of proclaiming America's neutrality between England and France during the French Revolution. Following the advice of Alexander Hamilton, Washington issued a proclamation asserting America's neutrality. Nevertheless, Washington's proclamation proved difficult to enforce, necessitating Congressional action. The next major use of executive privilege did not occur until the presidency of Abraham Lincoln and the crisis of the civil war.

<sup>13</sup> Theodore Roosevelt, "Establishment of the Executive Office of the President," Executive Order 8249, 8 September 1939. For a good analysis of the development of executive policy making see George C. Edwards and Stephen J. Wayne, *Presidential Leadership: Politics and Policy Making* (New York: St. Martin's Press, 1990) pp. 345-371.

<sup>14</sup> George C. Edwards and Stephen J. Wayne, *Presidential Leadership: Politics and Policy Making* (New York: St. Martin's Press, 1985) p. 345.

students of the American presidency have underappreciated the use of a president's ability to act unilaterally and make substantive policy decisions, particularly by way of executive orders.

Kenneth Mayer's scholarship on executive orders has made an important contribution to our understanding of how presidents exercise unilateral authority. He rightly points out that the emphasis on a president's ability to lead public opinion, negotiate with Congress, and manage the press without expending valuable political capital has led scholars to overlook the importance of constitutional powers.<sup>15</sup> In this way, an institutional, not only a behavioral, approach illuminates more fully the actions of the American presidency within a separated system. This approach is utilized infrequently within presidential scholarship. It is nonetheless apparent that the complexity of American political life necessitates a more pluralistic approach to the study of the presidency.

While the President has pursued his domestic policy agenda in Congress with limited success, Bush has also successfully used executive authority to reshape social welfare policy. Yet, the ability of a president to direct his domestic policy agenda remains subject to secular time and the vitality of the Framers' separated system. Secular time can act as the framework by which to examine the process of development for this policy. A structural argument holds that presidential-congressional relations and partisan shifts interact with the changes in the business cycle, issue-attention, and foreign policy developments to condition the context in which a policy change may take place.<sup>16</sup> For instance, the forward movement of faith-based legislation was stifled in the first year of the Bush Administration when the balance of power in the Senate shifted to the Democrats following Vermont Senator Jim Jeffords' defection from the Republican Party to become an Independent. This event, along with the events of September 11, 2001,

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<sup>15</sup> Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power*, p. 12.

<sup>16</sup> Sanford B. Ehrlich James R. Meidl, and Janet M. Dukerich, "The Romance of Leadership," *Administrative Science Quarterly*, 30 (1985): p. 79.

diverted the attention of the nation and the President away from FBCI.<sup>17</sup> But such a deterministic perspective disavows the possibility that a president could overcome contextual constraints.<sup>18</sup>

The historical conditions certainly constrained Bush's ability to oversee the successful passage of FBCI within Congress, but this contextual reality does not predetermine the outcome of this policy. Given FBCI's high policy preference for Bush, it is rational for Bush to look to both his formal lawmaking authority and his power to persuade Congress. Political conditions lead president's to adapt different lawmaking strategies to ensure they achieve the greatest number of policy preferences. The ability of a president's agenda to remain dominant fluctuates within the American system over his tenure on office. Charles O. Jones argues in his work *The President in a Separated System*, "Focusing exclusively on the presidency can lead to a seriously distorted picture of how the national government does its work . . . The plain fact is that the United States does not have a presidential system. It has a separated system."<sup>19</sup> The ability of a president to set his domestic policy agenda depends upon resources, advantage, and strategic position. Although some presidents have a greater opportunity to exercise the energy of their office than others, in the end each president is still bound by the separated system established by the Founders. However, these structural realities do not necessarily leave a president "in a no win situation" as Paul Light has suggested.<sup>20</sup> A president retains the constitutional authority under Article II to draw upon the energy of his office and administratively implement his policy preferences. Successful presidents – like all successful species – have the ability to adapt;

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<sup>17</sup> "Mr. Bush and Congress," *The New York Times*, 08/04/2001.

<sup>18</sup> For a discussion of this perspective, see Bert A. Rockman, *The Leadership Question: The Presidency and the American System* (New York: Praeger, 1984), Erwin C. Hargrove, *The Power of the Modern Presidency* (Philadelphia: Temple University Press, 1974), Paul Charles Light, *The President's Agenda: Domestic Policy Choice from Kennedy to Clinton* (Baltimore, Md.: Johns Hopkins University Press, 1999).

<sup>19</sup> Charles O. Jones, *The Presidency In a Separated System* (Washington, D.C.: Brookings Institution Press, 2005) p. 2.

<sup>20</sup> Light, *The President's Agenda: Domestic Policy Choice from Kennedy to Clinton*,

therefore it is essential to assess how a president manages temporal political conditions with the informal and formal powers he has at his disposal.

The Framers of the Constitution clearly sought to constrain executive power within the American regime by *divide et impera*.<sup>21</sup> By way of a separated system, the judiciary and the legislative branches check the will of the president. This is not to say the Federalists, the primary architects of the Constitution, intended to make the president into a shrinking violet. A “vigorous executive” is a key ingredient in the Federalists’ recipe for democratic liberty. An energetic executive coupled with a system of separation of powers is an essential element in the administration of good government. However, the administrative structure recommended by the Brownlow Commission and accepted by Congress by passing the Reorganization Act in April 1939 (3 U.S.C.A. § 106, 31 U.S.C.A. §§ 701, 1101) established a policy center within executive branch by granting presidents an institutional structure to manage the numerous and diverse parts of the presidency.<sup>22</sup> It is true that significant barriers stifled Bush’s legislative agenda; nevertheless, the president still managed to utilize the energy of his office to implement his policy preferences through the administrative elements of the executive branch. Increasingly, modern presidents have increased their ability to achieve their policy preferences by employing administrative power through the bureaucracy as opposed to working through divided powers with a fractious legislative branch.

The President has drawn upon the unilateral power claimed by his predecessors to direct the development of this policy. From Bush’s perspective, deploying the administrative function of the executive branch was a sensible use of his political resources.

I got a little frustrated in Washington because I couldn’t get the bill passed out of the Congress. They were arguing process. I kept saying, “Wait a minute, there are entrepreneurs all over our

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<sup>21</sup> *Madison: Writings*. Rakove, Jack N. ed., p. 151: Madison to Jefferson, 24 October 1787.

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country who are making a huge difference in somebody's life; they're helping us meet a social objective." Congress wouldn't act, so I signed an executive order – that means I did it on my own. It says we're going to open up billions of dollars in grant money competition to faith-based charities. And that's what's happening and that's what we're here to talk about today.<sup>23</sup>

Despite Bush's frustration with Congress, he was able to achieve a greater share of his agenda by unilateral action. On the one hand, the development of FBCI verifies aspects of previous scholarship on congressional-executive interaction. Bond and Fisher contend that a president's agenda-setting power in Congress is often quite significant – but their study has shown that “once a given part of a the agenda reaches the floor of Congress, the president's bargaining and popularity are insufficient to change the outcome, except in relatively rare cases.”<sup>24</sup> Paul Light similarly assesses a president's ability to set the agenda in Congress. He argues that although a president's impact on an agenda is quite significant, he does not find himself in a unilateral position to define his agenda.<sup>25</sup> However, neither study accounts for the president's ability to draw upon his constitutional and statutory authority to institutionalize his policy preferences within the executive branch. Two avenues exist for a president to see his domestic policy agenda through.

It is true that a president rarely has unilateral oversight of his agenda in Congress, even when he is able to move his policy to the legislative agenda at the outset. But on the other hand, when a policy languishes in the House or Senate, a president may find he is in a situation where he is able to implement a greater number of his policy preferences within the executive branch. The use of executive orders and regulatory policy to institute a critical portion of Bush's domestic policy agenda signals his ability to look beyond the bully pulpit to achieve his policy

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<sup>23</sup> George W. Bush, Speaking to Faith-based leaders in Los Angeles, 03/03/2004.

<sup>24</sup> Jon R. Bond and Richard Fleisher, *The President in the Legislative Arena* (Chicago: University of Chicago Press, 1990) p. 230.

<sup>25</sup> Light, *The President's Agenda: Domestic Policy Choice from Kennedy to Clinton*,

agenda. A president's policy agenda may succeed by drawing upon both congressional and presidential lawmaking power to enact the greatest number of his policy preferences.

This argument challenges Neustadt's definition of presidential success, since success in a policy arena does not depend exclusively on the ability of a president to bargain with members of Congress within the context of a system of separated powers.<sup>26</sup> For Neustadt and many other presidential scholars, the measure of presidential power is "the power to persuade."<sup>27</sup> In this view, the personal qualities of an individual – his charisma, experience, and political skills – define the character of the modern presidency. The persuasive skills of a president are an integral component of presidential authority, yet presidents have inherited other methods to exercise their power. The implicit implication of Neustadt's argument has led scholars to underappreciate the use of formal presidential authority. The ability of the president to marshal his legal authority, by way of statute or the Constitution, is also an important element in understanding the exertion of presidential strength.

Neustadt's model of presidential power provides great insight to the character of the modern presidency; yet the emphasis by scholars on the behavioral aspects of the presidency obscures the importance of a president's legal authority and his ability to act unilaterally. Relying upon the Neustadtian perspective to evaluate Bush's reliance on administrative powers to develop this policy paints the president as weak. It is true that the President's use of the bully pulpit did not generate the legislative success within Congress that he hoped. Throughout 2001, Bush gave at least 20 speeches on faith-based alone, and over the course of his presidency, he

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<sup>26</sup> Mark A. Peterson, *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan* (Cambridge, Mass.: Harvard University Press, 1990), Terry M. Moe and Scott A. Wilson, "Presidents and the Politics of Structure," *Law and Contemporary Problems*, 57 (1994): 1-44, Gary L. Rose, *The American Presidency Under Siege* (Albany: State University of New York Press, 1997).

<sup>27</sup> Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, p. 32. The power to persuade is the ability to achieve your policy agenda passively and not overtly.

has given at least 40 speeches on the topic. The importance of faith-based has not disappeared from his State of the Union addresses and has remained a central theme for the President. It is unwise to dismiss Neustadt's position outright. However, assessing Bush's uses of executive power may be an example of looking at a glass full versus half empty. The President's inability to persuade Congress to take up this initiative has not doomed the faith-based to public policy dustbin of the past.

The use of executive authority shows quite clearly that presidents have more tools at their disposal than persuasive power. A president need not act in institutional tandem with Congress to advance his policy agenda successfully.<sup>28</sup> In Bush's usual direct and plainspoken fashion, he believes his role, as president, does not always demand persuasion or explanation. In the days leading up to the invasion of Afghanistan in 2002, Bush evaluated the nature of his political situation as follows:

I'm the commander – see, I don't need to explain – I do not need to explain why I say things. That's the interesting thing about being the president. Maybe somebody needs to explain to me why they say something, but I don't feel like I owe anybody an explanation.<sup>29</sup>

An overemphasis on Bush's use of personal influence to tame the will of Congress or to achieve electoral advantages obscures other avenues through which the president can participate in the policymaking process. As this quote illustrates, the authority vested in the executive office allows presidents, if only intermittently, not to compromise to achieve their policy goals. It then is essential in the study of the American presidency to examine the unilateral use of executive authority by the president in the policymaking arena.

The power of the modern presidency is defined by more than the bully pulpit; presidents also have another card up their sleeves – the use of unilateral authority. This executive power

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<sup>28</sup> Peterson, *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan*, p. 8, 9.

<sup>29</sup> Bob Woodward, *Bush at War* (New York: Simon & Schuster, 2002) pp. 145-146.

enables the president to act unilaterally, without utilizing his persuasive power, to direct action from within the executive branch. Over the course of American history, presidents have turned to executive orders for a number of purposes. Executive orders are used to define public policy, reorganize the regulatory process, influence the implementation of legislation, and restructure the administration of the executive branch.<sup>30</sup> For example, prior to the passage of the Welfare Reform Act of 1996, Clinton issued an executive order to reshape existing elements of federal welfare policy while his welfare reform bill stalled in Congress.<sup>31</sup> When Congress fails to act, the institutional presidency supplies an alternative venue for a president to implement his agenda.

This is not to say that a president should look to formal legal powers to administer all aspects of his policy agenda. The effective use of executive orders depends upon the flexibility of a president's position – a president's ability to implement his policy agenda depends in large part on his interaction with Congress. When faced with congressional resistance, executive orders are a valuable strategy for a president to use. Yet, within a separated system, a president faces clear institutional restraints. On the one hand, it would be unwise for a president to thumb his nose at Congress every time it turned around. Therefore, a president may use executive orders on a discretionary basis in order to optimize the institutionalized power of the presidency to implement his policy agenda. Neustadt's claim that formal powers constitute a "painful last resort, a forced response to the exhaustion of other remedies, suggestive less of mastery than of failure – the failure of attempts to gain an end by softer means" is a bit of an overstatement.<sup>32</sup> It

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<sup>30</sup> Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power*,

<sup>31</sup> This executive order holds states accountable for enforcing the 1988 Family Support Act. The goal of this legislation was to ensure states withdrew welfare benefits from teen-age mothers who dropout of school and while supplying child care benefits.

<sup>32</sup> Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, p. 24.

is clear that the personal qualities of a president are not the only factor that determines the level of executive power.

On the other hand, the reliance on executive fiat to implement a key element in Bush's domestic policy agenda shows the contextual constraints placed on executive activism by a less-than-willing Congress. In this particular case, Bush's use of his legal authority accompanies an inability to achieve a full implementation of his domestic agenda through the legislative process. The effectiveness of this approach certainly is open for much debate, but a president's lawmaking ability has enabled Bush to jump over congressional and political roadblocks to ensure the gradual augmentation of his domestic policy. As recently as March 1, 2005, the President gave a speech before a group of religious leaders and pledged, "Since Congress isn't moving on [faith-based initiatives], I will."<sup>33</sup> Bush's legislative record on compassionate conservatism has fallen short of expectations, yet congressional inaction has not spelled the end for Bush's Faith-Based and Community Initiative. Instead, Bush has settled for an incremental introduction of this policy by utilizing the legal powers vested in the office of the president to redirect public funds to faith-based social welfare groups.

The institutional development of the American presidency shows that executive orders are a useful and often effective mechanism for implementation the president's policy agenda. Even still, political scientists are often a tough group to convince. Within the context of Paul Light's examination of presidential domestic policy choices, he asserts that executive orders "offer a very limited and temporary alterative for policy initiatives."<sup>34</sup> Mayer's recent

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33 Nedra Pickler, "Bush Pushes Faith-Based Initiative Agenda," Associated Press, 03/01/2005.

<sup>34</sup> Paul Charles Light, *The President's Agenda: Domestic Policy Choice from Kennedy to Reagan* (Baltimore: Johns Hopkins University Press, 1999) p. 117. Light's conclusion is drawn by an earlier study done by Sarah S. Schramm, "The Politics of Executive Orders: Presidential Activism and Restraint." (Midwest Political Science Association Meeting: Chicago, 1977) See also Peterson, *Legislating Together: The White House and Capitol Hill from Eisenhower to Reagan*, p.88. Mark Peterson acknowledges the ability of presidents to use their statutory authority

scholarship calls into question the temporary nature of unilateral action. He effectively shows that Congress or the Courts rarely overturn a president's executive order, indicating the stability of this type of executive lawmaking.<sup>35</sup> Light is correct to point out the limitations of executive orders in implementing a president's policy agenda. To be sure, the power of the purse is a strong check on the use of unilateral executive power. However, the institutionalization of the presidency has increased the chief executive's administrative capacity in key areas of governance, such as federal budget oversight. Congress may hold the purse, but the president appears at times to hold the strings. Not only does a president maintain the ability to circumvent congressional defeat or inaction, in some cases, it is more advantageous for a president to act unilaterally when attempting to push forward his policy agenda. The legal authority of the president, much like Congress, does not depend upon the establishment of a policy alone, but also is informed by the political and social factors. The failure to appreciate the importance of executive lawmaking has left the use of this power to enact significant public policy understudied.

Not all scholars discount or overlook the importance of executive orders. In the past, legal scholars have done most of the heavy lifting in the study of executive orders.<sup>36</sup> Although the work of Louis Fisher and others broadens our understanding of American politics, from the perspective of the study of the American presidency, the legal approach tends to ignore the

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to achieve a portion of their agenda when Congress is uncooperative, but finds "the potential for unilateral action of this kind is limited."

<sup>35</sup> Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power*, p. 28.

<sup>36</sup> For example, Peter M. Shane and Harold H. Bruff argue often "presidents use executive orders to implement many of their most important initiatives." Peter M. Shane and Harold H. Bruff, *Separation of Powers Law: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 2005) p. 132. Louis Fisher also finds, "Although the Constitution places the legislative power in Congress, the President's lawmaking role is substantial, persistent and in many cases disturbing." Louis Fisher, "Laws Congress Never Made," *Constitution*, Fall (1993): 59-66. See also Louis Fisher, *Constitutional Conflicts between Congress and the President* (Lawrence: University Press of Kansas, 1997) pp. 110-114.

growth of the institutions and the development of the policy process.<sup>37</sup> However, in recent years, there has been a renewed appreciation among presidency scholars for the importance of unilateral action by presidents. In particular, the work of Terry Moe demonstrates the ability of presidents to use their legal powers to shape and control the federal government's policy agendas.<sup>38</sup> The core assumption in Moe's approach is as follows:

Certain basic factors have structured the incentives of all modern presidents along the same basic lines. The president has increasingly held responsible for designing, proposing, legislating, administering, and modifying public policy. . . . Whatever his particular policy objectives, whatever his personality and style, the modern president is driven by these formidable expectations to seek control over the structures and processes of government.<sup>39</sup>

Following Moe's scholarship, Mayer applies this theoretical framework – “new economic institutionalism” – to his analysis of executive orders.<sup>40</sup>

Mayer posits that the institutionalization of the presidency will gradually increase executive authority over time since presidents possess a willingness and ability to take control of major areas of governmental policy.<sup>41</sup> The increased willingness by presidents to act unilaterally and engage in substantive policymaking without interference by the Courts or Congress is an important institutional development. It is important to note that executive orders do not amount

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<sup>37</sup> George C. Edwards and Stephen J. Wayne, *Studying the Presidency* (Knoxville: University of Tennessee Press, 1983) p. 25.

<sup>38</sup> Terry M. Moe, "The Politicized Presidency," *The New Direction in American Politics*, John E. Chubb and Paul E. Peterson, Ed. (Washington, D.C.: Brookings Institution, 1985) In this work, Moe uses “new economic institutionalism” to examine the president's responsive competence of the executive branch. And Terry M. Moe, "The Presidency and the Bureaucracy: The Presidential Advantage," *The Presidency and the Political System*, Michael Nelson, Ed. (Washington, D.C.: Congressional Quarterly Press, 1998) Here Moe shows how the executive retains a comparative advantage in policy formation by the use of unilateral action over Congress.

<sup>39</sup> Moe, "The Politicized Presidency,"

<sup>40</sup> Mayer draws heavily from Moe and Wilson, "Presidents and the Politics of Structure," who argue electoral and interest group pressure do not directly shape presidential action, unlike legislators who act to acquiring electoral capital by creating institutions and policies that deliver goods and services to the American voter. Therefore, president's have the ability to rise above public opinion when pursuing their legislative agenda. From this perspective, the opportunity cost of presidential legislative action may be lower for a president in comparison to Congress.

<sup>41</sup> Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power*, p. 220. It is important to note that although Mayer begins with a “new economic institutional” framework, a good portion of his work allows for a more pluralistic examination of executive orders, leaving room for social and political context to influence the actions of a president.

to a presidential blank check. The readiness of a president to exercise executive fiat is constrained by the political and institutional context of his Administration.<sup>42</sup> But, the context in which the presidency must operate does not necessarily render the individual president ineffectual.

Mayer's analysis adds an important dimension to the study of the presidency.<sup>43</sup> His analysis shows that unilateral governance on the part of presidents follows the expected pattern of development: presidential action, followed typically by congressional or judicial inaction, plus an additional caveat – even when executive authority is checked by the other branches, a president can write more executive orders to regain his political footing. The empirical skeleton Mayer and others supply is an important backdrop to understanding the development of FBCI. In Bush's case, it appears that formal executive powers are not necessarily a last resort – or to be overly dramatic, an example of Bush exercising the nuclear option. Instead, executive lawmaking in conjunction with even limited congressional action may be the best way for a president to achieve the greatest number of his domestic policy preferences.

To be sure, within a separated system a president's ability to act unilaterally is constrained.<sup>44</sup> The separation of powers system works to limit the power of the president; yet, the ability of a president to work out of this structural predicament demonstrates his strength. Paradoxically, the structural weakness fostered by a separated system can lead a president to call upon the energy of his office and exert the power vested to him by the Constitution. This may

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<sup>42</sup> Gary King and Lyn Ragsdale, *The Elusive Executive: Discovering Statistical Patterns in the Presidency* (Washington, D.C.: CQ Press, 1988) p. 121-124.

<sup>43</sup> The "new economic institutional" framework that Mayer begins with asserts generalizable patterns of presidential action given particular political and institutional contexts. Yet, Mayer does not adhere strictly to this approach, moving closer to the methodology employed by Norton Long. In the end, Mayer's analysis steps outside the boundaries of "new economic institutionalism."

<sup>44</sup> Charles O. Jones, *The Presidency in a Separated System* (Washington, D.C.: Brookings Institution, 2005)

simply be the ambivalent nature of the American executive power.<sup>45</sup> Without Congress, Bush's executive order reshapes social policy by redirecting public resources to faith-based social welfare groups. After an examination of Bush's use of executive orders to implement FBCI, we stand in a better position to evaluate the development of FBCI than by focusing on his inability to achieve legislative success in Congress.

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<sup>45</sup> Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: Free Press, 1989)

## **PART II: CASE STUDY**

### **Background of the Policy:**

Bush's commitment to faith-based solution in his domestic policy agenda is long standing. From his time as the governor of Texas – Bush has sought to transform the very character of social welfare policy by enabling religious groups to freely compete for government funds that would be used to solve social ills. Beginning in 1997, then Governor Bush followed his conviction that religious groups can transform lives in ways government cannot by sponsoring laws that allowed churches to provide social services their own way.<sup>46</sup> As governor of Texas, he brought a different face to the Republican Party – a “different kind of Republican” who embraced an ideology of “compassionate conservatism.” To be sure, Bush remained committed to small government conservatism and traditional family values; however, the tenor of his conservatism holds a different pitch. Bush recognized his “party ha[d] confused the need for limited government with a disdain for government itself . . . this is not an option for conservatives.”<sup>47</sup> Instead, government should be “effective and energetic.” Bush's goal is “a limited government, respected for doing a few things and doing them well.”

At the heart of compassionate conservatism is the belief that addressing the root causes of crime, education, poverty, etc, will likely fail if the primary agent of change is the federal government. But if the burden of helping the poor and disadvantaged is transferred to faith-based organizations – a form of governmental outsourcing – the nation's social ills are more likely to be alleviated. Despite the conventional wisdom that compassionate conservatism is an

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<sup>46</sup> Rosin, "George W. Bush: The Record in Texas; Putting Faith In a Social Service Role; Church-Based Providers Freed From Many Rules," The Texas policy was called "Faith in Action: A New Vision for Church-State Cooperation."

<sup>47</sup> George W. Bush, "A Culture of Achievement," 10/05/1999.

amorphous concept, this principle has definitive theoretical roots.<sup>48</sup> The intellectual seeds of Bush's compassionate conservatism stem in large part from two sources: Myron Magnet and Marvin Olasky.<sup>49</sup> While Bush was governor of Texas, Karl Rove gave him *The Dream and the Nightmare* by Magnet.<sup>50</sup> Bush's views on American welfare policy and culture were crystallized by Magnet's critique of the 1960's counterculture and its impact on America's poor.

Additionally, Bush's relationship with Marvin Olasky greatly influenced his thinking on the role of government in relation to the poor and the important role religious groups play in alleviating societal ills. His interaction with Olasky brought Bush to endorse a 19<sup>th</sup> century model of charity versus the modern welfare state.<sup>51</sup> From these influences emerged the foundational element of Bush's governing principle – a view that maintained government has a responsibility to the poor, but it should not be the primary provider of social services.

Bush firmly believes that charities and faith-based organizations enable “people as moral individuals, with responsibilities and duties, not as wards or clients or dependents or numbers.”<sup>52</sup> Bush sought to bring a softer side to the Republican Party by stressing the development of a virtuous character and personal responsibility. During the 2000 election, Bush carried this sense of idealism to the policy agenda of the Republican Party, asserting that conservatism must enact “a creed of hope.”<sup>53</sup> The operating principle of “compassionate conservatism” proclaims the personal responsibility of each individual citizen to improve civil society. Compassionate conservatism is more than a rhetorical or electoral strategy – this governing philosophy defines Bush's domestic policy agenda.

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<sup>48</sup> John J. Miller, "CAMPAIGN 2000; Bush's League; How George W. Bush Woos the Right.," *National Review*, 12/21/1998.

<sup>49</sup> Allison Mitchell, "Bush Draws Campaign Theme from More than 'The Heart'," *The New York Times*, 06/11/2000.

<sup>50</sup> Myron Magnet, *The Dream and the Nightmare: The Sixties' Legacy to the Underclass* (New York: W. Morrow, 1993)

<sup>51</sup> Marvin N. Olasky, *The Tragedy of American Compassion* (Wheaton, Ill.: Crossway Books, 1992)

<sup>52</sup> Bush, "Duty of Hope,"

<sup>53</sup> Ibid.

In the past, presidents have declared wars on poverty and promised to create a great society. But these grand gestures and honorable aims were frustrated. They have become a warning, not an example. We found that government can spend money, but it can't put hope in our hearts or a sense of purpose in our lives. This is done by churches and synagogues and mosques and charities that warm the cold of life. A quiet river of goodness and kindness that cuts through stone.<sup>54</sup>

Support for intermediate organizations is the cornerstone of Bush's compassionate conservatism.

Religious nonprofits have received federal funds for decades, but since the 1990s, the federal government has loosened restrictions on the types of religious organizations that can receive government funding. During the Clinton Administration, the national government moved to support directly religious organizations with the passage of Charitable Choice – an amendment introduced by Senator John Ashcroft (R-MO) to the 1996 Welfare Reform Act.<sup>55</sup> Under the 1996 federal welfare-reform law, Charitable Choice seeks to (1) create a level playing field between religious and secular social services in the competition for public funds, and (2) maintain the religious integrity of Faith-Based Organizations and the civil rights of the needy persons they serve. The purpose of Clinton's Charitable Choice legislation, according to John J. DiIulio, was simply to codify that "government must not discriminate against faith-based organizations in awarding funds for the administration of public programs."<sup>56</sup>

As governor of Texas, Bush ardently supported the implementation of Charitable Choice legislation. During his tenure in office, Bush aggressively implemented this policy by forcefully promoting a legislative agenda that would increase the participation of religious organizations in administering social services by removing significant barriers in the federal grant process and

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<sup>54</sup> Ibid.

<sup>55</sup> Section 104 of the Personal Responsibility and Work Opportunity Act of 1996, H.R. 3734, 104<sup>th</sup> Congress, 2<sup>nd</sup> Session, P.L. 104-193 Charitable Choice attempts to initiate direct contact with religious congregations as opposed to 501(c)3 affiliates. Examples of 501(c)3 affiliates are Catholic Charities, Lutheran Social Services, Jewish Family Services, etc.

<sup>56</sup> John J. DiIulio Jr., "Getting Faith-Based Programs Right," *The Public Interest*, 155 (2004): p. 75.

allowing religious groups to retain their religious identity.<sup>57</sup> The Bush policy took the additional step of actively bringing religious organizations into public life that went beyond Clinton's Charitable Choice program. Bush favored much of the substance of the 1996 Welfare Reform that placed limitations on assistances and established work requirements. Yet, he believed it was necessary to expand Charitable Choice, allowing faith-based organizations to compete against other non-governmental organizations to provide services to the poor. Bush stated,

For those who have left welfare and are now working but still classified as low-income, I will establish programs such as individual development accounts, increase access to health insurance and reduce marginal tax rates. My goal is to eliminate the toll booth to the middle class.<sup>58</sup>

A public policy agenda set by the principles of redistributive justice could not effectively fight poverty alone. Religious organizations were essential to fighting America's war on poverty.

Domestically, Bush came to believe that the biggest problem facing the United States as it entered into the next century was not materially based, but cultural. Bush argued throughout the 2000 campaign that a social policy established on the principles of compassionate conservatism was more than an attempt to alleviate of material disadvantages; it aimed to improve the spiritual condition of society. During the campaign, Bush made clear his desire to launch a version of his faith-based policy on the national stage. Bush effectively laid the groundwork in 2000 to forge a coherent national faith-based policy in the early days of his administration. However, Bush's failure to win the popular vote and the narrow margins he achieved in the Electoral College placed the 43<sup>rd</sup> President in the worst electoral position of any recent president.<sup>59</sup> Coupled with the close balance of power in Congress, this appeared to place the President in a weak position to achieve his policy agenda. Despite these contextual

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<sup>57</sup> Lewis D. Solomon, *In God We Trust?: Faith-Based Organizations and the Quest to Solve America's Social Ills* (Lanham, Md.: Lexington Books, 2003) pp. 27-46. Rosin, "George W. Bush: The Record in Texas; Putting Faith In a Social Service Role; Church-Based Providers Freed From Many Rules,"

<sup>58</sup> Voters' Guide, "Where They Stand - Part 1 of 2," *The Columbus Dispatch (Ohio)*, 11/05/2000.

<sup>59</sup> John P. Burke, *Becoming President: The Bush Transition, 2000-2003* (Boulder, Colo.: Lynne Rienner Publishers, 2004) pp. 130-131.

difficulties, his Administration wasted little in advancing an ambitious policy agenda. In what became known by his White House Staff as the “Big Six,” Bush pursued the major themes of the campaign within the opening days of his Administration— tax cuts: pare rates by \$ 1.6 trillion over 10 years; education reform: start national testing and school choice; strengthening the military: build missile defense system; bolstering Social Security: partial privatization; reforming Medicare: expand prescription drug coverage; and faith-based initiatives: fund social work of religious groups.<sup>60</sup>

**Implementation:**

In the early days of Bush’s Administration, the President remained mindful of his father’s failure to retain the support of religious conservatives and moved quickly to shore up his political base. Fast action to fulfill his campaign promises signaled to his political base a commitment to implementing his campaign platform.<sup>61</sup> Within a few days of his inauguration, Bush sent a number of key proposals to Capital Hill or took other related action to further his political agenda.<sup>62</sup> Bush utilized a variety of presidential resources to move his agenda forward – selectively bargaining with members of Congress while simultaneously drawing on formal powers of the presidency. On January 29, 2001, Bush’s supporters received one of the first signals they were looking for when Bush signed two executive orders shortly after his inauguration: Executive Orders 13198 and 13199. Kathryn Dunn Tenpas is correct to argue, “Rarely in American politics is campaign rhetoric buttressed by a formidable allocation of presidential resources.”<sup>63</sup>

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<sup>60</sup> Kenneth T. Walsh, "A Right-Stuff Kind of Guy," *U.S. News & World Report*, 04/09/2001.

<sup>61</sup> Dan Balz, "Bush Protects His Right Flank; President Winning Favor By Courting Conservatives," *The Washington Post*, 02/12/2001.

<sup>62</sup> Burke, *Becoming President: The Bush Transition, 2000-2003*, p. 132.

<sup>63</sup> "Can an Office Change a Country?: The White House Office of Faith-Based and Community Initiatives, A Year in Review," Kathryn Dunn Tenpas, *The Pew Forum on Religion and Public Life*, July 2002 and updated October 2002)

Bush's first move on FBCI was to make use of the formal powers vested in the Office of the President by signing Executive Orders 13198 and 13199. Executive Order 13199 established the White House Office of Faith-Based Community Initiatives (WHOFBCI).<sup>64</sup> This office was assigned "the lead responsibility in the executive branch to establish policies, priorities, and objectives, for the government's efforts to enlist, expand, equip, empower, and enable the work of faith-based and community groups." The creation of a new White House office made it a focal point of his Administration instead of adding FBCI to the Domestic Policy staff's agenda.<sup>65</sup> This organizational approach parallels Bill Clinton's decision to create the Office of National Service. The creation of a special White House office is a classic organizational principle of modern president's to "dramatize [a president's] concerns and to galvanize old interdepartmental efforts with new presidential energy."<sup>66</sup> After all, as Bradley Patterson points out, "no president is confined to the organizational charts of the past."<sup>67</sup> The placement of this office organizationally attempts to draw the attention to the American people of the Administration's activity in this area and reflects the importance of this policy to Bush. Presidential control of policy development has accompanied the evolution of the institutional presidency – John Kenneth Galbrith warned Lyndon Johnson, "Do not bury the program in the departments. Put it in the Executive offices, where people will know what you are doing, where it can have a new staff and a fresh man as director."<sup>68</sup>

Along with the establishment of a new White House office, Bush also signed Executive Order 13198 to set up five executive branch centers for this policy within the following cabinet

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<sup>64</sup> See George W. Bush, "Establishment of White House Office of Faith Based and Community Initiative," Executive Order 13199, 01/29/2001.

<sup>65</sup> George W. Bush, "Remarks by the President in Announcement of the Faith-Based Initiative," 01/29/2001.

<sup>66</sup> Patterson, *The White House Staff: Inside the West Wing and Beyond*, pp. 39-40.

<sup>67</sup> *Ibid.*, p. 263.

<sup>68</sup> John P. Burke, "The Institutional Presidency," *The Presidency and the Political System*, Michael Nelson, Ed. (Washington, D.C.: CQ Press, 2000) p. 421. See also Lyndon B. Johnson, *The Vantage Point: Perspectives of the Presidency, 1963-1969* (New York, Holt Rinehart and Winston, 1971) p. 298-323.

departments: Labor, Education, Justice, Health and Human Services, and Urban Development.<sup>69</sup>

By way of this executive order, the Bush Administration created liaison offices with five appointed Cabinet departments to coordinate the administration of this policy with the White House. Each department head was then charged with establishing a Center for FBCI within their respective departments under the supervision of the Director of WOFBCI. The creation of executive department centers was an effort to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services. Pursuant of Executive Order 13198, each executive center was charged to conduct:

A department-wide audit to identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services by the departments, including but not limited to regulations, rules, orders, procurements, and other internal policies and practices, and outreach activities that either facially discriminate against or otherwise discourage or disadvantage the participation of faith-based and other community organizations in Federal programs.<sup>70</sup>

The end goal of this executive order was to ensure cooperation between federal agencies and the delivery of social services.

The establishment of WHOFBCI enabled Bush to communicate to the public the centrality of a policy in his domestic agenda. Just as importantly, the use of executive orders to carve out new responsibilities for a White House Staff also lays the groundwork for a president to effect policy change. A new executive office enables a president to advance his policy preferences through the institutional presidency, not only the halls of Congress. A White House office staffed with supporters of faith-based and Cabinet position filled by long time supporters

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<sup>69</sup> George W. Bush, "Agency Responsibilities with Respect to Faith-Based and Community Initiative," Executive Order 13199, 01/29/2001.

<sup>70</sup> The WHOFBCI issued "UNLEVEL PLAYING FIELD: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs," – a report that summarizing the initial findings from the five cabinet Centers on barriers impeding religious and grassroots organizations that seek to serve the common good in collaboration with the Federal Government.

of this initiative, such as Attorney General John Ashcroft and Secretary of Health and Human Services Tommy Thompson, increases the likelihood that his policy preferences will win out. Political appointees are more likely to remain sensitive to a president's agenda than members of Congress who are oftentimes more concerned with winning their next election. However, WHOFCBI seemed to hit the ground stumbling more than running. Classic organizational shortcomings, such as shifting priorities, lack of autonomy for the director, the absence of internal White House coordination, and inflated expectations for the policy hindered the Office's agenda.<sup>71</sup> Nevertheless, Bush's use of executive orders to launch his domestic policy agenda shows the importance of a president's lawmaking power. This ability enabled Bush to direct FBCI through the executive branch.

In addition to the use of executive orders to implement FBCI through the institutional presidency, the Administration also pursued legislative implementation of FBCI in Congress. On March 29, 2001, Chairman of the GOP Conference J.C. Watts (R-OK) introduced HR. 7, the Community Solutions Act of 2001, on the floor of the House.<sup>72</sup> The House bill, drafted by Watts and Representative Tony P. Hall (D-OH), set out to expand the scope of Charitable Choice by earmarking federal funds for nine new categories of faith-based social services and creating tax incentives for private charitable donation.<sup>73</sup> From the outset, this legislation was burdened with institutional challenges hindering the successful congressional action.

A clear difficulty facing legislative action was building a stable coalition, which proved difficult for supporters of FCBI. It is important to highlight that a policy like FBCI raised red

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<sup>71</sup> "Can an Office Change a Country?: The White House Office of Faith-Based and Community Initiatives, A Year in Review," Tenpas, pp. 6-9.

<sup>72</sup> 147 Congressional Record E 489, THE COMMUNITY SOLUTIONS ACT -- HON. J.C. WATTS, JR. (Extensions of Remarks - March 29, 2001). The bill was referred to the House Ways and Means Committee and the House Judiciary Committee on the same day.

<sup>73</sup> *Congressional Quarterly* 2000, 17-3.

flags for both Congressional Democrats and Republicans. For instance, the original language of H.R. 7 generated constitutional concerns for House Judiciary Chairman James Sensenbrenner. One of the central questions was if taxpayer funding of faith-based social programs amounted to public financing of religion. Another controversial issue involved employment, since the original bill allowed faith-based groups that received federal funding to “require that that employees adhere to the religious practices of the organization.” The implication of this provision was that that religious groups could practice religious discrimination in hiring, while discrimination based on age, sex, race, national origin, etc. was unlawful for all groups.

Concerns among House Republicans were quelled in part by phone calls from high-ranking White House officials like the Vice-President and Attorney General John Ashcroft. Sensenbrenner voiced his concern to Vice-President Cheney, “I told him there were legal problems involved and I didn’t think the Administration had done its homework in broadening its base so that it had broad bipartisan support.”<sup>74</sup> The ability of religious groups to control “the definition, development, practice, and expression” of their religious beliefs led moderate Republicans and most Democrats to oppose this legislation.<sup>75</sup> To accommodate these concerns, the House bill was altered. The new provision required religious groups to separate religious activities from government-funded social programs. But the language of the final House bill still exempted religious charities from state and local employment laws that prohibit discrimination. This initial difficulty illustrates the problems swirling around FBCI.

As if the legislative battle were not already enough, the Administration found itself in a public relations nightmare after *The Washington Post* published an internal White House memo from the Salvation Army. According to the memo, the White House had made a “firm

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<sup>74</sup> Craig Gilbert, "'Faith-Based' Initiative to Face First Political Test," *Milwaukee Journal Sentinel*, 07/17/2001.

<sup>75</sup> HR. 7, the Community Solutions Act of 2001

commitment” to issue a regulation protecting religious charities from state and city efforts to prevent discrimination against gays in hiring and providing benefits. To gain this assurance, “the charity proposed spending nearly \$1 million on lobbyists and strategists, and those it retained included a key player in the Bush presidential campaign and one of the campaign’s top fundraisers.”<sup>76</sup> This development postponed the initial vote in the House for several days; but, on July 19, 2001, the House passed H.R. 7 by a 233 to 198 vote that ran mostly along party lines as moderate Republicans and Democratic representatives forcefully lineup in opposition to this legislation. The legislative fight over H.R. 7 came at a cost for the Administration as valuable resources were diverted to put out the political firestorm ignited by this memo.<sup>77</sup>

In the end, the Administration’s lack of political capital following the Salvation Army debacle and the uncertain constitutionality of H.R. 7 was enough to give the Democratic controlled Senate pause – leaving the President’s FBCI in legislative limbo. The Administration did, however, receive a consolation prize of sorts by way of a \$30 million addition to a larger spending bill know as “Compassionate Capital Funds.” Although FBCI stalled in the Senate, Bush would ultimately remain unhampered by Congress’s will. Two years into Bush’s first term, it would appear that the President’s compassionate conservative agenda was left flapping in the wind, as the most important element of his legislative agenda – the Faith-Based and Community Initiative – appeared doomed to rest in Congress’s legislative graveyard. Despite the legislative difficulties FBCI faced, the President remained determined to ensure the execution of this policy.

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<sup>76</sup> Mike Allen and Dana Milbank, "Rove Heard Charity Plea On Gay Bias; White House Denied Senior Aides Had Role," *The Washington Post*, 07/12/2001.

<sup>77</sup> "Can an Office Change a Country?: The White House Office of Faith-Based and Community Initiatives, A Year in Review," *Tenpas*, p. 12.

Acknowledging it was unlikely that Congress would move on FBCI, the President, following President Bill Clinton's strategy after the Republican take over of Congress in 1995, again made use of executive lawmaking power to pursue a new agenda that did not depend on Congress.<sup>78</sup> On December 12, 2002, at the WHO/FBCI regional conference in Philadelphia, Bush announced two new executive orders. Speaking to religious leaders attending the conference, Bush asserted,

As President, I have an authority I intend to use. Many acts of discrimination against faith-based groups are committed by Executive Branch agencies. And, as the leader of the Executive Branch, I'm going to make some changes.<sup>79</sup>

Executive Order 13280 extended the scope of executive branch reform by adding two additional cabinet centers at the Department of Agriculture and the United States Agency of International Development.<sup>80</sup> Executive Order 13279 removed all existing barriers that had prohibited religious organizations from working in conjunction with government social service programs.<sup>81</sup> Through Executive Order 13279, the Bush Administration ensured that religious groups receive equal consideration for federal funds while also attempting to facilitate greater corporate and philanthropic support for faith-based and community organizations. With the full force of law without the help of Congress, Bush has still been able to require that FBCOs receive equal protection.

The legislative failure of H.R. 7 aside, the establishment of seven cabinet centers within the executive branch has been a successful means to promote and assist with the implementation of FBCI. While FBCI failed to move forward in Congress, the executive centers for FBCI

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<sup>78</sup> Mike Allen, "'Faith-Based' Initiative to Get Push; Bush to Implement Parts of Proposal," *The Washington Post*, 08/31/2002.

<sup>79</sup> George W. Bush, "President Bush Implements Key Elements of his Faith-Based Initiative," 12/12/2002.

<sup>80</sup> George W. Bush, "Responsibilities of the Department of Agriculture and the Agency for International Development with Respect to Faith-Based and Community Initiatives," Executive Order 13280, 12/12/2002.

<sup>81</sup> George W. Bush, "Equal Protection of the Laws for Faith-Based and Community Organizations," Executive Order 13279, 12/12/2002.

actively attempted “to remove all existing barriers to the participation of faith-based and other community organizations.” The audit of federal programs undertaken by the centers for FBCI by the WHOFBCI was released on August 16, 2001. The report outlined the barriers to participation by FBCI in federal social service programs. The report revealed “a federal system inhospitable to faith-based and community organizations.”<sup>82</sup> Bush’s use of the institutional presidency to implement FBCI helped to reveal the failure of administrative agencies to follow congressional guidelines despite the enactment of The Government Performance and Results Act (GPRA) of 1993.<sup>83</sup> The report concluded:

The Federal Grants process, despite a few exceptions and a growing sensitivity to and openness toward both faith-based and community groups, does more to discourage than to welcome the participation of faith-based and community organizations. That is the overwhelming message trumpeted in the reports of the Centers for Faith-Based & Community Initiatives at HUD, HHS, Justice, Education, and Labor. Too much is done that discourages or actually excludes good organizations that simply appear "too religious"; too little is done to include groups that meet local needs with vigor and creativity but are not as large, established, or bureaucratic as the traditional partners of the Federal government. This is not the best way for government to fulfill its responsibilities to come to the aid of needy families, individuals, and communities.<sup>84</sup>

The report showed clearly that officials throughout federal agencies believed collaboration with FBCOs was legally suspect, despite prior legislative action that attempted to eliminate such legal barriers.

Through the efforts of WHOFBCI, the Administration made transparent the barriers to participation for FBCOs and later provided a framework in Executive Order 13279 for executive branch action to overcome these obstacles. Executive Orders 13279 and 13280 further outlined

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<sup>82</sup> See Appendix B for a list of the 15 barriers identified by the Administration’s report.

<sup>83</sup> The law requires agencies to write strategic plans and set annual performance goals, so that over time the agencies will be able to show taxpayers which programs produce the best results for the money spent. The legislation was sponsored by Republicans and embraced by top Democrats in the Clinton Administration.

<sup>84</sup> "Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs," White House Office of Faith Based and Community Initiative, (Washington, D.C.: 08/16/2001)

the substantive responsibilities of the Administration's seven executive centers for FBCI. The core elements of FBCI are as follows:

1. Government is to supply a "level playing field" in federal grant programs for social welfare services. That equal competition exists between religious and non-religious groups for the same government grants.
2. Religious groups who do participate in federal grant programs are able to do so "without impairing their independence, autonomy, expression, religious character."
3. Any organization that partakes in a federally funded grant program is prohibited from discriminating against "current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice."
4. Religious groups have the ability to prefer members from their congregations or denominations for employment when permissible under the law. (E.O. 13279 exempts FBCOs from a previous executive order that prohibited religious discrimination by any entity with whom the federal government procures funds.)
5. Organizations that provide direct federal funding for social welfare services are prohibited from using government funds for "inherently religious activities."
6. However, organizations that receive indirect funds are not required to segregate the financed service from "inherently religious activities."<sup>85</sup>

The regulatory changes finalized by the now ten executive agency centers with the assistance of WHOFBCI have been the primary vehicles for establishing Bush's FBCI policy preferences.<sup>86</sup>

Currently eight of the Administration's executive centers have finalized 15 regulations implementing the main components of FBCI outlined in Bush's executive orders.

Out of the media's spotlight, the administrative agencies have worked to transform the relationship between religion and government at the federal level. Each executive center for FBCI has overhauled internal operating procedures to remove the barriers for participation by FBCOs identified by the WHOFBCI. The executive centers have focused their energies on reaching out to FBCOs to encourage groups to apply for federal grants, while aiding FBCOs in

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<sup>85</sup> See Executive Order 13279, "The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative," Richard P. Nathan and David J. Wright Anne Farris, (Albany, NY: The Roundtable on Religion and Social Welfare Policy; A Project of the Rockefeller Institute of Government - Supported by the Pew Charitable Trusts, August 2004)

<sup>86</sup> Executive Order 13342 – created three Executive Department Centers for FBCI in Departments of Commerce, Veterans Affairs and the Small Business Administration.

the application process. The use of executive orders by President Bush is a clear attempt to implement administratively as many of his policy preferences as possible. To be sure, this governing strategy may limit aspects of the program, but it remains true that FBCI is an active attempt to use the federal government to provide social services to those Americans in need. Although Paul Light demonstrates that Bush has the smallest domestic policy agenda in recent history, it is clear that the President has undertaken an alternative method for administering social welfare policy change.<sup>87</sup>

The use of executive orders and administrative restructuring has gone unnoticed by many scholars and members of the media reporting on this subject. As Katheryn Dunn-Tempas has noted, “Oddly enough the disproportionate attention focused on H.R. 7 overlooked what may be the most important success of OFBCI – the five cabinet-based centers that promoted and assist with implementation.”<sup>88</sup> To a degree, it is unclear if FBCI has been successful. In the short run, however, it appears the Administration has made some progress ensuring that faith-based entrepreneurs received 10.3% (\$2,004,491,549) of the available grants available in 2004. Across the board – each executive center for FBCI increased the amount of grants awarded to new FBCOs between 2003 and 2004.<sup>89</sup> The total amount of funds available to faith-based groups is relatively small, but the political symbolism outweighs the total cost of the policy. By way of executive power and regulatory changes, the Bush Administration has fundamentally changed how the federal government distributes social service grants by increasing the access of faith-based groups. Bobby Polito, Director of the Center for FBCI in HHS assesses implementation of

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<sup>87</sup> "Fact Sheet on the President's Domestic Policy Agenda," Paul Light, (Washington, D.C.: The Brookings Institution, October 12, 2004)

<sup>88</sup> "Can an Office Change a Country?: The White House Office of Faith-Based and Community Initiatives, A Year in Review," Tempas, p. 14.

<sup>89</sup> See Appendix C for a report of federal funds allocated to FBCOs in FY 2004 and comparisons to FY 2003.

FBCI as follows, “It would be great to have legislation, but there’s a ton of stuff I can do without it.”<sup>90</sup>

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<sup>90</sup> "The Expanding Administrative Presidency: George W. Bush and the Faith-Based Initiative," Anne Farris,

### PART III: CONCLUSION

To establish FBCI Bush has followed a two-pronged lawmaking approach. The initial analysis of this policy indicates clearly that the Administration's use of executive power has facilitated the implementation of FBCI more effectively than Congressional avenues. FBCI flows through the executive branch, establishing the President as the chief lawmaker for this policy. At a Pew Forum on Religion and Public Life, Stanley Carlson-Thies, Fellow at the Center for Public Justice and former White House Associate Director for Cabinet Affairs, states that the institution of FBCI "are not so much question of grand legislative strategies as of government reform, of reinventing the way the federal government works across the sweep of its social service programs and reaching into how state and local governments use federal funds to provide services."<sup>91</sup> Bush's activist approach to governance has been successful, even if the scope of the policy has been limited. Yet it remains important to ask if executive orders should act as the primary mechanism for implementing this policy.

Bush's use of legal executive authority brings to light important questions concerning presidential power within a separation of powers system. In particular, Bush has drawn upon his executive power to circumvent the lawmaking authority and will of Congress by way of two executive orders, 13279 and 13280. Both executive orders implement policies Congress was unwilling to pass as legislation out of concern that these policies may violate the First Amendment and civil rights laws. Therefore, the constitutionality of Executive Orders 13279 and 13280 remains in question given the Supreme Court's ruling in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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<sup>91</sup> "The Faith-Based Initiative Two Years Later: Examining its Potential, Progress and Problems," Barry Lynn Stanley Carlson-Thies, Anne Farris, Fredrica D. Kramer, R. Drew Smith, Kathryn Dunn Tenpas, and E.J. Dionne, Jr., The Pew Forum on Religion & Public Life: Washington, D.C., 03/05/2003.

Under Article I, Section 1, legislative responsibility is held by Congress, “all legislative power . . . shall be vested in a Congress of the United States.” Congress however may delegate this authority to federal agencies, and sometimes directly to the president, in order to implement statutes by regulatory policy. Given the reasoning of *Youngstown*, it is the role of the executive to execute the law, not make law. Since Article II, Section 1, Clause 3, states “the executive power shall be vested in a President of the United States of America” and it is the role of the president to ensure the laws be “faithfully executed,” the Court refuted “the idea that [the president] is to be a lawmaker.” Although the ability of a president to engage in executive lawmaking is limited to the “recommending of laws he thinks wise and the vetoing of laws he thinks bad,” it is unclear if a president’s use of executive orders to reorganize the Executive Offices of Presidency falls under the jurisdiction of *Youngstown*. Under *Youngstown*, the Court held that the president’s lawmaking power must “stem directly from an act of Congress or the Constitution itself” to assure the separation of powers requirement in the Constitution.

The use of executive power to implement aspects of a president’s domestic policy agenda is not necessarily unconstitutional – in fact, an energetic executive is a necessary component of good government. Within a separated system of government, it is desirable for a chief executive to possess the flexibility to act unilaterally. The Constitution, out of necessity, both weakens and strengthens the power of the President.<sup>92</sup> By way of executive power, FBCI has become a legal reality, helping to change how social welfare policy is implemented. But, an executive order implementing a new law that acts in opposition to previous Congressional action, such as Executive Order 13280, seems to be a clearer encroachment of the separation of powers. Bush’s use of executive orders to establish the Faith-Based and Community Initiative (FBCI) begs the

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<sup>92</sup> Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power*,

question: has Bush taken Alexander Hamilton's notion of an energetic executive too far and become "too energetic"?<sup>93</sup>

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<sup>93</sup> *Federalist 70*

## Appendix A: Executive and Legislative Lawmaking Chart

	Executive Branch	Legislative Branch
2001	<p>(1) <b>Executive Order 13199</b> – created the White House Office of Faith-Based and Community Initiatives on January 29, 2001</p> <p>(2) <b>Executive Order 13198</b> – created five Executive Department Centers<sup>94</sup> for FBCI on January 29, 2001 in Departments of Justice, Education, Labor, Health and Human Services, Housing and Urban Development.</p> <p>(3) <b>Release of “Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs,”</b> by White House Office of Faith Based and Community Initiative, August 16, 2001.</p> <ul style="list-style-type: none"> <li>The goal of this audit was to identify all existing barriers to the participation of faith-based and other community organizations in the delivery of social services by executive departments pursuant of E.O. 13198.</li> </ul>	<p>(1) <b>HR. 7 – Community Solutions Act of 2001</b></p> <ul style="list-style-type: none"> <li>Bill provided for incentives for charitable contributions by individuals and businesses, to improve the effectiveness and efficiency of government program delivery to individuals and families in need, and to enhance the ability of low-income Americans to gain financial security by building assets.</li> <li>expansion of Charitable Choice failed</li> <li>The forward movement of this legislation was stifled by Vermont Senator Jim Jeffers switch from (R) to (I), which shifted the Senate to Democratic control. The partisan debate in the House also doomed the expansion of charitable choice.</li> <li>September 11, 2001 took the president and congress’s attention away from FBCI to focus on war and terrorism.</li> </ul> <p>(2) <b>Compassionate Capital Funds</b></p> <ul style="list-style-type: none"> <li>\$ 30 Million for funds attached to a larger spending bill.</li> <li>Funds were allocated in small grants by the end of fiscal year 2002.</li> </ul>
2002	<p>(1) <b>Executive Order 13280</b> – created two Executive Department Centers for FBCI on December 12, 2002 in Department of Agriculture and U.S. Agency for International Development.</p> <p>(2) <b>Executive Order 13279</b> – requires equal protection for FBCOs as of December 12, 2002</p> <p>(4) <b>Regulatory Policy - DOJ Office of Legal Counsel’s Opinion</b></p> <ul style="list-style-type: none"> <li><u>Federal Emergency Management Agency (FEMA)</u> In September 2002, the Department of Justice’s Office of Legal Counsel issued an opinion stating that the Stafford Disaster Relief and Emergency Assistance Act of 1974 and its implementing regulations permit FEMA to provide Federal disaster</li> </ul>	<p>(1) <b>Charity Aid, Recovery, and Empowerment (CARE) Act of 2002</b></p> <ul style="list-style-type: none"> <li>large tax provisions and capital care funds, but not an expansion of Charitable Choice.</li> <li>CARE also included religious non discrimination language – clarified which faith-based groups could apply for aid.</li> <li>Advance past the Senate Finance Committee in June of 2002, and awaited floor action in fall of 2002.</li> <li>Committed opposition on the part of several Senators and special interest groups caused the bill to stall.</li> <li>The Bill finally died during the Senates lame duck period following the 2002 election.</li> </ul>

<sup>94</sup> The purpose of the executive department centers is to coordinate department efforts to eliminate regulatory, contracting, and other programmatic obstacles to the participation of faith-based and other community organizations in the provision of social services.

	<p>assistance for the reconstruction of Seattle Hebrew Academy, and that the Establishment Clause does not pose a barrier to the Academy's receipt of such aid. The Academy is a private religious school that was damaged in the Nisqually Earthquake in February 2001. As a result of FEMA's change, faith-based organizations that previously had been excluded from FEMA funding may receive disaster relief funds if they meet other program eligibility criteria.</p>	
2003	<p>(1) <b>Regulatory Policy</b></p> <ul style="list-style-type: none"> <li>• <u>DOL Workforce Investment Act (WIA) Final Rule (September 30, 2003)</u> <i>Summary:</i> This final revision to DOL interim final rules allows participants to use their individual training accounts (ITAs), or similar training accounts under programs established by States or Local Workforce Investment Areas (LWIAs), for religious training, as long as the training account programs afford participants genuine and independent choice between religious and non-religious training options, and the religious organizations serving as eligible training providers otherwise satisfy the requirements of the program.</li> <li>• <u>HHS Temporary Assistance to Needy Families (TANF) Final Rule (October 30, 2003)</u> <i>Summary:</i> This final rule implements the TANF Charitable Choice provisions enacted by Congress in 1996. It clarifies the protections for beneficiaries of services, the rights and obligations of religious organizations that provide TANF-funded services, and the requirements and limitations of state and local governments.</li> <li>• <u>HHS Substance Abuse and Mental Health Services Administration (SAMHSA) Final Rule (October 30, 2003)</u> <i>Summary:</i> This final rule implements the TANF Charitable Choice provisions enacted by Congress in 1996. It clarifies the protections for beneficiaries of services, the rights and obligations of religious organizations that provide TANF-funded services, and the requirements and limitations of state and local governments.</li> </ul>	<p>(1) <b>CARE Act of 2003</b></p> <ul style="list-style-type: none"> <li>• The purpose of the bill was to provide incentives for charitable contributions by individuals and businesses, to improve the public disclosure of activities of exempt organizations, and to enhance the ability of low-income Americans to gain financial security by building assets, and for other purposes.</li> <li>• The bill amends the Internal Revenue Code with respect to charitable giving, charitable organizations, and social services to, among other things.</li> </ul>

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|  | <ul style="list-style-type: none"> <li>• <u>HHS Substance Abuse and Mental Health Services Administration (SAMHSA) Final Rule (October 30, 2003)</u><br/> <i>Summary:</i> This final rule implements the Charitable Choice statutory provisions of the Public Health Service Act, applicable to the Substance Abuse Prevention and Treatment (SAPT) Block Grant program, the Projects for Assistance in Transition from Homelessness (PATH) formula grant program, insofar as recipients provide substance abuse services, and to SAMHSA discretionary grants for substance abuse treatment or prevention services provided with direct Federal funds. It ensures that religious organizations are able to compete on an equal footing for Federal substance abuse funding administered by SAMHSA, without impairing the religious character of such organizations and without diminishing the religious freedom of SAMHSA beneficiaries.</li> <li>• <u>HHS Community Services Block Grant (CSBG) Final Rule (October 30, 2003)</u><br/> <i>Summary:</i> This final rule implements CSBG Charitable Choice provisions enacted by Congress in 1998. It ensures that religious organizations are able to compete on an equal footing for funds without impairing the religious character of such organizations and without diminishing the religious freedom of the CSBG Act recipients.</li> <li>• <u>DOL Office of Federal Contract Compliance Programs Final Rule (October 30, 2003)</u><br/> <i>Summary:</i> This rule amended regulations implementing Executive Order 11246, as amended, to incorporate the exemption for religious entities prescribed by Executive Order 13279. Executive Order 11246, as amended, prohibits Government contractors and subcontractors, and Federally-assisted construction contractors and subcontractors from discriminating in employment, and requires these contractors to take affirmative action to ensure that employees and applicants are treated without regard to race, color, religion, sex, or national origin. In Executive Order 13279, President Bush amended Executive Order 11246, as amended, to exempt religious corporations, associations, educational institutions and societies from certain</li> </ul> |  |
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	<p>nondiscrimination requirements, making the Executive Order consistent with Title VII of the Civil Rights Act of 1964 in allowing such organizations to make employment decisions on a religious basis.</p> <p>(2) <b>Regulatory Policy - DOJ Office of Legal Counsel's Opinion</b></p> <ul style="list-style-type: none"> <li>• <u>Save America's Treasure's Historic Preservation Fund</u> On May 27, 2003, Interior Secretary Gale A. Norton announced that the Old North Church of Boston – known for its part in Paul Revere's ride the night of April 18, 1775 – received a \$317,000 grant under the nation's Save America's Treasures Historic Preservation Fund Grants Program. This announcement that "active" historic houses of worship will be eligible for SAT funding is an important first step toward preserving some of our foremost sacred places, and it brings Federal policy into line with the intent of Congress, which amended its historic preservation law many years ago to authorize the award of grants to preserve historic churches and other historically significant religious properties. Given the wide range of institutions that receive assistance under the program – recent grants have rehabilitated everything from Revolutionary War barracks to slave quarters and art museums – the Department of Justice has concluded that the new policy is constitutional.</li> </ul>	
2004	<p>(1) <b>Executive Order 13342</b> – created three Executive Department Centers for FBCI in Departments of Commerce, Veterans Affairs and the Small Business Administration</p> <p>(2) <b>Regulatory Policy</b></p> <ul style="list-style-type: none"> <li>• <u>Department of Justice (DOJ) Final Rule (February 20, 2004)</u> <i>Summary:</i> This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for the Department's funding. It revises DOJ regulations to remove barriers to the participation of faith-based organizations in DOJ programs and to ensure that these programs are implemented in a manner consistent with the requirements of the Constitution,</li> </ul>	

	<p>including the Religion Clauses of the First Amendment.</p> <ul style="list-style-type: none"> <li>• <u>Department of Health &amp; Human Services (HHS) Final Rule (March 9, 2004)</u>  <i>Summary:</i> This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for HHS funding without impairing the religious character of such organizations. It revises HHS regulations to remove barriers to the participation of faith-based organizations in HHS programs and to ensure that these programs are implemented in a manner consistent with applicable statutes and the requirements of the Constitution, including the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment.</li> <li>• <u>Department of Housing and Urban Development (HUD) Final Rule (March 2004)</u>  <i>Summary:</i> This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for federal funding. Consistent with Executive Order 13279, entitled "Equal Protection of the Laws for Faith-Based and Community Organizations," this final rule describes HUD's policy for the participation of faith-based organizations in HUD programs and activities.</li> <li>• <u>Department of Labor (DOL) Final Rule (March 2004)</u>  <i>Summary:</i> This final rule revises DOL's general regulations. It clarifies, within the framework of constitutional guidelines, that faith-based and community organizations are able to participate in DOL social service programs without regard to their religious character or affiliation, and are able to apply for and compete on an equal footing with other eligible organizations to receive DOL support.</li> <li>• <u>Department of Ed – Final Rule (June 4, 2004)</u>  <i>Summary:</i> This final general rule clarifies that faith-based organizations are eligible to participate in ED programs on the same basis as any other private organization, with respect to programs for which such other</li> </ul>	
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	<p>organizations are eligible.</p> <ul style="list-style-type: none"> <li>• <u>HUD ICDBG and Indian HOME Final Rule (June 21, 2004)</u>  <i>Summary:</i> This rule removes barriers to the participation of religious (also referred to as "faith-based") organizations in HUD regulations implementing the Indian HOME Program and the Indian Community Development Block Grant Program (ICDBG). These changes are consistent with revisions of program regulations that have been undertaken on a department wide basis.</li> <li>• <u>Department of Veterans Affairs (VA) Homeless Providers Grant and Per Diem Program Final Rule (July 8, 2004)</u>  <i>Summary:</i> This regulation revises provisions that apply to religious organizations that receive VA funds under VA's Homeless Providers Grant and Per Diem Program to ensure that VA activities under this program are open to all qualified organizations, regardless of their religious character, to clearly establish the proper uses to which funds may be put, and the conditions for the receipt of such funding. Consistent with Title VII of the Civil Rights Act of 1964, the rule removes the regulatory prohibition against religious organizations making employment decisions on a religious basis.</li> <li>• <u>Department of Agriculture (USDA) Final Rule (August 9, 2004)</u>  <i>Summary:</i> This final rule implements executive branch policy that, within the framework of constitutional church-state guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for USDA assistance. It augments USDA regulations to bring them into compliance with this policy and ensure that USDA assistance programs are implemented in a manner consistent with the requirements of the Constitution, including the Religion Clauses of the First Amendment.</li> <li>• <u>U.S. Agency for International Development (USAID) Final Rule (October 19, 2004)</u>  <i>Summary:</i> This rule implements executive branch policy that, within the framework of constitutional guidelines, faith-based organizations should be able to compete on an equal footing with other organizations for USAID</li> </ul>	
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	<p>funding. This rule revises USAID regulations pertaining to the award of grants, cooperative agreements and contracts awarded for the purpose of administering grant programs to ensure their compliance with this policy and to clarify that faith-based organizations are eligible to participate in programs on the same basis as any other organization.</p>	
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**Appendix B: Barriers to Participation identified by the Administration's August 16, 2001 report, Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs<sup>95</sup>**

The Administration report identified 15 barriers that FBCOs may encounter. Following this report the FBCI executive centers were charged with dismantling these barriers.

1. A pervasive perception and bias by federal officials that collaboration with religious organizations was legally suspect.
2. Explicit bans against the receipt of federal funds by FBCOs. Program handbooks emphasized prohibited activities and eligibility rather than including affirmative language to encourage the participation of FBCOs.
3. Restrictions on religious activities had a chilling effect on the relationship between FBCOs and the government.
4. The expansion of application restriction to new program stifled FBCOs from receiving federal grants.
5. Denial of the ability of religious groups to use federal funds to employ staff based on religious affiliation.
6. The executive branch failed to put in motion the existing Charitable Choice provision of the 1996 Welfare Reform Act.

The next set of barriers were found to be particularly burdensome to smaller FBCOs that often lacked experience in applying for federal grants or working with government agencies.

7. Limited accessibility of government grant information to FBCOs. Previously this information only existed in the Federal Register and on department websites.
8. Excessive regulations and requirements complicated the application process.
9. Extensive financial and administrative requirement for organizations competing for federal grants.
10. Overly complicated grant applications and agreements.
11. An institutional bias favoring previous grantees.
12. A requirement that organizations apply for grants in collaboration with likely competitors.
13. A requirement that grantees have 501(c)(3) nonprofit status. By statute, many, not all, federal discretionary and formula grant programs require applicants to have nonprofit status. However, federal officials imposed this requirement unilaterally, even when statutory authority was absent.
14. Inadequate attention was paid to FBCOs, despite the government-wide effort ordered by Congress to simplify and streamline the grant application process.
15. Federal departments are discouraged from showing favoritism toward FBCOs because of the constitutional problems this practice raises.

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<sup>95</sup> "Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs."

**Appendix C: Grants to Faith Based Organizations**  
**Based on a Review of 151 Competitive Programs and 17 Programs Areas at 7 Federal Agencies<sup>96</sup>**

	<u>FY 03</u>			<u>FY 04</u>		
	Available Funding	Amount to FBOs	Percentage to FBOs	Available Funding	Amount to FBOs	Percentage to FBOs
HHS	\$10,874,318,385	\$567,875,824	5.2%	\$10,183,609,134	\$680,821,864	6.7%
HUD	\$2,197,738,326	\$532,073,257	24.2%	\$2,338,904,225	\$544,834,982	23.3%
DOJ	\$791,700,000	\$51,592,369	6.5%	\$756,239,680	\$59,275,674	7.8%
DOL	\$512,362,317	\$11,342,124	2.2%	\$180,460,540	\$34,362,075	19.0%
ED	\$134,699,000	\$6,817,999	5.1%	\$214,394,689	\$14,629,888	6.8%
<b>Sub Total</b>	<b>\$14,510,818,028</b>	<b>\$1,169,701,573</b>	<b>8.1%</b>	<b>\$13,673,608,268</b>	<b>\$1,333,924,483</b>	<b>9.8%</b>
USAID*				\$3,686,179,114	\$521,872,579	14.2%
USDA*				\$2,096,926,286	\$118,694,187	7.1%
<b>GRAND TOTAL</b>				<b>\$19,456,713,768</b>	<b>\$2,004,491,549</b>	<b>10.3%</b>

Note: FY03 data based on a review of 140 competitive programs at HHS (75), HUD (12), ED (3), DOJ (22), and DOL (28).  
FY04 data based on a review of 151 competitive programs at HHS (73), HUD (11), ED (7), DOJ (17), DOL (24), USDA (19), and (17) program areas at USAID.  
\* Did not report data in FY03.

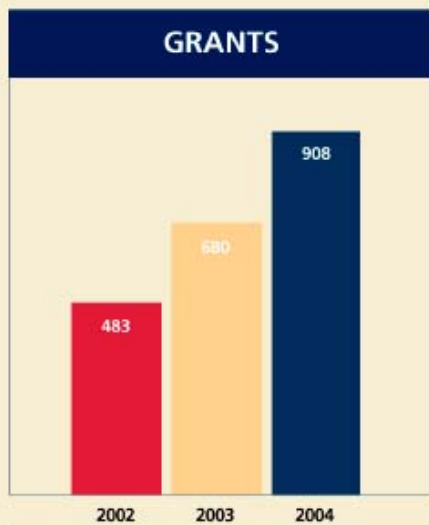
<sup>96</sup> These results do not reflect the full extent of Federal funding awarded to faith-based organizations. For further information, please review the notes included with the results, "Grants to Faith-Based Organization for FY 2004," (Washington, D.C.: White House Offices of Faith-Based and Community Initiatives, 03/01/2004)

**Number of Grants to Faith-Based Organizations Increases by 20%**  
**Grants and Funding to FBOs – Comparison of FY03 to FY04**

	<u>GRANTS</u>				<u>FUNDING</u>			
	FY03	FY04	# Change	% Change	FY03	FY04	# Change	% Change
<b>HHS</b>	680	908	228	34%	\$567,875,824	\$680,821,864	\$112,946,040	20%
<b>HUD</b>	765	835	70	9%	\$532,073,257	\$544,834,982	\$12,761,725	2%
<b>DOJ</b>	125	120	-5	-4%	\$51,592,369	\$59,275,674	\$7,683,305	15%
<b>DOL</b>	26	43	17	65%	\$11,342,124	\$34,362,075	\$23,019,951	203%
<b>ED</b>	38	62	24	63%	\$6,817,999	\$14,629,888	\$7,811,889	115%
<b>TOTALS</b>	1634	1968	334	20%	\$1,169,701,573	\$1,333,924,483	\$164,222,910	14%

*Note: FY03 data based on a review of 140 competitive programs at HHS (75), HUD (12), ED (3), DOJ (22), and DOL (28).  
FY04 data based on a review of 132 competitive programs at HHS (73), HUD (11), ED (7), DOJ (17), and DOL (24).*

### Number of Grants and Funding to Faith-Based Organizations at HHS Increases Grants and Funding to FBOs – Comparison of FY02 to FY04



88% increase ('02-'04)



43% increase ('02-'04)

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