

by *Bill Berkowitz*

Supreme Court limits citizens' ability to question state/religion connections, gives victory to president's religious patronage program

On Monday, June 25, the United States Supreme Court ruled that taxpayers have no right to challenge discretionary spending by the executive branch. The 5-4 ruling in the case of [Jay] Hein [Deputy Assistant to the President and the Director of the White House Office of Faith-Based and Community Initiatives] v. Freedom From Religion Foundation "revolved around a 1968 Supreme Court ruling that enabled taxpayers to challenge government programs that promote religion," the Associated Press reported. "That earlier decision involved the Elementary and Secondary Education Act, which financed teaching and instructional materials in religious schools in low-income areas."

In this case, the Freedom From Religion Foundation (FFRF - website) "objected to government conferences in which administration officials encourage religious charities to apply for federal money," the Associated Press pointed out. According to the website of the White House Office, in 2006, its Centers for Faith-Based and Community Initiatives "hosted 110 workshops, providing grant writing training to over 9,500 new and potential federal grantees. Since 2002, our Centers have hosted over 350 workshops across the country, training over 30,000 people."

Defenders of the first amendment and advocates of church/state separation condemned the decision, while President Bush and a host of conservative evangelical Christian leaders were clearly pleased.

The decision will no doubt encourage the administration to keep pouring money into its faith-based initiative. And while it dealt a blow to the initiative's critics, it will not prevent advocacy organizations from continuing to challenge the faith-based initiative in the courts; a news release by Americans United for Separation of Church and State (Americans United), pointed out that the decision would not "affect most legal challenges to the 'faith-based' initiative."

"The decision is a slap in the face to those of us who are trying to safeguard freedom of conscience and the separation of church and state," Annie Laurie Gaylor, Freedom From Religion Foundation co-president and a plaintiff in the lawsuit, told Media Transparency in an e-mail exchange. "Its one thing to disagree with FFRF on the merits of our lawsuit, but it's quite another to bar the courtroom door. What is the Supreme Court majority afraid of in letting us argue our case?"

Gaylor pointed out that "from a practical standpoint, the precedent of *Flast v. Cohen* was reaffirmed, and federal taxpayer lawsuits against specific acts of Congress that might violate state/church separation should proceed. Of course, we anticipate that it [the current decision] will give aid and sustenance to theocrats who want to shield the government from challenge when they unite church and state."

"Had Justice O'Connor remained on the court, as she was when we filed this lawsuit, we are confident this would have been a 5-4 decision in our favor. Kennedy has become a swing vote to overturn well-established precedent," Gaylor said in a previously released statement.

"This means we have a constitutional separation between church and state, but no way to enforce it if the executive branch chooses to violate it with 'discretionary' actions," added Dan Barker, a plaintiff and Foundation co-president.

"This is a disappointing decision that blocks the courthouse door for Americans with legitimate church-state grievances," said the Rev. Barry W. Lynn, executive director of Americans United. "Taxpayers should be allowed to challenge public funding of religion, whether the money is allocated by Congress or the White House."

"However," Lynn continued, "it is important to note that this ruling applies to only a few situations. Most church-state lawsuits, including those that challenge congressional appropriations for faith-based programs, will not be affected."

"It's a bad day for the First Amendment. The Supreme Court just put a big dent in the wall of separation between church and state, and a big smile on Pat Robertson's face. Robertson's American Center for Law and Justice and allied Religious Right groups have long called on the Court to restrict the right of Americans to challenge government expenditures that unlawfully mix church and state. That is exactly what the Court did today," People For the American Way Foundation (PFAW) President Ralph G. Neas said in a statement.

"Today's ruling will make it more difficult for citizens whose tax dollars are being unlawfully spent to subsidize religion to bring a complaint in court. It is also consistent with a broader strategy by right-wing judges and activists to restrict standing for average Americans to challenge powerful government and business interests. The increasing willingness of the Court to undermine our rights and legal protections should be a wake-up call to Americans about the importance of the Court and future nominees," Neas added.

In a statement released shortly after the decision, President Bush said that the "ruling is a win for the thousands of community and faith-based nonprofits all across the country that have partnered with government at all levels to serve their neighbors."

"Most importantly, it is a win for the many whose lives have been lifted by the caring touch and compassionate hearts of these organizations."

Jay Hein echoed the President's comments. "The bottom line to the decision today is we think it enables us to

keep doing what we're intended to do, which is help all of those who are interested in helping the poor," Hein said. "The administration believes that government does better when it works with every partner, whether faith-based or secular, large or small."

Focus on the Family's CitizenLink reported that Jay Sekulow, the chief counsel for the American Center for Law and Justice, called it a "very significant victory."

"This sends a powerful message," he said, "that atheists and others antagonistic to religion do not get an automatic free pass to bring Establishment Clause lawsuits."

Bruce Hausknecht, judicial analyst for Focus on the Family Action (FOTF's 501(c)(4)), agreed. "This was a win because it rejects the theory of taxpayer standing that would have allowed liberal groups to reach into the executive branch to complain about every speech, every meeting and every action that the president might take with regard to faith or faith-based initiatives."

"The liberal special-interest groups out there that insist on scrubbing religion out of the public square and American life have been denied an opportunity to increase their power to do so."

#### Hard time following the faith-based money

On January 29, 2001, President Bush issued two executive orders; one established the White House Office of Faith-Based and Community Initiatives (website) while the other created Centers for Faith-Based and Community Initiatives in five government agencies (the number of participating agencies now number 11). Unable to secure congressional legislation for the faith-based initiative, between December 2002 and March 2006, the president issued four more executive orders related to the initiative.

Despite claims of being a "results" oriented administration, since its inception, both reporters about and critics of the faith-based initiative have had a difficult time tracking how the billions of dollars in government grants to religious organizations are being used.

As Media Transparency reported last August, a report issued by the Government Accountability Office (GAO) found that many religious groups getting government money have had a difficult time separating religious proselytizing from the delivery of social services. In addition, the GAO report found that the Bush administration hadn't established a concrete process to monitor grant recipients nor measure their efficacy.

According to "Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability," "While officials in all 26 FBOs [faith-based organizations receiving federal grants] that we visited said that they understood that federal funds cannot be used for

inherently religious activities, a few FBOs described activities that appeared to violate this safeguard. Four of the 13 FBOs that provided voluntary religious activities did not separate in time or location some religious activities from federally funded program services."

The report also noted that "[L]ittle information is available to assess progress toward another long-term goal of improving participant outcomes because outcome-based evaluations for many pilot programs have not begun."

The beat goes on

Less than a week before the Supreme Court's ruling, the Freedom From Religion Foundation filed a federal lawsuit against officials in North Dakota claiming that they are using public money to religiously indoctrinate young people at the Dakota Boys and Girls Ranch.

Over the past two years about \$7 million in federal, state and county money has gone through the North Dakota Human Services Department to foster care services at Dakota Boys and Girls Ranch -- an entity with three residential facilities for troubled youth as well as day-programs. The money, which represents about 70 percent of the organization's budget, is not being used for religious purposes, said Carol Olson, executive director of the state Human Services Department.

"The Dakota Boys and Girls Ranch receives private donations to support their spiritual life programs," Olson said.

According to an Associated Press report, "The ranch is affiliated with the Lutheran Church Missouri Synod and the Evangelical Lutheran Church in America." According to its website, the organization's mission is to "help at risk children and their families succeed in the name of Christ," which is exactly the problem that the FFRF has with the ranch.

"The Dakota Boys & Girls Ranch provides services to children in the context of an explicitly Christian community, including post-release mentoring services, which are publicly funded with taxpayer appropriations," the lawsuit says.

Commenting on the North Dakota case, the Freedom From Religion Foundation's Annie Laurie Gaylor pointed out that it would be difficult for the Boys and Girls Ranch to keep public and private money separate. Even if that is possible, she said, public money frees up more private money for religious purposes.

"The whole purpose of this ranch is to proselytize and indoctrinate," she told AP.

The suit filed in federal court in Bismarck, North Dakota is against Lisa Bjergaard, director of juvenile services for the North Dakota state Department of Corrections and Rehabilitation, and Daniel Richter, director of Ward County Social Services.

Bjergaard said no youth are placed in a facility "without a good, thorough review that ensures that they're placed in compliance with state and federal law."

#### Moving 'Forward'

In looking at the bigger picture related to the faith-based programs, Gaylor told Media Transparency, "While it is a big loss that all Americans have lost the ability to challenge the executive branch for advancing religion in 'discretionary' actions, nevertheless, from a practical standpoint, we see no barrier to continuing our faith-based litigation."

"Our lawsuits will continue," Gaylor added. "We are full steam ahead. We are based in Wisconsin, where the state motto is 'Forward' and that is where we will be going! We have three faith-based lawsuits in state courts; we have one on hold challenging gross violations at the Department of Veteran Affairs, and our attorney is confident we should still be able to meet the taxpayer standing requirements upheld in *Hein v. FFRF*, but we expect a fight."

"We also are awaiting a move from the Federal Bureau of Prisons over their revamp of their faith-based prison ministry ideas. By the way, it should be noted that neither the VA nor the FBP questioned federal taxpayer standing when we brought those cases originally!"

*Faith the Nation: Part 5-4 by Bill\_Berkowitz*