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**REPORT** from the Capital

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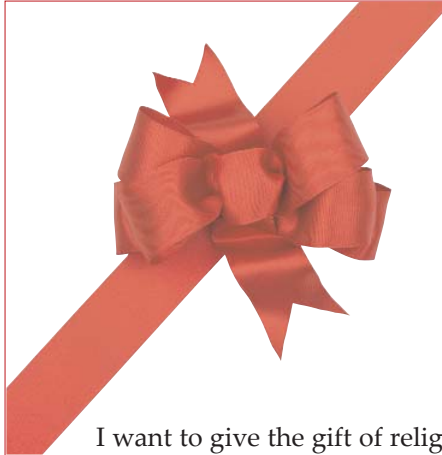


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# REPORT

from the Capital

## Supreme Court hears oral arguments in case on religious monuments

WASHINGTON — A small Utah religious sect told the U.S. Supreme Court on Nov. 12 that it should be allowed to erect a monument to its core beliefs alongside an existing Ten Commandments monument in a city park.

Pamela Harris, a lawyer for Summum, a 33-year-old spiritual group known for its unique practice of mummification, said the exclusion of its tenets by officials in Pleasant Grove City, Utah, is unfair.

“That’s a violation of the core free speech principle that the government may not favor one message over another in a public forum,” she said.

But Jay Sekulow, the lawyer representing the city, said a lower court erred when it decided that Summum had the right to place its “Seven Aphorisms” in a city park because a Ten Commandments monument had been placed there by the Fraternal Order of Eagles.

“When the government is speaking, it is free from the traditional free speech constraints of the First Amendment,” argued Sekulow, chief counsel of the American Center for Law and Justice, a law firm founded by religious broadcaster Pat Robertson.

Though the case is technically about free speech, another First Amendment question — governmental establishment of a particular religion — was raised almost immediately.

“It seems to me you’re walking into a trap under the Establishment Clause,” Chief Justice John Roberts told Sekulow.

Justice Antonin Scalia said the court may need to consider what the government is saying about the Ten Commandments.

“If the government is saying the Ten Commandments are the word of God, that’s one thing,” he said. “And if the government is saying the Ten Commandments are an important part of our national heritage, that’s something else.”

The Supreme Court wrestled with Establishment Clause cases regarding the Ten Commandments in 2005, determining that one set of the biblical laws displayed with other monuments outside the Texas Capitol was unconstitutional, while displays in Kentucky



Pamela Harris, an attorney for Summum, and Jay Sekulow, the attorney representing Pleasant Grove City, Utah, talk outside the U.S. Supreme Court after Nov. 12 oral arguments.

courthouses were not.

When Justice Ruth Bader Ginsburg noted that the monument permitted at the Texas Capitol was more than 40 years old, Sekulow said the similar monument in Pleasant Grove City had been there since 1971.

Both the city and the U.S. government created various scenarios that could result if the Supreme Court sided with the Denver-based 10th Circuit Court of Appeals, which had ruled in Summum’s favor. Deputy Solicitor General Daryl Joseffer argued that the Vietnam Veterans Memorial “did not open us to a Viet Cong memorial,” nor would the pending memorial to the late Rev. Martin Luther King Jr. require the government to erect a monument to his assassin.

The justices, in turn, asked questions that led to an additional range of hypothetical situations. Justice Stephen Breyer wondered if a government park could permit sculptures from Democratic sculptors but not Republican ones. Justice Samuel Alito asked if the government could refuse to list names of certain deceased soldiers on a memorial because it disagreed with their views.

Joseffer said permitting partisan sculptures was not likely. As for memorials, he said, “We do get to decide who we memorialize on the Mall because it’s government speech.”

Justices grappled with arguments over whether the monuments in question are “government speech,” “private speech” or a mixture of both. —RNS

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# At finish, Bush Faith-based Initiative gets mixed reviews

In the final months of George W. Bush's presidency, reviews are mixed on the administration's Faith-Based and Community Initiative, which has fundamentally altered the government's strategy to assist America's poor since 2001.

Amid the grumbling of critics and the glowing accolades of supporters, most observers agree that despite relatively little national media attention or general recognition by the American public, the Initiative has become so embedded in government that its impact will carry over into future administrations. In fact, President-elect Barack Obama has vowed to continue the effort in some form, with what he characterizes as improvements, in a proposed Council for Faith-Based and Neighborhood Partnerships.

The Faith-Based and Community Initiative sought to encourage more religious charities to provide services in partnership with government. Supporters say the Initiative removed discriminating barriers against religious organizations, "leveled the playing field" (to use the Administration's own phrase) for them to receive government grants, and brought more compassionate and personalized government-funded services to children of prisoners, drug addicts, the homeless and HIV/AIDS patients.

Critics charge the Initiative was used to woo political support, violated constitutional provisions for separation of church and state, and failed to provide promised money for social programs.

What is certain is that the Initiative took hold in a fashion that went largely unrecognized.

In a February report, "The Quiet Revolution," the White House summarized how the president, after failing to gain congressional approval, implemented the Initiative domestically and internationally by issuing five executive orders to spread its reach into virtually every government service program.

The Bush Administration also rewrote 16 federal rules to help faith-based organizations provide government services, provided training and assistance to religious and secular grassroots organizations, reached out to these groups through regional conferences around the country, and encouraged cities and states to create offices or liaisons to religious communities, according to the February report. The White House faith-based office also arranged to set aside about \$300 million in government money to finance the Compassion Capital Fund, which focuses on helping small faith-based and community organizations apply for grants and build their organizational capacity.

Critics said the entrenchment of the Initiative into government operations is problematic.

"Bush set up a faith-based office in the White House and pushed lots of states to set up similar offices," said Joe Conn, a

spokesman for Americans United for Separation of Church and State. "If these offices become a permanent part of the government, they will provide ongoing opportunities for constitutional and political mischief."



The progress of the Initiative is highlighted in a new book titled "To Serve the President" by Bradley Patterson, a member of the White House staff for three former Republican presidents, who cites the White House Office of Faith-Based and Community Initiatives as one of three "organizational innovations" of the Bush Administration. The other two are the creation of the Department of Homeland Security and USA Freedom Corps.

No other similar chain of executive orders, in the absence of legislation, establishes "so many interlinked operating bases through the federal executive branch," Patterson writes. He said the office also sets up an administrative body in the White House that will be replicated in a new administration.

Supporters and even some neutral observers agree that the Initiative played a significant role in giving credence, visibility and recognition to the integral role faith communities play in providing social services.

"The Bush Administration highlighted the important role faith communities play in inspiring volunteers and providing social welfare," said Eboo Patel, a Muslim youth leader and founder of the Interfaith Youth Core in Chicago.

Tom McClusky, vice president of government relations at the Family Research Council, noted that the importance of faith-based organizations to the government was accentuated during and after Hurricane Katrina in 2005, when religious groups, ready and able to react quickly with volunteers, became the most critical and effective responders to the disaster, while a government presence was scarce and lacked coordination. The pronounced role of religious organizations during Katrina resulted in greater coordination between government and religious groups to respond to future disasters, he noted.

Hurricane Katrina also advanced the Initiative to give religious organizations more leeway in receiving government assistance. For instance, the Bush Administration changed rules after Katrina to allow parochial schools damaged in a natural disaster to get federal aid.

The Initiative stirred its share of controversy. Critics assessed it as an imprint of Bush's religious ideology and as a tool to chip away at the wall separating the constitutional limits of church and state. The most vibrant example was the advancement and reinterpretation of legal provisions that

# REFLECTIONS

## Election a remarkable event on the religion front

I know, I know. We're all tired of politics. After nearly 20 months of incessant electioneering, reported by ever-looping 24/7 news cycles, it's time to give it a rest — at least for a while.

Indulge me one retrospective on the election. (At least some political junkies out there will be happy to get some help dealing with withdrawal.) After all, this was an historic and terribly important election in many ways. The first African-American was elected to the presidency defeating a genuine war hero with 25 years of national political service; a female was the runner-up in one party and another vied for the vice presidency in the other. All of this came in the midst of both the worst economic crisis in nearly 80 years and two seemingly unending wars.

It was a remarkable election on the religion front, too. The CNN Compassion Forum led by Jon Meacham and Campbell Brown and Rick Warren's Saddleback Church Civil Forum provided a national audience a chance to listen to the presidential candidates talk about their faith and related issues for four hours. Although these efforts were far from perfect (I've critiqued them in previous columns) and with a few other exceptions — notably the false charges that Barack Obama is a Muslim and the anti-Christ — religion was handled and discussed in this campaign about as responsibly as we've been able to do it in this country.

Two events occurred during the campaign that I hope we can learn from and use as models for future elections.

The big news on Sunday, Oct. 19 was Gen. Colin Powell's endorsement of Sen. Obama for president on *Meet the Press*. In that interview with Tom Brokaw, Gen. Powell made what I thought was a point vastly more important than his endorsement. Seeking to knock down the patent lies that seemed never to die about Obama's religion, Gen. Powell said:

I'm also troubled by, not what Senator McCain says, but what members of the party say... 'Well, you know Mr. Obama is a Muslim.' Well, the correct answer is he is not a Muslim, he's a Christian. He's always been a Christian. **But the really right answer is, what if he is? Is there something wrong with being a Muslim in this country? The answer's no, that's not America.** Is there something wrong with some seven-year-old Muslim-American kid believing that he or she could be president? Yet, I have heard senior members of my own party drop the suggestion, 'He's a Muslim and he might be associated with terrorists.' This is not the way we should be doing it in America. (bold added)

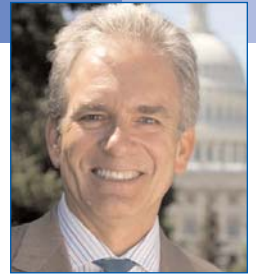
Gen. Powell concluded with a poignant story of a mother in Arlington Cemetery caressing her 20-year-old son's grave. The top of the headstone did not bear a Christian cross but the crescent and star of Islam. Kareem Rashad Sultan Khan was Muslim from New Jersey who gave his life for this country, his country.

If the ban on religious tests for public office in Article VI of the Constitution means anything — in letter and spirit — it is that there should be no faith litmus test for our national leaders. We presently have two Muslims serving in the Congress: Rep. Keith Ellison from Minnesota and Rep. Andre Carson from Indiana. Hardly anyone thought we would see an African-American elected to the presidency in our lifetime. Who knows, one of these, or maybe Gen. Powell's imagined seven-year-old, may contend for higher office — even the presidency — in our children's lifetime. It would be just like America to do something like that.

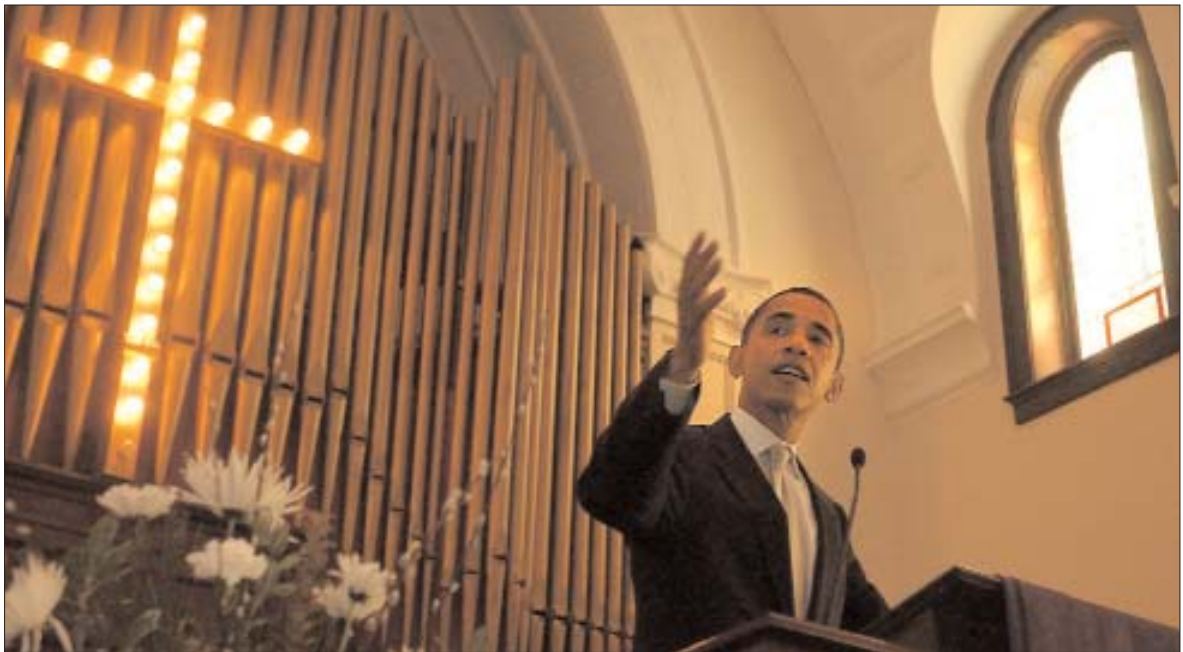
The other important event was Sen. McCain's laudable refusal to use the Jeremiah Wright flap as a political weapon in the campaign. (Yes, surrogates surely did, but McCain, to his credit, declined to elevate it to the top of the ticket.) The place where candidates worship and whom they choose as spiritual mentors is not irrelevant. It is part of the mix that makes up a candidate's character. But we should indulge a strong presumption against making such things a campaign issue.

That is, we should bend over backward to permit candidates to exercise their religion freely and not skew their decisions by fear of having to pay a political price if they chose a pastor that is controversial or given to harsh rhetoric — particularly when the candidate unequivocally repudiates the preacher's statements. I would hope candidates will listen to prophetic preaching every day they worship. They need to hear it as much as we do — maybe more. But a widespread attitude that straps candidates with isolated, out of context, statements of their pastors and spiritual advisers will have the effect of encouraging candidates to abjure the prophetic pulpit in favor of a blander form of preaching. That would be a great loss for the candidate and for the public.

Yes, this was an historic election — for more reasons than we had thought. And next time we'll do as well — or even better — in solving the perennial conundrum: how we uphold the institutional separation of church and state while affirming the relevance of a candidate's religion to politics, but without imposing a legal or practical religious test. I think we're making progress.



J. Brent Walker  
Executive Director



# Obama on church & state:

## A LOOK THROUGH THE LENS OF HIS WORDS

BY JEFF HUETT

**P**arade magazine, in its Oct. 19 issue, asked Jon Meacham what candidates vying for the most powerful post on the planet could learn from his new book on President Andrew Jackson.

His response – five ideas for the next president – was a “to do” list of sorts for the next commander-in-chief. “Find people who tell it like it is,” and “turn strengths into weaknesses,” Meacham wrote. “Speak to the electorate,” and “always have a backup plan,” he reminded. The fourth idea listed, and the sole thought devoted to an area of law, implored the next president to keep church and state separate.

According to Meacham, Jackson thought “public life was complicated enough without turning political disputes into religious ones.” With Barack Obama a month away from becoming the nation’s 44th president, a look at his church-state philosophy through the lens of his writing, interviews, speeches and debates could prove instructive about how he will govern.

The 2008 campaign provided a relatively large sample of material to examine on Obama’s thoughts on the proper relationship of faith to politics and government, but perhaps no interview affords a better look than a March 2004 interview U.S. Senate-candidate Obama gave to a columnist for the *Chicago Sun-Times*.

In an unknowing nod to Meacham’s description of Jackson, Obama told columnist Cathleen Falsani that “particularly as somebody who’s now in the public realm and is a student of what brings people together and what drives them apart, there’s an enormous amount of damage done around the world in the name of religion and certainty.”

But it was a question from Falsani on the perils of talking about faith as a public figure that elicited this response about how he expresses his faith:

“Alongside my own deep personal faith, I am a follower, as well, of our civic religion,” he said. “I am a big believer in the separation of church and state. I am a big believer in our constitutional structure.

“I am a great admirer of our founding charter and its resolve to prevent theocracies from forming and its resolve to prevent disruptive strains of fundamentalism from taking root in this country.

“I think there is an enormous danger on the part of public figures to rationalize or justify their actions by claiming God’s mandate. I don’t think it’s healthy for public figures to wear religion on their sleeve as a means to insulate themselves from criticism, or dialogue with people who disagree with them.”

While acknowledging such perils, Obama speaks

more openly and more often about his personal faith than any Democrat since Jimmy Carter, says Beliefnet editor Steve Waldman. In talking about his own faith in a June 2006 speech, Obama relayed his thoughts on religion in the public square.

“Secularists are wrong when they ask believers to leave their religion at the door before entering into the public square,” Obama said. He continued the thought in his 2006 book, *The Audacity of Hope*, “to say that men and women should not inject their personal morality into public policy debates is a practical absurdity; our law is by definition a codification of morality, much of it grounded in the Judeo-Christian tradition.

“What our pluralistic democracy does demand is that the religiously motivated translate their concerns into universal, rather than religion-specific, values.”

While chastising those who would strip religion from the public square, Obama said in the June speech to Call to Renewal that conservative leaders also have work to do, namely to acknowledge certain truth related to religion and government.

For one, they need to understand the critical role that the separation of church and state has played in preserving not only our democracy, but the robustness of our religious practice. Folks tend to forget that during our founding, it wasn't the atheists or the civil libertarians who were the most effective champions of the First Amendment. It was the persecuted minorities, it was Baptists like John Leland who didn't want the established churches to impose their views on folks who were getting happy out in the fields and teaching the Scripture to slaves. It was the forbears of the evangelicals who were the most adamant about not mingling government with religion, because they did not want state-sponsored religion hindering their ability to practice their faith as they understood it.

Moreover, given the increasing diversity of America's population, the dangers of sectarianism have never been greater. Whatever we once were, we are no longer just a Christian nation; we are also a Jewish nation, a Muslim nation, a Buddhist nation, a Hindu nation, and a nation of nonbelievers.

And even if we did have only Christians in our midst, if we expelled every non-Christian from the United States of America, whose Christianity would we teach in the schools? Would we go with James Dobson's or Al Sharpton's? Which passages of Scripture should guide our public policy? Should we go with Leviticus, which suggests slavery is OK and that eating shellfish is abomination? How about

Deuteronomy, which suggests stoning your child if he strays from the faith? Or should we just stick to the Sermon on the Mount — a passage that is so radical that it's doubtful that our own Defense Department would survive its application? So before we get carried away, let's read our bibles. Folks haven't been reading their bibles.

In the speech, he also counseled a sense of proportion as the boundary between church and state is policed. “Context matters,” Obama said. “Not every mention of God in public is a breach to the wall of separation.”

It is doubtful that children reciting the Pledge of Allegiance feel oppressed or brainwashed as a consequence of muttering the phrase ‘under God,’ I didn't,” he said. “Having voluntary student prayer groups use school property to meet should not be a threat, any more than its use by the High School Republicans should threaten Democrats. And one can envision certain faith-based programs — targeting ex-offenders or substance abusers — that offer a uniquely powerful way of solving problems.”

And the way Obama has signaled he will tap the faith-based programs is by retaining the White House Office of Faith-based and Community Initiatives that President George W. Bush opened in 2001. While claiming in a July speech that the office never fulfilled its promise, Obama has promised a real partnership between the White House and faith-based social service providers, “not a photo-op.” His plan features a new Council for Faith-based and Neighborhood Partnerships.

“I believe deeply in the separation of church and state,” he said, “but I don't believe this partnership will endanger that idea — so long as we follow a few basic principles.”

The principles include protecting social service recipients and potential employees of the social service providers from religious discrimination. Second, federal funds that go directly to churches and other houses of worship are only for use in secular programs. Finally, only successful programs will receive funding.

“I want to keep [the office] open, but I want to make sure its mission is clear,” Obama said at an April event sponsored by Faith in Public Life. “It's not to simply build a particular faith community,” he said. “The faith-based initiatives should be targeted specifically at the issue of poverty and how to lift people up.”

The principles he suggests are safeguards, meant to protect rights guaranteed by the U.S. Constitution, a document Obama considers to be living, rather than static. “While much of the Constitution's language is clear and can be strictly applied,” Obama wrote in *The Audacity of Hope*, “our understanding of its most important provisions ... has evolved greatly over time.

“What the framework of our Constitution can do is organize the way by which we argue about our future,” he wrote.



**K. Hollyn Hollman**  
General Counsel

## Religious display case a twist on a persistent problem

*Pleasant Grove City, Utah v. Summum* presents an interesting twist on the persistent constitutional problem of religious displays on government property. Instead of challenging a display under the Establishment Clause, this case involves a religious group's effort to display a monument reflecting their beliefs, alongside a donated Ten Commandments monument. While the facts present an interesting context for examining the proper relationship between religion and government, the case will be decided without reliance on the constitutional

provision designed to protect that interest.

Summum, a religious sect based in Utah, sued Pleasant Grove City because the city denied its request to post its "Seven Aphorisms." The 10th U.S. Circuit Court of Appeals agreed that the city had violated the First Amendment's Free Speech Clause, holding that Pioneer Park was a forum from which Summum had been unlawfully excluded.

At a glance, the result appears only fair. If the city allows a religious monument offered by some citizens, how can it reject one from others? This point was obscured, however, by the holding that the monuments in Pioneer Park were a traditional public forum, a result that could have extensive consequences. As one judge

argued in dissent from the 10<sup>th</sup> Circuit's denial of a rehearing, the decision could open the door to a parade of horrors, possibilities such as requiring governments to "either remove the . . . memorials or brace themselves for an influx of clutter."

On behalf of the city, the American Center for Law and Justice, a group that has often used free speech arguments in favor of religious voices, argued that Summum had no right to display their monument in the park. Instead, the city claimed that the case involved government speech, which created no duty to allow additional monuments from private citizens. Summum maintained that some displays in Pioneer Park, including the Ten Commandments monument, were created solely by private parties to advance their own messages, and the city had done nothing to adopt those messages. The city's "government speech" claim was simply a recent theory designed to exclude them.

Conspicuously missing from the case was a claim that the city had violated the Establishment Clause, the constitutional provision that typically applies to

disputes about religious monuments on government property, including the two Ten Commandments display cases decided by the Supreme Court three years ago. Those cases resulted in split decisions, illustrating the Court's fact-specific approach to determining when the constitutional boundaries protecting religious liberty have been crossed. Among the concerns raised by religious liberty advocates in such cases is the need to keep government from choosing among religions, recognizing that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

The fact that the case had not been fully developed and an Establishment Clause question had not been raised presented a challenge. In a friend-of-the-court brief filed on behalf of neither party, the BJC joined Americans United for Separation of Church and State, American Jewish Committee, and others to explain that the court below missed the proper vehicle for claims of religious discrimination. Indeed, while the Establishment Clause was missing from the parties' briefs, concerns about it quickly appeared during oral arguments. As Chief Justice John Roberts said to counsel for Pleasant Grove City, "[Y]ou're really just picking your poison, aren't you? I mean, the more you say that the monument is Government speech to get out of the . . . Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause. If it's Government speech, it may not present a free speech problem, but what is the Government doing speaking – supporting the Ten Commandments?"

As the Court heard its only religious liberty case this term, many regretted that the case was not pursued under "the clearest command of the Establishment Clause." In its current posture, the city seemed poised to win, despite concern that it may have acted out of religious animus. While the Court's decision may clarify the "government speech" doctrine or establish some hybrid theory for cases with private and governmental aspects, unless and until the case is reversed and pursued under a different theory, it will not address the fundamental issue of avoiding religious preferences. While the case offers little opportunity to impact religious liberty law, it stands as an important reminder to those who value religious liberty that a government that promotes the religion of some of its citizens threatens the religious liberty of others.

"While the facts present an interesting context for examining the proper relationship between religion and government, the case will be decided without reliance on the constitutional provision designed to protect that interest."

## At finish, Faith-based Initiative gets mixed reviews

allow government-funded religious organizations to base staffing decisions on employees' religious beliefs.

When Bush was unsuccessful in convincing Congress to expand the religious hiring provisions to a cadre of government programs, his administration changed the federal rules and issued legal opinions that allowed the hiring practice, at least on a case-by-case basis.

That stirred opposition from religious organizations, fearful that too much government intervention would infringe upon their religious liberty, and from civil rights groups.

"Separation of church and state is one of the greatest doctrines that separates us from other countries," said Stephen Copley, a United Methodist minister, lawyer and leader of a campaign to increase the minimum wage in Arkansas. "Religious hiring rights were part of a theocracy we saw under Bush."

Terri Schroeder, a lobbyist with the American Civil Liberties Union, agreed that the religious hiring provisions are unconstitutional. She added that the ACLU supports successful partnerships in federally funded social service programs, including those offered by religious affiliated providers.

"The current administration has eviscerated most of the safeguards that had successfully protected the independence of churches, while also protecting the rights that all Americans have to expect equal treatment when they apply for a government-funded job or when they participate in a government-funded service," Schroeder said. "The Bush Administration actually went out of its way to promote discrimination — and that discrimination based on religion with government dollars goes against a core American value."

Eight years of changes in how government interacts with religious organizations opened the door to scrutiny over whether the Initiative provided adequate safeguards and accountability of government spending.

A Government Accountability Office report issued in July 2006 said that government-issued guidelines to religious organizations about separating government-funded social services from religious activities were ambiguous and confusing, and some organizations appeared to violate the stipulations. The report also questioned the effectiveness of the Faith-Based and Community Initiative, saying that in fiscal year 2005, five federal agencies that helped carry out the federal effort were spending most of their allocated funds on staff salaries and benefits.

Other observers agreed that accountability was a problem for the Bush Initiative.

"The Bush Administration's Faith-Based and Community Initiative was a very mixed program precisely because its lack of accountability evoked some public mistrust and allowed a bit of faith community misconduct," said Robert M. Franklin, a scholar and ordained minister

who is president of Morehouse College in Atlanta. "At the end of the day, I believe it did more good than harm, and many worthy people were assisted. The FBCI deserves proper credit for the laudable accomplishments — but we are disappointed by the good that might have been achieved had it been administered differently."

Jay Hein, former director of the White House Office of Faith-Based and Community Initiatives, adamantly defended the government oversight of funding to religious organizations in several previous interviews.

Despite that, the White House faith-based office faced a legal challenge in a case known as *Hein v. Freedom From Religion Foundation* that charged the office with advancing religious interests and questioned its constitutionality. The case was never argued on its merits, as the Supreme Court decided in June 2007 that the taxpayers bringing the lawsuit did not have the right to challenge discretionary expenditures of the executive branch. That finding has had its own impact, in limiting the number of lawsuits alleging church-state violations in courts throughout the country.

Jim Wallis, a liberal evangelical Christian who is chief executive of Sojourners and an early supporter of the Initiative, said in a July interview that the Initiative fell short of its promise for a variety of reasons: "No. 1, things weren't funded very well. No. 2, it became a substitute for good social policy instead of an addition. And No. 3, it became very partisan, very political."

That final complaint was often cited after David Kuo, a former deputy director of the White House faith-based office, wrote a 2006 book criticizing the Initiative as being a "political tool and failing to deliver a promised \$8 billion in grants to faith-based organizations." The White House reports that more than \$2 billion in grants have been awarded to faith-based organizations.

Rep. Mark Souder, an early supporter of the Initiative, said in an interview in May that he lost confidence in the agenda as it became more politically oriented.

"When he [President Bush] talks about it, it's the way he started, which is, 'Government hasn't been serving the needs of low-income groups, especially in the inner city, and churches and faith-based groups are far more effective, and we need to get some dollars in their hands because they leverage it, and it's just about getting the goods there.' Is the argument economic or is it social? It's both, and Bush has never really wavered from that. But inside the administration, there has been bobbing and weaving. I think they tilted in the wrong direction," Souder said.

Still, supporters and critics agree that the administration made inroads into increasing partnerships between the government and religious charities. The disagreement comes in how those advances are viewed.

*From a report by Claire Hughes, Washington correspondent for the Roundtable on Religion & Social Welfare Policy.*