

October 18, 2008

Bush Aides Say Religious Hiring Doesn't Bar Aid

By [CHARLIE SAVAGE](#)

WASHINGTON — In a newly disclosed legal memorandum, the Bush administration says it can bypass laws that forbid giving taxpayer money to religious groups that hire only staff members who share their faith.

The administration, which has sought to lower barriers between church and state through its religion-based initiative offices, made the claim in a 2007 Justice Department memorandum from the Office of Legal Counsel. It was quietly posted on the department's Web site this week.

The statutes for some grant programs do not impose antidiscrimination conditions on their financing, and the administration had previously allowed such programs to give taxpayer money to groups that hire only people of a particular religion.

But the memorandum goes further, drawing a sweeping conclusion that even federal programs subject to antidiscrimination laws can give money to groups that discriminate.

The document signed off on a \$1.5 million grant to World Vision, a group that hires only Christians, for salaries of staff members running a program that helps "at-risk youth" avoid gangs. The grant was from a Justice Department program created by a statute that forbids discriminatory hiring for the positions it is financing.

But the memorandum said the government could bypass those provisions because of the 1993 Religious Freedom Restoration Act. It sometimes permits exceptions to a federal law if obeying it would impose a "substantial burden" on people's ability to freely exercise their religion. The opinion concluded that requiring World Vision to hire non-Christians as a condition of the grant would create such a burden.

But several law professors who specialize in religious issues called the argument legally dubious. Ira C. Lupu, a co-director of the Project on Law and Religious Institutions at [George Washington University](#) Law School, said the opinion's reasoning was "a very big stretch."

And Marty Lederman, a [Georgetown University](#) law professor who worked in the Office of

Legal Counsel from 1994 to 2002, said the memorandum's reasoning was incompatible with [Supreme Court](#) precedent. He pointed to a 2004 case, in which the court said government scholarships that could not be used to study religion did not substantially burden recipients' right to practice their religion because they could still study theology with their own money.

In the same way, Mr. Lederman said, World Vision is free to have an antigang program that hires by faith without using taxpayer money.

The Justice Department "stands strongly behind the opinion, which is narrowly drawn and carefully reasoned," Erik Ablin, an agency spokesman, said in an e-mail message. "Most of the criticisms that have been outlined against the opinion are thoroughly addressed in the opinion itself. Each of them lacks merit."

Carl H. Esbeck, a [University of Missouri](#) law professor and architect of the religion-based initiative movement, also defended the opinion, saying the Religious Freedom Restoration Act compelled the department's conclusion. "I understand that liberal law professors don't like this," he said. Why, he asked, should World Vision "be denied the opportunity that everyone else has to compete for funding simply because of their religion?"

The Office of Legal Counsel issues interpretations of the law that are binding on the executive branch and often rules on matters that are difficult to get before a court. Under the Bush administration, it has drawn sharp criticism for issuing opinions that provide legal cover for controversial policies preferred by administration officials.

In 2002, for example, the office secretly signed off on the use of harsh interrogation techniques despite a statute and treaties forbidding torture. The memorandum's legal reasoning was strongly criticized by legal scholars after it was leaked to the public, and the Justice Department rescinded it.

Christopher E. Anders, senior legislative counsel to the [American Civil Liberties Union](#), said he was alarmed by the 2007 memorandum's conclusion that the government does not have a "compelling interest" in enforcing a federal civil rights statute.

"It's really the church-state equivalent of the torture memos," Mr. Anders said. "It takes a view of the Religious Freedom Restoration Act that allows religious organizations to get federal funds without complying with anything."

Professor Lupu did not go that far, but said the opinion made "an aggressive reading of 'substantial burden' in a way that is not consistent with what courts and other agencies have

done in the past, and it is designed to serve the president's political agenda.”

Mr. Bush, whose strongest political base has been religious conservatives, has made lowering barriers to government financing of such groups a priority.

In January 2001, Mr. Bush's first two executive orders created an Office of Faith-Based and Community Initiatives in the White House and in five federal agencies, telling them to ease the way for church groups to win grants for social work, like homeless shelters.

Mr. Bush also asked Congress to make it legal for religious groups to win grants even if they discriminate against people of other faiths when hiring for taxpayer-financed posts. He said it was not fair to force them to give up their identities in order to compete for grants. When Congress failed to pass such a bill, Mr. Bush issued an executive order that made the changes on his own for most federal programs.

But statutes trump executive orders, and a few grant programs — including the one involving World Vision — had independent antidiscrimination requirements.

Since then, some social conservatives have advanced the view that the Religious Freedom Restoration Act might be used to nullify such restrictions.

In 2003, Mr. Lupu said, the [Department of Health and Human Services](#) issued a regulation for substance abuse and mental health program grants that advanced such a view, and in 2007 — several months after the Office of Legal Counsel memo was secretly completed — the Justice Department quietly changed its grant application rules to reflect that view.

But the release of the 25-page opinion this week is the “most elaborate and carefully reasoned effort by the Bush administration to justify its conclusion” that such grant conditions are legally obsolete, Mr. Lupu said.

The next administration would be free to rescind the memorandum. Both major party nominees for president, Senators [John McCain](#) and [Barack Obama](#), have said they would continue allowing religion-based groups to participate in federal grant programs. But Mr. Obama has also said taxpayer money should not go to programs that discriminate by faith in hiring, a condition Mr. McCain has not embraced.

Barry Lynn, president of Americans United for Separation of Church and State, said he hoped the opinion would not stand. “The Bush administration has been trying to allow religious recipients of tax dollars to discriminate in hiring,” he said. “No Congress intended that. The

Constitution does not permit it. And this memo is just one more example of this administration subverting Congressional and constitutional intent in pursuit of a forbidden goal: discrimination in hiring.”

Copyright 2008 The New York Times Company

[Privacy Policy](#) | [Search](#) | [Corrections](#) | [RSS](#) | [First Look](#) | [Help](#) | [Contact Us](#) | [Work for Us](#) | [Site Map](#)

George Bush has claimed he was on a mission from God when he launched the invasions of Afghanistan and Iraq, according to a senior Palestinian politician in an interview to be broadcast by the BBC later this month. Mr Bush revealed the extent of his religious fervour when he met a Palestinian delegation during the Israeli-Palestinian summit at the Egyptian resort of Sharm el-Sheikh, four months after the US-led invasion of Iraq in 2003. One of the delegates, Nabil Shaath, who was Palestinian foreign minister at the time, said: "President Bush said to all of us: 'I am driven with a mission from God'. God would tell me, 'George go and fight these terrorists in Afghanistan'. And I did. Mr. Bush, whose strongest political base has been religious conservatives, has made lowering barriers to government financing of such groups a priority. In January 2001, Mr. Bush's first two executive orders created an Office of Faith-Based and Community Initiatives in the White House and in five federal agencies, telling them to ease the way for church groups to win grants for social work, like homeless shelters. Mr. Bush also asked Congress to make it legal for religious groups to win grants even if they discriminate against people of other faiths when hiring for taxpayer-financed posts. "The Bush administration has been trying to allow religious recipients of tax dollars to discriminate in hiring," he said. "No Congress intended that. The Constitution does not permit it. Bush aides say faith-based hiring doesn't bar federal aid Administration memo says it can bypass laws that ban giving tax money to religious groups that discriminate. The new york times. Saturday, October 18, 2008. WASHINGTON " In a newly disclosed legal memorandum, the Bush administration says it can bypass laws that forbid giving taxpayer money to religious groups that hire only staff members who share their faith. The administration, which has sought to lower barriers between church and state through its religion-based initiative offices, made the claim in a 2007 Justice Department memo from the Office of Legal Counsel. It was quietly posted on the department's Web site this week. Frank also said Bush refused to roll back military's ban on gay service members, which was administrative and not statutory in the days before the "Don't Ask, Don't Tell" law of 1993. "Bush was simply unsupportive on any issue," Frank added. Frank, however, qualified his remarks by saying Bush did a positive thing by appointing former U.S. Associate Justice David Souter to the U.S. Supreme Court. "The elder Bush also signed into law an Americans with Disabilities Act that barred discrimination against people with HIV/AIDS. Vaid, who famously interrupted a speech Bush gave on HIV/AIDS, said those laws were directly the result of activism from groups like ACT UP and wouldn't have been signed otherwise. "He was not doing enough as a leader," Vaid said.