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Standing to Sue?

Supreme Court weighs taxpayer challenges under the establishment clause.

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Do Americans have a right to challenge how bureaucrats spend their tax dollars? That is what the Supreme Court must decide in *Hein v. Freedom From Religion Foundation*. Yet what should be a clear question of standing is viewed by some as just another round in the fight over separation of church and state—and that's unfortunate.

The facts are relatively straightforward: The Freedom From Religion Foundation believed that aspects of President George W. Bush's Faith-Based and Community Initiatives program violate the First Amendment's establishment clause. The foundation filed a lawsuit against the executive branch of the U.S. government. Specifically, the foundation took issue with seminars—planned and paid for by administration officials—that encourage faith-based (particularly Christian) groups to seek federal grants. Because these conferences do not benefit secular humanitarian organizations, the foundation concluded that they constitute improper support or endorsement of religion, while treating non-Christians as outsiders.

The foundation's complaint portrays the conferences, which are organized by Faith-Based and Community Initiatives offices within several executive departments, as propaganda vehicles for religion. A report from the Government Accountability Office estimated that these offices spent more than $24 million between 2002 and 2005 "on administrative activities related to the Initiative."

According to the foundation's lawsuit, at the conferences, faith-based organizations "are singled out as being particularly worthy of federal funding" and "the belief in God is extolled as distinguishing the claimed effectiveness of faith-based social services." The complaint cited several specific events as evidence, including speeches "singling out alleged exemplary stories and anecdotes, all of which focused on faith-based organizations, to the exclusion of other organizations," and preferential funding for faith-based organizations.

For example, in 2002, then-Secretary of Education Rod Paige reportedly told religious leaders at a faith-based initiatives meeting in Washington, D.C., that President Bush established the program "because he knows firsthand the power of faith to change lives," that "[w]e are here because we have a president who . . . is a true man of God—a man who prays every day," and "we can make America a better place." Paige also praised faith-based initiatives as a way for "good people" to "act on their spiritual imperative."

HEARD IN COURT?

Clearly, given the statements and actions of the Faith-Based and Community Initiatives program, there is reason for concern that the executive branch might be overstepping the bounds of the establishment clause. In rebuffing the foundation's challenge, however, government lawyers have consistently argued that where the spending is a decision made by executive-branch officials, taxpayers have no right to be heard in court.

As a rule, taxpayers do not have the right to challenge the legality of the use of government funds. But in its 1968 ruling in *Flast v. Cohen*, the Supreme Court held that when funds are being used to aid religion, taxpayers do have standing to assert that an exercise of Congress' taxing and spending power violates the establishment clause. In relating this to *Hein*, the U.S. Court of Appeals for the 7th Circuit rejected the Bush administration's attempt to create a distinction between executive and legislative spending. There the court pointed out that the Faith-Based and Community Initiatives program was created by executive order, although it is paid for by funds appropriated by Congress for the general operations of the executive branch.

The Supreme Court must now decide whether taxpayers can bring the question of the constitutionality of the program before a court.

Because *Hein* involves government funds being funneled to overtly Christian groups, all the usual suspects have made an appearance. And suddenly, what should be a question of standing has been transformed into a debate over where to draw the line in the separation of church and state.

On one side are groups such as Pat Robertson's American Center for Law and Justice and the Foundation for Moral Law, which claim to be acting in the best interests of Christians.

Voicing their support for the government's faith-based initiatives program, these groups argue that taxpayers should not be able to challenge government actions because it will lead to a rash of misguided, anti-religious litigation.

On the other side are groups such as American Atheists and Americans United for Separation of Church and State, which believe that no tax money should be spent to advance religion. In siding with the foundation and the lower court's ruling in *Hein*, they defend the taxpayer's right to challenge inappropriate government spending.

THE GREATER THREATS

While the motives of both sides are somewhat suspect, the arguments put forth by the Christian groups siding with the government fall on the wrong side of the church-state divide.

Because faith-based initiatives programs seem to favor Christians, these groups have aligned themselves with the current administration. But by relying on the artificial distinction between spending decisions by Congress and those by the executive branch, these particular Christian groups have taken an overly narrow view of the issue and thus failed to see the bigger picture—and the greater threats to religious freedom.

For example, would these same Christian groups be equally supportive if the White House—under a president not so sympathetic to Christians—decided to purchase menorahs for display in federal offices? What if the executive branch opted to produce pamphlets extolling the virtues of Wicca? Or what if, as Judge Richard Posner of the 7th Circuit pointed out, the homeland security secretary decided that in order to reduce the threat of domestic terrorism by al Qaeda, the U.S. government should build a mosque and employ an imam to conduct Islamic services using the agency's general funds?

Clearly, these actions would constitute endorsement of religion in violation of the establishment clause. Yet under the standing rule advocated by the government, taxpayers could not bring a challenge.

Let me state that there is nothing wrong with faith-based initiatives, as long as the funds support social programs. But secular humanitarian organizations, many of which provide crucial services to the poor and underprivileged, should also have equal access to these funds.

And churches should be aware that they cross an important line when they begin taking government money. Inevitably strings will be attached, and churches then run the risk of the government dictating exactly how those funds are to be used—a clear entanglement of government in religion.

But that is an altogether different debate. For now, all that must be decided in *Hein v. Freedom From Religion Foundation* is whether taxpayers have a right to object to possible government misuse of funds in violation of the establishment clause. In the end, this is a right that American taxpayers should have.

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