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Religious Freedom and the Federal Executive Branch: Suggestions for Future Administrations

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ARTICLE

RELIGIOUS FREEDOM AND THE FEDERAL EXECUTIVE BRANCH: SUGGESTIONS FOR FUTURE ADMINISTRATIONS

BY MELISSA ROGERS*

INTRODUCTION

Issues related to religion, law, and public policy arise regularly across the federal executive branch. In recent years, the federal executive branch has confronted questions such as:

- What rules should apply when the federal government forms financial partnerships with faith-based and community organizations to serve people in need?¹
- Must the garb and grooming requirements of the U.S. military accommodate service members whose religious beliefs require them to wear beards, turbans, or hijabs?²
- May the federal government use eminent domain to claim portions of a religious institution's property to build a border wall that the property owner opposes for religious reasons?³

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1. *See, e.g.*, Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 17, 2010); *see also* Final Regulations Implementing Executive Order 13559, 81 Fed. Reg. 19,355 (Apr. 4, 2016).

2. *See generally* Meghann Myers, *New Army Policy Oks Soldiers to Wear Hijabs, Turbans and Religious Beards*, ARMY TIMES (Jan. 5, 2017), <https://www.armytimes.com/news/your-army/2017/01/05/new-army-policy-oks-soldiers-to-wear-hijabs-turbans-and-religious-beards/>.

3. John C. Moritz, *La Lomita Mission Site Should Not be Used for Planned Border Wall*, *Bishop Says*, CORPUS CHRISTI CALLER TIMES (Nov. 16, 2018), <https://www.caller.com/story/news/local/texas/state-bureau/2018/11/16/trump-border-mexico-brownsville-texas-wall-la-lomita-mission-rio-grande-religion-freedom/1988552002/>; John C. Moritz, *Catholic Diocese Fights to Keep Historic Site from Being Used in Trump's Border Wall*, CORPUS CHRISTI CALLER TIMES (Nov. 27, 2018), <https://www.usatoday.com/story/news/politics/2018/11/27/texas-la-lomita-mission-center-border-wall-eminent-domain-fight/2132582002/>.

- What requirements may the Department of Defense (DOD) and the Department of Veterans Affairs (VA) place on religious bodies that would like their ministers to be recognized as DOD or VA chaplains?⁴
- May the federal government prosecute individuals who are motivated by their faith to provide humanitarian assistance to undocumented immigrants in deserts on the southwest border of the United States?⁵
- Should there be any religious exemption from prohibitions on employment discrimination on the basis of sexual orientation or gender identity in federal contracting?⁶
- In governmental programs designed to counter violent extremism, how should religion be discussed?⁷
- Do individuals who oppose oil pipelines due to their faith have a right to stop the federal government from issuing certificates allowing companies to run such pipelines across their property?⁸

4. See, e.g., Ecclesiastical Endorsing Organizations, 82 Fed. Reg. 1288 (proposed Jan. 5, 2017) (to be codified at 38 C.F.R. pt. 17).

5. See generally Rafael Carranza, *Clergy, Volunteers Leaving Water for Border Crossers in Arizona Desert Face Higher Risks*, ARIZONA CENT. (Aug. 5, 2018), <https://www.azcentral.com/story/news/politics/border-issues/2018/08/05/clergy-defy-prosecution-risks-defend-humanitarian-aid-arizona-border/911136002/>; Rory Carroll, *Eight Activists Helping Migrants Cross Brutal Desert Charged by US Government*, THE GUARDIAN (Jan. 24, 2018), <https://www.theguardian.com/us-news/2018/jan/24/us-immigration-activists-arizona-no-more-deaths-charged>; Katherine Franke, *Religious Freedom for Me, but Not for Thee*, THE WASH. POST (Sept. 28, 2018), https://www.washingtonpost.com/opinions/religious-freedom-for-me-but-not-for-thee/2018/09/28/297fffb4-c340-11e8-8f06-009b39c3f6dd_story.html?utm_term=.81eb84261221; Jacob Gershman, *Aid for Immigrants on Desert Trek Stirs Religion-Freedom Fight*, WALL STREET J. (Dec. 6, 2018), <https://www.wsj.com/articles/aid-for-immigrants-on-desert-trek-stirs-religion-freedom-fight-1544092201>.

6. See Implementation of Exec. Order No. 13672, 79 Fed. Reg. 72,985 (Dec. 9, 2014). President George W. Bush added a religious exemption to Executive Order 11246 in 2002. See Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002). The exemption, which is modeled on the religious exemption in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-1(a), states:

Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

Id.

7. See, e.g., *Remarks by the President in Closing of the Summit on Countering Violent Extremism*, THE WHITE HOUSE (Feb. 18, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/18/remarks-president-closing-summit-countering-violent-extremism>.

8. See, e.g., *Adorers of the Blood of Christ v. Fed. Energy Regulatory Comm'n*, 897 F.3d 187 (3d Cir. 2018); Robinson Meyer, *The Last-Ditch Attempt to Stop the Dakota Access Pipeline: Can Religious Freedom and Hobby Lobby Block the Black Snake?*, THE ATLANTIC (Feb. 10, 2017), <https://www.theatlantic.com/science/archive/2017/02/the-dakota-access-pipelines-final-stand/516225/>.

- Must or may religious exemptions be included in agency rules implementing certain provisions of the Affordable Care Act?⁹
- What kind of evidence is needed to determine whether an entity is committing genocide against particular religious communities?¹⁰
- Should the Department of Education accede to requests to post online the names of schools claiming the religious exemption of Title IX, a federal law prohibiting educational institutions from discriminating on the basis of sex?¹¹
- How should governmental officials or bodies speak to the issue of “conversion therapy”?¹²
- What limits should be placed on development or disaster relief aid for the construction or rehabilitation of buildings overseas, as distributed by the United States Agency for International Development, regarding religious uses of such structures?¹³
- Do congregations have a right to shield undocumented immigrants from deportation within their sanctuaries?¹⁴
- When potential government grantees would refuse for religious reasons to provide certain services required by a grant,

9. See Coverage of Certain Preventive Services Under the Affordable Care Act, 26 C.F.R. § 54.9815-2713A (2019); Melissa Rogers, FAITH IN AMERICAN PUBLIC LIFE (forthcoming 2019); see also 42 U.S.C. § 18116 (2010). The Affordable Care Act’s nondiscrimination provision states:

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

42 U.S.C. § 18116(a) (2010); see also Nondiscrimination in Health Programs and Activities: Final Rule, 45 C.F.R. § 92.31375 (2016).

10. See, e.g., Secretary of State John Kerry, *Remarks on Daesh and Genocide*, U.S. DEP’T OF STATE (Mar. 17, 2016), <https://2009-2017.state.gov/secretary/remarks/2016/03/254782.htm>.

11. See generally Exemptions from Title IX, U.S. DEP’T OF EDUC. (Sept. 25, 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>.

12. See, e.g., SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, U.S. DEP’T OF HEALTH & HUM. SERV., *ENDING CONVERSION THERAPY: SUPPORTING AND AFFIRMING LGBTQ YOUTH* (2015).

13. See, e.g., Participation by Religious Organizations in USAID Programs, 22 C.F.R. § 205 (2016).

14. Duarte Geraldino & Frank Carlson, *More Churches are Opening Their Doors to Undocumented Immigrants Facing Deportation*, PBS NEWSHOUR (Jan. 15, 2018), <https://www.pbs.org/newshour/show/more-churches-are-opening-their-doors-to-undocumented-immigrants-facing-deportation>; see also Thomas Scott-Railton, *A Legal Sanctuary: How the Religious Freedom Restoration Act Could Protect Sanctuary Churches*, 128 YALE L.J. 408 (2018).

how should the government respond to their grant applications?¹⁵

The United States Congress has spoken to aspects of some of these issues, and it may legislate on more of them. But Congress simply cannot address the multitude of issues that regularly arise across the federal executive branch or the minutia often associated with implementing statutes and enforcing law. The federal executive branch will necessarily handle many of these issues.¹⁶

When the executive branch does so, it must comply with law, including religious liberty guarantees such as the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. These guarantees protect fundamental human rights and liberties, yet Americans are bitterly divided about the meaning of some of these provisions and how they should apply in certain cases.

This brief essay does not address the merits of these cases, but it does offer a few suggestions regarding structures and processes future administrations should use to handle them. Every administration should begin by articulating a coherent vision of religious freedom and a specific plan for implementing that vision consistently across the executive branch. Among other issues, those plans should address the executive branch's staffing and coordination processes; consultation with the public on executive actions; and efforts to seek common ground. This essay offers suggestions in each of these areas. The suggestions are aimed at achieving modest goals: increasing the coherency, consistency, and transparency of an administration's handling of issues related to religion, law, and public policy and improving the debate that surrounds them.¹⁷

15. See generally *Am. Civil Liberties Union v. Azar*, No. 16-cv-03539-LB, 2018 WL 4945321 (N.D. Cal. Oct. 11, 2018); 22 U.S.C. § 7105 (2018).

16. The Executive Office of the President (EOP) and numerous federal departments and other agencies are part of the federal executive branch. President Franklin D. Roosevelt created the EOP in 1939 to provide him with the support he needed to govern. See Exec. Order No. 8248, 4 Fed. Reg. 3864 (Sept. 8, 1939). The EOP "represents an institutional response to needs felt by every occupant of the Oval Office" for "advice and assistance." HAROLD C. RELYEA, CONGRESSIONAL RESEARCH SERVICE, *THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW* (2008), <https://fas.org/sgp/crs/misc/98-606.pdf>. Depending on a president's needs and wishes, the composition of the EOP can vary, but it usually includes the National Security Council (NSC); the Office of Management and Budget (OMB), including the Office of Information and Regulatory Affairs (OIRA); White House Counsel's Office (WHCO); and the Domestic Policy Council (DPC), among other components. *Id.* For a primer on the workings of OIRA, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

17. An unintended consequence of encouraging presidents and their administrations to articulate such visions and coordinate around them could be increased politicization of these issues. If an administration does not do so, however, decisions will still be made by the federal executive branch—they will simply be less informed, coordinated, and transparent. Further, this essay advocates steps aimed at lessening the politicization of these issues, such as increased consultation with diverse external stakeholders on executive actions and a reinvigoration of the search for common ground. Overall, therefore, the benefits of this approach would seem to outweigh its costs.

I. STAFFING AND COORDINATION

Administrations should ensure that issues at the intersection of religion, law, and public policy are handled by staff with knowledge and experience in this area and that the administration's positions are consistent across the federal government. Taking the following steps will help reach those goals.

Staffing plans should recognize that these issues can arise as part of the work of virtually any federal agency and that church-state issues can be implicit as well as explicit. Explicit issues are questions of church-state law and policy on their face, like chaplaincy requirements or prohibitions on religious discrimination. Implicit issues are ones that may raise church-state concerns even though those concerns are not spelled out in the policy itself. Such issues would include whether the extension of government aid under certain instances might constitute an Establishment Clause violation, or whether a neutral, generally applicable regulation must nevertheless exempt religious practices.¹⁸ In short, proposed policies need to be scanned for both explicit and implicit church-state issues.

Policy as well as legal components within the agencies and the Executive Office of the President must contain staff with knowledge and experience handling issues at the intersection of religion, law, and public policy. In other words, the assistance of lawyers from an agency's Office of General Counsel or the White House Counsel's Office is absolutely essential, but not sufficient. Government attorneys usually opine only on what the law requires, permits, and prohibits, leaving policy judgments to others.¹⁹ Policy staff can play important roles, for example, in shaping permissive religious accommodations—ones that are not required but also not prohibited by law. Such staff may also craft policies so that they steer clear of governmental promotion of religion.²⁰

Both political appointees and civil servants should be included among staff handling these issues. Political appointees integrate a president's views on these issues into the work, as appropriate. Career civil servants make valuable contributions, too, through their expertise, apolitical posture, institutional knowledge, and ability to increase continuity across administrations.

Coordination on these issues across the federal executive branch is also essential. Part of that task is removing unnecessary differences in

18. See 42 U.S.C. §§ 2000bb to 2000bb-4 (2018).

19. Bob Bauer, who served as White House Counsel for President Barack Obama, says White House lawyers should serve as honest brokers regarding the law, not policy advisors. *Stay Tuned with Preet: All the President's Lawyers (with Bob Bauer)*, CAFÉ, at 39:50–41:00 (Nov. 28, 2018), <https://www.cafe.com/stay-tuned-with-bob-bauer/>.

20. Policies may even include steps the Establishment Clause does not require, see, e.g., *Locke v. Davey*, 540 U.S. 712 (2004), so long as those steps do not violate free exercise guarantees. See, e.g., *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

church-state policy across federal agencies. During my time at the White House, I co-chaired an interagency group charged with implementing certain common-ground reforms of the rules governing social service partnerships between the federal government and faith-based and community organizations. President Obama's diverse Advisory Council on Faith-Based and Neighborhood Partnerships recommended these reforms. President Obama subsequently embraced them through an executive order.²¹ The reforms included the addition of religious liberty protections for beneficiaries of social services supported by federal financial assistance. In many cases, there were no good reasons for differences in drafts of the proposed regulations implementing this executive order across nine federal agencies.²² Nonetheless, if left to each agency, such inconsistencies would have been prevalent simply because each agency has its own personnel and ways of doing things. Through painstaking work, this interagency group brought the final rules and guidance documents into much better alignment.²³ That was clearly the right result, not simply as a policy matter but also as a pragmatic one: social service providers and beneficiaries should not have to learn a whole new set of rules simply because they are working with, or receiving benefits from, different federal agencies. In sum, administrations should ensure adequate staffing on issues related to religion, law, and public policy and appropriate coordination across the federal executive branch.

II. CONSULTATION WITH THE PUBLIC ON EXECUTIVE ACTIONS

Administrations should seek to increase opportunities for citizens to participate in policymaking, including policymaking on church-state issues. Through executive orders, agency regulations and guidance as well as other executive actions, administrations affect Americans' daily lives in countless ways. The executive branch should consider ways to open more avenues for individuals and organizations that might be impacted by such measures to offer input on them.

Under the Administrative Procedures Act (APA), some executive actions require advance consultation with the public, while others do not.²⁴ For example, before a final agency rule is issued, the agency usually must publish a notice of proposed rulemaking (NPRM), receive comments on that NPRM from the public, and respond to those comments.²⁵ Interpretive

21. See, e.g., Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 22, 2010).

22. See generally Final Rule Implementing Exec. Order 13559, 81 Fed. Reg. 19,355 (Apr. 4, 2016).

23. *Id.*

24. 5 U.S.C. § 500–96 (2018).

25. See 5 U.S.C. § 553 (2018).

rules and general statements of policy, however, are generally exempted from these requirements.²⁶

Even when advance consultation with the public is not required by the APA, administrations sometimes require or encourage it. During the administration of President George W. Bush, for example, the Office of Management and Budget (OMB) directed agencies to invite public comment on draft “economically significant” guidance documents in most cases.²⁷ In 2009, President Obama launched a transparency and open government initiative,²⁸ calling for executive branch departments and agencies to “offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information.”²⁹ As part of this initiative, President Obama signed an execu-

26. See, e.g., 5 U.S.C. § 553(b)(3)(A)–(B). The debate about how the terms “interpretative rules” and “general statements of policy” should be defined is beyond the scope of this essay. See generally Cass R. Sunstein, *Preliminary Draft: “Practically Binding”: General Policy Statements and Notice-and-Comment Rulemaking*, 10–12 (Jan. 6, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697804.

27. Office of Management and Budget Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

For *significant guidance documents*, the bulletin prescribes the following public comment process:

Each agency shall establish and clearly advertise on its Web site a means for the public to submit comments electronically on significant guidance documents, and to submit a request electronically for issuance, reconsideration, modification, or rescission of significant guidance documents. Public comments under these procedures are for the benefit of the agency, and no formal response to comments by the agency is required by this Bulletin.

See *id.* at III.2.

For *economically significant guidance documents*, the bulletin prescribes the following public comment process:

- c. Invite public comment on the draft document; and
- d. Prepare and post on the agency’s Web site a response-to-comments document.

2. *Exemptions*: An agency head, in consultation with the OIRA Administrator, may identify a particular economically significant guidance document or category of such documents for which the procedures of this Section are not feasible or appropriate.

See *id.* at IV. c, d, 2.

28. Presidential Memorandum for the Heads of Executive Departments and Agencies on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).

29. The memorandum stated:

Government should be participatory. Public engagement enhances the Government’s effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Government should be collaborative. Collaboration actively engages Americans in the work of their Government. Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector. Executive departments and agencies should solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.

Id.

tive order in 2011 directing agencies to “seek the views of those who are likely to be affected” by a rulemaking *before* a notice of proposed rulemaking is published, when such consultation is “feasible and appropriate.”³⁰ One need not call, therefore, for any requirements to be added to the APA to increase public consultation regarding executive actions.

Professor Cass Sunstein, who served as administrator for the Office of Information and Regulatory Affairs from 2009–2012, has highlighted some of the benefits and costs of this kind of consultation.³¹ Regarding the benefits, Professor Sunstein stated,

Before committing themselves to one or another course of action, public officials should listen to the people they are privileged to serve, above all those whom they would affect. That form of listening is valuable and perhaps indispensable for democratic legitimation. On this view, agencies in general face some kind of democratic deficit, and notice-and-comment reduces the deficit, and promotes legitimacy, by requiring a period of public discussion. But the argument is less airy, and in my view more powerful, if it is hard-headedly *epistemic*: Policymakers might find out that their plan is in one or another respect misdirected, and as a

30. See also Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011). Executive Order 13563 contains the following section on public participation in the rulemaking process:
Sec. 2. Public Participation.

(a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Id. at 3821–22; see also OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-11-10, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND OF INDEPENDENT REGULATORY AGENCIES (2011).

31. See Sunstein, *supra* note 26, at 10–12. In this preliminary draft, Professor Sunstein comments on the benefits and costs of a potential statutory requirement that agencies invite public comments before making significant policy statements and on relevant court cases interpreting APA terms.

result, they might decide to change it in some significant way, or perhaps to abandon it altogether.³²

Policymakers' "democratic deficit" on issues related to religion, law, and public policy can be profound. One way to diminish this deficit is through consultations with the public.³³ Consulting with stakeholders before taking executive actions, can generate better law and policy, increase transparency, and build faith in the democratic process.

Competing interests also must be considered. Such interests include respecting the constitutional prerogatives of the president and ensuring that the executive branch is able to do its work without undue delay or impediment. Whenever appropriate and feasible, administrations should increase opportunities for consultation with diverse external stakeholders before taking executive action.

III. SEEKING COMMON GROUND

The federal executive branch should renew efforts to seek common ground. At the outset, the term "common ground" must be clarified, especially the way in which that term differs from the term "compromise." Compromises happen when people on different sides of an issue agree to meet somewhere in the middle. Common-ground projects, on the other hand, involve participants in searching for positions both sides agree on, even as they disagree on other issues.

There is precedent for federal executive branch efforts that either forge common ground or capitalize on the consensus others have already identified. The Clinton administration "borrow[ed] heavily and gratefully"³⁴ from common-ground work to produce consensus statements on current law regarding religious expression in the public schools.³⁵ Subsequently, the Clinton administration worked with diverse religious and civil liberties leaders to produce guidelines on religious exercise and expression in the federal workplace.³⁶ The Obama administration issued an executive order and regulations on faith-based partnerships with reforms that were unanimously

32. *Id.* at 8.

33. Officials may use tools such as listening sessions and invitations to submit informal comments. Such processes should always seek to be as transparent as possible, including by complying with any relevant sunshine laws and policies.

34. President Bill Clinton, 1995 Speech on Religious Liberty (July 12, 1995) (transcript available at <http://www.religioustolerance.org/clinton1.htm> (Part 1) and <http://www.religioustolerance.org/clinton2.htm> (Part 2)).

35. See Memorandum on Religious Expression in Public Schools, 31 Weekly Comp. Pres. Doc. 1227 (July 17, 1995).

36. The White House Office of the Press Secretary, *Guidelines on Religious Expression and Religious Exercise in the Federal Workplace* (Aug. 14, 1997), <https://clintonwhitehouse2.archives.gov/WH/New/html/19970819-3275.html>.

recommended by a group with some deep differences over church-state issues.³⁷

Common-ground projects usually have been honored by subsequent administrations, creating greater continuity and good will. Rather than sticking with that pattern, however, President Donald Trump has used an executive order to remove some of the common-ground reforms President Obama put in place.³⁸ Seeking common ground on church-state issues, especially at the federal level, is never easy. President Trump's actions have made that task much more difficult. People with diverse perspectives are sometimes reluctant to invest the large amounts of time and effort that are usually required to find common ground on divisive issues, and they are apt to be much more reluctant if they believe there is a strong likelihood their work may be undone after the next presidential election.

One must hope the Trump administration's approach is an aberration, not the new rule. The next administration should fix the Trump administration's errors and reinvigorate the common-ground approach.

Of course, simply searching for common ground provides no guarantee that consensus will be found, particularly on the most divisive issues.³⁹ Accordingly, shifts on some religious liberty issues from administration to administration are unavoidable.

Steps, however, can and should be taken to minimize both the number of shifts from administration to administration and their magnitude. Stakeholders deserve better than to have their expectations and understandings about fundamental human rights and liberties upset every four to eight years. Taxpayers' money should not be spent on the wholesale rewriting of executive orders, regulations, and guidance with each new presidential administration. A nation with a unique and proud, albeit flawed, history on religious liberty should do what it can to ensure that this freedom is not actually serving as, or even simply seeming like, a partisan tool.⁴⁰

37. Melissa Rogers, *President Trump Just Unveiled a New White House 'Faith' Office. It Actually Weakens Religious Freedom*, WASH. POST (May 14, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/05/14/president-trump-just-unveiled-a-new-white-house-faith-office-it-actually-weakens-religious-freedom/?noredirect=on&utm_term=.c7bdf821c361; see also President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (Mar. 2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

38. President's Advisory Council on Faith-Based and Neighborhood Partnerships, *supra* note 37.

39. Even when common-ground projects do not produce a slate of agreed-upon items, they can be clarifying and edifying. Done properly, they promote cooperation, trust, and help various sides better understand and communicate with one another.

40. In a characteristically insightful piece written in the wake of the United States Supreme Court's decisions in the *Hawaii v. Trump* and *Masterpiece Cakeshop* cases, Professor Tom Berg notes that both conservatives and progressives can be selective in protecting religious freedom. See Thomas C. Berg, *There is Religious Bigotry Behind Trump's Travel Ban. The Supreme Court Should Have Known Better*, AM. MAG. (June 28, 2018), <https://www.americamagazine.org/politics-society/2018/06/28/there-religious-bigotry-behind-trumps-travel-ban-supreme-court-should>.

In its final report to President Obama, the diverse Advisory Council on Faith-based and Neighborhood Partnerships emphasized the value of common-ground work. The Advisory Council said:

As far as we know, this is the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground [on social service partnerships between the federal government and faith-based and community organizations]. It should not be the last time a government body does so. Policies that enjoy broad support are more durable. And finding common ground on church-state issues frees up more time and energy to focus on the needs of people who are struggling.⁴¹

To reap such benefits, future administrations should renew the search for common ground.

IV. THE FUTURE OF RELIGIOUS FREEDOM AND THE FEDERAL EXECUTIVE BRANCH

Administrations should articulate coherent visions for handling issues related to religion, law, and public policy and specific plans for implementing those visions consistently across the federal executive branch. Adequate staffing is needed to produce informed judgments on the myriad of such matters arising across that branch. Interagency coordination is required to reconcile any conflicts among those judgments. Whenever appropriate and feasible, administrations should consult with diverse external stakeholders

When conservatives and progressives act in this way, Berg says, it creates the impression that religious liberty “is nothing more than a tool for each side to use or discard according to what supports its preferred policy positions.” *Id.* In the piece, Professor Berg notes that he “filed or joined [*amicus curiae*] briefs in support of the religious liberty claims in both cases, regarding the travel ban and the cakeshop, and wish the court had protected both.” *Id.* With Professor Doug Laycock, Professor Berg has also argued that the First Amendment’s Free Exercise Clause requires a narrow exemption for entities like *Masterpiece Cakeshop* from the Colorado Anti-Discrimination Act’s prohibition on LGBT discrimination in cases like the one that was before the Court during its 2017–18 term. *See* Thomas C. Berg & Douglas Laycock, *Masterpiece Cakeshop and Protecting Both Sides*, TAKE CARE (June 15, 2018), <https://takecareblog.com/blog/masterpiece-cakeshop-and-protecting-both-sides>. I agree that both conservatives and progressives can be selective in protecting religious freedom, and that such selectivity can make that liberty seem like a partisan tool. I also believe, however, that Justice Elena Kagan identified another way to take a principled stand in the *Hawaii v. Trump* and *Masterpiece Cakeshop* cases. *See* *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm’n*, 138 S. Ct. 1719, 1732–48 (2018) (Kagan and Breyer, JJ., concurring); *see* *Hawaii v. Trump*, 138 S. Ct. 2392, 2429–33 (2018) (Breyer & Kagan, JJ., dissenting); *see also* Vikram David Amar and Alan E. Brownstein, *Attitudinal and Doctrinal Takeaways from the Masterpiece Cakeshop Case*, JUSTIA (June 15, 2018), <https://verdict.justia.com/2018/06/15/attitudinal-and-doctrinal-takeaways-from-the-masterpiece-cakeshop-case> (“[O]n the narrow yet important issue of whether Colorado, under its own statute, could permissibly have distinguished Mr. Phillips’ refusal to create a cake from the actions of the bakers who turned away Mr. Jack’s religiously inspired anti-gay messages, Justice Kagan’s bottom line is the right one.”).

41. President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *supra* note 37.

before taking executive actions. Searching for common ground on religious freedom issues also needs to be part of these plans. Seeking consensus on these issues certainly will not end the culture wars, but it will help Americans find ways to live together across our deepest differences, and it could make aspects of law and policymaking more stable and durable. Especially at a time when the executive branch is handling a large number of important, complex, and contentious church-state issues, that branch should take specific steps to protect fundamental rights and freedoms that are central to human dignity and to our nation's character and success.