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## Fighting faith-based spending in court

**A Supreme Court case could set the standard for challenging grants that break down the wall between church and state.**

By Andrew B. Coan

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SIGNIFICANT constitutional cases don't always arrive at the ball dressed up as such. Sometimes they come in the modest trappings of an obscure technical dispute too dull to capture public attention.

On Wednesday, the U.S. Supreme Court will hear oral arguments in just such a case. Hein vs. Freedom From Religion Foundation is unlikely to make headlines, but it could deal a sharp blow to the wall of separation between church and state.

The plaintiffs are ordinary citizens who object to their federal tax dollars being used to fund the president's program for "faith-based and community initiatives." In particular, they claim that several conferences sponsored by the program were propaganda vehicles for religion and therefore violated the establishment clause of the 1st Amendment, which forbids government promotion of religion.

The government defendants — "Hein" is Jay F. Hein, director of the White House Office of Faith-Based and Community Initiatives — dispute the plaintiffs' claim about the conferences. But at this stage, the Bush administration is asking the court to throw the case out on grounds that ordinary taxpayers have no legal interest in how the executive branch spends public money.

It seems like the kind of dry, legalistic dispute that only a lawyer could love. But the appearance is deceiving. If the court grants the administration's request, it will eliminate what is often the only effective mechanism for challenging financial support of religion by the executive branch. The effect would be to grant the president and his staff, as well as the vast federal bureaucracy, a license to preach.

The basis for the administration's request is the esoteric doctrine of standing, which determines who has suffered a sufficiently tangible injury to be allowed to bring suit in federal court. Ordinary taxpayers generally cannot sue to challenge the legality of government spending decisions because their contribution to any given expenditure is too small to count as tangible.

For the last 40 years, however, the Supreme Court has consistently given special treatment to taxpayer suits that challenge government spending in support of religion. The justification is simple and compelling. Government spending in support of religion generally does not inflict tangible injury on anyone, so if taxpayers don't have legal standing, no one does. In terms of government spending, the establishment clause would be rendered merely advisory.

That, of course, is how the Bush administration prefers its constitutional constraints.

To be sure, the administration does not advocate the wholesale abolition of taxpayer standing in establishment clause cases. It would allow taxpayers to challenge specific congressional spending programs, but not executive branch spending from general funds. This is hardly a consolation, as the Court of Appeals recognized in rejecting the administration's argument.

Suppose, as the lower court suggested, the secretary of Homeland Security used general executive funds to build a mosque and hire an imam in the belief that such visible support for Islam would reduce the risk of Islamist terrorist attacks against the United States. Would this traducing of the establishment clause not allow taxpayers to sue?

If one accepts the administration's view, it would not. The prospect boggles the mind. Not only would serious violations of the establishment clause go unremedied, but Congress might be encouraged to pad the executive's general funds, with an implicit understanding that the extra money would be available to fund executive branch programs promoting religion.

These results would be deeply inconsistent with the core purpose of the establishment clause: to ensure that no taxpayer is forced to contribute to government support of religion.

Unfortunately, the Supreme Court rarely takes a case to affirm the decision from below. That, together with the recent shoring up of the court's conservative majority, strongly suggest that the administration's position will prevail, despite the threat it poses to the separation of church and state. If it does, everyone at the ball will take notice. But by that time, the party will be over.

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