

## Trouble Ahead for Religious Nonprofits

Obama Administration Threatens the Religious Liberty of Schools, Hospitals, Charities

By Patrick Reilly

***Summary:** The Bush administration encouraged more government support for faith-based charities. But the Obama administration thinks that as the federal government becomes more involved with religious charities, hospitals and schools it should make the decision about whether they are religious or not. Religious nonprofits are right to be very worried.*

Faith-based nonprofits today are threatened by two groups: federal agencies that seem at best oblivious to the First Amendment right to religious liberty, and secularists whose goal of driving religion from the public square has found sympathy in Washington. If they get their way, the consequences will be devastating for religious schools, hospitals, charities and other faith-based organizations. Our public culture will be dramatically changed and government will further expand into areas once reserved for non-government associations.

Over the next few years religious nonprofits face the prospect that the Obama administration will try to severely restrict their ability to hire like-minded employees. They also will discover whether administration officials get to decide whether religious nonprofits are “sufficiently religious” to be protected by the First Amendment. In addition, the Obama administration is getting ready to force religious groups to provide their employees with health insurance coverage that violates their



religious beliefs. And the administration may allege unlawful discrimination against religious groups that refuse to provide such coverage.

Taken together all these threats are prompting religious leaders to go to court to defend their rights as religious nonprofits. The federal courts may provide some relief, but it’s uncertain whether their response will be too little, too late.

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## EEOC & Justice Department: No “Ministerial Exception”

Critics cried foul when the Senate last December confirmed President Obama’s nomination of Chai Feldblum to be a commissioner at the Equal Employment Opportunity Commission (EEOC). Even though Feldblum taught for years at a Catholic law school, she publicly denied the primacy of religious freedom when religious doctrine conflicts with certain rights.

“Sexual liberty should win in most cases,” Feldblum said when discussing the proposed rights of sexual minorities. “...I’m having a hard time coming up with any case in which religious liberty should win.”

She is not alone in her thinking. The question of competing rights, especially with regard to nondiscrimination law, has been a thorny one for the courts and for every recent president. But the EEOC under President Obama—he has appointed three of the five commissioners—is especially aggressive in charging religious employers

with discrimination despite their appeals to religious doctrine and their right to religious liberty.

That aggression has led to one of the most important religious freedom cases in many years. On October 5, the U.S. Supreme Court heard oral argument in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. Shockingly, in this case the EEOC and the Justice Department are urging the Court to do away with the “ministerial exception.” This is a longstanding rule in the federal courts that exempts religious employers from nondiscrimination law when they hire or fire a “minister” of their religious faith.

The logic of the ministerial exception is obvious, although some cases can be murky. For instance, most Americans would agree that the Catholic Church should not be charged with sex discrimination because it only ordains men to the priesthood. Under the Constitution the government cannot interfere with the religious standards set by church leaders. However, in the *Hosanna-Tabor* case, Lutheran church leaders argue that a school teacher they hired may not sue the church for alleged violations of the Americans with Disabilities Act. During oral argument, the Supreme Court justices seemed uncertain whether an employee who teaches primarily secular subjects but who also has important religious duties should be defined as a “minister.”

That’s a tough decision. However, the Obama administration’s opposition to the ministerial exception is so sweeping that it would cause significant harm to religious activities. The Justice Department and EEOC attorneys are asking the Supreme Court to reject any sort of ministerial exception as a general rule. They argue instead that courts should engage in case-by-case determinations of whether enforcing nondiscrimination law

substantially burdens religious belief or activity, which is forbidden by the Religious Freedom Restoration Act (RFRA). RFRA is a law enacted in 1993 in response to what was considered increasing legal challenges to religious rights.

Furthermore, argue the federal attorneys, if the Court chooses to recognize a general ministerial exception, it should be “limited to those plaintiffs who perform exclusively religious functions and whose claims concern their entitlement to occupy or retain their ecclesiastical office.” Presumably such a narrow exception would not even apply to clergy performing a secular task, such as teaching history or caring for a sick patient.

Ed Whelan, president of the Ethics and Public Policy Center, notes that the Obama administration’s brief to the Supreme Court is “even more hostile to the ministerial exception than the amicus brief filed by Americans United for Separation of Church and State and the ACLU.”

The leaders of nearly every major religious denomination in the U.S. have come to the defense of the Lutheran school by filing amicus briefs with the Supreme Court. They include Seventh-Day Adventists, Baptists, Catholics, Episcopalians, Evangelicals, Hindus, Jews, Methodists, Mormons, Muslims, and Presbyterians. What unifies them is not the details of the case but the danger they see in the Justice Department’s overall argument. They believe preserving the ministerial exception, even if the definition is narrowed by the Supreme Court, is essential to protecting religious practice and First Amendment rights.

“Any given religious community is a mere generation away from extinction,” warns a brief filed by the National Council of Churches, the Baptist Joint Committee for

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Religious Liberty and the National Association of Evangelicals.

## **EEOC: No Choice to Be Catholic**

In another religious freedom case that may go to court the EEOC is charging a small Catholic college in North Carolina with sex discrimination because it refuses to cover prescription contraceptives in its employee health plan. Belmont Abbey College insists that its motivations are religious:

“As a Roman Catholic institution, Belmont Abbey College is not able to and will not offer nor subsidize medical services that contradict the clear teaching of the Catholic Church,” said the college’s president, William Thierfelder. Roman Catholic doctrine holds the use of contraception to be gravely sinful—and even more so abortion, which can be caused by some prescription contraceptives.

In 2007, eight faculty members filed a complaint with the EEOC, claiming that Belmont Abbey’s policy discriminates against women. In March 2009, the EEOC District Office in Charlotte told the college that it found no wrongdoing. But without explanation, EEOC later reopened the case during debate over the Obama administration’s health care proposals, and in August 2009 the EEOC district office ruled that the college had discriminated.

Belmont Abbey has asked the full Commission to review the district ruling, but after more than two years, a potential lawsuit looms over the college without any EEOC response. The agency’s published guidance on “pregnancy discrimination” offers little hope for avoiding a court battle. The EEOC makes the tenuous argument that insurance coverage for prescription contraceptives, when other prescription drugs are covered, is required by the 1978 Pregnancy Discrimination Act—even though the law is concerned

only with protecting the jobs of employees who are pregnant or may become pregnant and as a consequence may require time away from work. Contrary to the EEOC argument that the employer’s policy discriminates against female employees, some might argue that a federal rule requiring contraception coverage actually serves the self-interest of any employer who wants a pregnancy-free workplace.

The EEOC guidance says nothing about the First Amendment rights of a religious organization that considers contraception morally wrong. The agency cites Title VII of the federal Civil Rights Act, which prohibits employment discrimination based on race, color, sex, national origin and religion—but the law has always allowed religious employers to require their employees to hold particular religious beliefs. The Civil Rights Act does not authorize the EEOC to allege sex discrimination based on failure to subsidize certain medical benefits. In fact, the RFRA prohibits any federal law that substantially burdens the free exercise of religion unless the law serves “a compelling government interest” in the least restrictive way possible.

Belmont Abbey’s leadership has said that it will close down the college before betraying its Catholic principles. Other Catholic nonprofits will be affected also, should the EEOC fail to reverse the district ruling or allow the college’s appeal to go unanswered. Even non-Catholic religious institutions which do not hold contraception to be immoral are threatened by the EEOC’s apparent disregard for religious liberty when it applies federal civil rights laws.

For the EEOC, religious freedom is apparently the *last* of the civil rights worthy of protection, even though it is the *first* of the freedoms declared in the Bill of Rights.

## **HHS: No Cost-Sharing or Delay in Contraceptives**

What the EEOC wants to mandate under Title VII of the Civil Rights Act of 1964, the Department of Health and Human Services (HHS) has already mandated by regulation under the Patient Protection and Affordable Care Act of 2010 (also known as “Obama-care”).

HHS rules issued this past August require nearly all health insurance plans to fully cover without co-pay all “Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” The rule also provides a back door to abortion coverage: the FDA has already approved certain intra-uterine devices (IUDs), “the Pill,” emergency contraception and the drug “ella” which are labeled contraceptives but can cause early abortions. And new drug developments are increasingly blurring the line between contraception and chemical abortion.

The problem with the HHS mandate for religious employers is in many ways similar to the problem Belmont Abbey faces with the EEOC ruling. But the HHS regulations are even more comprehensive because they apply to all group health insurance plans and not just employee benefits. That’s a concern especially for religious colleges, which often provide health plans for foreign students, college athletes and other students not covered by their parents’ plans.

“If we comply, as the law requires,” writes John Garvey, president of the Catholic University of America, in a *Washington Post* op-ed, “we will be helping our students do things that we teach them, in our classes and in our sacraments, are sinful—sometimes gravely so. It seems to us that a proper respect for religious liberty would warrant



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an exemption for our university and other institutions like it.”

HHS seems unconcerned about the impact of free sterilization and contraception on the college campus “hook-up” culture. Indeed, it appears eager to see the results. Federal agencies typically allow a 30-day or 60-day period for public comments before they make a regulation final. But on August 1, 2011 HHS took the extraordinary step of implementing its new healthcare rules immediately and allowed 30 days of public comment only *after* the rules were already in force. The reason:

“Many college student policy years begin in August, and an estimated 1.5 million young adults are estimated to be covered by such policies,” HHS explained in a *Federal Register* announcement of the regulations. “Providing an opportunity for public comment [and therefore waiting beyond August to implement the rules]... would mean that many students could not benefit from the new prevention coverage without cost-sharing following from the issuance of the guidelines until the 2013-14 school year, as opposed to the 2012-13 school year.”

Unlike the EEOC, HHS explicitly allows a religious exemption, but it protects only “churches, their integrated auxiliaries, and conventions or associations of churches” and “the exclusively religious activities of any religious order.” That excludes any religious entity that is not a church or legally owned by a church body. Many of America’s most important faith-based charities, schools, hospitals, membership institutions and other groups are legally independent despite a clearly religious mission.

Moreover, the exemption applies only to nonprofits that are established for the “inculcation of religious values,” which likely

excludes social service agencies and other faith-based groups that provide services other than worship and religious instruction. Exempt organizations must also hire and serve “primarily persons who share the religious tenets of the organization,” which may exclude many religious colleges and charities that serve people regardless of their beliefs. It all depends on how you define the word “primarily.”

Here is perhaps the most important problem with the HHS rules—the provision of a religious exemption is entirely at the discretion of HHS. The federal agency authorizes itself to act as the arbiter of which entities are considered religious. The regulations go so far as to say that HHS “may” exempt churches within the provision’s narrow scope. Nothing aside from the government’s interest in avoiding a court battle stands in the way of simply refusing to exempt even a church from the mandate.

“No federal rule has defined being ‘religious’ as narrowly and discriminatorily as the [HHS] mandate appears to do, and no regulation has ever so directly proposed to violate plain statutory and constitutional religious freedoms,” write Kevin Theriot and Matthew S. Bowman, both attorneys with the Alliance Defense Fund, a public interest legal group. The Fund is appealing the HHS mandate and has submitted a legal brief on behalf of 18 Catholic colleges and universities, the Cardinal Newman Society, the Society of Catholic Social Scientists, and the chairman of the U.S. Catholic bishops’ Committee for Catholic Education.

The full contingent of U.S. Catholic bishops has also submitted its comment to HHS, calling the regulations “an unprecedented attack on religious liberty.”

Despite differing views on the morality of contraception, more than 40 Protestant, Catholic and orthodox Jewish leaders have protested the HHS rules in an August 26 letter to Joshua Dubois, director of the White House Office of Faith-Based and Neighborhood Partnerships. They are concerned that the HHS definition of a religious employer, “narrower than any religious exemption ever previously adopted in Federal law,” could set a “dangerous Federal precedent.”

Such strong opposition to the mandate has provoked a backlash from abortion-rights advocates. In October the president of Catholics for Choice, Jon O’Brien, publicly scolded the Catholic University of America for “interfering in women’s capacity for moral decision making,” simply because the university wants to protect its right to uphold Catholic teachings. Frances Kissling, co-founder of the National Abortion Federation, also accused the university of being “intolerant” and “politicizing some of the most sacred decisions people make about sexuality and reproduction.” For her, abortion rights and contraception are more “sacred” than the First Amendment right of Catholic institutions to be, and act, faithfully Catholic.

NARAL Pro-Choice America has urged HHS to eliminate its religious exemption entirely. “Birth control is essential for women’s health,” wrote NARAL president Nancy Keenan.

There appears to be no agreement among pundits and legal experts about what HHS will do next. Religious leaders find hope in the fact that HHS invited comments specifically on the religious exemption, and some think that the Obama administration will back away from a fight that has angered even the

president's liberal-but-religious supporters. Should HHS retain the religious exemption in its current form, however, it is likely that nonprofit leaders will take their fight to the courts. Not waiting to find out, in November the Becket Fund for Religious Liberty filed suit against HHS on behalf of Belmont Abbey College.

### Does the Government Get to Decide What's Religious?

In 2008, on the campaign trail, then-Senator Barack Obama said, "If you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion."

The statement was widely reported as criticism of the Bush administration for making federal grants to faith-based charities that imposed religious tests on employees they hired. The Obama campaign responded that when he became president Barack Obama would forbid faith-based groups from discriminating against employees "just like any other federal contractor."

However, it appears that the Obama Justice Department is acting cautiously regarding the rights of religious organizations under RFRA, and this may have helped diminish the administration's eagerness to withhold grants to faith-based charities. Still, an alliance of organizations is calling on President Obama to redeem his campaign pledge. As recently as September 19, the Coalition Against Religious Discrimination (CARD) has demanded that the president and Attorney General Eric Holder end "federally funded religious discrimination"—an ironic way to describe faith-based organizations that are trying to preserve their religious mission.

CARD represents 56 organizations such as

the ACLU, Americans United for Separation of Church and State, Human Rights Campaign, National Organization for Women, People for the American Way, Rainbow PUSH Coalition and other leftist advocacy groups.

Religious organizations have responded with their own demands. In a July 12, 2011 letter to President Obama, 43 leaders of faith-based organizations joining together as the Institutional Religious Freedom Alliance argued that "religious hiring by religious organizations is not a deviation from the great civil rights legacy of the United States but rather a distinctive and vital feature of it—vital because it protects the religious freedom of religious organizations." The letter's signers represented the U.S. Conference of Catholic Bishops, Southern Baptist Convention, National Association of Evangelicals, Council for Christian Colleges and Universities, Focus on the Family, Prison Fellowship, World Relief, and other leading Christian and Jewish groups.

The participation of World Relief is notable. In 2010, the charity associated with the National Association of Evangelicals formalized its Christian-only hiring policy and instituted a "Statement of Faith" for all employees, risking millions of taxpayer dollars. About 70 percent of the group's funds come from government sources. When it subsequently dismissed a Muslim employee, a flurry of media attention led many to question whether the Obama administration would retaliate—something that hasn't happened yet.

Another group threatened by possible federal grant restrictions is World Vision, a Christian charity that receives more than \$300 million each year in government funds. Its employee faith statement has not yet been challenged by the Obama administration, but the charity recently survived a court challenge by three fired employees who al-

leged that World Vision was not a "religious employer." Their lawsuit failed in October when the Supreme Court declined to review an August 2010 ruling by the Ninth Circuit Court of Appeals.

Despite the lawsuit's failure, the arguments used raise troubling legal issues. Title VII of the Civil Rights Act explicitly permits a religious employer to discriminate in hiring for religious reasons. As a consequence, the attorney for the fired employees attempted to convince the court that World Vision could not be considered a "religious employer." This is the same argument that the Obama administration used in the *Hosanna-Tabor* case: The "ministerial exception" allowing discrimination in hiring is narrowed so that a "minister" is defined as an employee who has no secular duties. The lawsuit claimed that World Vision's activities helping the poor were akin to the work of the American Red Cross. They were "secular" and not truly religious, despite World Vision's assertion that it "promotes the Christian faith by trying to meet the profound needs" of the poor while teaching clients about God.

When the Ninth Circuit rejected the fired employees' claim faith-based organizations had reason to hope that the Obama administration's threats to the religious liberty could be successfully challenged in federal court. The circuit court simply refused to answer the question raised by the employees' attorney: whether humanitarian work is religious or secular. The court ruled that even to ask the question would be "constitutionally troublesome" and "runs counter to the core of the constitutional guarantee against religious establishment." The federal government should not be the arbiter of what is religious.

Instead, the court used a three-part definition to decide what is religious. It ruled that any nonprofit entity should be regarded as reli-

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religious under Title VII if it “holds itself out to the public as religious,” has “a self-identified religious purpose” and acts “consistent with, and in furtherance of, those religious purposes.”

## The NLRB Decides What’s Religious

The federal Court of Appeals for the District of Columbia Circuit also defers to the self-identification of colleges and universities in determining whether they are religious. Nevertheless, in the past year the National Labor Relations Board (NLRB) has twice ignored the court and asserts that it has jurisdiction over employee relations at two Catholic institutions based on its own determination that the colleges are insufficiently religious.

The D.C. Circuit Court—following criteria first developed by Judge Stephen Breyer before he was nominated to the Supreme Court—told the NLRB in 2002 and 2008 to leave religious colleges alone.

It cited Supreme Court instructions in *Mitchell v. Helms* to “refrain from trolling through a person’s or institution’s religious beliefs.” The circuit court said a college is “religious” and therefore exempt from NLRB oversight if it is 1) nonprofit; 2) “holds itself out to students, faculty and community as providing a religious educational environment;” and 3) “is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.”

Those standards are based on the 1979 Supreme Court ruling in *NLRB v. Catholic Bishop of Chicago, et al.*, which found that the NLRB improperly asserted jurisdiction over Catholic parochial schools, thereby potentially interfering with religious decisions about curriculum and personnel.

Nevertheless, as documented in the Capital Research Center’s *Labor Watch* (August 2011), the NLRB has for decades skirted around federal court rulings to demand compliance from religious colleges and universities. Its current policy, deemed unconstitutional by the D.C. Circuit Court, is to engage in an intrusive “substantial religious character” test to determine whether institutions are exempt from its oversight. This test requires the very sort of subjective analysis of colleges’ religious nature that the Supreme Court sought to avoid.

The NLRB sets itself up as arbiter of religious identity. It considers such factors as whether a college or university is legally controlled by a church, whether it accepts government funds, whether it imposes religious tests on faculty and students, whether students are required to attend religious services, and more.

Applying its “substantial religious character” test, NLRB regional directors in 2011 declared two colleges—Manhattan College in New York and St. Xavier University in Chicago—to be primarily secular and therefore subject to NLRB intervention in faculty union elections. The claim that the colleges were “not religious enough” attracted widespread media attention. Legal experts and scholars of religious liberty were outraged. Both colleges have appealed the NLRB regional decisions to the full Board in Washington, and they will likely sue the NLRB in federal court if the Board supports its regional decision makers.

The Manhattan and St. Xavier cases raise an interesting quandary for religious leaders: how do they defend the First Amendment rights of faith-based organizations while also admitting the sad truth of the NLRB’s findings: Many nonprofits with nominal religious affiliations are not very religious.

Under the Constitution the federal government has no right to decide what makes an entity Christian or Jewish or Muslim. That decision belongs solely to religious authorities. But it’s also clear that some faith-based charities, schools, hospitals and other entities are hypocrites. At worst they reject and deny church teachings. At best they water down their own religious identity in order to attract state and federal tax dollars. Either way, it’s hard for people of religious faith to feel much sympathy for some nonprofits whose religious rights are threatened.

## Defending Religious Liberty

The religious freedom experts at the Alliance Defense Fund (ADF) urge faith-based groups to vigorously defend their rights—in court if necessary—but also to strengthen their religious character.

In a January 2011 memo to Catholic colleges and universities, ADF’s Kevin Theriot noted the possibility that “any available exemptions for religious institutions will not apply if a college that was founded as a religious institution has become largely secular. It is therefore vital that Catholic colleges and universities maintain their Catholic identity in all of their programs in order to best protect their religious character and mission.”

This principle applies to all faith-based organizations. For a religious nonprofit to obtain a religious exemption from an offensive law or regulation or claim a “substantial burden” on religious activity under RFRA, it must have a clear religious mission.

We don’t know how the Obama administration’s threats to religious liberty will pan out.

\* If the Supreme Court decides to accept the elimination or curtailment of the “ministerial exception” for religious entities the First

Amendment protections enjoyed by religious institutions will suffer a severe blow.

\* Should HHS retain its narrow definition of what is a religious employer, it could be a few years before the federal courts determine whether the health insurance regulations violate RFRA.

\* The NLRB is expected to rule soon on appeals by Manhattan College and St. Xavier University. If the Board refuses to acknowledge their exemption from federal oversight, it is likely that both colleges will appeal to federal court.

Aside from these particular struggles, the protection of faith-based nonprofits requires that Americans develop a renewed appreciation for the First Amendment and its guarantee of religious liberty. Threats from the Obama administration may help galvanize support for the rights of religious organizations. On the other hand, they may be signs that the public is growing increasingly ambivalent towards religion and accommodating towards secularism in American society.

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Terrence Scanlon  
President



# Briefly Noted

House Oversight and Government Reform Committee chairman **Darrell Issa** (R-Calif.) is demanding that the **Obama** administration investigate allegedly fraudulent fundraising practices that **ACORN's** New York front group may have used to raise funds for Occupy Wall Street. The ACORN spinoff, **New York Communities for Change** (NYCC), “solicited donations from union members under false pretenses and misappropriated those funds to support the protesters,” Issa said. NYCC staffers reportedly collected money door-to-door for the group’s campaign to test schools for dangerous toxins such as PCBs but then diverted those funds to support Occupy Wall Street.

The **George Soros**-funded **Alliance for Global Justice**, is managing donations benefiting the communists, socialists, anarchists, and hippies occupying Zuccotti Park in lower Manhattan. The Alliance has taken in about \$250,000 so far. A hotbed of anti-American activity, the Alliance takes money from some of the most extreme left-wing philanthropies operating in America today. The Alliance has accepted grants from the (pro-**Fidel Castro**) **Arca Foundation** (\$185,000 since 2001), **General Service Foundation** (\$165,000 since 2001), and **Foundation for Deep Ecology** (\$30,000 since 2000), an anti-science environmentalist group that regards human beings as a cancer on the earth.

The local branch of Occupy Wall Street invaded Freedom Works’ BlogCon “boot camp” for conservative bloggers in Denver last month. The “occupiers” attempted more than once to disrupt the proceedings but failed to do so. The conservative bloggers may be the first group yet to stand up to the radical occupiers who have set up camp in cities across the nation. Meanwhile, in Washington, D.C., occupiers knocked a woman in her seventies down the stairs outside the **Americans for Prosperity** convention. Outside the same forum, the D.C. activists also refused to allow a man driving an SUV to pass because they dislike luxury vehicles.

Election law expert **J. Christian Adams** reports that Soros-funded groups got together recently at an undisclosed location to plot new ways to undermine election integrity. The meeting was sponsored by the **Fair Elections Legal Network**, a group that received \$105,000 from the Soros-funded **Tides Foundation** since 2007. “These types of groups exist primarily to attack any effort to combat voter fraud or ensure the integrity of elections,” Adams writes. They are part of “an enormous and well-funded industry of voter fraud deniers that provides an intellectual smokescreen for this lawlessness.” Adams is author of *Injustice: Exposing the Racial Agenda of the Obama Justice Department* (Regnery, 2011) and of the October *Organization Trends*.

**Color of Change**, the extreme left-wing group that takes credit for getting **Glenn Beck’s** TV show off the Fox News network, has launched a new campaign trying to convince Americans that new electoral integrity measures adopted by states are some kind of a racist poll tax. Requirements that voters present an ID when voting constitute the “harshest attack on voting rights in decades” and are “threatening to disenfranchise millions of voters” who can’t bother to get government-issued photo ID.

Intrepid researcher **Trevor Loudon** launched his book, *Barack Obama and the Enemies Within*, at the National Press Club in Washington, D.C., at the end of October. Based in New Zealand, Loudon, who profiled the **Tides Foundation** in the October 2010 *Foundation Watch*, has won increased American attention as an authority on the radical Left.