Trump's religious liberty executive order: A whole lot of nothing

by Michael Sean Winters

Distinctly Catholic
President Donald Trump signed a much-anticipated executive order on religious liberty issues yesterday. But the anticipation turned out to be hyped: The executive order is a whole lot of nothing.

For example, the contraception mandate that has been at the center of litigation and political fighting since the Department of Health and Human Services issued it in 2012 received this paragraph in the order:

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Conscience Protections with Respect to Preventive-Care Mandate. The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services shall consider issuing amended regulations, consistent with applicable law, to address conscience-based objections to the preventive-care mandate promulgated under section 300gg-13(a)(4) of title 42, United States Code.
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Of course, the Supreme Court already ordered the government to devise "amended regulations" after hearing arguments in the case *Zubik v. Burwell*.

Similarly, the Johnson Amendment, which forbids non-profits, including churches, from explicitly endorsing candidates, cannot be rescinded by an executive order, so President Trump merely ordered the IRS to go easy on the subject. The IRS already went easy on the subject. One hopes, at least, that Trump will henceforth refrain from complaining that undocumented immigrants broke the law, seeing as he has just instructed his Treasury Department not to take action against pastors who still, technically, break a law which is still on the books.
I would add that the reasons for keeping the Johnson Amendment, articulated well in an editorial published here at NCR [2], were unaddressed by the president's order. Those reasons are sound both politically and ecclesiastically, but Mr. Trump knows that evangelical Christians are his most loyal supporters, and they were clamoring for him to overturn the Johnson Amendment.

Unfortunately, religious liberty, which should be something that unites Americans, is now one more pawn in the divisive culture wars. The Center for American Progress, a liberal think tank in Washington, was quick to denounce the executive order. The ACLU threatened lawsuits before the content of the order was announced but decided not to bother: Not sure what in this assemblage of nice talking points could be the object of litigation?

The president of the U.S. bishops' conference, Cardinal Daniel DiNardo, issued a statement [3] that reflected the ambiguity that remains around even the contraception mandate after the order was published. "Today's Executive Order begins the process of alleviating the serious burden of the HHS mandate," DiNardo said. "We will engage with the Administration to ensure that adequate relief is provided to those with deeply held religious beliefs about some of the drugs, devices, and surgical procedures that HHS has sought to require people of faith to facilitate over the last several years. We welcome a decision to provide a broad religious exemption to the HHS mandate, but will have to review the details of any regulatory proposals."

Notre Dame Law Professor Rick Garnett was similarly ambivalent. "Americans who embrace our constitutional tradition of respecting religious liberty and the role of religious believers in public life will welcome, naturally, the executive order's declaration that the Administration is committed to protecting religious liberty for all," Garnett told NCR. "Of course, the question is what that commitment means in terms of executive action. In terms of specifics, however, the order does very little and does not address a number of pressing and important questions having to do with conditions on licenses, grants, contracts, and the like."

A draft of the executive order [4] was leaked to The Nation in February, and it would have been far more sweeping. Among other things, the draft would have used religious liberty claims to justify discrimination against gays and lesbians. Of course, religious organizations have the right to hire for mission, and the ministerial exemption to labor laws remains the law of the land, affirmed by a unanimous Supreme Court as recently as five years ago.

It is for churches to decide who can function in a ministerial capacity, to be sure. Why would anyone think getting the government entangled in that would be a good thing for the country? But should churches go to court to make sure the accountant at a Catholic college can't get dental coverage for her same-sex partner? I would rather churches make that decision, but it is a foolish decision to make.

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One funny, or maybe not so funny, tweet I read said, "There is a special place in hell for those who attend National Day of Prayer in morning and take away healthcare in afternoon." Those who have been loudest in championing religious liberty tend to be the same people who narrowly define religious identity in terms of adherence to certain ethical, usually sexual, norms. Those of us who profess our faith in the Incarnation every time we recite the Creed must acknowledge that what we do with our bodies is of religious significance. But that is not the sum total of our religious identity. Those who objected to the contraception mandate would speak breezily about shutting down our ministries, as if that was not itself a
denial of our Catholic identity, too.

Most disturbingly, neither the advocates of religious liberty nor those who put the phrase in scare quotes as "religious liberty" and who seem quite content to roll over the First Amendment on behalf of gay rights or women's access to contraception? neither side? has made a good faith effort to sit down at the same table and work through a compromise. I was worried that Trump's executive order would be more strident and religious liberty policy would become like the Mexico City policy on government funding for organizations abroad that provide abortions: The policy would change depending on which party won the White House, even though no president has been elected in my lifetime primarily over culture war issues.

We need to find a modus vivendi that both respects people's sincere religious convictions and the rights of gays and lesbians to full participation in society. The Mormons and the LGBT community in Utah sat down together and made progress on legislation that satisfied no one entirely, which is the best kind of compromise. The USCCB should do likewise. I understand that political activists can be a stiff-necked and dogmatic as any religious leaders, but the effort must be made.

We need to stop letting these issues become not only divisive but defining of our political allegiances. We need to step back from the culture war a bit and seek solutions, not means of raising money for special interest organizations. I am embarrassed by those liberals who dismiss religious liberty concerns as some kind of nuisance as I am by those religious leaders who wish to demonize and discriminate members of the LGBT community. And most annoying are those leftist religious leaders who give political cover to those seeking to undermine religious liberty. There may be a special place in hell for them, too.

It remains to be seen what will happen to religious liberty concerns on Trump's watch. Yesterday was a whole lot of nothing, and none of us knows if that was the result of incompetence or if internal debates within the administration remain unresolved. It is precisely the time for discussions among those who differ on these issues amongst themselves.

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