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HHS mandate: Sure looks like a miracle

by Michael Sean Winters

Distinctly Catholic

The proposed final rule on the contraception mandate, announced by the Department of Health and Human Services today, will widely be portrayed as a victory for the Catholic Church. This is mistaken. It is really nothing short of a miracle. And, it is a particular kind of miracle, the kind that happens in politics too infrequently, when a decision that has no real political justification is, nonetheless, taken because it is the right thing to do.

Before I get ahead of myself, let me offer a big proviso and say that I am not a lawyer, and so I will wait to hear what some of my lawyer friends have to say on the subject before giving it a full-fledged, "Distinctly Catholic" imprimatur. Lawyers sometimes recognize dangers that are opaque to the rest of us. But, it is also the case that lawyers bring their own particular biases to analysis, they tend to ferret out worst case scenarios and assume those scenarios should govern the response of their clients. But, political judgment, while it requires one take account of a worst case scenario, must also take account of other factors. In this case, what are those other factors?

The President won re-election by 5 million votes. He won a majority of the Catholic vote according to exit polls. He won that vote in the face of some of our more strident bishops, such as Bishop Jenky in Peoria who compared the President to Hitler and Stalin, and in the face of Bishop Morlino in Madison, who shared his budding bromance with Cong. Paul Ryan in ways that undercut 120 years of Catholic social teaching, and in the face of Bishop Paprocki of Springfield who warned that a vote for Obama would imperil one's eternal soul. These bishops did not speak for all bishops. In fact, I do not think they spoke for a majority of the bishops. But, they captured the headlines. The President can be forgiven for thinking that they represented the considered opinion of the American hierarchy. Certainly, he and his advisors could reasonably conclude that he earned his second term in spite of, not because of, the Catholic bishops of the United States. In short, he owed them nothing.

President Obama, however, like most politicians I know, does not relish the idea of fighting with clerics and understands, in some sense, that it is not a President's job to pick fights with any denomination. It is not good for the country. And, so, something happened post-election within the administration that they found themselves able to address most of the concerns raised by the USCCB.

First, the four-part definition of what constitutes an exempt religious organization has been removed. This was key. It would have set a potentially nasty precedent in federal law, drawing a distinction between houses of worship and a church's ministries in ways that are particularly antithetical to Catholic sensibilities. We Catholics have always held that works, as well as faith, were a necessary part of the religious life, and so our ministries are as essential to our sense of our faith as are our sanctuaries. We Catholics have never set faith and reason at odds, and so our universities have a vital and specifically religious task, integrating faith and reason in each new generation. The idea that our ministries and our universities were somehow unworthy of an exemption because they do not exclusive employ or serve co-religionists was obnoxious to much that we Catholics believe.

Second, the administration has resolved the issue of what to do about self-insured religious organizations. They are exempt from the mandate. This was especially important because some religious organizations began self-insuring in the face of state-level mandates similar to the new federal mandate. The accommodation announced last February transferred the obligation to cover contraception from the employer to the insurance company, but that did nothing for the self-insured. And, because self-insured organizations tend to be larger, and because women's groups, who really did help the President win a second term, might have balked to see thousands of women denied the care they want, the administration, at long last, did what it should have done in the first place: Women who want contraception coverage and who work at an exempt organization can get it from the plan administrator who will be reimbursed via the exchanges being set up by the Affordable Care Act. This kind of mechanism had been proposed by Sister Carol Keehan, by Professor Stephen Schneck, and by me for the past year and one-half.

I foresee some objections to the new rules. First, some will say that the original accommodation was wrong not only because it did nothing for the self-insured, but because the vehicle for delivery of the contraceptive services remained the insurance company hired by the religious organization. This, it is claimed by some, amounts to material cooperation with evil. Of course, civil law finds other ways to address issues of material cooperation with evil, I will only note that in classic Catholic theology, in cases of material cooperation with evil, you can intend the cooperation but you can't intend the evil. So, if you are a university and you have an insurance plan with Aetna, you purchased that plan to get insurance for your employees and your students. That was your intent. Now, under the rules, Aetna must contact employees and pay for their contraceptive care separately. Aetna will be happy to do this, because it will save them money. You will know that Aetna will do this, but because you did not intend that when you signed up for the plan, I think this is morally licit. Besides, under compulsion, you can engage in material

cooperation with evil.

This last point is key. Pastors of the Church have two functions relating to the consciences of the faithful. They must try and form those consciences to be in conformity with the mind of the Church. Second, in difficult cases, a pastor's job is not to burden a person's conscience but to assuage it, if possible. If an employer comes in and says she is worried about this arrangement, a good pastor would instruct her that her intention of providing insurance coverage for her employees is what matters, that she is not intending to cooperate with the evil the insurance company will undertake and that, at any rate, the government's laws amount to exculpatory compulsion. These kinds of arrangements with third parties are used all the time with Hassidic communities.

I do not anticipate any objections from women's groups. Yes, the group of religious institutions that are exempt from the mandate is larger than it was before, but the administration has devised a way to genuinely make the contraceptive coverage universal, which is was not under the previous iteration of the rule. Previously, women that worked at an exempt institution were on their own. Now, even those at previously exempt institutions will have a way of getting coverage if they want it. This, too, is a victory for conscience rights, no?

The new changes do nothing about for-profit employers. Some of those employers are currently suing the government in court. Those cases will continue. They may flourish or they may fail, and you may wish for one outcome or the other depending on how you weigh the relative advantages of near-universal contraception coverage versus holding to a broader understanding of conscience rights. I support the idea that Hobby Lobby should get an exemption and I suspect they can make a case that they are a religious organization deserving of RFRA protection, even if they are a for-profit company and, so, are not covered by the rules issued today.

But, what cannot happen, what would be a disaster, is if the USCCB were to oppose the new rules on the grounds that they do not cover for-profits. Or, for any other reason. The fact is that there were plenty of Catholics who were telling the administration to ignore the bishops' complaints, that contraception was a winning political issue, and that no changes needed to be made in the original proposed rule. The White House, thankfully, did not listen to them. They listened to those who proposed a sensible solution and urged a policy fix. The White House gave more than they had to. Politically, this is a huge win. As for the legal qualifications, I await the considered judgment of those learned in the law, but I suspect that while this HHS mandate may still be of concern to the Becket Fund, it is no longer a problem for our bishops, our Church or Her many ministries.

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