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The "Sanity Caucus" Wins

by Michael Sean Winters

Distinctly Catholic
Fall bishops' meeting 2013

The United States Conference of Catholic Bishops evidently had an interesting discussion in their closed-door executive session yesterday. What issued from that meeting was a statement that represents the first step off the limb they have been climbing out on the past couple of years regarding the religious liberty squabble with the Obama administration over its HHS contraception mandate. This time, the "sanity caucus" at the USCCB won, forging a consensus statement that is far less confrontational than previous statements on this subject issuing from the USCCB.

The differences between this statement and previous ones become clear when you note what is in this latest statement and what is missing from it. First, there is the opening paragraph which reads:

The bishops of this country have just concluded their traditional fall meeting in Baltimore and have spent time on issues important to them and their people: help to those suffering from Typhoon Haiyan; an update on the situation in Haiti; matters of worship and teaching; service to the poor; and comprehensive immigration reform. Among those priorities is the protection of religious freedom, especially as threatened by the HHS mandate.

To recall, in the past two years we did not have a "Fortnight for Service to the Poor" or a "Fortnight for Comprehensive Immigration Reform." Now, finally, the fight against the HHS mandate is properly placed among a variety of priorities, not at the top of the list. That is progress. Sanity requires perspective.

The statement issued yesterday also includes these important sentences:

As the government's implementation of the mandate against us approaches, we bishops stand united in our resolve to resist this heavy burden and protect our religious freedom. Even as each bishop struggles to address the mandate, together we are striving to develop alternate avenues of response to this difficult situation.

Each bishop are the operative words. While there is obvious consensus among the body of bishops on the desire to resist the mandate, and all wish the lawsuits well, it is finally emerging that should those lawsuits fail, most bishops are disinclined to start shuttering their ministries to the poor. No one wants to say that outright. The courts do not look kindly on the argument that a law should be overturned because one does not like it. The courts respond better to a claim that a given law violates one's conscience. But, it is now obvious that, having indulged what can only be called a hyperbolic narrative these past couple of years, many, perhaps most, bishops do not very much like the consequences of their own hyperbole. Ask yourself this question: Which bishop would look forward to an ad limina visit with Pope Francis if the first thing they have to say is that they closed down all their ministries that assist the poor because they did not want to provide insurance coverage for things to which the Church objects?

In addition to what is in the statement, it is curious what is not there too. The 2012 statement "Our First, Most Cherished Freedom," issued by the Ad Hoc Committee on Religious Liberty, stated, "In an unprecedented way, the federal government will both force religious institutions to facilitate and fund a product contrary to their own moral teaching and purport to define which religious institutions are 'religious enough' to merit protection of their religious liberty." The words "facilitate and fund" were not chosen merely for their alliterative value. This is the language of moral cooperation with evil, and that is the issue the USCCB has been dodging for some time now. If compliance with the mandate represents illicit material cooperation with evil, then we really would have to contemplate closing our ministries. If not, while it is always good to avoid cooperation with evil, in a complex society, such cooperation is often necessary and permissible. And, as Cardinal Sean O'Malley stated in his interview with the Boston Globe this week, "closing the [Catholic] institutions down is also an evil for us." Throughout the early nineteenth century, every conclave was a contest between the *zelanti* and the diplomats. Yesterday, at the USCCB meeting, the diplomats among the bishops declined to get boxed in by the cooperation with evil argument put forward by the *zelanti*. Therein is the victory for the sanity caucus.

This new, less pristinely ideological stance had to emerge at some point. It has been noted before that many dioceses already included contraception in their insurance policies, including the archdiocese of the new USCCB President, Louisville Archbishop Joseph Kurtz. I am sure +Kurtz did not intend to include contraception coverage. More likely, no one thought to check the fine print. But, if the issue of insuring things the Church frowns upon, as opposed to actually engaging in those things, were so grave, I suspect someone at the Louisville chancery would have checked. Similarly, the out-going USCCB President, Cardinal Dolan, allowed some coverage of contraception in union-negotiated contracts for archdiocesan employees, not because he wanted to, but because in a complex society, sometimes you end up remotely cooperating with evil. To be sure, there is a difference between government coercion and a bad result from a union contract, but the key point is that much of the hyperbole the past couple of years was overwrought.

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To be clear: I agree with the bishops when they state "We have been forced to devote time and resources

to a conflict we did not start nor seek. President Obama brought on this fight, quite unnecessarily in my view. And he was wrong to do it. But, it is also true that while no bishop sought this fight, far too many were only too willing to engage it. Some bishops just hate Obama and that hatred has skewed their vision.

Nowhere is that skewed vision more obvious, or more counter-productive, than in the narrative put forward repeatedly by Archbishop William Lori, chairman of the Ad Hoc Committee on Religious Liberty. Take, for example, his article in America earlier this year. The tone in that article and that in the statement issued yesterday could scarcely be more different. Most importantly, +Lori has been one of several bishops who have seen the HHS mandate as part of an organized effort to sideline the Church from public life. To be sure, there are enemies of the Church. To be sure, there are some people who would like to see the Church sidelined from public life. But, in the HHS fight, it seems to me that what governed the Obama administration's actions was a desire to extend contraception coverage to as many women as possible. That is what they were after. We may disagree with that aim, and I do. And, we may think that in balancing that aim with the religious rights of our Catholic institutions, the administration erred. But, I have never discerned an all-out attack on religious liberty in the administration's actions and, what is more, the invective directed against President Obama, long before the HHS mandate, gave him little reason to think that an amicable solution could be found.

This is why I still believe that once the pernicious four-part definition of a religious employer was removed, the USCCB should have declared victory and gone home. True, the new definition relied on a differentiation among religious non-profits never used before in the context of conscience protections. The point of the differentiation, drawn from the tax code, was not to label some institutions less religious, or "second class" compared to others. The original reason for distinguishing between religious institutions that must file 990s and those that must not was informational: Large charitable institutions were not taxed more than smaller, exclusively worship-oriented institutions, but the government expressed a desire to check the financial records, mostly to ensure that there were no financial shenanigans going on. The Church has never previously objected to the fact that some of our religious institutions must file 990s. That was never seen as a burden on our religious liberty. Do I wish the administration had used a more appropriate line of demarcation, one that had been used in the context of conscience exemptions in the past? Yes, I do. Those laws and regulations are part of the "architecture of religious liberty," yesterday's statement mentioned a very felicitous expression. But, the administration was using the 990 distinction because that was likely to achieve their goal of extending coverage as far as possible. That may be bad policy, but I do not believe it was intended as the first part of a long-term strategy to circumscribe the religious liberties of the American people.

The bishops continue to insist on the need to extend religious protection to for-profit employers. I continue to think this is a non-starter, and would set a dangerous precedent. Let us recall that many white, Southern preachers pointed to the story of Ham to justify their opposition to civil rights legislation. The invocation of religious liberty has not always been on the side of the angels, and it must always be balanced by the common good. It can be argued that civil rights legislation helped achieve the common good, and the mandate does not, but that is no longer a religious liberty argument. Additionally, I think if we had focused exclusively on the integrity of our ministries, and not jumped onto the Enlightenment-inspired talk about individual conscience rights, we might have had a happier outcome. Just as importantly, churchmen are well advised to be leery of Enlightenment-inspired talk about individual conscience rights. That path has dangers too.

So, to sum up, yesterday's statement is a first step towards sanity. It recognizes that while we all hope the lawsuits prosper, and this and future administrations will think twice before limiting conscience exemptions for our ministries, we are not going to close those ministries just because of an insurance mandate that will, in fact, not require us to either fund nor facilitate the coverage of procedures we find

morally objectionable. And, the issue of religious liberty will no longer be the thing that drives the entire agenda for the USCCB: The issue is important, but not exclusively so and, as Cardinal Dolan explained, the issue of religious liberty abroad commends itself to our attention as well. Yesterday was one step off the limb, one step back from the barricades in the culture wars. Let's hope the lawsuits are successful. (N.B. The naughty, journalist side of my personality must register the lesser hope that if the lawsuits lose, it is on a 5-4 majority opinion authored by Justice Antonin Scalia. The irony would be too delicious.) But, what I read in yesterday's statement is an assurance that if the lawsuits do not prosper, our ministries will not close, and our fight for religious liberty may be less hysterical and, just so, more successful.

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