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### February 3, 2013: The Response to Obama's Contraception Initiative

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Title: The Response to Obama's Contraception Initiative

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2/3/2013—It's been a disappointing reminder of the America's hyperpartisanship to hear the grudging and resisting tone of the response to the Obama Administration's new offer on the contraception mandate. Of the critics and litigation parties, only the Catholic Bishops have offered anything like openness to see whether any new rules might work as a compromise.

The most important aspect of the new proposal is its expansion of the exemption from the contraception mandate. The old proposal covered only churches, essentially, and now many and maybe most religiously affiliated nonprofits, like my own Duquesne University, appear now to be covered, or at least accommodated.

Of course some people say that the compromise itself is suspect because the requirement that insurance companies pay for the coverage without raising prices for the institution is impossible. But that position is ideological. The burden will be on those complaining to show actual costs to the institution.

And it is also true that for-profit businesses are still not covered by the exemption. That issue is going to have to go the US Supreme Court, since it would create an incentive to opt out for financial reasons and create quite a broad precedent for businesses that object on religious grounds to public policies—like union rules and nondiscrimination policies.

Having been a movement lawyer in death penalty cases, I wonder about the legal ethics of the Becket Fund for Religious Liberty. According to news reports—which may not be accurate—Kyle Duncan stated that the proposed rule “does nothing to protect the religious liberty of millions of Americans.” In context he may only have meant for-profit businesses, which is true. But Becket represents some parties who are included in the rule expansion. Their lawyers owe their clients strategies to benefit them and not just score political points. Two points made on the Becket website are

“For other religious non-profits, HHS proposes a convoluted ‘accommodation’ that may not resolve religious organizations’ objections to being coerced into providing contraceptives and abortifacients to their employees.

Finally, the long-awaited rule provides no concrete guidance for religious groups that are self-insured.”

Note the weasel words—“may not” and “concrete”. Some of their clients “may” be included and the self-insured “may” get relief when details are hashed out. A real lawyer would praise the expansion and try to get her client included—not bash it and avoid negotiation. Death penalty lawyers take plea bargains when they can get them. They don't litigate to show how unfair the death penalty is.

I guess I should not be surprised at the rejection by the National Right to Life Committee. They are only using the religious objection to aid their opposition to the whole idea of contraception coverage. They would only be satisfied if contraception were dropped from healthcare altogether.

Even the reactions of law professors broke down on essentially party lines. Where are the religious liberty proponents who will welcome the continuing efforts of the Obama Administration to carve an effective compromise? Of course by insisting on everything, religious liberty proponents may lose everything. But, as I heard at the AALS meeting last month, they expect to win in the Supreme Court. Maybe they will. Yet by resisting efforts to compromise and refusing to offer alternatives in negotiation, the cause of religious liberty may be the ultimate loser among the public.