The HHS Mandate: One Battle in a Two-Front War

By Carl A. Anderson - Obama has opened two fronts in the war on religious liberty and may try more.

Before we turn the page on the HHS contraception mandate and focus on the current inadequate compromise, or on just how far the Obama administration will backtrack — or be forced back — let's not forget what it nearly got away with.

Twice in recent months, the administration has attempted to apply wide-reaching government regulation to religious organizations. And twice it has faced repudiation — first from a unanimous U.S. Supreme Court ruling and now from outraged citizens in the court of public opinion.

But it is the combined effect and underlying philosophy of these proposals that has so many religious believers concerned. The perception is growing that there is hostility within the Obama administration to the role of religious institutions in American life.

Arguing before the U.S. Supreme Court in *Hosanna-Tabor v. EEOC* late last year, the administration sought unprecedented limits on the autonomy of churches and religious institutions in employment matters. The administration argued that the free-exercise clause of the First Amendment is not relevant to any "ministerial exception" in employment law claimed by religious institutions. To the extent that the administration was willing to recognize any exception, it wanted such exceptions "limited to those employees who perform exclusively religious functions."

So radical was the administration's reasoning that the Supreme Court *unanimously* disagreed, saying: "We are unsure whether any such employees exist," because even the highest-ranking churchmen have "a mix of duties," not all of which are religious. Dismissing the administration's arguments, **the Court ruled 9–0** that "there is a ministerial exception grounded in the Religion Clauses of the First Amendment" with President Obama's nominee to the Court, Justice Kagan, co-authoring a concurring opinion, which some legal scholars see as even more wide-reaching than the Court's majority opinion.

While the *Hosanna-Tabor* case was pending, the administration opened a second front in the religious-liberty debate last summer. Its contraception mandate allowed only the narrowest exemption for religious institutions - one apparently crafted earlier by the ACLU. Religious organizations could claim this exemption only if they meet a strict four-part test: (Difficult to find an organization that can meet this test.)

(1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization . . .

As Cardinal Daniel DiNardo of Houston put it, "Jesus himself, or the Good Samaritan of his famous parable, would not qualify as 'religious enough' for the exemption, since they insisted on helping people who did not share their view of God."

In a country where 75 percent of the population professes to be Christian, the administration proposed an exemption that neither Christ himself nor his followers could legitimately meet, since Christians are called to reach beyond their own denominations in teaching "all nations," considering everyone their "neighbor," and doing "good to those who hate" them. No Christian denomination could be expected to comply with the third requirement of the exemption without forsaking those they were called to serve. And many non-Christians also object to such a self-centered view of their service to society.