

April 2017

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Most Rev. William E. McManus

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FELIX CULPA—REPORT FROM THE AD HOC COMMITTEE ON SCHOOL AID

MOST REVEREND WILLIAM E. McMANUS*

A few days ago Father Theodore Hesburgh, Notre Dame's distinguished and outspoken President, told a Catholic Press Association meeting that the Church's inept leadership may be largely to blame for the legality of abortion and the illegality of aid to nonpublic schools. Father Hesburgh said that Church leadership had gone it alone on the abortion question and the school aid controversy and thus had made Catholic issues out of what should have been civic issues of interest to all Americans. There has been, he said, little or no attention to the ecumenical dimension of the abortion and the school aid controversies. The Notre Dame President also alleged that some top Catholic officials apparently were witless victims of President Nixon's gamesmanship. After the President had played Catholics for their vote, Father Hesburgh said, he didn't lift a finger to help Catholics score a victory on abortion or school aid. The result, he said, is that Catholics are losers on the two political issues which were high priority items in their campaign for recognition and acceptance on the American scene. At least inferentially Father Hesburgh suggested that the Church would be better off with some new upper echelon management.

During the NCEA Easter week convention in Cleveland I encountered some severe criticism of "you people in Washington." You don't seem to have either the talent or the power to score a school aid victory in either the political or judicial arenas. Some weeping at the bar was accompanied by soul searching remorse for not having closed down all Catholic schools to protest the U.S. Supreme Court's *Lemon v. Kurtzman*¹ decision. What the Church needs, some school superintendents asserted, is a Catholic B'Nai B'Rith, a Catholic Anti-Defamation League, a Catholic Civil Liberties Union. Ironically, these advocates apparently don't recall their own denunciations of B'Nai B'Rith, the Anti-Defamation League and the ACLU for being bigoted. The presumption seems to be that if they were Catholic, they would not be bigoted!

In parishes there is no little bitterness about having to pay taxes on

* Co-chairman, USCC Ad Hoc Committee on School Aid; Auxiliary Bishop of Chicago.

¹ 403 U.S. 602 (1971).

tuition payments. Parishioners resent being required to pay 10% to 40% tax on the soaring tuition charges for Catholic education, especially for high school education. The typical Catholic is not convinced that tuition payments are not a charitable donation eligible for a deduction for income tax purposes. If that deduction isn't legal now, the typical Catholic parent reasons, then the Church ought to hire some attorneys, some smart tax attorneys, who would find a way to make it legal. That attitude is understandable. Now that the income tax returns of certain prominent persons have been publicized, ordinary folks are becoming increasingly intrigued by the possibility of hiring an attorney to get their taxes reduced.

Attorneys, diocesan and otherwise, are not the school people's favorite persons at the present time. Attorneys, the school people say, are always giving us long explanations about why there is no aid instead of telling us how to get it. Our attorneys, they say, are losers—bad news for Catholic education.

Call me a coward if you will, but I candidly tell you that I am tempted to drop from my current biography two of its lines: *viz.*, former member of President Nixon's Panel on Nonpublic Education and co-chairman of the USCC's Ad Hoc Committee on School Aid. If I had to make a living on that reputation, I'd be on relief! After almost 30 years of personal effort for tax aid to nonpublic education, I get the blues when friends now ask me, "Do you see any hope for state aid?" and I have to answer, "No, not as long as the present U.S. Supreme Court has the last word." Then I have to go into a dismal description of "the law of the land" and explain that the law of the land on school aid is exactly what Supreme Court Justice White called it, "an insoluble paradox." Unrestricted aid to church-related schools is aid to religion, the Court has said, and is a violation of the establishment clause of the first amendment. Aid to schools with a prohibition against aid to their religious component is entanglement, the Court has said, and is a violation of the establishment clause of the first amendment. "An insoluble paradox"—those three words were well chosen by Justice White. An insoluble paradox means that nobody on the face of the earth can write a school aid law which would satisfy the present Court. This damned if you do and damned if you don't situation is a distorted misinterpretation of the first amendment.

This unpleasant mixture of defeat, criticism, resentment and disgust explains why the concluding official act of the USCC Ad Hoc Committee on School Aid at its last meeting was to address itself to the hard question: "Has the Ad Hoc Committee now reached that point in history when it should go out of business because it has no more work to do?" After some sincere soul searching about the Committee's origin, purposes and track record the members voted unanimously to continue it. I believe the members' main motivation was their renewed commitment to the Church's official position proclaimed 40 years ago by Pope Pius XI and reaffirmed in November of 1972 by the American Bishops in their Pastoral Letter: "To

Teach As Jesus Did." "Catholics will never feel, whatever may have been their sacrifices already made, that they have done enough for the defense and support of their schools and for the securing of laws which will do them justice."

Before coming to its decision, the Committee reviewed its origin. The Committee was started a few weeks after the *Lemon* disaster.² And I think "disaster" is the right word. Before, during, and after the litigation on *Lemon*, *DiCenso* and *Tilton v. Richardson*,³ attorneys and their consultants were at odds on the process: to consolidate the pending cases or to plead them separately; how to plead the various cases; who should have the final word on the right approach to the Court? To this day, attorneys in this organization still are divided on the question whether the Court might have ruled favorably on *Lemon* if it had not been associated so closely with *DiCenso* and *Tilton*. To ease the tensions in the wake of *Lemon-DiCenso* and to set up machinery for what was loosely called "political and judicial strategy on the school aid question." USCC appointed the Ad Hoc Committee composed of diocesan attorneys, state conference directors, educators, and USCC personnel. The appointments noted that the Committee was to be an "in-house research and study group," not an action committee, and that all its recommendations would go directly to the USCC Administrative Board's Executive Committee for implementation. Not being an action group, the Committee has not been unduly disturbed by the fact that some of its wisdom evidently has been entombed in the mausoleums customarily erected by executive committees.

The Committee's functions in the main are four:

First, to review, study, analyze and evaluate school aid litigation.

Second, to review, study, analyze and evaluate school aid legislation on both federal and state levels.

Third, to offer advice and counsel to diocesan attorneys and others involved in school aid litigation and legislation.

Fourth, to recommend to the USCC Executive Committee a course of legislative and judicial strategy.

The Committee has met irregularly for 18 sessions to deal with its business as it irregularly has developed. In my opinion, the Committee's major accomplishment was the plan and program related to tax credit. First of all, this was an intelligent response to the entanglement theory propounded by the U.S. Supreme Court in *Lemon* and *DiCenso*. Credit legislation would have separated the Government from any involvement in the affairs of a school chosen by parents for their children's education. Three of the Justices in *Committee For Public Education and Religious Liberty (PEARL) v. Nyquist*⁴ have recognized that indeed credit does pro-

² *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

³ 403 U.S. 672 (1971).

⁴ 413 U.S. 756 (1973).

vide the separation that had been legalized by the Court's opinion on entanglement under the first amendment.

Tax credit turned out to be politically feasible. There was support for credit in the Ways and Means Committee which for years had been the major barrier to any kind of tax credit on tuition payments for higher education. The Committee Chairman, Representative Wilbur Mills, took a personal interest in moving tax credit legislation through his committee. Tax credit legislation had the support of the U.S. Treasury Department, in the past, a major source of opposition to tax credit on tuition payments for higher education. The Treasury did an excellent job of research on just what it would cost the Government to provide tax credit for tuition payments to elementary and secondary nonpublic schools. Tax credit, Father Hesburgh's point of view notwithstanding, did have the support of the President of the United States. The President appointed a four member panel to research the needs of the nonpublic schools and to report directly to him. President Nixon accepted the panel's major recommendation in favor of tax credit. The panel's recommendations for nonpublic education were well supported by research, a large part of which was conducted at the University of Notre Dame.

Tax credit had ecumenical support, the most support from non-Catholics in the whole history of efforts to get favorable government action on some kind of a school aid bill. One of the remarkable events during the credit campaign in Congress was the testimony of a Jewish rabbi as the chief spokesman for a coalition of church groups in favor of tax credit.

Congressional support for credit was amazing, so amazing that a majority of members of Congress polled on the matter said that if credit were to come to a vote in the House of Representatives, it surely would pass. The odds were at least even that it would also pass in the Senate.

Credit had support from the education profession, notably from Catholic professionals who saw in credit an ideal way to get a tax break for parents who support nonpublic schools without subjecting them to dangers much like those so vividly described during the afternoon discussion about governmental intrusion into Catholic hospitals which are assisted by public funds.

The only shortcoming, and it was a major one, of the tax credit proposal was that it would not have aided parents in low income brackets, parents who are making the most extraordinary sacrifices of all to keep their children in the inner-city nonpublic schools of most major cities.

The tax credit effort, as I see it, was an impressive climax to about 30 years of endeavor to bring the Government around to a recognition of its obligation to provide some kind of tax support for the direct or indirect benefit of nonpublic schools. I have been with this work for about 30 years. I recall the hard days long ago when our only tenable position was one of opposition to any kind of federal aid to education. I didn't find it pleasant to be called a "dog in the manger," which was an epithet often hurled my

way during my NCWC days. But I guess we were obstructionists; we dug in and said there would be no federal aid unless in some way or other nonpublic school children would be beneficiaries of it. It was difficult to hold to that position, particularly when the evidence was mounting that federal aid was necessary more nearly to equalize educational opportunities for the young in the United States. But the digging in process eventually paid off in a compromise law called ESEA.⁵ That law was and still is a source of substantial benefit to nonpublic school children, notably the children most in need, those in the inner-city schools for whom Title I benefits are extremely important.

During the 70's, I witnessed something that I would not have dared to predict in the 40's. Virtually every state where there is a substantially large Catholic population enacted some kind of a law for the benefit of the nonpublic schools. Purchase of services, tuition reimbursement, tax credit—all sorts of ingenious laws—were passed by state legislatures in Pennsylvania, Ohio, Michigan, Illinois, New York, and California, to name only a few. There was a sentiment, more than that, there was a conviction on the part of a majority of the American public that tax assistance to nonpublic schools or to their parents, preferably to their parents, would be in the best interest of our nation.

In summary, the Ad Hoc Committee has had some scores on legislation but its record in the courts, through no direct fault of its own, has not been good.

The Ad Hoc Committee's main limitation has not been its ineptitude but its impotence. For example, after the *Lemon* and *DiCenso* decisions, the Committee recommended staying out of court. Nothing would be gained, the Committee reasoned, from getting the nonpublic schools involved in the Court's "insoluble paradox." A good enough recommendation, but it was impossible to put into effect because the situation in the legislative arena was not under the control of either the Ad Hoc Committee or of the USCC Executive Committee. Plaintiffs who wanted to exploit *Lemon* and *Di Censo* launched their attack on school aid laws and brought them into court regardless of what the Ad Hoc Committee had in mind.

The Ad Hoc Committee also decided that the most desirable case for a further test of state aid would be one involving a federal statute which was thought to be less vulnerable to judicial reversal than are state statutes. That again was a wise decision, but it did not cover situations beyond the Committee's control.

A New York tax credit plan arrived in the Supreme Court before the Congress of the United States had a chance to cast a vote on federal tax credit legislation. Moreover, the *Nyquist* case and its companions reached

⁵ Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241a *et seq.* (1972), provides federal funds for the education of children from low income families whether they attend private or public schools.

the Supreme Court at the same time the Pennsylvania tuition reimbursement case was set for argument. That happened despite the fact that proponents of tax credit wanted it isolated from radically different tuition reimbursement.

Our wisdom in the Ad Hoc Committee suggested that any litigation argued before the Supreme Court should have briefs prepared by the top talent of the legal profession; but calls for summit meetings in which top talent would participate encountered a good deal of reluctant resistance. That's understandable. An attorney on the local level feels that his main obligation—and he should feel that way—is to his client on the scene. He is not much impressed by broad recommendations from a committee in Washington. That is one reason why the Ad Hoc Committee has always nuanced its positions by including escape routes in most of them, *e.g.*, adding the words “if possible,” “where feasible,” “provided that,” and so on. So it should be. Conditions vary from state to state and there are human considerations which are involved in this sort of work. Being sensitive to local conditions, the Ad Hoc Committee has been especially careful about its position on the New Jersey auxiliary services litigation now pending in the Supreme Court. The Ad Hoc Committee had hoped that somehow this litigation could be mooted because it fears that an unfavorable decision may set a precedent that would put in jeopardy many excellent auxiliary services statutes now working out satisfactorily in other states. But the Ad Hoc Committee nuanced its position by saying that this moot-ing should be attempted if the realities of the political situation in New Jersey would tolerate it.

In summary, my impression of the attitude of diocesan attorneys toward the Ad Hoc Committee is that most of them want to win local battles and they will leave winning the wars to the Committee. The Ad Hoc Committee, however, is more interested in winning the war and sees some of the battles only as minor skirmishes. Bishops, too, are in the same frame of reference. They are on the scene in their dioceses and are under great pressure from their clergy and people and from civic leaders who want to do the right thing for the nonpublic schools. They have to take risks in the hope that something will be done by Government to relieve the agonizing financial pressure bearing down upon most nonpublic schools. The Ad Hoc Committee is aware that it takes a long time for an organization to develop the kind of statesmanship required for seeing the big picture at all times and for letting the concerns of the big picture prevail over local interests.

The Committee's immediate position is to be poised for the *Wheeler v. Barrera*⁶ decision. The Committee is ready to study it the moment it

⁶ 417 U.S. 402 (1974). Decided after this address was given, *Barrera* was a class action suit to enjoin Missouri state officials from approving Title I programs which deprived private school children of the same services available to public school children. The services involved were on-the-premises remedial instruction during school hours. State officials were directed

breaks, to make recommendations for intelligent comments about it, and to analyze its consequences for ESEA, be the decision favorable or unfavorable or something in between.

At its last meeting the Ad Hoc Committee took a dim view of tax deductions for tuition payments. Despite the fact that the desire for some kind of a tax break on the part of the Catholic public is intense, the Committee's view still is that classifying tuition as a line item deduction for income tax purposes would not stand a ghost of a chance of getting through the Supreme Court. About the only thing that would stand up in the Court, the Committee thinks, is a line item that would permit a taxpayer to deduct all educational expenses across the board—kindergarten, elementary, secondary, higher education—and to include in that category virtually everything connected with sending children to school. Jim Robinson had an estimate from the Treasury Department that this would involve a tax loss of about six billion dollars. The political feasibility of that kind of a broad based tax deduction is not good at all.

During the summer lull, a subcommittee of the Ad Hoc Committee is going to consider a plan for its reorganization, a plan which will reflect a reconsideration of its goals, objectives, and methodology.

The Committee has recommended to the USCC Executive Committee that preparation of learned articles on the church-state question be funded.

The Committee also recommended at its last meeting that every diocese have a diocesan attorney, an identifiable diocesan attorney, to whom the USCC can turn when information is needed about local legislation and local litigation.

That concludes my report on the Ad Hoc Committee. Now a few words about Felix Culpa.

Felix Culpa is a Latin phrase in the Exsultet, the beautiful proclamation of Easter joy that occurs in the Holy Saturday Liturgy. The words to which I refer in the Holy Saturday Liturgy are: "O necessary sin [Felix Culpa] of Adam, which gained for us so great a Redeemer." If Adam had not committed his sin, Christ might not have been necessary. So we see some good even in the sin of Adam and in all its consequences. We see that good in Jesus Christ, our Redeemer. Felix Culpa: perhaps the adverse court decisions on state aid are a blessing in disguise.

If the Court had decided favorably in *Lemon* and *DiCenso*, we might today be restructuring the curricula of most Catholic schools to separate the sacred from the secular. We might be inviting the same kind of governmental intrusion which is disturbing hospitals and is distressing universi-

to develop programs within Title I guidelines, *i.e.*, that the programs for private and public school children be comparable in size, scope and opportunity.

The Court declined to consider whether state law or the establishment clause would prohibit the use of federal funds for on-the-premises instruction in parochial schools.

ties and colleges. Recently I was invited to speak to a group of students majoring in theology at one of the Catholic universities in the Midwest. For my lecture on the topic, "The Church and Authority," I was taken to a nondescript, broken-down building which was, the university authorities told me, totally separated from the rest of the campus. That is where religion is, because all of the other buildings are in one way or another funded with federal money and there can be no religion in them. The university authorities admitted that this was not a happy situation, but it was the price to be paid for the substantial amount of federal funds that had been poured into university buildings.

Maybe the loss in *Lemon* and *DiCenso* was a blessing in disguise. Perhaps our elementary and secondary schools would be compromising their integrity, and if not compromising it, they might be tempted to compromise it to receive the funds that would have been authorized under the *Lemon* and *DiCenso* plans. In saying that, I do not mean to infer for a moment that I did not support the approach that was taken in *Lemon* and *DiCenso*. It was a reasonable thing to do in the light of *Board of Education v. Allen*⁷ and it looked good at the time. But hindsight is always useful, just so it isn't second guessing.

The unfavorable decision in *Nyquist* was much harder to take. Tax credit, as I have already said, looked like a good plan. But there was one serious limitation, as I previously noted, that tax credit would not have benefited low income families. With a trend already under way to close down inner-city Catholic schools, there may be a message for us in *Nyquist*. Perhaps it deserved to go down in defeat because it did not include benefits for those making the most generous sacrifices for Catholic education.

How do I describe our Catholic schools at the present time? They're broke, but beautiful.

They are, indeed, under terrific financial strain. They are caught up in an inflationary economy. Enrollments are dropping, but overhead is not dropping proportionately. There is a need to pay much higher salaries to lay teachers and substantially larger stipends to sisters. Yet, these schools today are the best I've ever seen. They have taken to heart the Bishops Pastoral of November 1972. Catholic elementary and secondary schools, believe me, ladies and gentlemen, are trying to teach as Jesus did.

Catholic schools are vigorously independent. In the past, many Catholic educators talked, as I did, about being "partners with public schools" and looked to them to see how Catholic schools were doing. We now are just about ready to say we are not partners but competitors. We know the market for schools is going to be extremely tight. The great shortage ahead, even more severe than the shortage of money, is going to be a shortage of

⁷ 392 U.S. 236 (1968).

students. Because the competition for students is going to be so intense, forward-looking Catholic educators are ready to say to the public schools: We will take you on; we are going to run the best schools ever put together. We will have schools permeated with values from the moment the pupils arrive until they leave. We are not going to ape the public schools. We will implement our theology and our philosophy of education all the way. Our schools won't be partners because they are going to be radically different from the public schools. They are going to be radically Christian. The call in our day is for Catholic schools to go counter-cultural; to turn against society's disregard for values, to turn against governmental corruption, and to turn out future citizens who will stand up against these evil trends in American life.

Our schools are going to be beautiful—beautiful spectacles to see on the American scene. They are going to respond to Jesus' call to be the light of the world, the light in a dark world. They will be the leaven which will help people rise out of the depression that is dragging so many of them down in these troubled days. Counter-culture, that's the call to which I think Catholic schools are addressing themselves in the name of Jesus Christ.

Another challenge confronting Catholic education is to measure up to an ideal proclaimed by the Vatican Council. In its document on Christian education, the Council said that the Church should spare no sacrifice in helping Catholic schools show special concern for those who are poor in the goods of the world, or who are deprived of the assistance and affection of a family, or who are strangers to the gift of faith. That accurately describes about 50 inner-city schools which I know in Chicago. The children are poor—their mothers are on ADC; many of the children, if not most of them, are illegitimate—they are deprived of the assistance and affection of a normal family; they are strangers to the gift of our faith—they aren't Catholic, many of them aren't Christian. They hunger, like the people of old hungered for manna, for education. We don't necessarily have to bring it to them with sectarian religion. I think we may be able to go totally nonsectarian in many places in the inner city. Just go out there and satisfy this starving hunger for a decent education.

I hope you diocesan attorneys will help us stick it out in the inner city, no matter what it costs. We have to make these schools extraordinary, so extraordinary that eventually the Government will have no choice but to enter into contracts with them for these services. Maybe that's the hope of the future—to get them under contract for the services that these schools alone can give. If we can get these contracts, it would be a marvelous legal achievement as well as a great way to help the poor.

The Catholic Bishops of the United States are on record in favor of Catholic schools. The Bishops have said in the plainest possible language: of all educational programs available to the Catholic community, Catholic schools afford the best opportunity to realize the central purpose of Chris-

tian education among children and young people. Only in such schools can they experience learning and living fully integrated in the light of faith. This integration of religious truth and values with life distinguishes the Catholic school from all other schools.

The Bishops have called upon all members of the Catholic community to do everything in their power to maintain and strengthen Catholic schools. What we all want to do is: "To Teach As Jesus Did."