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CONTENTS

Editor's Preface 5

**Articles**

The Ministry of Reconciliation: Canon 1 of New  
Title IV in Practical Application  
Les Alvis 7

Document: Minutes of the Committee on Canons  
(Committee No. 5) at the 76<sup>th</sup> General Convention,  
Anaheim, California, July 7-16, 2009  
55

Where is the Locus of Authority within The  
Episcopal Church?  
James Dator 131

The Episcopal Church and Association Law:  
Dioceses' Legal Right to Withdraw  
Mark McCall 191

**Notes and Resources** 245



## Editor's Preface

This is the second issue of the *Journal of Episcopal Church Canon Law*. The journal is intended to be a resource for all with interest in canon law and particularly for those with concern for the canonical tradition of The Episcopal Church.

This issue contains articles about two subjects. The first pair of articles deals with the revisions to Title IV of the Constitution and Canons of The Episcopal Church, which were adopted at the 2009 General Convention and come into effect on July 1, 2011. Les Alvis has written an article in which he focuses on the theory of reconciliation that underlies this revision of the canons. His article is followed by the minutes of the Committee on Canons of the 76<sup>th</sup> General Convention, which held hearings and made revisions in the Title IV proposal before it came to the floor of the two house of General Convention for adoption. The minutes provide some indication of the intent and concerns of members of a committee that played a key role in the adoption of the revised section of the Canons.

The second pair of articles concerns a matter that is currently before the secular courts in several jurisdictions: Does a diocese have the right to withdraw from The Episcopal Church without permission of General Convention? Two authors—James Dator and Mark McCall—reach opposite conclusions on the question. They do, however, agree on three matters of importance: that hierarchical governments can take a number of different forms, that The Episcopal Church does *not* have a federal form of government that closely parallels the secular government of the United States,

and that the exact character of the government that The Episcopal Church does have has long been a matter of disagreement.

Robert W. Prichard  
Editor

## The Ministry of Reconciliation: Canon 1 of New Title IV in Practical Application

Les Alvis<sup>1</sup>

### ***CANON 1: Of Accountability and Ecclesiastical Discipline***

*By virtue of Baptism, all members of the Church are called to holiness of life and accountability to one another. The Church and each Diocese shall support their members in their life in Christ and seek to resolve conflicts by promoting healing, repentance, forgiveness, restitution, justice, amendment of life and reconciliation among all involved or affected. This Title applies to Members of the Clergy, who have by their vows at ordination accepted additional responsibilities and accountabilities for doctrine, discipline, worship and obedience.<sup>2</sup>*

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<sup>1</sup> Les Alvis is a lawyer in Tupelo, Mississippi. He served as a member of the General Convention's Committee on Sexual Exploitation (2001-2003) and Task Force on Disciplinary Policy and Procedure (2001-2006). He presently serves on the General Convention's Title IV Task Force II for Education and will be a member of the Disciplinary Board of the Diocese of Mississippi beginning on July 1, 2011. The opinions and ideas expressed in this article are his and do not necessarily reflect those of any of the groups mentioned.

<sup>2</sup> Canon IV.1, *Constitution & Canons together with the Rules of Order for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church* (New York: Church Publishing, Inc., 2009), 123. References herein to canons are to this edition of the *Constitution & Canons* unless otherwise noted.

## 8 Ministry of Reconciliation

This is the point of departure for new Title IV of the canons of The Episcopal Church, which takes effect on July 1, 2011.<sup>3</sup> It departs along a path toward lofty destinations: healing, repentance, forgiveness, restitution, justice, amendment of life, and reconciliation in the context of clergy misconduct. The identification of these values as objectives to be promoted in the process of ecclesiastical discipline is perhaps the single most significant difference in perspective between new Title IV and its predecessor, so it is fitting that these values appear in its opening words. And they appear not only there; the complete list is repeated in no fewer than five additional canons.<sup>4</sup> The values expressed in Canon 1 are thus the constant theme of new Title IV.

### Introduction

Former Title IV<sup>5</sup> ultimately concerned itself with a single question: whether the Respondent would remain in holy orders. Moreover, it addressed this question through an adversarial process that has much in common with

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<sup>3</sup> Canon IV.20.2, 164.

<sup>4</sup> Canon IV.8.1, 134 (what pastoral response must be designed to promote); Canon IV.9.2, 135 (what an agreement for discipline must consider); Canon IV.10.1, 136 (what conciliation is to seek); Canon IV.14.1, 142 (what an Accord may provide); Canon IV.14.6, 143 (what an Order may provide).

<sup>5</sup> At the time of the publication of this article, the 1994 version of Title IV is not yet quite former, but almost so. As used in this article, "former Title IV" refers to the version of Title IV which remains in effect until July 1, 2011, as published in *Constitution & Canons together with the Rules of Order for the Government of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church* (New York: Church Publishing, Inc., 2006), 119-80.



criminal and military justice models.<sup>6</sup> Particularly with cases of clergy sexual misconduct, the reported incidence of which mushroomed in the 1990s, the Church began to realize that this single question was often not the most important issue presented. Instead, other questions often predominated, focusing on the needs of those who suffered from such misconduct,<sup>7</sup> concerns for making the Church a safer place, and “truth-telling” to and care for congregations which experienced the loss of a Member of the Clergy, suddenly gone under quietly-handled circumstances. Former Title IV offered no framework for this and, significantly, no specific canonical safe harbor for Bishops who ventured out to address these broader questions.

Eventually these broader questions were often addressed in diocesan policies and procedures regarding sexual exploitation which in practice became kinds of *ad hoc* extracanonical supplements to—and in some instances almost substitutes for—former Title IV. Adoption of local policies and procedures was initially prompted by the requirements of liability insurers.<sup>8</sup> But by around 1999, the motivation for diocesan policies and

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<sup>6</sup> References to former Title IV as having a basis in military justice models are found in the report of the Standing Commission on Constitution and Canons in *Reports to the 73rd General Convention Otherwise Known as the Blue Book* (New York: Church Publishing, 2000), 44, and in the report of the Task Force on Disciplinary Policy and Procedures in *Reports to the 75th General Convention Otherwise Known as the Blue Book* (New York: Church Publishing, 2006), 408.

<sup>7</sup> This group included “Victims” in the terminology of former Title IV (see former Title IV, Canon IV.15, definition of “Victim”, 174) but did not exclude Respondents.

<sup>8</sup> See, e. g., The Church Insurance Company, “Comprehensive Sexual Misconduct Liability Protection: New Conditions and Risk Management Strategies,” June 1994.

## 10 Ministry of Reconciliation

procedures took a discernable shift toward theological rootedness and pastoral sensitivity.<sup>9</sup> This movement toward informal expansion of the limited scope of former Title IV in cases of clergy misconduct, and particularly the Church's experience with the shortcomings of those limitations, fueled the General Convention's creation in 2000 of a task force to assess models for ecclesiastical discipline as set forth both in policies and procedures and in Title IV and to make recommendations concerning the same.<sup>10</sup> This task force continued for two triennia and was replaced by the General Convention in 2006 with a second task force, which produced new Title IV.<sup>11</sup> In this way new Title

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<sup>9</sup> In 2002 the General Convention's Committee on Sexual Exploitation undertook a review of the policies and procedures of 67 Dioceses then in effect. Among the topics addressed by these policies and procedures were specific standards of behavior and conduct (including definition of concepts such as "sexual exploitation"), pastoral care for those affected by misconduct, rehabilitation of offenders, congregational response and healing, investigation of complaints, and disclosure of information. Many policies and procedures contained theological statements. These statements were collected and studied by the General Convention's Task Force on Disciplinary Policy and Procedure (see note 10), also in 2002. The author was a member of each of these groups.

<sup>10</sup> Resolution 2000-A028. *Journal of the General Convention of the Protestant Episcopal Church in the United States of America Otherwise Known as The Episcopal Church, 2000* (New York: Church Publishing, Inc., 2001), 300. The task force created by this resolution was the Task Force on Disciplinary Policy and Procedures, sometimes called the Task Force on Title IV Revisions or simply Task Force I. See the report of the Task Force on Disciplinary Policy and Procedures in *Reports to the 74th General Convention Otherwise Known as the Blue Book* (New York: Church Publishing, Inc., 2003), 355-68.

<sup>11</sup> The second task force was the Title IV Task Force II on Disciplinary Policies and Procedures, or simply Task Force II. See the report of Task Force II in *Reports to the 76th General Convention*

IV, among other changes, has made canonical many of the formerly-extracanonial approaches of diocesan policies and procedures to promoting the objectives now expressed in Canon 1.

The list that made its way into Canon 1— healing, repentance, forgiveness, restitution, justice, amendment of life, and reconciliation—is well established in the Church’s theology of pastoral discipline and in the *Book of Common Prayer*. Five of the seven values expressed in Canon 1 appear in the Disciplinary Rubrics of the prayer book.<sup>12</sup> The other two, healing and justice, are found in various prayers<sup>13</sup> and in the baptismal covenant.<sup>14</sup> There is nothing novel about Canon 1 other than its proposal that these objectives have a place in ecclesiastical discipline.

This article considers the meaning of the values set forth in Canon 1 and how they might be promoted practically within the framework of new Title IV as objectives of its processes. The discussion focuses particularly upon practical consideration of the Canon 1 objectives in the Reference Panel process and their

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*Otherwise Known as the Blue Book* (New York: Church Publishing, Inc., 2009), 766-69.

<sup>12</sup> The five values found in the Disciplinary Rubrics of the *Book of Common Prayer* are repentance, forgiveness, restitution, amendment of life, and reconciliation. The Disciplinary Rubrics have identified these values in every English edition of the prayer book since the first in 1549 and in every American edition. See *Book of Common Prayer* 1979 (New York: Seabury Press, 1979), 409.

<sup>13</sup> For example, “Help us to heal those who are broken in body or spirit, and to turn their sorrow into joy” from the prayer for the Poor and Neglected (in which categories most Respondents and Complainants would readily place themselves). See *Book of Common Prayer* 1979, 862.

<sup>14</sup> “Will you strive for justice and peace among all people, and respect the dignity of every human being?” *Book of Common Prayer* 1979, 305.

## 12 Ministry of Reconciliation

incorporation into Accords and Orders that bring resolution to a case.<sup>15</sup> The discussion additionally assumes that the reader has a basic working knowledge of the processes of new Title IV and the various roles created by new Title IV to implement them.

This article does not pretend to be anything approaching a comprehensive treatment of how the Church might seek healing, repentance, forgiveness, restitution, justice, amendment of life, and reconciliation through the use of new Title IV. Of course, each of these objectives is a separate and complex field of study. Instead, this article is primarily intended to raise questions about the place of Canon 1 in the workings of new Title IV and to offer some practical ideas for those who will implement it. This discussion certainly does not set forth all such ideas, and, as the Church learns from experience with new Title IV, some of the ideas offered may prove to be flawed. The present purpose is nothing more than to begin discussion of the practical meaning of Canon 1.

### **Thinking about Relationships**

Among those who work in the field of conflict resolution, reconciliation is a fashionable concept. But in secular conflict resolution, its amorphous attributes tend to lead toward frustration: “Reconciliation is a theme

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<sup>15</sup> The particular context most often assumed in the discussion is that of clergy sexual misconduct. Of course, the scope of Offenses under new Title IV is, as was under former Title IV, much broader than this. However, because the anecdotal evidence is that a great majority of Title IV cases involves sexual misconduct, such will be assumed as the Offense for purposes of exploring the practical application of Canon 1, although the ideas offered in this article ought to transfer in varying degrees to any Title IV matter.

with deep psychological, sociological, theological, philosophical, and profoundly human roots—and nobody really knows how to successfully achieve it.”<sup>16</sup> One worker in the field, laboring from a Christian perspective, has described reconciliation as a “stew” consisting, not unlike Canon 1, of such ingredients as forgiveness, repentance, apology, justice, truth—all “often undefined, ill-defined, or idiosyncratically defined”—but in the end aimed at “the healing of relationships.”<sup>17</sup>

The Church speaks of reconciliation as the restoration to right relationship.<sup>18</sup> This definition works well in the context of new Title IV, as clergy misconduct results in varieties of broken relationships. In the abstract, this definition may be of no more practical help than the term itself, but progress from the abstract toward the concrete can begin to emerge with consideration of precisely which relationships the Church might endeavor to make right utilizing new Title IV.

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<sup>16</sup> Johan Galtung, “After Violence, Reconstruction, Reconciliation and Resolution” in ed. Mohammed Abu-Nimer, *Reconciliation, Justice and Coexistence: Theory and Practice*. (Lanham, MD: Lexington Books, 2001), 4.

<sup>17</sup> Joseph Liechty, “Putting Forgiveness in Its Place: The Dynamics of Reconciliation” in Davis Tombs and Joseph Liechty, eds., *Explorations in Reconciliation: New Directions in Theology* (Burlington, Vermont: Ashgate Publishing, 2006), 59-68.

<sup>18</sup> Indeed, the concept of “restoration to right relationship in community” as a primary purpose of disciplinary canons was a central theme of the theological work of Task Force I as developed by the Rev. Pamela Cooper-White in “Some Thoughts Toward Canon Revision: Canons as Gift of Grace and Dance of Love,” appended to the task force’s report the 2003 General Convention. See the report of Task Force I in *Reports to the 74th General Convention Otherwise Known as the Blue Book*, 357-68.

## 14 Ministry of Reconciliation

A good starting point for this is Canon 8, which deals with pastoral response and lists the persons and groups for whom pastoral care is to be considered: Complainant, Complainant’s family, Respondent, Respondent’s family, Injured Persons, Injured Persons’ families, the Community, witnesses, and the Disciplinary Board.<sup>19</sup> Assuming that new Title IV seeks to promote reconciliation among this list of nine, the interconnectedness of these relationships can be visualized through the following table:

	Complainant	Complainant’s Family	Respondent	Respondent’s Family	Injured Persons	Injured Persons’ Families	Community	Witnesses	Disciplinary Board	Bishop
Complainant	1	2	3	4	5	6	7	8	9	10
Complainant’s Family		11	12	13	14	15	16	17	18	19
Respondent			20	21	22	23	24	25	26	27
Respondent’s Family				28	29	30	31	32	33	34
Injured Persons					35	36	37	38	39	40
Injured Persons’ Families						41	42	43	44	45
Community							46	47	48	49
Witnesses								50	51	52
Disciplinary Board									53	54
Bishop										55

<sup>19</sup> Canon IV.8.2, 134.

The numbers indicate the persons in relationship. For example, 21 indicates the relationship between the Respondent and the Respondent's family; 27 indicates the relationship between the Respondent and the Bishop;<sup>20</sup> 37 indicates the relationship between the Community and Injured Persons, and so on. Even relationships that intersect with themselves (1: Complainant with Complainant; 20: Respondent with Respondent; 46: Community with Community) connote a kind of restoration to right relationship within oneself, with one's own experience and suffering—a healing that is central to the aspiration of Canon 1 to “reconciliation among all involved or affected.”

The practical application of the table is to serve as a kind of checklist to identify the various relationships, first, to which pastoral response will be offered in accordance with Canon 8 and, second, for which the objectives of Canon 1 may be promoted in the resolution of a particular case through an Accord or Order.<sup>21</sup> The table is not to suggest that pastoral response or the promotion of reconciliation must be directed at all fifty-five relationships identified. But every relationship among all involved or affected should be *considered* as a candidate for pastoral response and being made right, and, depending upon the circumstances, some *must* be offered a process for the

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<sup>20</sup> The role of Bishop has been added to the table for reasons developed later in this discussion, though the Bishop is not one of the persons specified in Canon IV.8.2.

<sup>21</sup> A third application might be to aid the Investigator in understanding the complex array of relationships to which he owes “due consideration to pastoral sensitivities” in the conduct of the investigation. Canon IV.11.2, 136.

## 16 Ministry of Reconciliation

promotion of reconciliation in order for Canon 1 to have any meaning.

The table can similarly be used to check how (or whether) particular persons or groups are in need of what the various Canon 1 objectives offer. Which persons or Communities are in need of healing? Which need to forgive and be forgiven? To which and from which is any restitution due? The Canon 1 objectives can be separately applied to each person and group in the table in an exercise to determine where work, whether pastoral or in terms of resolution, should be especially focused.

Regarding certain broadly-defined groups in the table: Injured Persons, for example, constitute a group within which the needs of the constituents may vary greatly. The content of pastoral response, the promotion of reconciliation and the applicability of the various Canon 1 objectives should not be checked against the group of Injured Persons as a whole, but instead against each individually identified member of that group. The same observation applies to the Community, which may consist of subsets with differing needs (for example, wardens, the vestry, the staff, the members at large).

Regarding the inclusion of the Bishop in the table: the Bishop is not among the list of persons to be considered for pastoral response under Canon 8 because Canon 8 requires the Bishop to coordinate that response.<sup>22</sup> But the Bishop belongs in the table for Canon

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<sup>22</sup> Canon IV.8.1, 134. Notwithstanding this omission from Canon 8, a Bishop fulfilling his or her role under Title IV will need pastoral care from some source. Dealing with matters of clergy misconduct can be among the most stressful obligations to fall to a Bishop. For that reason, the person who has responsibility for implementing pastoral



1 purposes because invariably clergy discipline results in the need to put right some relationships with the Bishop. The most obvious examples of this are the Bishop's relationships with the Respondent and with the affected Community. Where a Respondent is suspended from ministry or restricted from involvement with the Community, new Title IV requires that conditions be prescribed for reinstatement and restoration.<sup>23</sup> Such conditions would almost of practical necessity require reconciliation between Respondent and Bishop to some degree. Similarly, the aftermath of removal of a Respondent from a Community can leave relations between the Community and the Bishop strained. Such situations likewise call for reconciliation.

A final use of the table is a metaphorical one. The relationships indicated by squares of the table might be viewed as the pieces of a patchwork quilt which, imperfectly knit together, are the fabric of the Church, the body of Christ. The jagged edge between the shaded and numbered squares might be viewed as the tear in that fabric caused by the Offense to be mended by aspiration to the objectives of Canon 1. The task that new Title IV sets out to tackle is, of course, to sew it back together. The tear may still be visible, some squares of the quilt may be missing and never recovered, and other squares may show up years later to be sewn back in, but the fundamental task is the creative restoration of a torn fabric.<sup>24</sup>

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response (see Canon IV.8.5, 135) should be particularly mindful of the Bishop's care and insistent that he or she connect with sufficient personal support systems, such as those facilitated through the Office of Pastoral Development of the House of Bishops.

<sup>23</sup> Canon IV.14.1, 14.6, 142-43.

<sup>24</sup> The author is indebted to the Rev. Margo Maris, who first viewed the table in this metaphorical way.

## 18 Ministry of Reconciliation

The success of the process of restoring this torn fabric will depend upon realization that Canon 1 does not require that ecclesiastical discipline achieve reconciliation or any of the other objectives there expressed. Rather it aspires to the *promotion* of healing, repentance, forgiveness, restitution, justice, amendment of life, and reconciliation among all involved or affected. A successful Title IV process will be one that paves the way to facilitate realization of these objectives.

### **Thinking about Accountability in Community**

The concept of “accountability to one another” is at the heart of Canon 1. Because Canon 1 describes this accountability as a calling belonging to “all members of the Church”, this concept at its most basic is broader than the particular kind of accountability that is the subject of Canon 3.<sup>25</sup> The accountability to which all members of the Church are called is best understood in the actual application of the disciplinary processes of new Title IV as accountability for the promotion of the objectives of Canon 1.

The reference in Canon 1 to *all* members of the Church is particularly significant in that the processes of new Title IV are designed for implementation in community. This community in its narrowest sense includes the Disciplinary Board and its panels, the Intake Officer, the Church Attorney, Advisors, the Investigator, and, of course, the Bishop. But in its broadest sense it includes *all* the members of the

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<sup>25</sup> Canon IV.3, 126-27, defines the kinds of conduct for which Members of the Clergy are accountable to discipline under Title IV.

Church.<sup>26</sup> To meaningfully implement Canon 1 then requires that the community that implements it have an awareness of Canon 1 values.

Thus, if the Disciplinary Board is elected by diocesan convention, then the community that nominates and elects the Board in the name of all the members of the Church must be mindful that its work is to promote healing, repentance, forgiveness, restitution, justice, amendment of life, and reconciliation and to elect those whose talents and gifts will best serve that work.<sup>27</sup> The same is no less true of the selection of those to fill the key roles of Intake Officer and Church Attorney: to implement new Title IV to its fullest potential, they must be committed to and thoroughly trained in the promotion of the objectives of Canon 1.<sup>28</sup>

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<sup>26</sup> The use of “community” here is in contrast with the more specific meaning of “Community” as defined in Canon IV.2, 124, which pertains to that particular part of the Church where the Respondent exercises his or her ministry. In the discussion that follows, unless the word is capitalized, “community” means “all members of the Church” as mentioned in Canon 1.

<sup>27</sup> New Title IV leaves to diocesan canon the manner in which members of the Disciplinary Board are selected; there is no requirement that its members be elected. Canon IV.5.1, 128.

<sup>28</sup> New Title IV provides that, unless diocesan canon provides otherwise, the Intake Officer is designated by the Bishop after consultation with the Disciplinary Board. See definition of “Intake Officer” in Canon IV.2, 125. New Title IV requires that diocesan canons set forth the manner of selection the Church Attorney. See definition of “Church Attorney” in Canon IV.2, 123-24. These canons place no limit on the number of Intake Officers or Church Attorneys a Diocese may have (“one or more”). Further, regarding the Church Attorney, the implementation of new Title IV in community likewise requires a recognition of and respect for role boundaries among those who implement it. For example, Chancellors and Vice Chancellors and members of their law firms are disqualified from serving as the Church Attorney. Canon IV.19.19, 161. They are also disqualified from

### Canon 1 and the Reference Panel

Apart from the initial pastoral response that is provided when any report is first made to the Intake Officer,<sup>29</sup> and assuming that the Intake Officer does not dismiss the matter,<sup>30</sup> the determinations of the Reference Panel regarding how to refer a matter are the real beginnings of response that can promote the objectives of Canon 1. Those experienced with responding to matters of clergy misconduct well know that the Church's response can often be more damaging to Injured Persons and Communities than the original Offense.<sup>31</sup> That

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serving on the Disciplinary Board or as Advisors. Canon IV.5.3(c), 128; Canon IV.19.10(c), 158-59.

This boundary emphasizes the importance of the Church Attorney's independence of the Bishop; the Chancellor and Vice Chancellor—not the Church Attorney—serve as the Bishop's counsel. Instead, in representing the Church, the Church Attorney's function, most fully realized, involves advocating resolutions that serve the objectives expressed in Canon 1. In so doing, the Church Attorney is not compelled necessarily to work toward the result that the Bishop may want in a particular case. To the contrary, the Church Attorney is empowered by new Title IV to exercise his or her own discretion. See definition of "Church Attorney" in Canon IV.2, 123-24.

Just as any particular lawyer is not the right person to handle every possible case, the tremendous variety of circumstances that can make a case under Title IV requires flexibility in assuring that the right person serves as Church Attorney in the particular case at hand. That flexibility can further the promotion of Canon 1 objectives by allowing the selection of the person best suited to creatively advocate those objectives in the given fact situation. Diocesan canons that provide for appointment of a Church Attorney, i. e., a specific person, for a definite term to handle whatever may come his or her way during that term, thus may prove to be unnecessarily limiting.

<sup>29</sup> Canon IV.8.1, 134.

<sup>30</sup> Canon IV.6.5, 131.

<sup>31</sup> See, e. g., Chilton Knudsen, "Understanding Congregational Dynamics" in Nancy Myer Hopkins and Mark Laaser, eds., *Restoring*

experience underscores the vital importance of the Reference Panel's decision-making and the centrality of the need to make decisions that are consistent with the objectives of Canon 1.

When an intake report is referred to the Reference Panel, the panel has four initial options: (a) to take no action except for appropriate pastoral response; (b) to refer for conciliation; (c) to refer for investigation; or (d) to refer for possible agreement for discipline.<sup>32</sup> These options are considered in order.

*Reference for Canon 8 Pastoral Response*

That the Reference Panel, as opposed to the Intake Officer who has determined to dismiss the matter,<sup>33</sup> would refer it only for appropriate pastoral response seems unlikely except possibly in two circumstances. The first is where there is no Respondent, either because the subject Member of the Clergy is deceased or has been previously deposed. The second is where the Reference Panel concludes that the Intake Officer erred and should have dismissed the matter.

This second circumstance suggests itself because new Title IV does not intend for any matter to come before the Reference Panel unless the Intake Officer has determined that the information received, if true, would constitute an Offense.<sup>34</sup> That determination carries with it the further determination that the information received, if true, involves a matter which is either (a) material and substantial or (b) of clear and weighty

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*the Soul of a Church: Healing Congregations Wounded by Clergy Sexual Misconduct* (Collegeville, MN: The Liturgical Press, 1995), 95.

<sup>32</sup> Canon IV.6.8, 131-32.

<sup>33</sup> See Canon IV.6.5, 131.

<sup>34</sup> See Canon IV.6.5, 131.

## 22 Ministry of Reconciliation

importance to the ministry of the Church.<sup>35</sup> This further determination is compelled because no conduct or condition can be subject to proceedings under new Title IV unless it meets one of these two conditions.<sup>36</sup> Thus, if the Intake Officer has done a thorough job, the matter before the Reference Panel (assuming it is true, as the panel must) is both an Offense *and* either material and substantial or of clear and weighty importance. Apart from cases lacking a Respondent, it is difficult to envision a circumstance meeting these conditions precedent where only pastoral response is appropriate, unless, perhaps, the Reference Panel decides that the circumstances do not meet the conditions precedent after all.

Of course, in a case where the conditions precedent are satisfied, resolution of an Offense utilizing only Canon 8 pastoral response does not preclude the aspiration to Canon 1 objectives. To the contrary, Canon 8 requires it.<sup>37</sup> But what reference to pastoral response alone can preclude is full realization of principles of accountability that are built into Canon 1 and that are furthered through, for example, opportunities for hearing from such diverse participants as the Complainant, the Complainant's Advisor, the Respondent, the Respondent's Advisor, Injured Persons, the Church Attorney and the Investigator.<sup>38</sup> In other words, if the matters described in the intake report,

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<sup>35</sup> Canon IV.3.3, 126.

<sup>36</sup> Canon IV.3.3, 126.

<sup>37</sup> Canon 8 pastoral response "*shall be* designed so as to promote healing, repentance, forgiveness, restitution, justice, amendment of life and reconciliation among all involved or affected." Canon IV.8.1, 134 (emphasis added).

<sup>38</sup> See, e. g., Canons IV.12.7, 138; IV.9.1, 135; IV.14.3, 142.

taken as true, *would* constitute an Offense and *are* either (a) material and substantial or (b) of clear and weighty importance to the ministry of the Church, then removal of the matter from the processes of new Title IV that might result in an Accord or Order with binding effect could run counter to the promotion of justice as an objective of Canon 1 and absolutely leaves the Respondent exposed to further amenability to Title IV proceedings for the same Offense.<sup>39</sup> Having said this, there is nothing to prevent a matter referred for Canon 8 pastoral response from eventually resulting in a Canon 9 agreement for discipline,<sup>40</sup> but there is nothing to require that outcome either.<sup>41</sup>

*Reference for Canon 10 Conciliation*

Under new Title IV, conciliation is a dispute resolution process in which Complainant, Respondent, other

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<sup>39</sup> The “former jeopardy” canon of new Title IV (to borrow the parlance of former Title IV) expressly excepts “pastoral responses” from those proceedings to which jeopardy attaches and for which no further proceedings may be brought. Canon IV. 19.13, 159.

<sup>40</sup> Agreements for discipline can be reached at any time before an Order becomes effective, which means that such an agreement can be reached during, or even after, a Canon 8 pastoral response. Canon IV.9.1, 135.

<sup>41</sup> There are other situations where a Title IV matter might be resolved through pastoral response only, such as where there is insufficient evidence to prove the Offense or the Complainant or any other necessary witness refuses to cooperate. However, these circumstances implicate the exercise of the Church Attorney’s discretion not to advance a proceeding, most likely after the receipt of an Investigator’s report. In such cases, new Title IV gives the Church Attorney the discretion to send “any matter back to the Intake Officer or the Bishop Diocesan for pastoral response in lieu of disciplinary action.” See definition of “Church Attorney” in Canon IV.2, 123-24. It is not the role of the Reference Panel in such situations to refer the matter only for Canon 8 pastoral response in the first instance.

## 24 Ministry of Reconciliation

affected persons and perhaps the Bishop work things out with the help of a Conciliator;<sup>42</sup> it is essentially a mediation process which, if successful, results in an Accord.<sup>43</sup> Conciliation under new Title IV is carried forward from former Title IV basically unchanged, but with one fundamental difference. Under former Title IV, conciliation was available only where the matter complained of, if true, would constitute an Offense, but was considered by the Bishop “not to be a serious Offense against the Church and its good order and Discipline, but an *interpersonal conflict* not involving immorality or serious personal misconduct, or one that may be a technical commission of another Offense . . . .”<sup>44</sup> Under new Title IV the identical process may be employed for Offenses that are material and substantial or of clear and weighty importance to the ministry of the Church.

The key distinction between conciliation and Conference Panel proceedings lies in who, working directly within the process, furthers the promotion of Canon 1 objectives and restoration of relationships beyond the Complainant and the Respondent. Conciliation efforts are undertaken among the Complainant, the Respondent, “other affected persons,” and the Church,<sup>45</sup> aimed at resolution by Accord.<sup>46</sup> The

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<sup>42</sup> The Conciliator is “a person skilled in dispute resolution techniques and without conflict of interest in the matter” and not a member of the Disciplinary Board. Canons IV.10.4, 136, and IV.5.3(c), 128. As a practical matter, the Conciliator should additionally be a person grounded in the objectives of Canon 1.

<sup>43</sup> Canon IV.10, 136.

<sup>44</sup> Former Title IV, Canon IV.16.1, 159 (emphasis added).

<sup>45</sup> Canon IV.10.2, 136. New Title IV does not define “other affected persons.” Canon IV.10.1, 136, states as the purpose of conciliation to



Bishop may also participate in a conciliation,<sup>47</sup> and because the Church is a listed interested party and because conciliation is a proceeding under new Title IV, perhaps the Church Attorney is entitled to participate.<sup>48</sup> But despite the variety of these participants and their respective interests, the Complainant and the Respondent control the content of any Accord that is ultimately presented to the Bishop. New Title IV provides that among those affected by the Offense, only the Complainant and the Respondent sign an Accord resulting from a conciliation;<sup>49</sup> Title IV makes no provision for the direct participation of any other affected person in the formulation of its terms, though where other affected persons are participating in the conciliation, presumably the Conciliator is mindful of facilitating a result that addresses their needs as well. But because it is not the role of the Conciliator to impose any result, and because the Complainant and the Respondent are the principal signatories to an Accord in a conciliation, there remains the possibility that they may arrive at one which, despite their agreement, nevertheless fails to reach “a suitable resolution of all issues.”<sup>50</sup> Because the Conciliator must sign the Accord before it goes to the Bishop, the Conciliator might serve

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seek resolution among “the Complainant, Respondent, *affected* Community, *other persons* and the Church.” (Emphasis added.) Canon IV.10.2 combines the third and fourth into “other affected persons.” In each instance, “other persons” probably ought to be read as the equivalent of “Injured Persons” as defined in Canon IV.2, 125.

<sup>46</sup> Canon IV.10.3, 136.

<sup>47</sup> Canon IV.10.2, 136.

<sup>48</sup> See definition of “Church Attorney” in Canon IV.2, 123-24.

<sup>49</sup> The Conciliator also signs the Accord, but only after the Complainant and the Respondent have signed, and not as one affected by the Offense. Canon IV.14.2, 142.

<sup>50</sup> Canon IV.10.3, 136.

## 26 Ministry of Reconciliation

the objectives of Canon 1 by refusing to sign an Accord that is not a suitable resolution.

In contrast, the primary participants in a proceeding before the Conference Panel are the Church Attorney and the Respondent.<sup>51</sup> Others may attend and be heard,<sup>52</sup> but the conference is principally between the Church Attorney, the Respondent, and the Conference Panel, aimed at resolution by Accord, failing which the Conference Panel may dismiss the matter, refer it to conciliation or to the Hearing Panel, or issue an Order (which the Respondent may at that stage refuse). Notably, the Complainant cannot be required to attend the conference<sup>53</sup> and the canon governing Conference Panel proceedings does not mention participation by the Bishop.<sup>54</sup>

Where a Conference Panel proceeding results in an Accord, the Complainant is first given the opportunity to be heard concerning its terms, and then it is signed by the Church Attorney, the Respondent, and the president of the panel.<sup>55</sup> This is a significant distinction between conciliations and Conference Panel proceedings. In the former, there is no provision for the Church Attorney to be heard concerning the terms of the

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<sup>51</sup> Canon IV.12.4-5, 137. In all proceedings under new Title IV where a Respondent appears or participates, the Respondent always has the right to be accompanied and represented by counsel. The same applies to the Complainant. Canon IV.19.12, 159.

<sup>52</sup> See Canons IV.12.3, 137, and IV.12.7, 138.

<sup>53</sup> Canon IV.12.6, 138.

<sup>54</sup> Compare the list of conference participants in Canon IV.12.7, 138, (which does not necessarily exclude the Bishop) with the list conciliation participants in Canon IV.10.2, 136, (which expressly mentions the Bishop).

<sup>55</sup> Canon IV.14.3, 142.

Accord, and thus there remains the distinct possibility that the Accord reached by the Complainant and the Respondent will not adequately address the interests of the Church or of “other affected persons” or sufficiently or appropriately promote the objectives of Canon 1 unless the Conciliator withholds her signature or the Bishop refuses to accept the Accord. In the latter case, the Complainant is afforded the opportunity to be heard concerning the terms of the Accord, but it is the Church Attorney, acting on behalf of the Church, who negotiates the terms and decides whether they are sufficient and acceptable.<sup>56</sup>

Because Canon 1 seeks the promotion of its objectives among *all* involved or affected, and because the outcome of a successful conciliation is an Accord negotiated by the Complainant and the Respondent, in cases where others are involved or affected, reference to the Conference Panel<sup>57</sup> may provide a better process for arriving at a resolution that more fully promotes the objectives of Canon 1. Reference for conciliation would thus seem appropriate in only that very narrow and rare kind of case where the Reference Panel is reasonably certain that the only persons affected are the Complainant and the Respondent.<sup>58</sup> This in turn raises the question of what informs that reasonable certainty.

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<sup>56</sup> Canon IV.14.3, 142. The canon is silent regarding what is to be done with this right of the Complainant to be heard before a Conference Panel Accord is signed. Presumably the expectation is that hearing from the Complainant could convince the Church Attorney, or possibly the Respondent, that the proposed terms are insufficient or inappropriate in some respect, resulting either in abandonment of the Accord or renewal of negotiations in order to address the insufficiency or impropriety.

<sup>57</sup> See text accompanying note 66.

<sup>58</sup> An example might be an Offense in which the only Injured Person is the Complainant (i. e., a Complainant with no immediate

*Reference for Canon 11 Investigation*

Moving forward with ecclesiastical discipline with less than reasonably full awareness of the material facts is one of the classic ways in which the response can cause more harm than the original Offense. Such harm typically manifests itself in some unjust result reached in haste, before enough facts are known. Because reference occurs at the beginning of the Title IV process, new Title IV makes available as one of the reference options that of investigation under Canon 11.

When the Reference Panel convenes to consider what to do with an intake report, it is acting on a report prepared with little or no substantive investigation. Although Canon IV.6.4 authorizes the Intake Officer to make a “preliminary investigation,”<sup>59</sup> the Intake

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family) committed by a Respondent who is not performing ministry in any Community and who has no immediate family. Where the Respondent is engaged in ministry in a Community (as that term is defined in Canon IV.2, 124: “part of the Church . . . such as a Diocese, Parish, Mission, school, seminary, hospital, camp or any similar institution”), the Community would always be affected to some extent. Further worth considering are those circumstances where a Complainant comes forward with information that, viewed only as between the Respondent and Complainant, constitutes such a narrow and rare case, yet the Bishop has independent knowledge of other questions or concerns about the Respondent that, in light of the Complainant’s narrow information, nevertheless indicates a broader need to promote the objectives of Canon 1 and the restoration of relationships beyond merely the Complainant and the Respondent. Referral of that kind of case to conciliation would seem inconsistent with the objectives of Canon 1.

<sup>59</sup> Canon IV.6.4, 131. The silence of new Title IV regarding the difference between this preliminary investigation and the kind of investigation provided in Canon 11 may lead to the expansion of preliminary investigations beyond what is probably intended by new Title IV. A Canon 11 Investigator must be knowledgeable, skilled, experienced, and trained in investigation. See definition of

Officer's function at this stage is to determine whether the information reported constitutes an Offense, assuming that it is true.<sup>60</sup>

Often in cases of clergy misconduct the information concerning the Offense that is received by the Intake Officer will not describe every Offense that may be involved or identify every person who has been injured. Where a Respondent has been out of bounds in one instance, there is the possibility, if not the probability, of being out of bounds in others; this seems particularly so in cases of sexual misconduct.<sup>61</sup> The Reference Panel cannot make a sufficiently informed decision on how to refer the matter if there lingers the

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"Investigator" in Canon IV.2, 125. As these requirements do not apply to the Intake Officer, it is reasonable to infer that any preliminary investigation by him would be only of the most cursory nature. For example, the Intake Officer might receive information from a person who mentions that she is in possession of documents that corroborate or otherwise relate to the information she has reported. As a reasonable preliminary investigation, the Intake Officer might ask to see those documents before proceeding further. Or, the Intake Office might receive information from a person who has no direct personal knowledge but is merely relaying information heard from an Injured Person. As a reasonable preliminary investigation, the Intake Officer might ask the reporting person to, in turn, ask the Injured Person to contact the Intake Officer so that the Intake Officer might hear directly from the Injured Person. In any event, great care should be exercised in rare situations where preliminary investigation by the Intake Officer is needed, and such preliminary investigations should be undertaken only sparingly. It is the primary function of the Intake Officer to *receive* information, not to investigate it.

<sup>60</sup> Canon IV.6.5, 6.7, 131. The Intake Officer does not *determine* whether the information is true but instead assumes it is true and then decides whether it constitutes an Offense based upon that assumption.

<sup>61</sup> See, e. g., Nancy Myer Hopkins, "Living Through the Crisis" in Hopkins and Laaser, eds., *Restoring the Soul of a Church*, 227. Hopkins lists verbal abuse, financial irregularity, and substance abuse as among frequently-seen additional boundary issues.

possibility that what has been reported to the Intake Officer is the tip of the proverbial iceberg. Nor can the objectives of Canon 1 be adequately promoted without a sufficient understanding of the scope of the conduct at issue and the extent to which persons other than the Complainant have been affected.

The importance of placing an investigation in capable hands cannot be overemphasized. Groundedness in Canon 1 values is a canonical prerequisite for the Investigator: the Investigator is required to be familiar with the “objectives” of new Title IV, which are, of course, set out in Canon 1,<sup>62</sup> and to conduct the investigation “with due consideration to pastoral sensitivities.”<sup>63</sup> This is because the Investigator’s role is crucial particularly to the promotion of justice and healing. As is more fully developed in the pages that follow, healing requires justice and justice requires that the truth be told.<sup>64</sup> The investigative process of Canon 11, expertly employed by an Investigator grounded in the values of Canon 1, can be the first step along the path of truth-telling.<sup>65</sup>

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<sup>62</sup> See definition of “Investigator” in Canon IV.2, 125.

<sup>63</sup> Canon 11.2, 136.

<sup>64</sup> See text accompanying notes 93-100.

<sup>65</sup> That Canon 11 should be expertly employed is critical to the success of the disciplinary process under new Title IV. Although Title IV does not require investigation in every case, when it is utilized it is imperative that it be performed with the “sufficient knowledge, skill, experience and training” required by new Title IV. See definition of “Investigator” in Canon IV.2, 125. Few things can compound the hurt of Injured Persons and Communities or frustrate the objectives of Canon 1 more than an inexpertly and incompetently conducted investigation. The appointment of an Investigator for a given case is thus a serious undertaking; in so doing, the Bishop and the president

Reference for Canon 11 investigation is thus likely indicated in any case where the Reference Panel cannot say with reasonable certainty that it has sufficient awareness of the material facts, the scope of the potential Offenses at issue and the identities of Injured Persons and Communities and the likely needs of those involved. After considering the findings of the Investigator's report, the Reference Panel still retains the same array of reference options as at the outset, but with the additional option of reference to the Conference Panel.<sup>66</sup> The objectives of Canon 1 are well-served by a reference for investigation because such results in a Reference Panel much better equipped to weigh the needs for healing, repentance, forgiveness, restitution, justice, amendment of life, and reconciliation, to identify those involved or affected, and to refer the matter along the course that will be best-suited to promote the same in the given case.

*Reference for Canon 9 Agreement for Discipline*

The final option afforded to the Reference Panel is referral to the Bishop for a possible agreement with the Respondent for discipline pursuant to Canon 9. The Canon 9 agreement for discipline is carried forward from former Title IV's Voluntary Submission to discipline.<sup>67</sup> Referral for agreement for discipline may be anticipated as the most tempting alternative for the

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of the Disciplinary Board should not confine their search for a suitable person to local candidates.

<sup>66</sup> Canon IV.11.3, 136, provides as post-investigative reference options (a) to take no action except for appropriate pastoral response; (b) to refer for possible agreement for discipline; (c) to refer for conciliation; (d) to refer for further investigation; or (e) to refer to the Conference Panel.

<sup>67</sup> Former Title IV, Canon IV.2, 110-12.

## 32 Ministry of Reconciliation

Reference Panel in general and for the Bishop in particular because it is a familiar process that can bring matters to a quick end. Under former Title IV, Voluntary Submission to discipline was the device employed to resolve the large majority of cases.<sup>68</sup>

But Canon 9 agreements for discipline present risks for falling short of the objectives of Canon 1, precisely because it can be a relatively easy and quick process. Canon 9 agreements occur by arrangement between the Bishop and the Respondent, can be initiated by either, and can occur at any stage of the Title IV process before an Order becomes effective and regardless of whether the Reference Panel has referred the matter to some other process.<sup>69</sup> The agreement for discipline takes the form of an Accord.<sup>70</sup> Canon IV.9.2 requires an Accord that “adequately considers and, where possible, provides for healing, repentance, forgiveness, restitution, justice, amendment of life and reconciliation among the Complainant, Respondent, affected Community and other persons and is otherwise

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<sup>68</sup> A survey conducted in 1999 by the Standing Commission on Constitution and Canons found that 67 percent of cases under former Title IV ended with Voluntary Submission to discipline. More than half of these cases were resolved prior to the making of a Charge, and in those cases Voluntary Submission to discipline concluded the matter 83 percent of the time. Report of the Standing Commission on Constitution and Canons in *Reports to the 73rd General Convention Otherwise Known as the Blue Book* (New York: Church Publishing, 2000), 64-65.

<sup>69</sup> Canon IV.9.1, 135. This is consistent with the Voluntary Submission to discipline under former Title IV, except that under the former canon technically only the Respondent could initiate it (but with the Bishop’s consent). See former Title IV, Canon IV.2.1, 110.

<sup>70</sup> Canon IV.9.1, 2, 135.



an appropriate resolution of the matter.”<sup>71</sup> Before reaching the agreement, the Bishop must consult with Injured Persons (apparently including the Complainant), the president of the Disciplinary Board, and the Church Attorney.<sup>72</sup> This arrangement is better than that provided in the conciliation process: there, neither Injured Persons nor the Church Attorney have any right to be consulted prior to the entry of an Accord.<sup>73</sup>

Presumably the concerns of whether an agreement adequately addresses the objectives of Canon 1—or whether they were adequately considered in the process—and whether the Accord is an appropriate resolution of the matter are addressed when the Bishop consults the Injured Persons and the Church Attorney. Worth noting, under former Title IV, the Bishop was required to give Complainants, Injured Persons (Victims), and the Church Attorney “an opportunity to be heard” concerning a Voluntary Submission to discipline.<sup>74</sup> Under new Title IV, the Bishop consults these persons. To be heard and to be consulted are different concepts. The former involves arguing one’s position; the latter involves offering one’s counsel and advice.

Reference for a Canon 9 agreement for discipline is indicated where the Bishop is confident of his or her ability to reach an Accord with the Respondent that can adequately promote the objectives of Canon 1, given the particular circumstances presented. Of necessity, this must be an informed confidence, as opposed to one that is primarily intuitive. That, in turn, may suggest a need

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<sup>71</sup> Canon IV.9.2(c), 135.

<sup>72</sup> Canon IV.9.1, 135.

<sup>73</sup> See text accompanying notes 49-50.

<sup>74</sup> Former Title IV, Canon IV.2.2, 110.

## 34 Ministry of Reconciliation

for Canon 11 investigation before reference to agreement for discipline so that the Bishop can have reasonable assurance that the resulting Accord is “an appropriate resolution of the matter.”<sup>75</sup>

### *Designating a Complainant*

New Title IV defines “Complainant” as (a) the person or persons from whom the Intake Officer receives information concerning an Offense or (b) any other Injured Person designated by the Bishop to “be afforded the status of a Complainant.”<sup>76</sup> Having the status of a Complainant in a proceeding under new Title IV carries significance. The Complainant is entitled to numerous opportunities in the processes of new Title IV that are not available to other Injured Persons. These include the opportunities to

- have the assistance of an Advisor;<sup>77</sup>
- have counsel present;<sup>78</sup>
- appeal a dismissal by the Intake Officer;<sup>79</sup>
- participate in the formulation of the Accord in a conciliation (or withhold assent to one);<sup>80</sup>
- attend Conference Panel proceedings;<sup>81</sup>

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<sup>75</sup> Canon IV.9.2(c), 135.

<sup>76</sup> See definition of “Complainant” in Canon IV.2, 124. The definition provides that any Injured Person may decline such a designation.

<sup>77</sup> Canon IV.19.10(b), 158.

<sup>78</sup> Canon IV.19.12, 159.

<sup>79</sup> Canon IV.6.5, 131.

<sup>80</sup> Canon IV.10, 136.

<sup>81</sup> Canon IV.12.6, 138.

- be heard by the Conference Panel, both during the conference and before any Accord is reached;<sup>82</sup>
- be heard by the Conference Panel or the Hearing Panel before any Order is issued;<sup>83</sup> and
- be heard in any Canon 18 proceeding for modification or remission of an Order.<sup>84</sup>

There will be cases where the initial Complainant may not be the right person, or the only person, to fill that role in these processes. One example is where a Member of the Clergy, who otherwise has no connection with the matter, learns from an Injured Person of some misconduct and the Member of the Clergy contacts the Intake Officer.<sup>85</sup> Another arises where a person whose contact with the Intake Officer begins with “I just thought you might be interested to know . . .” but who is not an Injured Person; instead, this person is merely relaying information. In each instance, these persons having first contact with the Intake Officer technically are Complainants.<sup>86</sup> But practically, the objectives of Canon 1 are unlikely to be served with such persons occupying that role through whatever processes will follow. New Title IV anticipates this and gives the Bishop the discretion to designate any Injured Person as a Complainant, thereby conferring upon that person the opportunities listed above.

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<sup>82</sup> Canons IV.12.7, 138, and IV.14.3, 142.

<sup>83</sup> Canon IV.14.7, 143.

<sup>84</sup> Canon IV.18.6, 155. Modification and remission are discussed in the text accompanying notes 104-108.

<sup>85</sup> Canons IV.4.1(f), 127; IV.6.3, 130.

<sup>86</sup> See clause (a) in the definition of “Complainant” in Canon IV.2, 124.

Such a designation is a discretionary function of the Bishop; it is not a function of the Reference Panel. Nevertheless, from the time the Intake Officer receives the first information, to the implementation of pastoral response, and throughout the reference process, the question of whether any other Injured Person should be designated as a Complainant should be at the forefront of the Reference Panel's work if the panel aspires to move the matter along a path that will promote the objectives of Canon 1.

This could occur at any time, but the main junctures for consideration and reconsideration would probably be during the Intake Officer's preparation of the intake report, during the reference process itself, and particularly following the receipt of an Investigator's report. It is not merely the Bishop, but the Intake Officer, the Investigator, and the Church Attorney who should be vigilant about the need to designate other Complainants and to suggest such to the Bishop where any of them think it is appropriate.

There is no test or standard provided in new Title IV (apart from exercise of the Bishop's discretion) by which to weigh whether a particular Injured Person should be designated as a Complainant. As a practical matter, one approach might be to consider an Injured Person in light of the opportunities listed above:

- Is this person one who has been directly and seriously harmed by the act or omission constituting the Offense?
- Is this person willing to participate in the processes of Title IV and to contribute to the promotion of the objectives of Canon 1?

- Is this person one from whom the Conference Panel must hear to facilitate a fuller promotion of the objectives of Canon 1?
- Ought this person be heard concerning the terms of any Conference Panel Accord?
- Ought this person be heard concerning the terms of any Order?
- Ought this person be heard if the Bishop later considers modifying or remitting the terms of any Order?

In view of the general experience with Victims and their Advocates under former Title IV, one might expect that Complainants and their Advisors under new Title IV will be particular proponents of the objectives of Canon 1 and will thus be particularly resolute in making known when processes fail to deliver them. New Title IV will benefit from that kind of presence.

### **Accords, Orders and Canon 1**

Under Canon 14 of new Title IV, Accords and Orders may

- (a) provide any terms which promote healing, repentance, forgiveness, restitution, justice, amendment of life and reconciliation among the Complainant, Respondent, affected Community and other persons;
- (b) place restrictions on the Respondent's exercise of ministry;
- (c) place the Respondent on probation;
- (d) recommend to the Bishop Diocesan that the Respondent be admonished, suspended or deposed from ministry;
- (e) limit the involvement, attendance or participation of the Respondent in the

Community; or (f) any combination of the foregoing.<sup>87</sup>

Additionally, any Accord or Order that suspends the Respondent from ministry must specify the terms and conditions under which the suspension will end, and if the Respondent's involvement, attendance or participation in the Community is limited, the Accord or Order must provide conditions for restoration.<sup>88</sup> (For purposes of this discussion, these additional requirements will be referred to as the "reinstatement provisions.") While none of these six categories is mandatory in any Accord or Order, all are permissible, and the breadth of their scope encourages creative dispute resolution aimed at restoration of as many relationships as is necessary and possible.

The six categories of Canon 14, coupled with the reinstatement provisions, point to a different view of justice than was promoted by former Title IV. Like criminal and military justice models, former Title IV promoted retributive justice.<sup>89</sup> This form of justice is rooted in punishment.<sup>90</sup> The view of justice promoted

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<sup>87</sup> Canon IV.14.1, 142 (Accords); canon IV.14.6, 143 (Orders). Curiously, the third category—placement of the Respondent on probation—is made available only for Accords; Canon IV.14.6 omits it.

<sup>88</sup> Canon IV.14.1, 142 (Accords); canon IV.14.6, 143 (Orders).

<sup>89</sup> See note 6.

<sup>90</sup> "Retributive justice is the reestablishment of justice through unilateral imposition of punishment on the offender consistent with what is believed the offender deserves." Michael Wenzel et al., "Retributive and Restorative Justice," *Law and Human Behavior*, 375 (2008): 381. This definition echoes the traditional view of Article XXVI of the Articles of Religion (dealing with deposition of "evil ministers" and from which disciplinary canons are drawn) that, for example, it is the duty of the members of the Church "to see that the evil conduct of

by new Title IV, informed by Canon 1 generally and by Canon 14 and its reinstatement provisions specifically, is restorative justice. Definitions of restorative justice vary with the contexts in which it is employed, but succinctly stated, “restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”<sup>91</sup> Its emphasis, like that of new Title IV, is very much on reconciliation and the restoration to right relationship.

This definition points back to the table of relationships proposed earlier. Each person and group listed in the table potentially has a stake of some kind in the Offense, and the application of the Canon 1 objectives to the respective stakes of each person and group aims at dealing with the aftermath of the Offense and its implications for the *future*, principally, healing and reconciliation and focus upon what measures might be employed through the disciplinary process to promote these along with the other Canon 1 objectives.<sup>92</sup>

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their Ministers, if such come to their knowledge, be brought before those, who have authority in the Church to enquire into, and to inflict the due punishment of, such misconduct.” James R. Dimock, *The Thirty-nine Articles of the Church of England* (London: J. Hatchard & Son, 1843), Vol. 2, 133.

<sup>91</sup> Tony F. Marshall, “Restorative Justice: An Overview” (London: Home Office Research Development and Statistics Directorate, 1999), 5, <http://rds.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf>. (accessed November 20, 2010) Marshall’s definition is frequently cited by restorative justice writers.

<sup>92</sup> That restorative justice is a collaborative effort among these stake holders further points to Conference Panel proceedings as perhaps the best vehicle for promoting the objectives of Canon 1 among all those involved or affected, as opposed to Canon 10 conciliation, where the Complainant and the Respondent drive the process, or Canon 9 agreement for discipline, where the Bishop and the Respondent exercise control over the result. It can be hoped, but not assumed, that

There are several practical provisions that can be considered for inclusion in Accords and Orders as devices for promoting these objectives.

*Truth-telling*

Truth-telling is frequently an element of restorative justice and is well-established as an element of healing in the aftermath of clergy misconduct.<sup>93</sup> Truth-telling is often a complicated undertaking<sup>94</sup> but it can be summarized for Canon 1 purposes as openly stating the facts of the Offense and the harm that it caused. Truth-telling begins with truth-seeking, which is in the first instance the role of the Investigator. It includes both an occasion and a safe setting, for Injured Persons especially, to speak their truths and to tell their stories. This safe setting is likely to be in the “informal and conversational”<sup>95</sup> environment of the Conference Panel; it is unlikely to be found in the formal adversarial proceedings of the Hearing Panel, where cross-

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Complainants, Respondents and Bishops will look beyond their own respective needs and interests in the formulation of Accords. It is the Church Attorney, who represents not the Complainant nor the Respondent nor the Bishop, but the *Church*, who may be best positioned to work for the broadest promotion of Canon 1 objectives among all of the stake holders. See definition of “Church Attorney” in Canon IV.2, 123-24, as an attorney selected “to represent the Church.”

<sup>93</sup> See, e. g., Marie M. Fortune, *Is Nothing Sacred? When Sex Invades the Pastoral Relationship* (San Francisco: Harper & Row, 1989), 114.

<sup>94</sup> See, e. g., Harold Hopkins, “The Effects of Clergy Sexual Misconduct on the Wider Church” in Hopkins and Laaser, eds., *Restoring the Soul of a Church*, 129-30. Hopkins writes that “Truth in these situations is often an elusive commodity and, if eventually found, is sometimes found not to be simple.”

<sup>95</sup> Canon IV.12.7, 138.



examination and impeachment of witnesses are the mode.

Truth-telling might end with an agreement or a finding that leads to a setting forth of facts in narrative form sufficient to serve the justice purpose of truth-telling. If this is accomplished in connection with an Accord, then there has been agreement upon a statement of facts between the Respondent and, variously, the Complainant if it results from conciliation, the Church Attorney if it results from a Conference Panel proceeding, or the Bishop if it results from an agreement for discipline. If it is accomplished in connection with an Order, then the Respondent has accepted the Conference Panel's understanding of the facts or the Hearing Panel has made findings.

Concerning the telling of facts in Accords and Orders, new Title IV requires only a statement of "general information sufficient to afford protection from proceedings" based upon the same Offense.<sup>96</sup> This kind of general information is unlikely to satisfy the need for truth-telling as an element of justice and healing. Moreover, privacy interests of Injured Persons might be infringed by incorporation of overly-detailed accounts into an Accord or Order.<sup>97</sup> Disclosure of facts promotes

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<sup>96</sup> Canon IV.14.9(c), 144.

<sup>97</sup> New Title IV requires the Bishop to provide copies of all Accords and Orders to the Archives of The Episcopal Church. Canon IV.19.30(d), 163. Apparently Accords and Orders in the archives will not be available for public access. See the summary of the Archives' access policy, accessed November 20, 2010, [http://www.episcopalarchives.org/access\\_policy.html](http://www.episcopalarchives.org/access_policy.html). New Title IV requires the Bishop to give *notice* of Accords and Orders (i. e., notice of the fact of an Accord or Order and the specific canonical provision pertaining to the subject Offense, but not a copy of the Accord or Order itself) to, among other recipients, every Member of the Clergy and Vestry in the diocese. Canon IV.14.12(a), 144. Further regarding

truth-telling; disclosure of unnecessary details can aggravate harm already done.

Nevertheless, Accords and Orders can provide for meaningful truth-telling outside of their four corners. Examples of this might include utilization of Canon 7 or Canon 8 disclosure of some kind by or at the direction of the Bishop or through private meetings between affected persons—such as between Injured Persons and the Respondent facilitated, perhaps, by the Conference Panel—in which the truth as discerned through the process which led to the Accord or Order is spoken and acknowledged.<sup>98</sup>

Truth-telling can explode a culture of secrecy that is harmful to all involved and can further the healing of those who would suffer in silence without it. An Accord or Order which provides for truth-telling will recognize the difference between a secrecy that is counterproductive to healing and a preservation of confidentiality that is vital to the promotion of healing. The former is in service to the power to exclude; the latter is in service to care for, and honor of, those who

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privacy interests of affected persons, see Canon IV.8.4, 135, requiring the Bishop to take such interests into consideration.

<sup>98</sup> Canons 7 and 8 expressly give the Bishop broad discretion to disclose any information that the Bishop deems pastorally appropriate. Canons IV.7.9, 133, and IV.8.3, 135. These canons contemplate disclosures to the Community, such as the now-familiar congregational meeting soon after the Respondent has left and that was often provided for in diocesan policies and procedures used in connection with former Title IV. There is a certain truth-telling purpose in such disclosures, but because they typically occur early in the process, they are often incomplete and less than fully informed. Accordingly, such disclosures are usually insufficient as the kind of truth-telling required to do justice.

have been harmed.<sup>99</sup> Finally, truth-telling can serve a vindicating function, whether for the Complainant who might have previously experienced rejection or disbelief from the Community or for the Respondent who has been determined not to have committed the Offense, either of which can play a role in the promotion of justice and healing.<sup>100</sup>

#### *Acknowledgement*

Acknowledgement that harm was done in the commission of the Offense can be another simple but powerful step to promote healing among all involved. Canon 14 requires that all Accords and Orders must specify the Offense.<sup>101</sup> Compliance with this canonical requirement is one kind of acknowledgment of the behavior that caused harm to Injured Persons and affected Communities. This acknowledgment can also occur in the truth-telling process, particularly if the process includes an opportunity for Injured Persons to hear from the Respondent or from the Bishop an acknowledgment not only of harmful behavior but also of harm done to Injured Persons.

#### *Accountability*

Accountability is the first theme introduced in Canon 1, and it is therefore not surprising that accountability is the common thread in the categories of Canon 14 permitting restrictions on the exercise of the Respondent's ministry, placement of the Respondent on

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<sup>99</sup> Margo Maris, ". . . that which is hidden will be revealed" in Hopkins and Laaser, eds., *Restoring the Soul of a Church*, 13.

<sup>100</sup> See Canons IV.12.10, 138, and IV.13.8, 141, providing for the issuance of Orders of dismissal "which may contain findings exonerating the Respondent."

<sup>101</sup> Canon IV.14.9(b), 144.

## 44 Ministry of Reconciliation

probation, recommendation for admonishment, suspension or deposition of the Respondent, or limiting the Respondent's involvement, attendance, or participation in the Community. All of these are methods of holding a Respondent to account for his or her violations.<sup>102</sup> And while they may appear as punitive, punishment of the Respondent is not their primary purpose in the spirit of Canon 1.

Deposition of the sexually exploitative priest is not nearly as much about punishment as it is about the Church's duty to protect the vulnerable. Limiting involvement in the life of the Community is not to punish the Respondent but to promote the healing of the Community. Nevertheless, where Accords and Orders make for such provisions, accountability is a consequence of violation and serves justice in the process. Justice is incomplete without accountability.

Accords and Orders need not limit accountability to the Respondent. For example, where a Community has failed to implement recognized "safe church" practices<sup>103</sup> and such failure contributed to the Offense, an Accord or Order that calls the Community to account could serve to promote the Community's healing and the amendment of its corporate life. New Title IV does not provide for discipline of anyone other than a Member of the Clergy. But an Accord or Order that speaks the truth about such a failure and calls for its

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<sup>102</sup> See Canon IV.3.2, 126: "A Member of the Clergy shall be accountable . . ."

<sup>103</sup> See, e. g., Church Pension Group and Praesidium, Inc., *Safeguarding God's People: Preventing Sexual Exploitation in Communities of Faith* (New York: Church Publishing, Inc., 2008), DVD and multi-media materials.

correction (albeit without any ability to require it) is one that promotes the objectives of Canon 1.

*Compassion and Mercy*

But even where the Respondent is held to account, the objectives of Canon 1 point to compassion and mercy. This is the very purpose of the reinstatement provisions of Canon 14: where an Accord or Order suspends or restricts the Respondent's ministry or places him on probation or otherwise separates him from the life of the Community, the Accord or Order must likewise provide a way for him to redeem it. Even where the Respondent is deposed from holy orders, new Title IV leaves open the possibility for undoing it through a remission process which hears anew from the Church Attorney, the Disciplinary Board, the Complainant and others.<sup>104</sup>

Canon 18 allows for modification or remission of any Order (but not of an Accord) or for remission or termination of any Sentence of deposition resulting from an Order (but not from an Accord) upon application of the former Respondent, if the Bishop "is satisfied that sufficient reasons exist for granting the modification or remission sought."<sup>105</sup> Where the Bishop is so satisfied, remission or termination<sup>106</sup> of a Sentence of deposition further requires (a) the consent of at least two-thirds of the Disciplinary Board; (b) the consent of at least four Bishops Diocesan of the five nearest Dioceses; and (c) sufficient opportunity for hearing from the former

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<sup>104</sup> See Canon IV.18, 154-55.

<sup>105</sup> Canon IV.18.1, 154.

<sup>106</sup> The distinction between remission and termination, if any, is not specified in new Title IV.

Respondent, the Church Attorney and the Complainant.<sup>107</sup>

The Bishop's satisfaction as to the existence of "sufficient reasons" would be informed by a variety of considerations, beginning with whether the terms of the Order have been fulfilled. But Canon 1 would not countenance remission of deposition for that reason alone. Faithfulness to Canon 1 in the weighing of "sufficient reasons" under Canon 18 might additionally include consideration of the degree to which there has occurred healing, repentance, forgiveness, and amendment of life and whether adequate time has passed to allow for these. A cross-check of these against the table of relationships proposed earlier might be of some assistance in this weighing task.

Even after the Bishop has found the existence of "sufficient reasons" in light of these considerations, the requirement of Canon 18 that the former Respondent, the Church Attorney, and the Complainant be given the opportunity be heard suggests that these same Canon 1 considerations ought to be the focus of hearing from them. Canon 18 thus furthers the reconciling objectives of Canon 1 and the attendant principles of compassion and mercy by giving a second chance not only to the former Respondent but also to the Community as represented in the Complainant and the Church Attorney.<sup>108</sup>

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<sup>107</sup> Canon IV.18.3, 154.

<sup>108</sup> The inapplicability of Canon 18 to Accords presents some concerns. Orders will probably be less commonplace under new Title IV than Accords, since Orders can only issue from the Conference Panel (subject to the Respondent's acceptance) or from the Hearing Panel (imposed on the Respondent). Accords, on the other hand, can result from Canon 10 conciliation, Canon 12 Conference Panel

*Restitution*

Of all of the objectives promoted by Canon 1, restitution seems the most concrete. Because of its concreteness, restitution is perhaps the easiest objective of Canon 1 to express in an Accord or Order. Asking four basic questions concerning restitution can test the sufficiency of any Accord or Order:

- Is restitution needed?
- To whom is restitution due?
- From whom is restitution due?
- What is appropriate restitution, and how will it be made?

If the answer to the first question is yes, then the Accord or Order promotes the objectives of Canon 1 by providing answers to the last three.

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proceedings or Canon 9 agreements for discipline. Given experience with former Title IV, the last of these might be in practice the most common resolution. The salutary characteristic of an Accord is that it is a collaborative product and thus something to be encouraged. However, a Respondent might be reluctant to enter into an Accord recommending a Sentence of deposition knowing that new Title IV offers no way to remit or terminate the Sentence.

Because an Accord is an agreement (see definition of "Accord" in Canon IV.2, 123), there would seem to be no reason to prohibit an Accord from providing its own terms and conditions for modification of terms other than a Sentence of deposition, but new Title IV appears to offer no means for relief from deposition imposed from an Accord. This problem might be solved by an Accord that recommends suspension from ministry on terms that are the practical equivalent of deposition. Such could be accomplished by thoroughly expressed terms of suspension (e. g., to refrain from the exercise of the gifts of ministry conferred by ordination, from referring to or holding out oneself as a Member of the Clergy, from wearing clerical garb), in addition to the other characteristics of suspension set forth in Canon IV.19.7, until such time as the same conditions required by Canons IV.18.1, IV.18.3(a) and (c), and IV.18.6 for cases of deposition are satisfied.

Restitution is usually understood as restoration of something wrongfully taken or reparation for injury. In matters of ecclesiastical discipline many kinds of takings and injuries are encountered. Spiritual, psychological, and physical injury is common among those subjected to sexual abuse or misconduct.<sup>109</sup> Communities harmed by financial misconduct<sup>110</sup> are injured not merely by the upset and disruption caused by the departure of the Respondent but by the resulting lack of funds to deal with its aftermath and the ordinary needs of Community life. Similarly, a diocese that responds to an Offense and administers the processes of new Title IV can incur significant expense.

Again, the table of relationships can be a tool for checking the second and third questions. With regard to each person and group listed in the table, the inquiry is whether this person or group is due restitution. In each instance where the answer is in the affirmative, the next inquiry is to determine from whom restitution is due to that particular person or group.<sup>111</sup>

Concerning the fourth question, the medium of restitution in popular culture is money. Monetary restitution may sometimes be considered appropriate in an Accord or Order, especially where there has been quantifiable economic injury, such as medical expenses, costs of counseling or misappropriation of funds or property. But the other objectives of Canon 1 suggest

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<sup>109</sup> See, e. g., Kathryn A. Flynn, *The Sexual Abuse of Women by Members of the Clergy* (Jefferson, NC: McFarland & Company, Inc., 2003) 87-150.

<sup>110</sup> See Canon IV.4.1(e), 127.

<sup>111</sup> For this application of the table, it is probably helpful to substitute the Diocese for the Bishop.



that it promotes a considerably more expansive view of restitution than this. For example, the sexually exploitative Respondent might make symbolic restitution to Injured Persons, the Community, his or her own family, and the Bishop by entering into behavioral treatment, dedicating himself or herself to its disciplines and requirements and thereafter, perhaps, contributing work to an organization that raises awareness about exploitation in helping professions and aids the vulnerable.<sup>112</sup> Acknowledgement by the Respondent of the harm done can be a form of symbolic restitution. Apology can likewise be a powerful symbol of restitution.<sup>113</sup> However, care should be taken to ensure that symbolic, nonmonetary restitution is not provided as a substitute for monetary restitution where there has been economic harm and the responsible party has the reasonable prospect for paying all or some of it, either presently or in the future.<sup>114</sup>

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<sup>112</sup> Restitution in this form can also simultaneously promote the objectives of healing, repentance, and amendment of life.

<sup>113</sup> See Conrad G. Brunk, "Restorative Justice and the Philosophical Theories of Criminal Punishment" in Michael L. Hadley, ed., *The Spiritual Roots of Restorative Justice* (Albany, N.Y.: State University of New York Press, 2001), 51-53. See also L. William Countryman, *Forgiven and Forgiving* (Harrisburg, Pennsylvania: Morehouse Publishing, 1998), 74. Countryman describes apology as "a kind of gift to the one we have offended and, in the limited way possible when we're in the wrong, a contribution to the shared process of forgiveness and reconciliation." Restitution is not a gift; it is compensation. But where apology is offered as a compensating act, it is indeed an important part of that process.

<sup>114</sup> Nevertheless, sometimes the providing of symbolic restitution might serve to lessen the expectation for monetary restitution.

*Apology*

Meaningful apology includes acknowledgment of the Offense and its effects on Injured Persons, acceptance of accountability for the Offense, the offering of some form of restitution, commitment to refrain from repeating the Offense, and contrition.<sup>115</sup> An Accord or Order that promotes the objectives of Canon 1 will typically address all of these, with the last two being marks of amendment of life and repentance. In some cases, such an Accord might include an express statement of meaningful apology, since the Respondent signs the Accord. Formulation of an apology provision of an Accord or Order can be aided by the table of relationships to consider those from whom and to whom an apology might be offered.

Apology is not without its perils. A premature or qualified apology can hinder healing and inflict further harm.<sup>116</sup> While a compelled apology is neither genuine nor meaningful, an Accord or Order could nevertheless express the expectation that the Respondent appropriately apologize, and the

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<sup>115</sup> Recent literature on apology is considerable and addresses a wide range of contexts, from international politics to interpersonal relationships. The elements of apology suggested here appear in most attempts to define it and are consistent with the objectives of Canon 1. See, e. g., John Kador, *Effective Apology: Mending Fences, Building Bridges and Restoring Trust* (San Francisco: Berret-Koehler Publishers, Inc., 2009), which mentions recognition, responsibility, remorse, restitution, and assurance against repetition as among the elements of an effective apology. Other studies sometimes suggest purposes that are inconsistent with Canon 1. See, e. g., Aaron Lazare, *On Apology* (New York: Oxford University Press, 2004), 44, which suggests that apology should meet the need to see the offender suffer as a part of the injured person's healing.

<sup>116</sup> Countryman, *Forgiven and Forgiving*, 74-75.

reinstatement provisions of Canon 14, if applicable, might make apology a condition. Of course, no Respondent can be required to offer an apology, and no person to whom one is offered can be required to accept it, but the objectives of Canon 1 are promoted by an Accord or Order that addresses the subject.<sup>117</sup>

### *Rehabilitation*

A term that sometimes carries with it considerable baggage, rehabilitation in the Canon 1 context is about both healing and amendment of life. In the case of the clinically disordered Respondent, therapeutic intervention and treatment can be appropriate tools for rehabilitation and in such cases it is entirely appropriate for an Accord or Order to provide for it, either as an independent term or in connection with the reinstatement provisions of Canon 14. But other provisions of Accords and Orders on points mentioned previously can work to promote a more profound kind of rehabilitation that is more consistent with the objectives of Canon 1. “An offender who has taken responsibility for repairing the harms done, and who has restored the trust and confidence of the community is ‘rehabilitated’ in a far broader sense than can be said of individualized therapeutic measures.”<sup>118</sup> Thus,

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<sup>117</sup> Formulation of an Accord or Order in a case involving sexual exploitation and an unrecovered Respondent should consider that meaningful apology likely will be delayed until the Respondent has developed, through therapy or other assistance, sufficient empathy for those harmed by the Offense. See Richard Beckett, “Cognitive-behavioural treatment of sex offenders” in Tony Morrison, Marcus Erooga and Richard C. Beckett, eds., *Sexual Offending against Children: Assessment and Treatment of Male Abusers* (New York: Routledge, 1994), 96-98.

<sup>118</sup> See Brunk, “Restorative Justice and the Philosophical Theories of Criminal Punishment,” 50-51.

Accords and Orders that address acknowledgment, accountability, restitution, and apology will promote rehabilitation.

*Reform of Systems and Structures*

Protection of others from harm is implicated in the Canon 1 objective of amendment of life. Where systems, structures, and practices can be reformed to help prevent the kind of harm caused by an Offense, then an Accord or Order should address pursuit of the reform needed. To return to the example noted in the discussion of accountability, a Community that lacks or fails to follow “safe church” standards has systems, structures, and practices that should be reformed. While it appears beyond the scope of new Title IV to require it, an Accord or Order could nevertheless express an expectation that a Community implement the appropriate reforms.<sup>119</sup> Such is one way to promote the amendment of the life of the Community.

*Implications for the Future*

All of the practical considerations raised in this section, working together and with collaboration in community, are instruments for justice, healing, forgiveness, and reconciliation. It would be absurd to expect that upon

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<sup>119</sup> Some may see a tension between Canon IV.14.1(a), which permits an Order to set forth “any terms” that promote the Canon 1 objectives among the Complainant, Respondent, affected Community and other persons, and Canon 1 itself, which states that Title IV applies to Members of the Clergy. Where a Community has no “safe church” practices, an Order requiring it to implement them is certainly an order that promotes the objectives of Canon 1. But the last sentence of Canon 1 appears to limit the binding effect of an Order to Members of the Clergy.

the entry of an Accord or Order justice will have been done, persons and Communities will have been healed, or that all will be forgiven and reconciled. Instead, it is the implementation and living out of Accords and Orders rooted in Canon 1 that may, in time, realize these and restore to right relationship all involved or affected.

Thus it is that Accords and Orders that promote the objectives of Canon 1 should be formulated with a view to the future. The ingredients of the “stew” of reconciliation described earlier<sup>120</sup> simmer in a stock of time. Whether such Accords and Orders can actually bring any of the objectives of Canon 1 to fruition in a given case is a question that can be answered only with the benefit of hindsight, for the objectives are processes, not events.<sup>121</sup>

### **Conclusion**

In the end, new Title IV requires none of the concepts put forth in this article; it merely *permits* them. No Respondent can be required to enter into any Accord, whether in the context of Canon 9 agreements for discipline, Canon 10 conciliations, or Canon 12 Conference Panel proceedings. Likewise, no Respondent can be required to accept any Order issued by a Conference Panel. Under new Title IV it always remains the prerogative of the Respondent to force the Church to move the matter to the Hearing Panel,<sup>122</sup>

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<sup>120</sup> See text accompanying note 17.

<sup>121</sup> Cooper-White, “Some Thoughts Toward Canon Revision: Canons as Gift of Grace and Dance of Love” in *Reports to the 74th General Convention Otherwise Known as the Blue Book*, 364.

<sup>122</sup> The one exception to this would be where the Conference Panel is designated as the panel to hear a Respondent’s request for review of a Canon 7 restriction on ministry or Administrative Leave. See Canon

## 54 Ministry of Reconciliation

where the process will be essentially the same as under former Title IV—an adversarial and non-collaborative one in which the Church must prove everything by clear and convincing evidence.<sup>123</sup>

But Canon 1 orients ecclesiastical discipline toward the remembrance that God has given the Church the ministry of reconciliation.<sup>124</sup> This ministry is most fully exercised not by adapting itself to familiar secular conventions that champion the adversary system of retributive justice, but by recognizing that the purpose of canon law is to further the mission of the Church to restore all people to unity with God and each other in Christ.<sup>125</sup> If new Title IV shares that purpose, then implementing it to resolve conflicts by promoting healing, repentance, forgiveness, restitution, justice, amendment of life, and reconciliation among all involved or affected will require unconventional, creative, difficult, and counter-cultural applications, many of which may appear impractical. This is seemingly, for all of these adjectives apply to the mission of the Church in the world.

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IV.7.11, 133-34. There is no resort to the Hearing Panel in that circumstance.

<sup>123</sup> Canon IV.19.16, 161.

<sup>124</sup> 2 Cor. 5:18.

<sup>125</sup> *Book of Common Prayer* 1979, 855.

Document:  
Minutes  
Committee on Canons  
(Committee No. 5)  
At the 76<sup>th</sup> General Convention  
Anaheim, California  
July 7-16, 2009<sup>1</sup>

The Membership of the Committee on Canons was as follows:

<b>House of Bishops</b>	<b>House of Deputies</b>
The Rt. Rev. Catherine M. Waynick, Chair, [Diocese of] Indianapolis ([Province] V)	Mr. Thomas A. Little Esq, Chair [Diocese of ] Vermont ([Province] I)
The Rt. Rev. Robert L. Fitzpatrick, Sec'y, Hawaii (VIII)	Mr. Kevin J. Babb, Vice-Chair Springfield (V)
The Rt. Rev. William O. Gregg North Carolina (IV)	The Rev. Carol Barron, Secretary Southeast Florida (IV)
The Rt. Rev. Dorsey F. Henderson Jr. Upper South Carolina (IV)	Duncan A. Bayne Esq. Olympia (VIII)
The Rt. Rev. Mark S. Sisk New York (II)	Ms. Lilith [Zoe] Cole Colorado (VI)
	Mr. Paul E. Cooney Washington (III)
	Mr. William W. Crosby

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<sup>1</sup> These minutes are reproduced with permission from Committee co-chair Thomas Little. There have been some changes in format in order to conform with other materials in this journal. Corrections in spelling and clarifications are marked in brackets. [Editor's note]

	<p>Georgia (IV)  The Rev. Thack H. Dyson  Central Gulf Coast (IV)  The Rev. Kathryn "Holly" Eden  Central New York (II)  Mr. William Fleener Jr.  Western Michigan (V)  Ms. Carlynn Higbie  Milwaukee (V)  Stephen F. Hutchinson Esq.  Utah (VIII)  The Rev. Patricia Micklow  Northern Michigan (V)  Mr. Mike Morrow  Kansas (VII)  The Rev. Ellen C. Neufeld  Albany (II)  Mr. Larry S. Overton  East Carolina (IV)  Mr. Russell V. Palmore Jr.  Virginia (III)  Mr. Russell R. Reno Jr.  Maryland (III)  The Rev. Canon Alicia Schuster  Weltner  Atlanta (IV)  Mr. Roger D. Schwenke  Southwest Florida (IV)  Mr. Marcellus L. Smith Jr.  Alabama (IV)  The Very Rev. Arthur Tripp  Rio Grande (VII)  The Rev. Canon Bradley S. Wirth  Montana (VI)  Mr. Belton T. Zeigler  Upper South Carolina (IV)</p>
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The Committee's Administrative Assistant was Laura Russell, Diocese of Newark. The Rev. Peter Keese, Diocese of East Tennessee, served as liaison with the Committee on Dispatch of Business.

**Tuesday, July 7**

**8:00 a.m. – 12:00 p.m.**

House of Deputies Chair Thomas Little called the meeting to order at 8:00 a.m. House of Bishops Chair, the Rt. Rev. Catherine Waynick, led the Committee members in Morning Prayer.

Mr. Little asked all members and guests to introduce themselves and share a bit of background information.

A draft of the proposed agenda was distributed for consideration, and is attached to these Minutes as Exhibit 1. Mr. Little also explained that in addition to the Resolutions already referred to the Committee, other resolutions may come from committees during convention. Some Resolutions will be reviewed as to canonical form only, and others not only for canonical form but also full substantive review. Mr. Little recommended that on some Resolutions, subcommittees may be formed to review and report back to the Committee.

Mr. Little mentioned that Resolution A123, proposed by Bishop Pierre Whalen, looks to modify the disciplinary process relating to Episcopal clergy officiating in foreign lands. Since it mentions terms which may be modified if the new Title IV passes, it will be connected to our discussion of A185 (the Title IV revision).

Discussion followed on the proposed agenda and schedule for the Committee's work.

A list of email addresses was circulated for members to update, and the Chairs reminded the members that an “extranet” web site is available for members to send and receive messages and documents concerning the Committee’s work.

Members were asked to report back any information they may hear [...] relating to the business of this Committee, particularly from the Committees on Structure, World Mission, and Liturgy and Music.

The protocol for an open hearing was reviewed and approved and is attached to these Minutes as Exhibit 2. Mr. Little mentioned several basic guidelines: Treat each other and guests as we would like to be treated by them, please be recognized by the co-chairs prior to speaking, and we will have sign up sheets for each public hearing.

*[A056]*

Resolution A056 is one of the Resolutions we must discuss. It is left over from the 2003 and 2006 Conventions. It is a modification to Canon III.11.4 (a). It modifies actions that must be taken when a bishop’s election occurs more than 120 days from the next General Convention. The Standing Committee on Constitutions and Canons thought it had been fixed but there is currently a missing certification that needs to be added Mr. Little asked for volunteers to review this Resolution.

*[A185]*

Mr. Little then asked the Title IV Task Force II to present A185. The invited guest speakers were: Joe Delafield, Duncan [Bayne] and Sally Johnson.

The first speaker was Steve Hutchinson, the Chair of Task Force II. He gave a history of the 1994 Title IV revision. He noted that the proposed Title IV replacement is a change towards true reconciliation and penance. Convention 2006 acted to approve the concepts set out in the proposed Title IV but did not approve the revision presented in 2006-A153.

Spring 2007 began the continued work of the Task Force, now called Task Force II, generating exposure to a new draft in many forums, and gathering their comments. In October 2008 this Task Force met with [the Standing Commission on Constitution and Canons], in New Orleans.

Bishop Dorsey Henderson spoke next, speaking about the theological underpinnings of A185, asking such questions as: What is the church called to do when allegations are made in light of the Church's mission and ministry? Doesn't the mission of the Church include reconciliation?

Joe Delafield, a member of the Task Force and the lead drafter of A185, identified major points of difference between A185 and 2006-A153. For clarity and reference, there was a comparison between the current Title IV and the proposed Title IV. Under the current Title IV there is an underpinning of criminal law, based upon the use of the Uniform Code of Military Justice. The new Title IV proposed in A185 treats this more as professional misconduct, which is the mechanism professionals use to self-govern and maintain profession[al] standards; so some of the due process, criminal constitutional protections have been altered or removed. Proposed Title IV's theological implications express truth telling, transparency, healing, forgiveness, and reconciliation.

There is a criticism that the falsely accused will be hurt more by this Canon. This was addressed by the materiality requirement of IV.3.3—an alleged offense must be material and weighty to be of concern of the church.

An Intake Officer also has the ability to weed out capricious allegations. There is an emphasis on pastoral resolutions. Focus is not only on the accused but also on the complainant, witnesses, parish and greater Church.

Changes in personnel include: Diocesan Review Committee [which] can currently be the Standing Committee; and Ecclesiastical Trial Court. Proposed Title IV now has [Conference and Hearing panels].

Mr. Delafield noted the major differences between the 2006 proposed Title IV revision and A185:

- Discipline of laity in 2006 removed in A185
- 2006 “impairment” provisions removed from A185
- Standards of conduct refined in A185
- Restorations of statute of limitations as in existing Title IV
- Abandonment of communion of the Church; 2006 treated abandonment as one type of offense; A185 would revise this to reflect historical understanding with some amendment.
- Terminology change: e.g., an “accord” rather than a “covenant”
- Conference panel may consist of one person
- Pastoral relationship IV.2 was revised to eliminate the administration of sacraments;
- Standards of conduct

- Preservation of confidences unless disclosure is required, but privileged conversations can only be disclosed by law.
- Diligence performance of duties removed
- Avoiding conflicts on interest rather than avoidance
- Abiding by terms of accord, pastoral direction
- Abandonment restored as separate canonical issue
- Habitual neglect of public worship restored
- Canon IV.1: absolute prohibition of Standing Committee member serving on panel; but [Canon 5] allows. This must be fixed.<sup>2</sup>

Mr. Delafield requested the committee to add to the fourth [line of?] IV.5.1 “unless permitted by diocesan canon.”

Canon IV.3 gives great attention to balancing the rights and concerns of the accused and the complainant. Mr. Delafield requested that changes to this section be undertaken carefully.

#### Voluntary submission Canon IV.9

- 3 day right of rescission has been restored to A185
- Any agreement reached by bishop and accused can be reviewed but not modified by others
- Admonition restored

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<sup>2</sup> This comment may be in error. The draft of title IV in the *Blue Book* included the prohibition of Standing Committee members serving on the Disciplinary Board from which the panels are chosen. This prohibition was removed from the text of Title IV as adopted by 2009 General Convention. [Editor’s note]

## 62 Minutes of Committee on Canons

- Bishops right to amend or modify order and given 30 days to do so.

Bishops' discipline changes:

- The Presiding Bishop can inhibit without requirement of consent of the 2 senior bishops<sup>3</sup>
- Proposed Canon IV.19.7 prohibits a clergy person under inhibition from exercising authority over the temporal or physical property of a congregation

Proposed Canon IV.20.2 sets the transition date to 2011; allows all dioceses two conventions to implement.

Mr. Delafield provided handouts as well as a flow chart.

Sally Johnson then addressed the Committee. She came at this from her experience as a chancellor and attorney for the church insurance company in which capacity she has consulted with dioceses, bishops, standing committees on approximately 200 matters each year.

Realistically, one of the issues with the current Title IV is the front end, informal part of the process, and the uncertainty as to when one is actually in a Title IV process. Title IV tries to answer if the clergy person committed the offense and if so should they continue to be a priest. What a diocese really has to respond to is much more than those two questions: pastoral and practical issues. The A185 proposal brings the two together to give uniformity and guidance as to the values of reconciliation, forgiveness, and restoration.

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<sup>3</sup> The previous Canon IV.9.1 had required the consent of "the three senior bishops." [Editor's note.]

The main desire of the complainant is to tell his or her story to the Bishop. To some, the Bishop is perceived as an advocate for the clergy. The conference panel is to serve both roles and is authorized by the church, not the bishop.

Ms. Johnson continued by saying that she has dealt with hundreds of disciplinary complaints and most are resolved without trial. Since 1996, there have been about 25 trials, of which most have been waivers and voluntary submissions. She does not expect trials to increase under A185.

Under the current Title IV, a clergy person has a right not to respond and this causes the church to spend huge resources and 80% of its time to determine the facts of what happened.

Clarification question: clergy under A185 can refuse to answer or cooperate and, accordingly, this may be treated as a negative inference during the process.

The Title IV process may have possible criminal prosecution implications. An accused clergy person will have to make the choice to proceed under the proposed new professional board process, not protected from civil or criminal authority. A priest can opt to request to delay the Church proceedings until the civil/criminal matter is resolved.

The Bishop has discretionary authority to release information as to the accord.

Concerns were voiced as to frivolous matters going forward with more frequency. These matters are currently going forward, based on our current system. She sees no reason this will not change.

The intake process is similar to what have now.

Ms. Johnson stated that no system will work if bishop, disciplinary board, or clergy are not interested in the Church, or the victim cannot be satisfied.

Mr. Little asked Mr. Delafield to address how A185 handles the burden of proof. He answered that existing Title IV requires clear and convincing evidence of the commission of the offense; A185 shifts the burden to preponderance of the evidence standard (on a scale of 100, 51%). The net effect is to reduce the burden on proving the offense. Why? The Task Force's point of view is, since the church has no enforcement or subpoena power to acquire evidence, it is difficult for the Church to obtain evidence to meet this higher burden. In civil law, when a party goes forward, it has that power, so they can have a higher standard.

Other statements suggest outcomes of the proposal lend a holistic response. We are trying to make the church a safer place. Mr. Hutchinson added that this is in line with disciplinary standards for other professional groups.

Where else in the law is the clear and convincing standard of evidence used? Mr. Delafield answered that it is used in civil cases to determine whether punitive damages should be awarded. Committee members contributed their own answers to the question: Abuse and neglect proceedings in actions against parents, matters involving the removal of life support.

Please comment on the role of the church chancellor and the intake officer?

Mr. Delafield: One of the most difficult sections of A185 as drafted was to consider the Church Attorney as independent counsel.

The intake officer position is up to each diocese to determine how hired and fired.



A185 gives the Church Attorney the ability to be independent counsel, but the diocese still has right to adopt canons on how to remove the Church Attorney.

Steve [Hutchinson] stated that we need to move away from the Church Attorney as representing the Standing Committee (current Title IV) as the Church Attorney should be representing the Church as a whole. The Task Force did not want the appearance that a Standing Committee could tell the Church Attorney how to direct the case.

Committee member Roger Schwenke stated that in his diocese, the Church Attorney is selected by the ecclesiastical trial court. This has been working.

Steve [Hutchinson] mentioned many dioceses have the trial court choose the church attorney. This can be a concern, as in an appeal, the Church Attorney is appealing decision of his or her "boss."

Zoe Cole questioned whether the provision is any different for hiring an attorney and firing an attorney?

Steve [Hutchinson] also mentioned that church attorneys [are] sometimes shared between dioceses.

Mr. Little asked: Can Mr. Delafield or Ms. Johnson envision any local diocesan canons that are theologically inconsistent with A185?

If elected by some diocesan body, does this put the propriety of independence in different light?

Mr. Delafield commented that diocese feel that [they] have the unfettered right to hire and remove the Church Attorney; this is not possible under A185; if a bishop could step in at any time to fire the Church Attorney, it would be inconsistent with the design of A185. By selecting the Church Attorney by convention, or by other bodies, there is greater independence. Also,

there is much flexibility under A185 as to what diocesan canons can allow.

There needs to be a standing church attorney to be on call for fairly routine matters.

Under A185, there is sufficient time while a case is developing, for a diocese to find the kind of attorney best for the particular case; such as child abuse, embezzlement, or rubrics violations.

Ms. Johnson also stated that the task force has great interest in offering model diocesan canons and resources as to selection.

Committee member Thack Dyson questioned the affirmative obligation on the clergy to appear.

There was a discussion of D044, a Resolution proposing to establish a Title IV revision education task force, and its purpose.

Bishop Gregg questioned which values and value judgments underlie the burden of proof decision. Ms. Johnson responded. First, in the U.S. criminal justice system, we have chosen a standard of proof (beyond a reasonable doubt) to minimize the number of people who are incorrectly jailed instead of maximizing the number of people convicted. We have chosen to let a select number go free by significantly skewing the system in favor of the accused, since there is a loss of liberty upon conviction. This is why criminal law has the burden of proof of beyond a reasonable doubt.

The opposite thought, or value, would be to minimize to the extent possible the number of acquitted persons, which would raise the number of innocently convicted.

The standard of proof is one of the reflections upon which A185 is built. Though A185 is neutral or

early neutral, it still favors the accuser over the safety, health and well being of the Church.

Thack [Dyson] raised the question of what will happen when a liability insurance defense attorney demands the clergy not testify, or risk losing their insurance coverage, or attorney's representation. Ms. Johnson stated the church cannot be responsible for the other systems. It is unreasonable to think we can address all systems. The Church has to focus on designing a system to reflect the values of the church. But she understands clergy are not working in a vacuum. Sally [Johnson] said usually [the one] who is sued is the diocese, or the parish. Usually, it is not the clergy.

Committee member Rev. Ellen Neufeld stated that the severity of the consequences of losing liberty is akin to the loss of your orders. Loss of your orders is the most severe thing that can happen to a priest. We need to take seriously discovery issues, adverse inferences. An adverse inference may place clergy between a rock and a hard place; she was not convinced that a large number of clergy are "getting away Scot free" and we need to take into consideration the community. She also voiced concern about clergy taking personal risks by going into tough, volatile situations to give pastoral care.

Ms. Johnson commented that the Church has been working since 1994 to strike the proper balance with clergy. They are aware of importance of orders to clergy and how bishops have worked matters out, not taken matters lightly. They have also heard others who have been deeply damaged by clergy. They are trying to define that balance. Most clergy would not volunteer to talk about their situations. She heard the fear.

Mr. Little suggested using the first 30-60 minutes together tomorrow to focus on what is in A185,

discuss two other resolutions that refer to A185 and then discuss A185 and the additional resolutions in total.

Tonight's hearings will be on A053, A054, A056, A171, and A172.

Also we will discuss who will be willing to work on A156.

Chair Little announced that the Committee would reconvene at 7:00 p.m., and thanked Joe [Delafield], Sally [Johnson], Steve [Hutchinson], and Duncan [Bayne] for their work on the Task Force.

The Committee adjourned at noon.

**Tuesday, July 7, 2009**

**7:00 – 9:00 p.m.**

The Rt. Rev. Catherine Waynick convened the meeting at 7:00 PM. Zoe Cole began with Evening Prayer.

No one has signed up to speak as to the posted Resolutions A171, A173, A053, A054, A055, and A056.

*[A171]*

Episcopal Church Archivist, Mark Duffy, a member of the Church's Archive Board, will speak to A171.

A discussion began with Mr. Duffy on A171. Bishop Waynick asked a question as to electronic format: A171 does not refer to either electronic or paper.

Mr. Little asked what the Resolution requires as to the Synods. Mr. Duffy replied that most Synods are producing a journal and do not know to whom to pass them on; the intent of A171 is to mimic the Diocesan requirement of filing Convention journals.

Mr. Little noted that A 171 would add a new Subsec. 10 to Canon I.9, but currently there is a Subsec.10. Mr. Duffy indicated that the proposal might

instead add a further sentence to the existing Subsec. 10 or a new Subsec. 11. There was a question about the meaning of the phrase “give charge for keeping journals or other minutes”.

Bishop Gregg asked whether the records in question should be sent not to the Secretary of the House of Deputies, but to the Secretary of the General Convention. Mr. Duffy noted that these offices are now held by the same individual; it is the House of Deputies office that is charged with producing the report on the State of the Church – which report relies on this type of records.

Mr. Schwenke expressed a concern about requiring a Province to produce these records in a certain format to which it is not accustomed. i.e., a formal journal. Mr. Duffy replied that this is what is now expected of Dioceses.

Mr. Hutchinson noted that some Provincial meetings have no “business” sessions, but rather are entirely programmatic, and as to these sessions, a Province may in fact take no minutes or keep any other official record.

Ms. Cole asked whether the proposer of the Resolution is or should be trying to make this Canon parallel to what is currently in A172. Mr. Duffy commented that there is a similarity, but the A172 context is more formal and would hold a Province to a higher standard than is needed. Parallel construction of the two Canons would not, however, be objectionable to the Archives Board.

There was further discussion about the parallel construction issue.

[A172]

Bishop Waynick then took up Resolution A172: a resolution in two parts that Canon I.6.5 (a) be amended to include electronic format language and that 2 copies rather than 1 copy be sent in whatever format prescribed by the Archivist; striking the time frame “within 30 days of the adjournment of the General Convention”; sending the records to the Archivist not the Registrar; and in the manner prescribed by the Archivist.

Mr. Duffy explained that this portion of A172 is more complicated. He explained the several layers of changes. How rapidly since last triennium we are turning to electronic formats; some Dioceses are not producing journals electronically and some are. This challenges the Archives to maintain the records in their original format. Mark [Duffy] states that electronic records maintained on Diocesan websites are not permanent records, and are not in the original format (which is important from an archival perspective), so it is necessary to provide in written format a copy to the Archivist. The Archives want to help Dioceses find a solution for “getting beyond the post office;” it wants to know how it can help Dioceses to deposit records with it. The Archives can give this to us in any number of ways but not a format that cannot be carried into the future without change due to changing technology of records creation and storage.

There was discussion with Mr. Duffy about differences in canonical requirements in terms of the record-keeping responsibilities of the House of Deputies versus those of the House of Bishops.

Mr. Wirth asked if the fact that this Canonical change, if adopted, would take effect January 1, 2010, would present any implementation problems to the

Archives. Mr. Duffy stated that the Archives would be ready by then, assuming its budget was adopted.

Mr. Fleener asked how the two parts of A172 are related to each other. Discussion ensued.

Mr. Smith asked Mr. Duffy whether format guidelines have been discussed with dioceses. Mr. Duffy replied that he has had these discussions with some Dioceses, but has not yet put out general guidelines – which he will do. A diocese that wishes to continue to submit written (paper) records will be permitted to do so; if it files them electronically, there will be format requirements.

There was an interchange with Mr. Duffy about the A172 proposal to replace “Registrar” with “Archivist.” Mr. Duffy noted that the Registrar was present “in the room” when this change was agreed to by the Archives Board.

Mr. Duffy also noted that currently the Historiographer is not the same person as the Registrar, since under Canon I.1.5(d), the House of Bishops and the House of Deputies have designated another person to serve as Historiographer.

Mr. Little thanked Mr. Duffy for assisting the Committee.

[A053]

Resolution A053 was then taken up; no witnesses signed up to testify on this. Co-Chair Little noted that this proposal from the Standing Commission on Constitution and Canons would conform the eligibility requirement for Executive Council Lay members elected by General Convention to that of the requirement for Lay members elected by the Provinces: being a confirmed communicant in good standing. The Committee discussed whether the conformity should go this way, or

whether the confirmation requirement should be stricken from both places. No action was taken on the Resolution.

*[A054]*

The Committee took up Resolution A054. No witnesses signed in to testify on this.

Mr. Little and Mr. Babb, also a member of [the Standing Commission on Constitution and Canons], explained that A054 was A007 from 2006, which came as a request from the statistician of the Episcopal Church Center, Dr. Kirk Hadaway, who asked that the Canon be amended to provide new information as to parishes closed or removed.

Mr. Babb explained that Dr. Hadaway's request would capture data where closed or removed parishes [were] not reported as required. This was taken up in 2006 but no action was taken on it. There is a missing "in" in Subsection (d).

*[A055]*

The Committee then took up Resolution A055. Deputy Ward Simpson testified to the Committee about his work on this Resolution as a member of [the Standing Commission on Constitution and Canons] over the last triennium, and his Diocese's experience of having his Standing Committee's consent to the election of a Bishop rejected for using "counterpart" signatures on the consent document. Counterpart signatures are separate signature pages to the same document, signed separately by the document's signatories, for convenience when obtaining all necessary signatures on



a single signature page would be time-consuming or otherwise inconvenient.

Rev. Simpson noted that an earlier version of A055 would also have authorized a Standing Committee to meet by conference telephone call. Time constraints prevented [the Standing Commission on Constitution and Canons] from completing this aspect of the original proposal, and it also was felt that the canon should not get too specific about such a matter.

There was extended Committee discussion about the legal meaning of “counterpart,” about variations in usage, about the need to have actual, face-to-face meetings, and whether somehow permitting counterpart signatures might have unintended consequences (e.g., possibly persons signing a signature page without reading the entire document).

There was consensus that the Canon currently requires an actual “convened” meeting prior to action by a Standing Committee. Ms Cole summed this up by noting that in her judgment the proposed change would have no effect on the current requirement for meetings; this only goes to the paper.

[A056]

The Committee next took up Resolution A056; no witnesses signed up to testify on this.

Mr. Little noted that the Committee briefly discussed the drafting issues in this Resolution earlier in the day. It would add a clarifying phrase to a Canon dealing with Diocesan record-filing requirements when it elects a Bishop prior to 120 days in advance of a General Convention. He advised that he and Bishop Waynick are hopeful that the prior Section 3 has language that will be a good model for further clearing up the somewhat impenetrable language of this Section

4. Ms. Cole volunteered to work on a revised draft and present it to the Committee for its consideration

*[A071 and A072]*

The Committee then returned to Resolutions A171 and A172 to make progress to perfect them.

There was discussion about dividing A172 into two distinct Resolutions to reflect the fact that its two parts may not be sufficiently related to one another to stand together in the same Resolution. Mr. Fleener moved to divide the Resolution; Ms. Cole seconded the motion. Following extensive discussion, the Committee voted to not divide the Resolution.

The Committee proceeded to mark up these two Resolutions and agreed to defer action on them until the next day after final drafts are prepared and reviewed, and after Archivist Mark Duffy is consulted.

*[A053 and A055]*

With respect to A053, members Schwenke and Fleener will provide a final draft for the Committee's review and action. Mr. Schwenke also will work on a draft for A055.

Mr. Little reviewed the Resolutions on the Committee's agenda for the next day: what we reviewed tonight plus A057, A058, A123.

Tomorrow night after the Archbishop of Canterbury's address 7:45PM-9PM: the Title IV Resolutions, A185, A187, and A188.

Tomorrow afternoon at 2:00 – 4:00, probably some combination of the above. The Committee concluded its work for the evening at [9:00] p.m. with prayer lead by Bishop Waynick.

**Wednesday, July 8, 2009**

**11:00 a.m. - 12:30 pm**

Bishop Waynick convened the meeting at 11:00 AM with a quorum present. Bishop Gregg led prayers.

Mr. Little advised the members and guests of the resolutions posted for public hearing this morning: A057, A058 A123, A055, A171, A172, and A133

*A057*

Ward Simpson, lead drafter, spoke on A057: Translation of a Bishop. Translation occurs when a bishop already of the Church in one diocese is elected a bishop in another diocese. There is no canonical provision for this process, and thus no canonical testimonial certification. The resolution remedies this and also adds positive language in support and adding “convened at \_\_\_\_\_” so as to change the requirement that everyone necessarily meets in the same room. It also adds sec. 5 to III.11.

Fleener: Question as to consent by Standing Committees: Is consent to bishops for the church not a particular jurisdictional consent? Simpson’s response: this translation provision does not require review of educational attainment, etc.

Mr. Little: Language in Constitution is clear as to authority to translate, however, there is no Canons language to effect a translation and to make clear what is involved and not involved.

Rev. Neufeld: There is still a discernment and review process going on in the search process, and the bishop is already in good standing, so why do we need this extra mechanism?

Rev. Simpson: A057 does not create an extra mechanism but rather a canonical structure that we have been using the last 200 years but have just never put in writing in the Canons.

Fleener: discussion of another process; once a bishop always a bishop. Translation should be less formal. Let's talk about less formal or default to current system.

Bishop Gregg stated translation is not the creation of a bishop but, to find a parallelism, it is not unlike moving a rector from one rectorship to another. Fully done so that there is due diligence which is already in the canons. Simply need consent to move from one diocese to another. This new section 5, except for the testimonial is unnecessary.

Neufeld: What was the driving concern that we need this to happen? Was this brought by the Presiding Bishop's or President's office regarding a translation in the prior triennium?

Second resolve puts the consent in the House of Deputies; third resolve includes again the positive language of support.

Is it consent to *consecration*?

A058.

This Resolution is identical to A033 from 2006 on which no action was taken. It adds in 5 places in the Canons for the trial of a bishop "*and the Court for the Trial of a Bishop for an Offense of Doctrine.*"

If Convention adopts Title IV would it affect this change? Steve [Hutchinson]: No, there are still two trial courts for bishops for the time being: one for non-doctrinal matters and another for doctrinal matters.

A123

The Committee next convened an open hearing on Resolution A123, which was proposed by the Standing

Commission on the Structure of the Church. This general idea also was a B resolution in 2006 to address inconsistencies for clergy discipline in foreign lands. Deputy Becky Snow, who was on Structure at the 2006 General Convention, may speak to the Committee later, as will Bishop Pierre Whalon. Resolution A123 has references to ecclesiastical trial court which would make it inconsistent with A185. One approach is to wait to see if A185 passes.

Testimony from outside the Committee: None

Committee questions and comments: Are clergy canonically resident in the Convocation of American Churches in Europe? Clergy serving in Guam and Taiwan would be canonically resident in Hawaii; ecclesial oversight of those clergy is being designated with the Bishop of the Diocese of Hawai'i, Bishop Fitzpatrick.

Bishop Waynick had canonically resident clergy in Indianapolis and some residing in Paris.

"Officiating in a foreign land"—what does that mean? A Committee member commented that this is intended to track or parallel the geographic location where a member of the clergy is doing the act where the misconduct is believed to have occurred.

Little: Bp. Whalon's concern is for clergy canonically resident elsewhere and functioning in the Convocation of American Churches in Europe, when a Title IV offense occurs, there needs to be a way under Title IV for the Convocation bishop to have jurisdiction over that clergy to the extent of the offense. The Committee is still unclear about this and needs Bishop Whalon's input.

Dyson: The resolution does not state where the person is canonically resident.

Little: Let's come back and know what our scope of review is.

*A053*

The Committee then moved on to Resolution A053 on the election at Synod of persons for the Executive Council. Roger Schwenke, who has been reviewing possible revisions, explained that A053 adds "confirmed adult communicants in good standing" to Canon I.4.1(c). Consistency suggests doing this; however, if one feels that baptism is the way to full incorporation into the church then confirmation might not be necessary or appropriate. Schwenke and Fleener reviewed most of the Canons and found that most existing leadership roles in the Church require confirmed adults

Little and Waynick: We can either vote it out the way it is[,] assuming it is canonically consistent or re-refer it to Committee on Structure for its input on whether baptism is enough.

Fleener: Moves we pass this amendment; his objections have been satisfied; seconded. Little suggested the capitalization of diocese and province where present, and the Committee concurs.

Brad Wirth asked whether in light of Canon I.17, does "confirmed adult" mean someone who is confirmed when he or she is an adult? There was discussion of this but no further action.

Both the Deputies and the Bishops voted unanimously to amend as proposed and to vote out of Committee.

*A054*

The Committee next took up Resolution A054, and unanimously voted to approve it when amended in subsections j, c and d by capitalizing “diocese” where it appears in three places, and in subsection d by adding “in” where shown on the projection screen.

The Resolution passed as amended[.]

*A055*

This Resolution proposes to enable and permit Standing Committee members to sign individual signature pages which, when attached to the document, would be considered a single, signed document. The Committee agreed to capitalize “diocese” and “province” in the Resolution.

This concept already exists as to certain ordination documents under Title III. But there are still concerns as Schwenke stated:

1. Using counterpart signatures should require that each signer had an opportunity to read the whole document; and
2. Each signer signed only upon having read entire document.

After discussion, [it was agreed that there would be] two to three to work on and bring back, with volunteers Zoe Cole and Alicia Schuster Weltner

*A171 [and A172]*

The Committee then took up revision of Resolution A171. Little will consult with Mr. Duffy for his input to bring back to the Committee at 2 PM as well as the pending A172 revision, and Resolutions A185, A187, and A188[.]

*[A053 and A054]*

Should the Committee ask that A053 and A054 be placed on the Consent Calendar? Russ Palmore raised a question about the advisability of putting revisions to the Canons on the Consent Calendar. Russ said this has been done in the past but some Deputies object. Other members expressed no concerns. Little said that as these are the Committee's first Resolutions to go to the floor, they should not be on the Consent Calendar.

The Committee adjourned at 12:30 p.m.

**Wednesday, July 8, 2009**

**2:00 p.m. - 4 p.m.**

The Committee took up the rewrite of Title IV; A187, and A188. A173 will be taken up tomorrow. Open Hearing [followed.]

*A185*

Joseph Delafield is here at Committee's invitation. Little—the Committee's questions should focus on clarification questions, as this time is primarily for others to ask questions and make comments. Two points were raised: one as to standard of proof, which under A185 is currently a preponderance of the evidence as opposed to clear and convincing; this standard is hoped to increase [the likelihood of] the victim coming forward and if it is more difficult to establish what has taken place many will be reluctant to come forward. The National Network of Episcopal Priests has endorsed the Resolution. The Committee members asked a series of questions which Mr. Delafield answered.



*A187*

Mr. Delafield stated he is primarily concerned with conformity between A185 and Titles I and III. The provisions of Titles I and III need to conform to that of Title IV.

*A188*

This Resolution requests an authorization for funding, dependent on the Church's ability to fund, which would help to provide resources for the dioceses to put A185 in effect.

The members proceeded to ask additional questions of Mr. Delafield and made further comments on all three of these Resolutions.

Bishop Henderson: What about "abandonment of The Church as opposed to The Episcopal Church". Mr. Delafield[:] to be consistent either The Episcopal Church or this Church is fine as defined by the preamble for The Episcopal Church.

Zoe Cole: How is A187 impacted if A185 not adopted? Then it would be inappropriate to adopt any portion of A187.

Bob [Prichard], a Deputy from Virginia and professor at Virginia Theological Seminary, spoke. A185 has an innocuous looking line that makes most clergy guilty of misconduct: if a clergy member has sexual behavior with a congregant, they are guilty (lines 106-107); there is no exclusion of spouses, and it is rather broad. The second [concern] is Canon IV.19 which has a weaker standard of evidence for those convicted under this canon; the person is denied any constitutional rights including self incrimination and there is no appeal; we are lowering the standard of proof.

Mr. [Prichard's] concern is that we adopted a Title IV to avoid the troublesome cases such as [those

mentioned by Alan] James, Ohio. [James is] in favor of Title IV revision, but Blue Book p 775 253-356 creates a double standard when any [clergy] “must” but the Bishop {Diocesan} “may,” and so Bishops [Diocesan] will have the ability to bury possible infractions. See p. 780-Canon IV.12.8. There are no records held for a conference panel. If there was an order against the respondent, no documentation as to what took place that is helpful to transparency would be available and [this is] highly problematic.<sup>4</sup>

Scott Bellows, Deputy and President of the Standing Committee of Maryland, here at the suggestion of Bishop John Rapp, 13 years as Bishop and overseer of Title IV in his diocese. Scott served as coordinator of pastoral response team since 1994; what efforts were there to gather information from dioceses that have been using Title IV over the last few years. In Maryland, they favor use of current Title IV.

1. *{Blue Book page 775}* Canons IV.6.2 have apparent anonymity of complaints in any manner or any form; he wants to see confidentiality but not anonymity.
2. Absence of the Standing Committee in the process; if included in ordination and excluded from this process is problematic.

Bishop Waynick: Constitutions and Canons did a survey of dioceses and chancellors and found an informal process in place in many dioceses.

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<sup>4</sup>Original text read: “helpful to transparency and high problematic would be available.” [Editor’s note]

David Gunderson, Deputy of Montana addressing the spirit rather than the letter of the law; seems to decrease the kinds of protection for clergy; in practice, this is an extreme vulnerability.

Trial is not the place for finding deep truths. They feel more vulnerable and then step back from those who most need ministry.

Paul Ambrose, Alternate Deputy from the Diocese of New Jersey and Chair of its Constitutions and Canons Committee, spoke to strongly support A185 but amendments were in order; references throughout the circulation draft say “of the Church” just as with “abandonment of the Church”, “this Church” appears throughout the Canons; concern relates to A185 as well as A187; issue of whether it should be this Church, the Church or The Episcopal Church. His second point in A187 concerns dissolution proceedings; language there prevents a vestry from pursuing; current information comes to intake officer, Vestry isn’t told; intake officer is removed in this process for priests and deacon and not for bishops. He asked us to put back what was in circulation draft. Regarding the standard of evidence, there was one experience in New Jersey at the Title IV trial court where a complainant’s testimony was clear and convincing but there was no offense found on appeal because the judge ruled that a corroborating witness is needed to establish clear and convincing evidence. Paul says that preponderance is sufficient.

Diane Sammons, Chancellor of Diocese of Newark, spoke to the standard of proof. We need to move past adversarial and loss of liberty, so the protections are significantly different. Doctors and professionals are held to this lesser standard. In exchange, we built Title IV to be reconciliatory; to look at rehabilitation. The clergy person in the process should

move from trial model. You will see numerous spots for mandated reconciliation.

Chair Little stated that the Committee is available at 7:45 for any other comments and questions. We will now close the open hearing portion. We need Committee discussion on what we have heard so far. Or, should we take up other Resolutions that are close to being ready to vote on? A053 and A053 are already voted out.

*A055*

The Committee resumed its work on Resolution A055. There were questions on the proposed amendment. Is it our consensus that a signature implies or means that the signer read the document? Yes. Fleener moved to amend the resolution by striking some language and replacing it as shown on the projection screen; seconded. Additional discussion and debate followed. Rev. Patricia Micklow commented that we should assume that Standing Committees will not have legal counsel available; because these documents, in this context, are very important documents, we need to be clear.

A055, on amendment: Deputies: passes.  
Bishops passes.

Move to adopt with amendment, with no further discussion. Deputies pass, and Bishops pass.

*A171*

The Committee moved to consideration of Resolution A171, and a proposed further revision to clarify and to provide that unpublished, inactive records also be sent to the Archives. The amendment was been moved and seconded. Deputies voted in favor of amending the

resolution. Members of House of Bishops voted in favor of adopting amendment.

It was moved and seconded to adopt the resolution as amended. Members of the House of Deputies voted in favor. Members of the House of Bishop voted in favor of the resolution.

*A172*

Little: As to Resolution A172, it will be held until Mr. Duffy can speak to the Committee.

*A056*

Zoe Cole asked to make its language parallel to III.11.3. This will be considered once hard copies are distributed.

Tom Little reported that the following Resolutions have been referred to the Committee:

- A064 from Ministry
- B007 from Ministry (with amendment)
- A176 from Ministry
- A175 from Ministry
- A133 from World Mission
- A122 from Structure
- A123 referred back; need decision to whom to refer

*A057*

The Committee discussed Resolution A057 with focus on whether the continuing fitness of a bishop in this *particular* diocese – i.e., the proposed new diocese, should be a part of a consent to translation and whether due diligence in translation is necessary. The other issue is, what is being certified?

The meeting was adjourned at 4:03 p.m.

**Wednesday, July 8, 2009**

**7:30-9 pm**

*Open Hearing on Resolution A185*

Deputy John Dawson, Texas: inclined to support but has questions: Definition of Church Attorney was a concern as they have strong power. Definition of sexual misconduct: [that no offence is created by any] sexual behavior outside the boundaries of his church, could be unintended results; is that intended result or a misreading on his part? Sec. 4. H (2) holding and teaching any "doctrine;" heretofore had been "scripture," new nuance. In Canon IV.16 the abandonment of the Episcopal Church, deletion of the consent of three senior bishops; John would presume that there was some wisdom of the three senior bishops that was important.

Deputy Michael Delk, Southern Virginia and presiding judge of the trial court. He lives in dread of a trial. Revisions some concern, especially Canon IV.12.8 line 490: is it contradictory? Could no witnesses be called at the proceedings? B(5) evidence could not be excluded; hearsay can be heard; no record of panel conference even for the sake of the panel even if later sealed. Sec. 5 the bishop diocesan shall pronounce sentence . . . probably there should be a lag but 40 days seems to be a cruel amount of time for respondent to wait.

Deputy Mark Hall, San Joaquin, Canon to the Ordinary: Consider that if a boundary has been passed, the Title IV process goes up faster. There is a barrier in the current canon; here the canons go stage to stage. He is pleased to see something more flexible and applicable in our situation.

Gwen Santiago, Alternate Deputy from Pittsburgh, grateful to committee, for the revisions and their flexibility. She asked to move toward Canon IV.15 and what is now in Canon 2; a lot of the terms have been changed; inhibition to administrative leave; while it appears softer, it is operating in same way as in 1993. IV.3. (10(3) failure to cooperate. Deacons, Priests Canon 3.9, Bishops Canon 12.37(a), say if had to resign. Canon 3.9.2 charges against priest by Vestry – discharge for an allegation and not charge.

Timothy Safford, Alternate Deputy from Pennsylvania: If this title were in place would it have helped us with our recent problems in Pennsylvania and in San Joaquin? Moving to the truth model, transparency, shortening periods of time are all helpful to the people in the pew; is it necessary to still have a conduct unbecoming issue since when standards are set it creates opportunity for mischief? Is conduct unbecoming really necessary?

Small changes in statute of limitations are very helpful. Really taking about issues of reconciling, then talk about rubric and doctrine violations need to be more such as with bishops having two types of proceedings. Could we suggest some consideration of two for priests and deacons? [First Episcopal bishop Samuel] Seabury believed bishops should be judged by bishops; bishops tried on issues other than doctrine so maybe priests should be too.

Richard Helmer, Deputy of California, wishes to commend but specific points are of concern. What exactly is the role of the Standing Committee in Canon 5.1 and is there conflict with Canon 5.3(c)? His diocese's Standing Committee would like clarity.

Two hats issue: bishops experience in disciplinary matters. As pastor and an adjudicatory role

this would be helpful to clarify. Provision for the intake officer: having one person be point of contact and lead the investigation could constitute a problem depending on gender, age and position in the diocese. There should be a provision for multiple persons; too much for one person. Administrative leave, if two clerics, one complainant and one respondent in same congregation, that means complainant should take the leave.

Joe Delafield, Chancellor for Diocese of Maine, Task Force member with a considerable role in drafting A185. Two points tonight and this afternoon: Task Force willing to agree to amendments that result in improvement in Title IV. Selection of Intake Officer may be otherwise determined by Diocesan canon. In Resolution A187, the proposal to modify Canon III.9.20(b) (page 798) on dissolution of the pastoral relationship; the dissolution canon contains similar language, we're going to change to track new Title IV, but content to delete III.9.20(b) because preceding clause on the right of the bishop to suspend for cause but we would need to add language that [which] causes this.

Mr. Little: half an hour left. Questions for discussion?

Bishop Waynick suggested that we form a subcommittee to review resolutions coming to us from other committees and to report back to us by Saturday at the latest; even another subcommittee if needed.

After some discussion, a subcommittee was formed of Mike Marrow, Marcellus Smith, Holly Eden, and Paul Cooney to work on Resolutions referred to the Committee for review as to canonical form.

Bill Fleener, Alicia Weltner, Zoe Cole, and Kevin Babb are working on A172, A057, and A058.



Mr. Little asked [...] Mr. Delafield about the timing lag of 40-60 days for pronouncement of a sentence, and about the removal of the consent of three senior bishops. Mr. Delafield responded: A court review is sometimes 30 days so this seemed adequate for execution of the pronouncement of sentence. The Task Force rationale for removing the consent from 3 senior bishops in abandonment of the church cases contemplates that the disciplinary board of the Bishop is a responsible board. The consent of the three was redundant and [there was a] possibility of one of the three having a veto power over the entire matter.

Mr. Delafield also commented on the definition of sexual misconduct: it was discussed in the Task Force and would include spouse in same congregation. We could not find a way to get there without defining spouse in light of same sex relationships and risking criticism that the Task Force was taking a roundabout way to getting recognition of same sex relationships. So it was drafted this way that in reliance of the materiality standard no one would pursue sexual misconduct charge other than abuse. Committee member Baynes mentioned see Sec. 3.3 in this regard. Roger Schwenke: what about [clergy sexual misconduct involving] the stranger in town? That could be pursued under "conduct unbecoming".

Roger Schwenke asked about the of the Standing Committee. Mr. Delafield: other than when diocesan canons may be drafted to involve the Standing Committee it has little role in the proposed Title IV revisions. The reason is for the Standing Committee to be unconflicted and available to the bishop for advice.

Brad Wirth: The Church sees sexuality as a divine gift whereas sexual behavior here is defined

negatively. Mr. Delafield: only sexual behavior in the judgment of Task Force in [...] certain situations.

Fleener: 'Sexual neglect' gets to what we are about rather than disorder (status).

Mr. Delafield stated conduct unbecoming was appropriate to continue in Title IV.

Sally Johnson; longstanding offense is the only definition added later.

Kevin Babb: scope of church attorney: There may need to be some restraints on church attorney and we may not want to have such a wide open definition.

Mr. Delafield: Task Force felt the Church Attorney should be independent.

Ms. Johnson: she was an original drafter of the definitions until Task Force made any revisions; yes, sexual harassment is intended to be included as is sexual arousal of either party.

Zoe Cole: definition of sexual behavior seems broader than what is defined here.

Ms. Johnson: There should be some absolute wall between employees and priest.

Chair Little advised that copies of A172 with proposed revisions will be distributed.

*[A133]*

[Chair Little] also said that the Committee has received a request for review of A133 which we discussed earlier in week; it addresses the scope of the Standing Commission on World Mission. A motion made and seconded to delete the word "all" in the second sentence of Canon 1.1.2(n) (11).

Deputies voted in favor of the amendment.  
Bishop voted in favor of the amendment.

Meeting adjourned at 9:04 p.m.

**Thursday, July 9, 2009**

**7:00 a.m. – 9:00 a.m.**

Mr. Little called the Meeting to order at 7:00 a.m.

[A185]

Bishop Waynick recommended that the first hour of the meeting be devoted to the discussion of Title IV and the balance to other matters before us.

Bishop Ohls commended the Task Force II for its work that incorporates the theological and the practical. He hopes the Committee and the Convention adopt this.

Rev. Wirth hopes the Committee considers the situations in which we are called to serve which make clergy most vulnerable and subjects them to allegations of misconduct.

Carlynn Higbie stated we must train the intake officers well.

Rev. Neufeld stated that given the deputies' wider view, she cannot overemphasize the impact of loss of orders to a clergy person. Actuality of false allegations exists. Canon 16 on abandonment and definitions especially "officiating" are problematic. Her other issue is in the translation of a bishop Canon; if called and vetted by a diocese, there should not be an extra burden placed on the bishop.

Rev. Eden: In a diocese where the Standing Committee is Court of Review, and the intake officer is canon to the ordinary, there will be uncomfortableness about this.

Roger Schwenke: He served as presiding judge at a trial where he saw a lot of places where the current Title process could be misused.

Rev. Dyson: Notice of fundamental fairness of rights when accused; none immune from false allegations; need to cooperate with the process but if representing a priest, attorney would advise no appearance before the disciplinary panel or conversation.

Bishop Gregg: What are the appropriate structures and processes to deal with these matters? Secondly, do we need the appropriate structures and processes to support what we put in place, such as training of intake officers, bishops, etc.? He hoped for no radical changes to current Title IV. Not assuming that misconduct is not only sexual but also financial.

Rev. Canon Schuster Weltner: Clergy are vulnerable, so what needs to be fixed is how we support clergy who have been charged; people can be helped more under this Title IV than former Title IV.

Belton Ziegler: Title IV has stark choices; needs to be an official way at the beginning to respond quickly. How much trust we put into clergy means the church should respond quickly and not slowly. Concerns: standard of proof; it [is] clear that the intake officer has to be unbiased.

Duncan [Bayne]: Task Force II is very concerned with education. Resolution A188 includes some money for Title IV training.

Larry Overton: Intensity of knowledge is here (at this Committee) but Church-wide we need education of standing committees and bishops; they need to be ready at all times.

Steve Hutchinson: A185 is a balance of concerns for all involved and models successful in other settings; felt this most tracks the theology of the Church.

Palmore: In other system models in these types of cases such as for judges, doctors, and lawyers, hearsay is allowed. Finds it helps in truth telling and helpful to process. Questions as to informal unwritten record; this is also found in health, lawyers, and judges disciplines.

Little: Where clergy is accused of serious issue, can there be interim suspension for potential harm? Steve [Hutchinson] said whether held in abeyance is question, sometimes can be interim relief.

Schwenke: Hearsay can come in but weight given can vary.

Brad: What are we spending to support alleged victims?

Bishop Henderson: We must be sensitive to the standard of proof.

#### *A064*

Subcommittee [I's] (Mike Morrow) recommendation on Resolution A064 is to approve as to canonical form, and Mike so moved.

Deputies approved. Bishops approved.

#### *A115*

The subcommittee moved to approved A115 as to form.

Deputies approved. Bishops approved

#### *A176*

The subcommittee next recommended approval of A176 as to canonical form (amend Canon 3.16.1 "Of the Board for Transition and Ministry").

Deputies approved. Bishops approved.

*A122*

The subcommittee next recommended approval of A122 as to canonical form with slight<sup>5</sup> amendments (add period at the end of the last sentence and to capitalize By-Laws as hyphenated).

Deputes approved. Bishops approved.

*B007*

The subcommittee then recommended approval of B007 to approve as to form with amendment as shown on the projection screen.

Deputies approved. Bishops approved.

*[A073, A123, and A172]*

Little: Resolutions A073 and A123 not ready to be voted upon at the moment.

Subcommittee II member Kevin Babb reported and requested that A172 take new form.

He advised that Resolution A172, as re-drafted by the Archivist in response to some comments of the Committee, will be ready for Committee review and action later.

Subcommittee I will further review A123 and report back this afternoon.

Little: On the agenda for this afternoon's 2-4 hearing are: A123 and A185.

*[A185]*

The Committee finished up its morning work with some additional discussion of Resolution A185

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<sup>5</sup> A redundant "with" has been removed here. [Editor's note]

Mike Morrow: burden of proof and balance fit together; hearsay has no standards as to when that type of evidence is allowed in the Resolution. Why not incorporate the Federal Rules of Civil Procedure, or some rules to define when hearsay evidence is allowed. He also ask[ed], is the self-reporting binding?

Mr. Delafield: The Task Force didn't want to bring in external rules that might make for arguments.

Zoe Cole: from her experiences she has two concerns: first, hopes and expects the training and skills must be in the document; second, there is a fine line between necessary truth telling and tattle telling; how with this system, do we have accountability?

Patricia Micklow: Hearsay should be dealt with under the standard of reliability.

Carol: What would be the resource for the rules?

Bishop Sisk: Under a hypothetical where a clergy person comes and says that 'this is in confidence'; what should Bishop[s] response be in light of this revised canon?

Steve [Hutchinson]: You need to say something preliminarily to a member of the clergy in that situation, to make it clear that depending on what he or she says, you as bishop may not be able to keep everything confidential, e.g. the statements reveal criminal conduct.

Sisk: Can someone go to bishop rather than intake officer or must they go to intake officer?

Delafield: They may go to the bishop.

Gregg: hearsay or training: Is it possible to send to a cognate or other committee to draft? Little: We could choose to refer to another committee

The meeting was adjourned at 9:00 a.m.

**Thursday, July 9, 2009**

**2:00 – 4:00 p.m.**

Open Hearing on Resolutions A123 and A075, as posted.

The Rt. Rev. Catherine Waynick convened the hearing at 2:05 p.m.

*A123.*

Chip Strickland, Diocese of Albany spoke and asked, if there is no bishop there, to whom does he report?

Answer – the Presiding Bishop is the Bishop over the foreign lands.

Discussion focused on whether this should read in the title of the resolution that we mean outside the United States rather than just foreign lands; rather read Convocation of American Churches in Europe since other dioceses have not come to us. The Convocation is a missionary diocese under the Presiding Bishop, the Convocation Bishop cannot hold letters because he does not have a diocese. Title I.15.10 speaks of a commission being formed to look into the action; existing Sec. 10 creates a limited jurisdiction for limited purpose of pulling out of the jurisdiction, otherwise the Presiding Bishop handles this. Concern–this proposal seems to [pit] the bishop of foreign land against the bishop of the clergy person’s canonical residency which would seem to cause problems in acting on Title IV issues.

Bishop Waynick recommended moving on to further discussion of Resolution A185, and regarding A123, to invite Bishop Whalon to our next meeting.



A173

Mr. Little asked for a reporting from the A173 subcommittee: Mike Morrow recommended approval with amendments (Board of the Archives of the Episcopal Church). Discussion was on whether to divide, remove proposal.

Motion to approve this substitute for A173 which was seconded.

Deputies approved and Bishops approved.

A172

Babb subcommittee reported on A172 with amendments. Moved and seconded as shown on the screen.

Deputies approved. Bishops approved.

A173

Mr. Little introduced A173, which was posted, and was so moved and seconded with amendment.

Deputies approved; Bishops approved.

[A185]

An ad hoc committee of Brad Wirth, Steven Hutchinson, Diane Sammons, Joe Delafield, and Tom Little has met to review and amend A185 to address some of the issues raised in the public and committee hearings. Little noted that, in terms of absolute perfection, it is typical for the General Convention to further perfect such a large revision in the following General Convention that reflects the experience and wisdom gained in its application.

Four areas of concern that kept coming back from witnesses at the public hearing, committee members and others, and have been discussed in the ad hoc committee; the members concluded that for the

revision to be effective, emphasis must be given to training and resources which is available in A188.

The four areas are the role of the church attorney as to whom the attorney reports. The ad hoc group recommends adding a sentence to the church attorney provisions that diocesan canons may include a provision that a church attorney can be fired with cause. Those decisions should be left to local reflection and decisions.

Second, talking about an adverse inference upon not cooperating, testifying, or participating: the proposal states a presumption of innocence. Canon IV.19.6 provides if the member of the clergy fails or neglects to file an answer or general denial that the consequence in the statement of offenses may be accepted as true. Canon 19.18 (the duty to cooperate) applies broadly across the church; section 18 does not say any adverse inference is to be taken. The point the ad hoc subcommittee committee wants to make is that 18 contains neither an adverse inference nor a protection. Also there is a materiality requirement laid over the canon.

Third, the subcommittee noted Sec. 1(f) is the self-reporting of others and themselves requirement. There is a suggestion to strike the clause "his or her own offenses." There is also discussion about hearsay concerns. The canon tells the panel it may admit hearsay, and earlier it says hearsay cannot be excluded solely because it is hearsay. Judges often instruct what kind of weight can be given the testimony thereby allowing the person opportunity to speak. However, the ad hoc group recommends adding "the hearing panel will determine the credibility, reliability, and weight of the evidence. "

Last of these is the standard of proof in 19.16. It is in the same section as presumption of innocence: ad hoc subcommittee proposes altering that formulation when a matter reaches the hearing panel so the burden of proof shall be clear and convincing evidence. Up to that point there is the preponderance standard because it is not in an adjudicative mode. Mike Morrow has language and definition of clear and convincing.

Bishop Waynick and Mr. Little have discussed how to maintain the highest level of consensus of this committee as well as what would best serve the passage of the revision of the Title.

Bishop Waynick: Other areas of concern?

Bishop Ohls still convinced of need to look at the definition of sexual misconduct as to spouse and partner.

Bill Fleener asks if dissolution of episcopacies will be looked at?

Belton Ziegler has concerns of alignment of interests of staff and bishop, and asks if it might be helpful to have the chancellor as a consultant to the disciplinary panel. Also, it could be more constructive as to bishops, under Canon 17.3, to have the appointment by the Presiding Bishop and not by election by the Executive Council; automatic requirement of recusal when Bishop is to testify should be reviewable as to the material fact at issue.

Zoe [Cole] still has an issue as to disclosure of others; as to a panel of one and number on panels.

Bishop Waynick: subgroups to meet at 7:00 p.m. for work sessions tonight and earlier.

The meeting was adjourned at 4:03 p.m.

**Friday, July 10, 2009**

**7:30 a.m. - 9:00 am**

A123

The Committee returned to Resolution A123

Bishop Pierre Whalon, of the Convocation of American Churches in Europe, explained his reasons for proposing A123. The problem which A123 seeks to address was created by the fact that Episcopal clergy serve in congregations that are outside existing Anglican provinces, and have no “local” bishop exercising oversight – other than the Presiding Bishop, or – in some sense – the Bishop of their canonical residence (which may well be thousands of miles away). Also, the Presiding Bishop does not have an ecclesiastical court in the way that a diocesan bishop does.

Bishop Whalon said the Convocation cannot create its own disciplinary canons, because it is not a diocese.

Steve Hutchinson asked whether this really is intended to focus just on the Convocation?

Bp. Whalon: Yes, but it should be about handling clergy discipline wherever misconduct occurs in the world. There are, for example, Episcopal congregations in Croatia, and clergy functioning there.

Tom Little: If a member of the clergy officiating in a foreign land is charged with misconduct, A123 seems to set up a conflict over where title IV trial would occur. The priest may want the proceeding to be in his or her diocese of canonical residency; A123 would shift it elsewhere—the Council of Advice provision. Is this a conflict?

Bp. Whalon: I have a conflict case already that the bishop of canonical residency transferred to me.

Little: You are limited to what you can do, could refer to bishop with canonical residence or not refer to them.

Fleener: If Title IV changes per A185, what is currently in A123 has to change in places.

#### *A185*

The Committee suspended its discussion of A123 to return to Title IV, and reviewed a number of areas where A185 is different than the current Title IV. The Committee examined, among other issues:

- Canons IV.5.1; Canon 6.4; hearsay concerns (the proposal makes it clear that hearsay is to be received. While cannot be excluded, it is given the weight it deserves);
- 7 .2.c; (lay and clergy would be appointed by the Executive Council);
- 19.14(a) making the recusal obligation of a bishop to be not automatic if bishop likely to be a witness to some extent; 18 - provide the clergy does not have to appear to testify or respond;
- 21 (make it clear that under certain circumstances other bishops are covered under referral to bishops diocesan; it is an amendment to canon 1.16(c) part of task force's [original] proposal);
- Canon 4.1.(f) where striking out "including his or her own Offenses", insert "meeting the standards of Canon IV.3.3"; this is stating that the reporting requirement involves the materiality requirement of Canon 3.3.

- Only thing left unperfected is the transitioning provisions for<sup>6</sup> clergy and lay members of the board [which] is to be done [in] Canon 17.3

Steve [Hutchinson]: whether to put in transitional canon in the meantime to the Board get populated.

Belton drafted language presented about transition. Belton anticipates staggered terms of six years, so if the president of the House of Deputies would appoint for staggered terms in some fashion and be picked up as terms expire. Board terms: i.e. appointed 2 priests and lay for 2 year terms and 2 and 2. This would allow enough direction.

Fleener said appoint half every 3 years.

The Committee then worked through final markup of A185, including the following comments:

- Intake officer; add “, unless otherwise provided by diocesan canons[.]” We had talked about this.
- Page 12, Canon 7.12 second line [‘hearing from such persons . . . as desire to be heard,’] committee suggests “*who*”.
- Page 24, Canon15. 7, sixth line change “of” to “on”.
- Page 25, 15 next to last line change “of” to “on” appeal.
- Page 16 Canon 13.3, insert a space between Sec. and 3.

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<sup>6</sup> Unneeded “which” has been deleted. [Editor’s note]

- Canon 1 line 3, end of second line—lives or life? Considered collective, not individualistic.

The Committee completed its mark-up discussion and drafting.

The Chairs then asked the members to share any final comments or reflections as the Committee prepares to take a vote on the Resolution.

Ellen Neufeld: Deeply impressed with work of the Task Force and Committee; adequate protections for priests is there; forgot to re-raise removal of the requirement of 3 senior bishops to be deposed. This is a concern of hers. Could we consider requiring but providing for the consultation with or advice of the three senior bishops so at least one last safeguard and provide the benefit of the calculated wisdom of the bishops. We have had a number of depositions lately, not intended to be an optical[?] decision but collected wisdom would be helpful.

Another Committee member commented that the Presiding Bishop has authority to find abandonment and needs the consent not for that but for the inhibition.

Ellen [Neufeld] responded: then perhaps then at the earlier stage; to bring these safeguards in.

Bishop Sisk: If we decided to put such a provision in (the three senior bishops), it would be favoring duration of tenure rather than wisdom. He suggests that the Presiding Bishop's council of advice would be a better choice if the Committee wanted to do something in this area. The Council of Advice is a group of bishops with whom the Presiding Bishop consults regularly.

Bishop Gregg supportive of Bishop Sisk's approach, a more appropriate consultative body. To

address Ellen [Neufeld]'s issues, these recent depositions have been thoughtful and [prayerful].

Discussion continued on the safeguards of Resolution A185, and the consultation clauses in Title IV.

After all members had a chance to offer their comments and reflections, Chair Little asked Bishop Ohls to lead the Committee in prayer prior to taking action on the revisions to A185, and Bp. Ohls did so.

Little then asked, shall the committee adopt A185 as amended and perfected as shown on the projection screen?

Russ Palmore moved the question, and it was seconded by a number of Committee members. Mr. Little asked the Deputies for their votes, and all members voted in favor of the motion, unanimously. Bishop Waynick asked the Bishops for their votes, and all Bishops voted in favor of the motion, unanimously.

Bishop Waynick took a point of personal privilege to thank Steve Hutchinson, and the nine years Steve [Hutchinson] and Duncan [Bayne] worked on Title IV, and for their friendship, and gave thanks for the incredible hard work of Joe Delafield who drafted it and this legislative committee for willing to be present to one another in this extraordinary experience, an emotional one for many of us. Now we can go home after General Convention adjourns and say "we did it".

Other Committee members expressed their appreciation of the guidance of the Chairs through the A185 review and deliberations. Some described their own process of coming to understand A185, and participating in the amendments to improve it in significant respects, as moving, or transformational



Little will be in touch with the Deputies concerning the floor action when the timing is determined. It is likely a special order will be set. We must have Committee members ready to respond to questions and comments on the floor of the House of Deputies.

Rev. Arthur Tripp said we will need time to discuss prior to vote; to let those with concerns be heard. There was consensus that information sessions should be offered for Deputies and Bishops, prior to floor action.

*[A120]*

The Committee then took up Resolutions brought to it for review as to canonical form.

Mike Morrow, for the A120 subcommittee, recommends approve as to canonical form.

Deputies approved. Bishop approved.

*Resolution A119*

[A]pproval as to canonical form is recommended, without amendment.

Deputies approved. Bishops approved.

*Resolution A181*

[A]pproval as to canonical form is recommended, without amendment.

Deputies approved. Bishops approved.

The hearing adjourned at 9:10 a.m.

**Saturday, July 11, 2009**

**7:30 a.m. - 9:00 a.m.**

Bishop Waynick called the meeting to order at 7:35 a.m.

Holly Eden led the prayers

Mr. Little reported that A177 and A173 passed the House of Deputies; that A054 and A055 are working their way through the House of Deputies Calendar, and should be up for action today; that A058, A123, A187, and A188, previously referred to Committee subcommittees, will be taken up late; that A185 is on the House of Deputies calendar today and will be set for special order, probably for Sunday afternoon.

Two A185 Q & A sessions with this Committee will be offered Sunday prior to the special order.

The Committee next took up the following Resolutions and took action on them as stated.

*D023: Rule of Order to Amend Jt. Rule 15 (Budget)*

The subcommittee recommends approval as to canonical form. The Resolution calls for Executive Council to accommodate an appropriation request in the Church's operating [budget], even if not included in the budget approved by General Convention, if it involves "Canonical and corporate expenses".

Deputies approve. Bishops approve.

*A070: To Amend Joint Rules of Order of the House of Bishops and House of Deputies*

The subcommittee recommends approval as to canonical form.

Deputies approve. Bishops approve.

*A126: To Amend Canon I.4.6 (a) and (b) (changes to Executive Council's budget to a calendar year)*

The subcommittee recommends approval as to canonical form.

Deputies approve. Bishops approve.

*D006: Revisions to Title III.9.12-21 (changes in provisions for dissolution of pastoral relationship)*

The subcommittee has reviewed this and recommends approval as to form with the following amendments: in (H), strike all after "Diocese," and insert "Sections 12 and 13 of Canon III.9 shall not apply in any Diocese whose canons are otherwise consistent with Canon III.9."

Deputies [a]pprove. Bishops approve.

*A177: Denominational Health Plan (Canons I.8.1 and I.8.3)*

The subcommittee recommends approval. Patrick Cheng, deputy legal counsel for Church Pension Group was introduced and spoke in favor of passage and offered to answer questions. This Resolution parallels the form of Resolution A138 (establish a mandatory lay employee pension fund, and amending Canons I.8.1 and I.8.3), which the Committee has not seen.

Mr. Fleener moves to add "in Resolution A177" where shown on the projection screen, to make it clear for the record which principles are intended; seconded.

Deputies approve. Bishops approve.

*[A188: request for funding for training for Title IV implementation; D044]*

Bishop Waynick then brought up Resolution A188, the request for funding for training for Title IV implementation. D044 is another resolution requesting educational funding for Title IV without an amount. There was Committee consensus that some members of the Title IV Task Force II should be on the committee that drafts the educational and training materials. Duncan Bayne then moved that we make the text of D044 the first resolved clause of A188, and that A188 be the second resolved; seconded.

Deputies approve. Bishops approve.

There was a question as to the proper funding level; Steve Hutchinson said the budget request would cover the travel costs and Duncan Bayne was hopeful that the Church Pension Group would partially fund the effort.

*A187*

The Committee next took up Resolution A187, which proposes amendments to Title III and V which are relevant only if A185 does not pass. This was deferred for later consideration.

*A058*

The Committee took up Resolution A058 (Canon IV.6, 14, 15). The Resolution was deemed necessary by [the Standing Commission on Constitution and Canons] for the period between GC 2009 and the effective date of the new Title IV; it would add references to the Court for the Trial of a Bishop for an Offense of Doctrine where such references had been omitted inadvertently in the wholesale revisions to Title III in 2003 and 2006. Duncan [Bayne] moved for adoption; seconded.

Deputies approve. Bishops approve.

*A056*

Next, the Committee took up Resolution A056 (Title III.11.4 (a), which, as introduced would correct a slight omission in the 2006 Title III revisions by adding “and a certificate”). As currently proposed, the revisions are more extensive. The drafters believe that just adding “and a certificate” is insufficient to clean up the provisions here.

Changes look different than Sec. 3; the language is parallel, but the form is not.

Review showed that the testimonial is the same and added those things in practice which are done but not specified in the canons. Substantive issue was no evidence of psychological examination; Bishop Gregg says [Church Pension Group] forms exist and are in current usage. Do we want them to track each other?

Mr. Little: There appears to be insufficient time to finish. May be beneficial to speak to someone on the Committee from Ministry Development.

Holly [Eden] asked for the bullet point list of revisions to Title IV. For further questions please refer to the chair, Duncan Bayne or Steve Hutchinson.

Resolutions A067 and A123 are still before us.

Tomorrow, Sunday, July 12, here in room California C at 8:00 a.m., chaired by Mr. Little and at 1:00 p.m., chaired by Bishop Waynick, we will gather for Q & A on Title IV and have a panel of this committee present to answer questions from Deputies, Bishops and guests.

The meeting was adjourned at 9:00 a.m. until the next official meeting, Monday, July 13, at 7:30 a.m.

*Note – there were no Minutes take at either of the two Q & A sessions held Sunday, July 12, 2009, which were not Committee meetings.*

### **Monday, July 13 2009**

**7:30 a.m. – 9:00 a.m.**

Bishop Waynick convened the meeting at 7:30 a.m. Duncan [Bayne] led the Committee in prayers. Mr. Little reviewed the resolutions still pending at General Convention:

110 Minutes of Committee on Canons

- A056 passed the House of Deputies and is pending in the House of Bishops.
- A057, on translation, is still in this Committee.
- A123
- D006
- B008
- A187
- A056 was discussed. There was discussion as to an amendment and language changes.
- A185 is still not on the floor of the House and it is not clear when it will be. There might be potential problems with floor amendments.

*A187*

The Committee moved on to consider Resolution A187, which would conform Title III to the new Title IV (i.e., to A185). A part of A187 would revise Canon III.9.8 to move certain renunciations to Title III which might previously have occurred in Title IV. If there is a Title IV proceeding, the bishop could accept that even though not provided in Title IV. If bishop believes it in the best interests of all, then could so do. So moved and seconded to adopt.

Need to be alert: A185 has to be adopted first, before A 187.

Deputies approve; Bishops approve.

*A057*

The subcommittee distributed materials on this Resolution. Deputy Ward Simpson (member, [the Standing Commission on Constitution and Canons] in 2003-2009): A057 covers three things: certificate, adding testimonial for House of Deputies when consenting, and

Standing Committee certification by other than an in-person meeting. The consent provision contains the same language as consents to the consecration of a bishop. Ward walked through the proposed amendment.

Second resolve; [is] that resolution limited to translation? Yes.

Third resolve is a general change.

Moved and seconded for adoption.

Discussion; with further amendments.

Bishop Gregg supports Ellen Neufeld's concern that consent initially is for the whole Church; this consent should only be directed to consent to the election as to a new place.

Article II.8.4; Bishop Sisk may apply the consent to the process of the new election; not a consent to make that person a bishop but to assume an office.

What exactly is being consented to? To have the election in the first place, to accept a resignation.

Belton: It appears to be more than that.

Zoe [Cole] raises more issues, including theological.

Carlynn [Higbie] likened this to a dissolution of marriage; appropriately terminated and appropriately ready for new diocese.

Fleener: Moves to refer A057 to Standing Commission on Ministry and Development.

Neither first mover nor mover of amendment objects to referral of A057 to the Standing Committee on Ministry and Development.

Recap: [the Standing Commission on Constitution and Canons] gave no instruction to House of Deputies to see[k] its consent. Second and Third resolve consents to his or her consecration rather [than] translation. There is no impediment. Sensitive to Title

III and could get into a healthy discussion in light of it; that it needs to be cleaner and tidier.

Steve [Hutchinson]: the third resolve as to all the Standing Committee being in the same room. Not dealt with specifically in the counterparts' resolution.

Northern Michigan's election of a bishop was discussed as a painful experience for the people of that Diocese.

The pending Motion is to discharge and to refer in entirety A057 to Standing Committee on Ministry and Development with reference to recent problems in elections of bishops, especially Northern Michigan.

Deputies approve. Bishops approve.

*[D006]*

Mr. Little: We have received Resolution D006 from Ministry for canonical form review. Mike Morrow and Tom Little made comments. Title III.9.12 would be restructured into subsections 12-13 for the dissolution of a pastoral relationship. As provided in the proposal, if local canon in place, it would take precedence over the provisions in III.9.12 and III.9.13. These two subsections refer to Title IV and concern expressed that this was not in total alignment with Title IV but not problematic. Section 12 includes the words "trained mediator" not in the canons, and also not "licensed" mediator.

Fleener: Section H "due process safeguards" removed by Ministry Committee; determined substantive and "which is otherwise consistent."

Mr. Little "has made a provision on this subject."

Gregg: might give diocesan canons to supersede national canons. So clarity necessary; Mr. Little: the



current dissolution canon, page 92, Title III.9.21, deals with this.

Patterning this after the III.9.21. So not changing it. Mike says this clearly says Diocese can adopt alternative provisions in Sec. 12 and 13 that are inconsistent that is otherwise consistent. Keep “otherwise consistent with Canon III.9”.

Amendments “trained mediator” and “otherwise consistent . . .” moved and seconded to approve when amended as shown on the projection screen.

Deputies approve. Bishops approve.

[A123]

Little: Still in Committee are Resolution A056 (“certificate”) and Resolution A123 (Title I disciplinary canon). The A123 foreign lands proposal is full of Title IV concerns and process issues.

Motion and seconded to refer Resolution A123 to the Standing Committee on Constitution and Canons.

Deputies approve. Bishops approve.

[A056]

Fleener: moved and was seconded to refer A056 to Standing Committee on Constitution and Canons with statement to actively consult with Standing Committee on Ministry and Development.

Deputies: approved. Bishops: approved.

Little asked all Deputies to meet on the floor immediately upon adjournment of the House of Deputies, to review the status of A185 and the other Resolutions acted on by the Committee.

The hearing was adjourned at 9:07 a.m.

**Tuesday, July 14, 2009**

**7:30 a.m. - 9:00 a.m.**

Bishop Fitzpatrick convened the meeting at 7: 30 a.m. with prayer.

Little reviewed the status of Resolutions acted on by the Committee: A185, A187 with technical corrections, A188 (funding and training resolution), A058 (housekeeping), A055 (closed parishes) – all passed the House of Deputies; still outstanding A057; A123 sent to the Committee on the Dispatch of Business which will resolve as to who will get it. A056 (certificates on election of bishop); A053.

All Resolutions referred to the Committee have been acted on by the Committee and voted out.

Little mentioned that he saw four Resolutions needing review as to canonical form but three of them went instead to Rules of Order and were voted out to the floor, including D040, which would charge certain Anglican Boards to report back to this Church.

Little: Resolution B008 (treat transfers or encumbrances of trust and permanent funds analogously as to how we handle real estate transfers/encumbrances) is on the House of Deputies Calendar; he has been told that other canonical revision Resolutions are “out there”.

When A185 might be tak[en] up by the House of Bishops was not known yet, but that House wanted time to review.

[A123]

Resolution A123: Bishop Fitzpatrick asked whether the Convocation needs to be a missionary diocese because of carving out exceptions; so wholesale canon revision of

canons needing revision and Bishop Whalon preparing to bring this before the House of Bishops.

*B008*

No new referrals; Committee will get B008; proposer Bishop Sisk addressed the Committee on B008; he stated that just as permission is needed to obtain a mortgage on property, so should spending down endowment funds which have spending limitation provisions. He has seen parishes use endowments to meet operating expenses. B008 is an attempt to spur a national effort to direct dioceses to develop canons to meet this reality.

The Committee proceeded to discuss the B008 proposal. Concerns were raised about the proposed language. Little: two issues; spend down of endowments; other is scenario where a “runaway” parish is trying to transfer funds to an entity that is not part of The Episcopal Church; Standard Business Practices are accounting methods. If so, each diocese would need a canon that “spending” is a business practice.

Bishop Sisk wants to stimulate conversation.

Zoe Cole: two churches in litigation; court directed trust funds as part of the property. Series of allegations of misconduct including fraud and a former IRS auditor reviewed discretionary funds.

Ronnie Reno: There is a Uniform Management of Institutional Funds Act. The law requires a covered endowment to track its historic value of the original and subsequent donations and cannot make distributions until “above water”. In states where the Uniform *Prudent* Management of Institutional Funds Act has been adopted, “under water” funds can continue to make disbursements if the fiduciary takes specified steps and

makes certain decisions around prudence. {He doesn't} know whether [it] applies to the Church.

Henderson: standard business methods, the Canon sets out more than accounting standards.

Tripp asked if this spend-down would be a canonical violation?

Babb: civil and criminal charges could be brought; standard practices to be followed in Sec. 7 already required.

Ziegler: business practices and methods is flow of paper; if withdraw[al of] money it has to be approved by the right board within the parish. Aim here is only reasonable amount of corpus can be used. Many trusts are set up to allow use of principal at any time. Trying to impose the business practices would be problematic. Other issue is bank trustees who are extremely cautious in releasing funds adds burden to show the business practices to allow it. Probably requires Standing Committee review.

Schwenke mentioned that there can be confidentiality issues; corporate trustees have taken a minimal position of sharing of information.

Clearly if a vestry is interacting with a corporate trustee there are controls; Bishop Sisk is talking about where Vestry is acting as custodian.

Cole suggests that the real concern: not how to maintain a trust but about transparency; who and what and amount must be clear and administered properly.

Babb: "Runaway" Diocese of Quincy, transferred from a trust \$100,000 retainer to a law firm, locking in legal fees for the future and done with apparent nefarious intent even though one can find a

rationale. Questions whether this would be captured in B008.

Sisk: not nefarious intent required, sometimes endowments used for salaries.

Little: time of effective date of this; different approach would be a provision in the Canons that points to the issue, not necessarily a mandate, but that local canons should address how endowment funds should be expended.

Ziegler: when asking for lien on property banks often encumber these funds. Can give unexpected gift to local and international charity when have healthy balance sheet quite different. Not standard business practice but also acts as a church.

Sisk: A diocese in Maryland has a canon on "impaired parishes;" this may be a good drafting model.

Little: Note that we do not yet have B008 but when we do receive it, the Committee will have full review.

Little notes that today's Daily Calendar of the House of Bishops has Title IV on it.

Ellen [Neufeld]: Canons will do what they will do; strongly concerned there are no words being spoken of Christian charity, mercy, and reconciliation rather than litigation. She and her diocese are wanting to be faithful; the Diocese of Albany *is* here at General Convention.

Little; practical and human side not always focused on, we focus on legal issues and we need to recognize there are potential and untended consequences of our laws.

Ellen [Neufeld]: would like to see the process of reconciliation rather than how we protect the property.

Ronnie [Reno]: Describes the Maryland canon on imperiled parishes: bishop can appoint a committee of three to audit the parish, and, with the consent of the Standing Committee, can declare it is an imperiled parish, and other remedies to restore the health of the parish. Question would a liberal standard in a trust be in conflict with this canon?

Can a canon impose a trust on a trust?

Fleener: California has spoken that you could.

Cole: Question is how we support each other in financial viability to do the work called to do. Many churches do not have a wealth of management skills to utilize our resources. This should be the concern, especially when survival at stake.

Little: maybe a subgroup can be formed to start thinking about this so that it is a good proposal.

Belton: refer to a Standing Committee for study.

*B029*

We received from Ministry, Resolution B029 revising Article II of the Constitution as to age and consent to election of a Bishop for review as to canonical form. This is a second reading. Moved and seconded to approve as to canonical form.

Deputies approve. Bishops approve.

The hearing was adjourned at 8:57 a.m.

**Wednesday, July 15, 2009**

**7:30 a.m. - 9:00 a.m.**

Bishop Waynick convened the meeting at 7:30 am. Marcellus Smith prayed and referred the Committee members to the Deputies brochure and particularly the handbook.

Bishop Waynick has been asked to identify any pending matters: B008.

Mr. Little: The House of Deputies platform, via Bob Royce, has reminded me that Canon V.1.5 (a) requires that the Deputies on the Committee appoint two Deputies to certify canonical changes to the Secretariat.

The Bishops have conferred on D066 (give vote to eighteen youth representatives in the House of Deputies) and are not prepared to sign off because of inartful language which could be clearer, especially for such an important matter of including youth as voting members.

*[D066]*

Mr. Little: The Committee Deputies signed off on D066 yesterday with minor changes.

The Committee worked on drafting a substitute. Discussion centered around perfecting the amendment as opposed to having something that is workable and amendable in the future.

Mr. Fleener moved and it was seconded to adopt the substitute. Mr. Little will speak to the Chair of the Structure Committee to offer this as a substitute on the floor of the House of Deputies.

Dissent: agree in leaving out entitlement language.

*B008*

The Committee then took up further consideration of Resolution B008, as redrafted by the Committee. Bishop Sisk hopes that the proposal would stimulate conversation on the Diocesan canons. Anything beyond earnings being spent, this would impose going to the Bishop or Standing Committee for approval for a trustee

to release funds. Sense from yesterday is to refer to [the Standing Commission on Constitution and Canons] and at this point not helpful to try to move onto the floor at this stage in the General Convention. Mr. Little worried that without a proper review it was imprudent decision making.

Motion to refer Resolution B008 to the Standing Committee on Constitution and Canons, with the request that it consult with Stewardship; seconded.

Deputies approve; Bishops approve.

Mr. Little will include in his report on the floor [the] recommend[ation] that dioceses consider adopting a form of imperiled or endangered parishes canons as such models exist in the Dioceses of Maryland, Western Michigan, and Chicago.

Resolutions A123, A057, and A057, A053 pending on floor.

Hearing no further business, the meeting was adjourned until 7:30 a.m. on Thursday, July 16.

**Thursday, July 16, 2009**

**7:30 a.m. - 9:00 a.m.**

There being no new referrals to the Committee, and all prior referred Resolutions having previously been voted out of Committee, there was no formal business conducted. Chair Little and Vice Chair Fitzpatrick thanked the Bishops and Deputies for their diligence and stamina in conducting the work of the Committee. The Committee gave its thanks to the Committee leadership—Chairs Little and Waynick, Vice Chair Babb, and Secretaries Bishop Fitzpatrick and Carol Barron. All thanked Dispatch of Business liaison, the Rev. Peter



Keese, and Committee Assistant Laura Russell, for their dedicated service to the Committee and its efforts.

Respectfully Submitted,

/s/Rev. Carol Barron, Secretary

/s/Rt. Rev. Robert L. Fitzpatrick, Secretary

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*Note: At Chair Little's request, his report to the House of Deputies on Resolution A185 is attached to these Minutes as Exhibit 3.*

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### **Exhibit 1**

#### **Tentative Committee Schedule**

##### **Tuesday, July 7**

8:00 a.m. – Noon

8:00 – 8:30: opening prayer, greetings and introductions

8:30 – 9:00: discussion of Committee process, scheduling, priorities

9:00 – 9:30: Title IV: scheduling of hearings, committee discussion, mark-up and vote

9:30 – 9:45: break

9:45 – 11:15: overview of Title IV Task Force Blue Book Report (Joe Delafield, et al.)

11:15 – 11:45: discussion of Title IV Task Force Blue Book Report

11:45 – Noon: assessment of committee process thus far; discussion of schedule

*Note: post notice of evening hearings no later than 3:00 p.m. (get them to Secretariat by 2:30 pm)*

122 Minutes of Committee on Canons

*6:30 pm: Post notice of July 8 hearings on Resolutions A123, A185, A186 and A 187*

7:00 p.m. – 9:00 p.m.

Open hearings on Resolutions A053, A054, A055, A056, A171 and A172; Committee discussion, mark-up and possible vote.

**Wednesday, July 8**

11:00 a.m. – 12:30 p.m.

11:00 a.m. – 11:45 p.m.: complete committee discussion, mark-up and vote on Resolutions A053, A054, A055, A056, A171 and A172 (unless completed on July 7)

11:45 a.m. – 12:30 p.m.: Presentation on Resolution A123 (from a member of Standing Committee on Structure of Church, and/or Bishop Pierre Whalon)

2:00 p.m. – 4:00 p.m.

2:00 p.m. – 3:30 p.m.: Committee hearing on A185

3:30 p.m. – 4:00 p.m.: Committee discussion on A185

*6:30 pm: Post notice of July 9 hearings on A123, and on A171, A172 and A173.*

7:00 p.m. – 9:00 p.m.

7:45 p.m. – 8:45 p.m. (start after Archbishop of Canterbury session ends): open hearings on A185, A187 and A188

8:45 p.m. - 9:00 p.m.: Committee discussion of A185, A187 and A188; schedule A185, A187 and A188 for mark-up and vote

**Thursday, July 9**

7:00 a.m. – 9:00 a.m.

7:00 a.m. – 8:30 a.m.: Committee discussion and possible vote on A185, A187 and A188 and any amendments

8:30 a.m. - 9:00 a.m.: discussion of floor strategy for presenting A185, A187 and A188.

2:00 p.m. – 4:00 p.m.

2:00 p.m. – 3:00 p.m.: hearing, discussion, mark-up and vote on A057

3:00 p.m. – 4:00 p.m.: hearing on A123; backup for completing vote on Title IV Resolutions

*9:00 pm: Post notice of July 10 hearings on A123, and on A171, A172 and A173.*

7:30 p.m. – 9:00 p.m.

7:30 p.m. – 8:15 p.m.: discussion, markup and vote on A123

8:15 p.m. – 9:00 p.m.: open hearing on A171, A172 and A173

**Friday, July 10**

7:30 a.m. – 9:00 a.m.

7:30 a.m. – 8:00 a.m.: discussion, markup and vote on A171, A172 and A173

8:00 a.m. – 9:00 a.m.: review status of Resolutions in other Committees with impact on Canons; update schedule; clarify priorities

124 Minutes of Committee on Canons

Legislative Session, 2:00 p.m. – 6:00 p.m.: Title IV Floor presentations (A185, A187, A188); or, complete work and take vote on all Title IV Resolutions

*9:00 pm: Post notice of July 11 hearings.*

7:30 p.m. – 9:00 p.m.

7:30 p.m. – 9:00 p.m.: Take up Resolutions referred from other Committees; markup and vote

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**Exhibit 2**

**Protocol for Hearings Committee 5 -- Canons**

Invited or designated “experts” may be given the time deemed necessary to provide adequate background and information concerning a resolution; 10 minutes followed by clarifying questions from the Committee?

All others will be limited to 2 minutes – and clarifying questions from the Committee may be permitted

Speakers will be heard in the following order:

- Experts
- Deputies/Bishops
- Alternates
- Others

A limited amount of time will be allowed for hearing debate on each resolution – that time to be determined by the Committee before the hearing is posted.

Speakers will be alternated - pro and con – until the allotted time has expired.

All speakers must register and indicate their position to facilitate hearing from different perspectives.

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**Exhibit 3**  
**Report to the House of Deputies on A 185**  
**Deputy Thomas A. Little, Chair, Committee on Canons**

*Title IV Task Force II's Blue Book Report*

In the face of criticisms that the 1994 Title IV then in use was overly militaristic and rigid in its application, and lacked a theological foundation, the 2000 73rd General Convention resolved that a Task Force should be formed, charged with the responsibility of reviewing the existing Title IV, researching the disciplinary policies and procedures of other churches and various professions, making an interim report to the 2003 General Convention, and to bring to the 2006 75<sup>th</sup> General Convention recommendations for the revision of Title IV of the Constitution and Canons of the Episcopal Church. (See, GC Resolution 2000-A028).

After six years of work the Task Force submitted a complete revision of Title IV to the 75<sup>th</sup> General Convention (Resolution A153). Following extensive debate in the Cognate Canons Committee of both the House of Deputies and the House of Bishops, the Committee recommended an alternate A153, and the two Houses agreed.<sup>7</sup> The amended A153 stated:

By virtue of our Baptismal Covenant, all members of this Church are called to holiness of life and accountability to one another. The

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<sup>7</sup> The fragment "to the legislative floors." was deleted here. [Editor's note]

Church and each Diocese shall support their members in their life in Christ and shall hold one another accountable as provided in this Title.

The 2006 Resolution included these goals for Title IV:

1. Reflect the values, ecclesiology, and theology of the Church;
2. Move Title IV towards a reconciliation model for all appropriate circumstances;
3. Maintain the historic pastoral role and canonical authority of Bishops.

Task Force II produced A 185 after a series of meetings, research, outreach and reflection. Its Blue Book report is on page 766. In early 2008, an “Exposure Draft” was published on the Episcopal Church website, with provisions for comment by any interested reader. Many comments were received over the following six months.

Throughout 2008 presentations were made to many groups in the Church, including the House of Bishops, Standing Commission on Constitution and Canons (twice), Executive Council and a number of Provincial meetings.

*The A185 Big Picture - Main Themes and Goals*

The disciplinary process in the Church should be as open, receptive, transparent and as theologically based as possible.

Clergy disciplinary proceedings should move away from a more rigid judicial, or “military”, model to

more of a “professional” model, reflecting the course of other religious or professional disciplinary styles.

Agreements for Discipline are the favored course of action, with a change in the approval process.

The flow of the proceedings, whenever there is evidence that an Offense has been committed and the matter has not otherwise been disposed of by an Agreement to Discipline, is straightforward. It contemplates an attempt at informal resolution (Conference Panel) followed, if necessary, by a formal proceeding (Hearing Panel). A Disciplinary Board of seven clergy and lay persons provide the personnel for both panels and for the presidency of the Board.

Although the number of people involved currently varies from diocese to diocese, this should not be a significant change in number or expense.

Dioceses may share people and financial resources in a disciplinary process.

The statute of limitations remains set at ten years, except for physical or sexual violence against minors, where there is no limitation on how soon charges need be brought.

A pastoral response appropriate to the circumstances will be required in every case.

The burden of proving an offense at trial continues to be by “clear and convincing” evidence.

There is an affirmative duty on both clergy and lay to appear when called and to testify. This is frequently required in disciplinary proceedings in other professions, and is consistent with the ecclesiastical nature of the proceedings under Title IV. A member of the Clergy may be excused from appearing before the Hearing Panel for good cause shown.

The proposed new Title IV is intended to move from a punishment/win-lose model to a model which

strives for reconciliation, healing, restoration, truth-telling and forgiveness.

### **Canons Committee Amendments**

The Canons Committee proposes eight substantive amendments to A 185.

1. Church Attorney (Page 2, Canon 2): The amendment states that a Diocese's canons may provide for removal of a Church Attorney, e.g., for neglect or abuse of discretion.
2. Standard of Proof (Page 2, Canon 2): The amendment restores the clear and convincing standard of proof at the Hearing Panel that is used in the current Title IV.
3. Intake Officer (Page 3, Canon 2): The Canons Committee amendment now gives an option to select an Intake Officer by either a Bishop's appointment or some other method stated in local canons. There also may be more than one intake officer.
4. Standards of Conduct (Page 5, Canon 4.1(f)): The amendment removes the clergy "self-reporting" requirement, and clarifies that the duty to report others is qualified by the materiality-weightiness standard (IV.3.3).
5. Standing Committee (Page 6, Canon 5.1): We clarified that local canons may permit members of the Standing Committee [to] serve on the Disciplinary Board and on its panels.
6. Hearsay Evidence (Page 20, Canon 13.6): We amended A185 to state explicitly that the



Hearing Panel shall determine the credibility, reliability and weight of all testimony and all other evidence.

7. Appointments to Disciplinary board for Bishops (Page 29, Canon 17.3): The amendment provides that the initial appointments are by the President of the House of Deputies, with the advice and consent of the clergy and lay members of Executive Council, and thereafter by election by the House of Deputies.
8. Duty to Appear and Testify (Page 40, Canon 19.18): A 185 requires all members of the Church –including a member of the clergy who is a respondent, to “appear and testify or respond” at a Title IV. The amendment gives the member of the clergy the right to ask not to appear and testify or respond, which the Hearing Panel may grant for good cause shown.

Also, we made some typographical and minor edits, and minor changes for internal consistency.

#### *Committee process*

The Canons Committee held two open hearings, taking testimony from some twenty-five Deputies, Alternates and visitors. The Committee had testimony from Joe Delafield over the course of three days. Joe Delafield was the principal drafter for the Task Force, is the Chancellor of Maine, and a three-time Deputy to this House. He also has previous served on the Canons Committee and the Standing Committee on Constitutions and Canons. Diane Sammons, Chancellor of Newark, also testified about her experience with current Title IV and her work on the Task Force.

The Committee engaged in an intensive series of discussions and debates on A 185, leading to consensus on the amendments I have described. The Committee used this listening and engagement to build consensus not only on the amendments, but on the resulting perfected draft. This resulted in unanimous votes from both Deputies and Bishops, and a strong, shared sense that the Committee and its members had achieved a break-through of understanding and appreciation for the differing views that the movement of the spirit united in the final draft now before the House.

Committee members held two information sessions for Deputies on Sunday, July 12, to answer questions about A185 as passed by the Committee. These were helpful to the Committee members and, we hope, to the other Deputies who attended.

The Committee recommends **Adopt with Amendment.**

Thank you, Madame President.

## Where Is The Locus Of Authority Within The Episcopal Church?

James Dator<sup>1</sup>

Where is the locus of authority within in the Episcopal Church? Do dioceses (and/or even parishes) have inalienable governing rights and procedures that the national church cannot override? Do dioceses (and/or even parishes) have the right to secede if they disagree with decisions of the General Convention? If dioceses (and/or parishes) do leave, should the courts of the United States rule that the property belongs to the departing entities, or to the Church in the General Convention? These are extremely controversial questions now, regrettably dividing families, friends and neighbors primarily (but not exclusively) because of profound disagreements over the centrality of same-sex behavior and male leadership in the faith, doctrine, and practices of the Church.

As a result of very detailed research I conducted many years ago,<sup>2</sup> recently revisited and updated,<sup>3</sup> I believe the answers are very, very clear: Final authority

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<sup>1</sup> James Dator is Professor and Director of the Hawaii Research Center for Futures Studies, Department of Political Science, and Adjunct Professor in the Program of Public Administration, the College of Architecture, and the Center for Japanese Studies of the University Hawaii at Manoa.

<sup>2</sup> James Allen Dator, "The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal or Unitary," (Ph.D. diss.: American University, 1959).

<sup>3</sup> James Dator with Jan Nunley, *Many Parts, One Body: How the Episcopal Church Works* (New York: Church Publishing, 2010). Portions of this book are used in this article with permission from the publisher.

in the Episcopal Church rests now and has always rested in the Generation Convention. Dioceses and parishes do not have any governing rights that General Convention cannot override by following proper procedures. Dioceses and parishes certainly do not have an inherent right to secede. Unless they change the long-standing basis of their decisions in matters of church governance, the courts of the US should be expected to rule that departing entities have no right to the property they occupied when they were members of The Episcopal Church.

### I.

#### **Criteria for analyzing the constitution of the Church**

Political scientists classify government in relation to the concentration versus the dispersion of political power as being unitary, federal, or confederal.<sup>4</sup> To define or explain any one of these three types is impossible without reference to the other two. The normal, default type of governmental organization is unitary. Kenneth Wheare, one of the great students of federalism, says:

It is commonly assumed that federal government is called upon to justify its existence. The unitary form of government is regarded as normal and self-explanatory and self-justifying; if there is to be government at all for an area, it is assumed that, unless strong

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<sup>4</sup> William Anderson, *Federalism and Intergovernmental Relations* (Chicago: Public Administration Service, 1946), 6.

reasons to the contrary can be shown, that government will and should be unitary.<sup>5</sup>

Certainly, unitary nations in the world vastly outnumber the few nations that are federal, and there appear to be no nations now that are confederal in form. It should be added that whether a government is confederal, federal, or unitary has nothing to do with whether it is democratic or not. The rate of incidence of unitary national governments has no direct effect on the forms chosen by churches; it is, however, suggestive of the governmental models with which the founders of The Episcopal Church would have been acquainted.

#### *Characteristics of Unitary Government*

The overwhelming majority of governments in the world are unitary. Henry Sidgwick defined this form of government as one “in which the ordinary exercise of the highest powers of government belongs to a central organ or organs, exercising control over all the members of the state; while only matters of secondary importance are handed over to the independent management of local governing bodies.”<sup>6</sup>

It must be emphasized that these “matters of secondary importance are handed over” by the central government. They are not possessed by inherent right by the local governments. Thus, all political decisions

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<sup>5</sup> Kenneth C. Wheare in Geoffrey Sawer, *Federalism. An Australian Study* (Melbourne: F.W. Cheshire, 1952), 110.

<sup>6</sup> Henry Sidgwick, *The Elements of Politics* (Second Edition; London: Macmillan, 1897), 331-32. See also, Herman Finer, *Theory and Practice of Modern Government* (Revised Edition; New York: Henry Holt, 1949), 166. Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (Eighth Edition; London: Macmillan, 1924), 153.

are ultimately referable to a single, territorially inclusive, all-powerful, and, if explicitly limited at all, self-limited central government. The principle of unitary government is that of the legal supremacy of a central government over all other exercisers of power in a given geographic area.

Decision-making authority in a unitary government may be highly centralized--in which case considerable power is held and exercised by the central government--or decentralized--so that the local governments possess a great deal of discretion by permission of the central authority. This sometimes confuses observers who may conclude that the local governments possess inherent powers *vis-à-vis* the central government, which, even in a decentralized unitary government, they do not.

#### *Attributes of Confederal Government*

Actual confederacies are rare. The Articles of Confederation (1781-89) under which the American states related to one another prior to adoption of the U.S. Constitution provided one of a very limited number of historical examples of confederal national governments. Despite its rarity, this form of government is clear in principle. A confederacy is an association of independent polities that have agreed to delegate to a common governmental authority the exercise of certain of their governmental powers. Though the association is often intended to be permanent, the associated governments each retain the right to nullify acts of the common government agency, and to secede from the association at will. Supreme power thus lies in the member governments severally. The powers of the

common government are usually partial, and are related to those problems that are the overarching concern of the confederacy as a whole. Thus, to some extent, a confederacy is an independent entity itself and to some extent it is nothing more than a rather rigid alliance of polities that have set up a common governmental system over some matters.<sup>7</sup>

#### *Characteristics of Federalism*

Since the United States has a federal structure, many Americans may assume that federations are more common than they actually are; in fact, only a handful of governments today are federal. Federal government lies between a closely-knit confederacy and a decentralized unitary government and must be defined in reference to these two systems.<sup>8</sup> Federalism is a principle of governmental organization, designed to be permanent,<sup>9</sup> which manifests a constitutional division of governmental powers between a central (common, national, or general) government and two or more regional (constituent or associated) governments.

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<sup>7</sup> Westel W. Willoughby, *The Fundamental Concepts of Public Law* (New York: Macmillan, 1924), 189-96.

<sup>8</sup> Edward A. Freeman, *A History of Federal Government in Greece and Italy* (Second Edition; New York: Macmillan, 1893), 1: "Federal government . . . is, in its essence, a compromise between two opposite political systems. Its different forms occupy the whole middle space between two widely distant extremes. It is therefore only natural that some of these intermediate forms should shade off imperceptibly into the extremes of either side. Controversies may thus easily be raised both as to the correct definition of a federal government, and also whether this or that particular government comes within the definition." See also Carl J. Friedrich, *Constitutional Government and Democracy*, rev. ed. (New York: Ginn, 1950), 190.

<sup>9</sup> Albert H. Hart, *Introduction to the Study of Federal Government* (Boston: Ginn, 1891), 17.

Conceptually these three forms of government are quite distinct. A note of caution is needed, however. Historically, the use of the words “federal” and “confederal” has not always been precise. Especially in the early part of the United States’ history – at least before the Civil War period – the terms were used interchangeably in discussions about national government, and did not always convey the distinction that has been stated in the foregoing section.<sup>10</sup> The same is true in early discussions in The Episcopal Church. Thus, it may be possible to find instances when the Church is called “federal” or “confederal” even in the *Journals of the General Convention*. But simply calling The Episcopal Church a confederation does not mean that it actually exhibits the governmental structure which confederal governments, by definition, must have. It is primarily to the structural realities of the Church, rather than to vocabulary used about the Church’s structure, that this article is directed.

## II.

### Arguments about Church Governance in Books and Journals.

A researcher looking in literature written for and about The Episcopal Church for a simple description of the governance of the denomination will soon be

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<sup>10</sup> For a good example, see Alexander Hamilton, *et al.*, *The Federalist* (Modern Library Edition; New York: Random House, [N.D.]), especially Federalist Number 9 and Number 39, as well as *passim*. The interchangeable use of the two words is most striking in this volume which is now taken as the most powerful early statement of federal, as opposed to unitary, government, as defined above.



frustrated.<sup>11</sup> Some sources have said The Episcopal Church is federal, others that it is confederal, and still others state that it is unitary. Here are some examples over the Church's history.<sup>12</sup>

- Actually the Episcopal Church was a federal union of independent diocesan units, and each diocese a federation of independent parishes, rather than a single, closely-knit ecclesiastical institution.<sup>13</sup>
- As all trained churchmen know, the Episcopal Church in the United States came into being and still exists as a federated union of dioceses, in which each diocese is a "sovereign diocese," with the right and the power to enact canon laws for its own government; and in which the several dioceses have established a central or

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<sup>11</sup> This was the case even before the current disputes between the General Convention, dioceses, and parishes. When I began my research, the issue of the locus of authority was not in any particular dispute, and I had no interest whatsoever in what my conclusion would be. Rather, I was attracted to the matter because I found there were many conflicting claims about the formal structure of the Episcopal Church. As a young graduate student in political science attending Virginia Theological Seminary for one year as a special student, and looking for a topic for a doctoral dissertation, this was an intriguing puzzle and an opportunity to write on "private government," nothing more.

<sup>12</sup> For additional examples see Dator, *Many Parts, One Body*, 1-6.

<sup>13</sup> Powel Mills Dawley, *Chapters in Church History* (New York: The National Council, 1950), 222. See also, William S. Perry, *History of the Constitution of the American Church* (New York: T. Whittaker, 1891), 99, 118; Samuel D. McConnell, *History of the American Episcopal Church* (Milwaukee: Young Churchman, 1916), 264; and William W. Manross, *A History of the American Episcopal Church*, 2d ed. (New York: Morehouse-Gorham, 1950), 190.

federal government having such powers only as have been delegated to it by the dioceses.<sup>14</sup>

- It will be perceived, that there is a very manifest and beautiful analogy between the ecclesiastical institutions of the Protestant Episcopal Church of the United States, and the civil institutions of the United States.<sup>15</sup>
- Just as thirteen independent states became fused into one nation, so thirteen independent church provinces became dioceses of one church under a written constitution, Diocesan Conventions answered to State Conventions, and General Convention to Congress.<sup>16</sup>

Many statements have also been made from time to time that deny that there is any significant similarity between the government of the United States and that of the Church, as far as their constitutional structure is concerned:

- Any supposed analogy between the two Constitutions is in my judgment groundless, fanciful, and misleading.<sup>17</sup>
- There is no parallel between the Constitution of the Church in the United States and the Civil

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<sup>14</sup> G. MacLaren Brydon, *Shall We Accept the Ancient Canons as Canon Law?* (Richmond: Virginia Diocesan Library, 1955), 32-33.

<sup>15</sup> Thomas H. Vail, *The Comprehensive Church* (Hartford: H. Huntington, 1841), 103.

<sup>16</sup> Edwin G. White, *Inter-relation of Personality and Institution as Exemplified in the Membership of the Protestant Episcopal Church* (East Lansing: University of Michigan, 1934), 27.

<sup>17</sup> Hill Burgwin, "The National Church and the Dioceses," *Church Review* 45 (1885), 438.

Constitution of the United States, except in so far as both are intended to set forth the fundamental principles for the government of each.<sup>18</sup>

- It is nonsense to say that [the Church's] governing power is patterned after that of the Republic.<sup>19</sup>
- The few resemblances between the Church and the nation sink into insignificance, however, when we compare the differences between them.<sup>20</sup>

Other authors have contented with equal certainty that the government of the Episcopal Church is confederal:

- In the days of [William] White and [Samuel] Seabury it was the prevailing opinion that the Church was a confederation of independent dioceses, just as the nation was a confederation of the independent states, and no national

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<sup>18</sup> Henry Mason Baum, "The Law of the Church in the United States, Chapter VIII. Scope and Powers of the Constitution," *Church Review* 50 (1887), 767.

<sup>19</sup> John H. Stotsenburg, "The Governing Power in the Church," *Virginia Seminary Magazine* 4 (1891), 322-23.

<sup>20</sup> Edwin A. White and Jackson A. Dykman, *Annotated Constitution and Canons for the Government of the Protestant Episcopal Church*, 2 vols. (Greenwich, Connecticut: Seabury, 1954), 1:140. See also, Murphy Hoffman, *A Treatise on the Law of the Protestant Episcopal Church in the United States* (New York: Stanford & Swords, 1850), 105; and Francis Vinton, *A Manual Commentary on the General Canon Law and the Constitution of the Protestant Episcopal Church in the United States* (New York: E.P. Dutton, 1870), 48, 75.

executive was provided for in the Church's Constitution.<sup>21</sup>

- The great importance of securing uniformity of faith and worship for our entire communion in the United States alone induced any of these dioceses to waive even in part the practical assertion of their independence, and to enter into any Articles of Confederation.

In the very act, however, of so confederating, and in the Articles of Confederation themselves, the pre-existing, separate and independent organization of the several dioceses was fully and expressly recognized, and the continuance of such independence was provided for, except (and except only) so far as such independence was limited by the transfer of delegated powers to a General Convention of the confederating dioceses. That General Convention was and still is the freely constituted creature of the several independent dioceses, and not the dioceses of the General Convention.<sup>22</sup>

Finally, there have been many authors who have stated that the National Church or the General Convention is supreme, thus showing that The Episcopal Church is unitary:

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<sup>21</sup> James A. Muller, *The Government of the Episcopal Church* (Cambridge, Massachusetts: Episcopal Theological School, 1929), 19.

<sup>22</sup> J.S. Hanckel, "On Diocesan Autonomy and Federal Relations," In *Journal of the Eighty-Third Annual Council of the Protestant Episcopal Church in Virginia* (Richmond: Clemmitt and Jones, 1878), 67. By "Articles of Confederation" is meant the Church's Constitution.

- The history of the legislation of General Convention since its formation shows that the Convention has again and again taken to itself powers which once belonged to the diocese, and in some case to the individual parish. This fact demonstrates the correctness of the theory, as we have before stated, upon which the General Convention has ever acted from the beginning of its history: that it has the power to legislate on any subject unless expressly forbidden to do so by the Constitution. The General Convention not only makes the Constitution and amends it, but it interprets the Constitution. The General Convention limits its own power, and it can remove that limitation. It assumes that all power is in the General Convention which the Constitution itself does not limit. The one conclusion that follows from these facts is, that the General Convention is the ultimate seat of authority in American Church government.<sup>23</sup>
- The General Convention possesses the acknowledged power of supreme legislation, as a corollary of the supreme and sole authority to make, and to alter the Constitution of the Protestant Episcopal Church in the United States.<sup>24</sup>
- When, however, we examine the printed Constitution of our Church we find ourselves

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<sup>23</sup> White and Dykman, *Annotated Constitution and Canons*, 1:142. See also 1: 33, 92-94, 100, 139-142; and 2: 55-56.

<sup>24</sup> Vinton, *Manual Commentary*, 124. Italics in source.

confronted with what looks very much like parliamentary absolutism.<sup>25</sup>

Clearly, authors writing about the Episcopal Church are not of one mind about the form of government that the Church has adopted.

### III.

#### **Distinguishing Forms of Government**

Despite this lack of agreement among authors writing about The Episcopal Church, it is possible to distinguish unitary, federal, and confederal forms of government by looking for certain basic clues. The most important single place to look is at the Church's Constitution. Indeed, throughout history, the Church literature has clearly framed the debate over forms of government as a "constitutional" question: the matter of where authority lies and how it is divided is to be found in the written Constitution of The Episcopal Church (just as the Constitution of the United States serves as the first and final source for answering questions of decision-making authority in the United States central government and the constituent states). A constitution provides clues on multiple levels: in its distribution of powers, in its identification of its own status, in its method of adoption and amendment, and in its provision, if any, for withdrawal.

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<sup>25</sup> Francis Wharton, "How Far We Are Bound by English Canons," in William S. Perry, *The History of the American Episcopal Church, 1587-1883*, 2 vols. (Boston: James R. Osgood, 1885) 2: 398ff. However, Wharton cites several allegedly confederal features of the Church's government only in order to show that the Church is not confederal, but instead unitary.

As William S. Livingston noted in *Federalism and Constitutional Change* “nearly every writer who addresses himself to the question” has agreed that “the real key to the nature of a federation is in the distribution of powers . . . . Federalism implies the existence of two coordinate sets of government operating at two different levels in two different spheres.”<sup>26</sup> Each must be supreme, independent, and coordinate in its own sphere. There is no necessary formula of how the division is to be made, what powers each shall have, or whether the local or central governments have residual or enumerated powers. However, the powers of both central and local governments should be substantial and not merely trivial.<sup>27</sup> If there is no such division of powers, the government is not federal and is unitary or confederal.

In a federal system the general government and the member governments should each possess a complete complement of governmental institutions such as an independent executive, legislature, and judiciary.<sup>28</sup> The presence of dual systems does not prove that a system is federal, but the absence of a complete system suggests that the system is not.

In a federal system the separateness and independent political power of the associated governments as such should find substantial expression in the central government, especially by representation of the governments-as-such in part or all of the central legislature. There should also be a genuine legal

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<sup>26</sup> William S. Livingston, *Federalism and Constitutional Change* (Oxford: Clarendon, 1956), 10.

<sup>27</sup> Arthur V. Macmahon, *Federalism, Mature and Emergent* (Garden City, New York: Doubleday, 1955), 4; and Kenneth C. Wheare, *Federal Government* (London: Oxford, 1947), 3.

<sup>28</sup> Willoughby, *Fundamental Concepts*, 276.

equality among the constituent governments themselves.<sup>29</sup> Associated governments should also participate in the election of the central executive.<sup>30</sup>

In a federal system, the governmental powers of the central government must be able to extend directly to the persons in the member governments rather than indirectly to them through the component governments.<sup>31</sup> There should be dual citizenship or membership, moreover. A person should be a citizen, or member, of both the federation and of the member governments, rather than of one or the other only.<sup>32</sup>

One can also look to budgetary provisions for clues as to the form of government. In a federal system, the central government and the several governments each should possess constitutionally sufficient human and other resources to carry out the constitutional powers and duties allotted to each jurisdiction. Thus, neither a constituent government nor the central government should be forced by the constitution to be dependent financially upon the other components for the exercise of its constitutional authorities and requirements. If the central government is dependent on the constituent governments, the structure may be confederal. A unitary government may, however, allow

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<sup>29</sup> Marriott, *Federalism and the Problem*, 96. Macmahon, *Federalism*, 5.

<sup>30</sup> Livingston, *Federalism and Constitutional Change*, 11.

<sup>31</sup> Freeman, *History*, 9. Sidgwick, *Elements*, 538. Macmahon, *Federalism*, 5. Wheare, *Federal Government*, 2. But see, to the contrary, Willoughby, *Fundamental Concepts*, 198-200.

<sup>32</sup> Robert M. MacIver, *The Web of Government* (New York: Macmillan, 1947), 160-61; J. Rivero, "Introduction to a Study of the Development of Federal Societies," *International Social Science Bulletin* 4 (1952), 42; Marriott, *Federalism and the Problem*, 100; and Willoughby, *Fundamental Concepts*, 205, 273.



or require its constituent parts to acquire and spend money for themselves, Nevertheless, a unitary government has ultimate authority over all income, expenditures, and debts for itself and its parts.

The status of the constitution itself is also an indicator of the form of government adopted. In a federal system, sovereignty, or ultimate legal supremacy, lies in the federation as a whole rather than in either the local or the central governments alone, and the main expression of this sovereignty is found in the constitution of the federation (or other written document) that defines the distribution of governmental powers between the general and regional governments. This constitution or document has supremacy over all other acts and bodies. If, on the other hand, the central government possesses an authority superior to the constitution, the government would be unitary. If the local governments are superior, the government would be confederal.

A related question deals with the manner in which the constitution and laws of the central government can be changed. If there can be "nullification" by a component part of the acts of the central government, the government is confederal. On the other hand, if the central government unilaterally can eradicate or modify the structure or powers of the associated governments, the government is unitary.<sup>33</sup>

In a federal system, the constitutional distribution of powers between and among the several governments cannot be modified by the central government or by a state government alone, but only by

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<sup>33</sup> Robert M. MacIver, *The Modern State* (London: Oxford, 1926), 379-81; Willoughby, *Fundamental Concepts*, 210-18, 195-203; and Wheare, *Federal Government*, 91-92.

each operating independently and coordinately. This amending process not only must be substantially more difficult than ordinary legislative processes, but also must involve the concurrent consent of both the central and associated governments.<sup>34</sup>

In a federal system, disputes between the regional and the general government or among the regional governments as to the meaning of the division and distribution of powers (that is, problems of constitutional interpretation) are settled by an authority independent of both local and central governments. However, if no authority is provided in the written constitution, the function belongs to the courts.<sup>35</sup>

Finally, there is the question of departure. If a member government can depart from the central government, the system is confederal. This is not possible under a unitary system. It is also not permitted in a federal government; since sovereignty lies in the federation as a whole, secession of the member governments from the union is not permitted.

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<sup>34</sup> Livingston, *Federalism and Constitutional Change*, 11-15. See also, George B. Adams, *Federal Government: Its Function and Method* (New York: Knickerbocker, 1919), 59, 83-101; Arthur B. Keith, *Federation: Its Nature and Conditions* (London: Wyman, 1942), 536; Friedrich, *Constitutional Government*, 6; Wheare, *Federal Government*, 10-11, 96; Sidgwick, *Elements of Politics*, 220; and Dicey, *Introduction to the Study of Law*, 140-53.

<sup>35</sup> John A. R. Marriott, *Federalism and the Problem of the Small State* (London: George Allen and Unwin, 1943), 90. See also, Adams, *Federal Government*, 84, 97-100; Wheare, *Federal Government*, 64-88; Dicey, *Introduction to the Study of Law*, 153-61; Livingston, *Federalism and Constitutional Change*, 14-15, 295-318; and Arthur W. Macmahon, "Federation," in Edwin R.A. Seligman, Editor, *Encyclopedia of the Social Sciences*, vol. 6 (New York: Macmillan, 1931), 175.

These distinguishing characteristics of federal, confederal, and unitary systems provide criteria for the examination of the constitutional structure of the government of The Episcopal Church. After describing the government of the Church and comparing its structure with these criteria, it is possible to conclude whether or not The Episcopal Church is confederal, federal, or unitary. Having made this determination, the problem of the supremacy of the National Church, in General Convention, over the dioceses (and/or parishes), or of the dioceses (and/or parishes) over General Convention can be affirmed or denied.<sup>36</sup>

In the following portion of this paper, I will examine the current constituting documents of The Episcopal Church and then the many drafts and counterproposals that led up to the first constitution in 1789. I will also track subsequent changes made in that document, the debates in the official documents of the General Convention, and articles about the issue in the numerous magazines and scholarly journals of The Episcopal Church from 1789 onward.

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<sup>36</sup> While the question of the status of parishes vis-à-vis their dioceses and the General Convention is not the central focus of this article, the matter is discussed in *Many Parts, One Body* and in the dissertation from which it is drawn. See *Many Parts* for sections on church membership (129-32), parish government (181-84), and on the creation of the original constitution of the Church, (Chapter 2). Here as elsewhere the evidence is clear: while parishes, through their vestries and rectors, have “considerable power over church property” (183), this power is given to them by the canons made by the General Convention that is “a single, sovereign, and only self-limited representative assembly”(182).

## IV.

**The Creation of The Episcopal Church in the United States**

When the colonies of what was to become the United States of America successfully obtained their independence from England, the members of the Church of England in the former colonies were faced with a dilemma: should they remain loyal members of the Church of England, in which case they might very well be judged traitors to the new nation, or should they reconstitute their church in the United States on a basis separate from that of the Church of England in terms of governance but not of faith, practice or doctrine?

The Church of England itself was established on the belief that the one, holy, catholic and apostolic Church, with its unbroken succession of properly-ordained bishops, should conform itself governmentally in accordance with the laws of the nation-state in which it was situated. This is what Henry VIII claimed in creating the Church of England as a governmental—but not necessarily theological—entity separate from the Church in Rome (and elsewhere). This principle was enunciated by Richard Hooker in his *Ecclesiastical Polity* and by Article Thirty-Four of the Thirty-Nine Articles of 1563, which form the basis of the Church of England and of the Anglican Communion subsequently:

*Article XXXIV: Of the Traditions of the Church*

It is not necessary that traditions and ceremonies be in all places one or utterly alike; for at all times they have been diverse, and may be changed according to the diversity of countries, times, and men's manners, so that

nothing be ordained against God's word. Whosoever through his private judgment willingly and purposely doth openly break the traditions and ceremonies of the Church, which be not repugnant to the Word of God, and be ordained and approved by common authority, ought to be rebuked openly,( that other may fear to do the like,) as he that offendeth against common order of the Church, and hurteth the authority of the magistrate, and woundeth the conscience of the weak brethren.

Every particular or national Church hath authority to ordain, change, and abolish, Ceremonies or Rites of the Church ordained only by man's authority, so that all things be done to edifying.<sup>37</sup>

As long as England retained political control over the colonies, the Church in England and the Church in the colonies were under the same ecclesiastical discipline. When the political association ended, so must the ecclesiastical. This then necessitated a "reconstitution" of the government of the Church in the new nation because of the change in civil government.

However, that was easier theorized than done. Prior to the revolution, no bishop was resident in the Church in the colonies. From 1689 to the American Revolution the Bishop of London provided supervision for the Church in some of the colonies by appointing commissaries, but there were always some colonies without commissaries, and the statutory authority for their appointment was not always clear.

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<sup>37</sup> *Book of Common Prayer* (1979), 874.

The members of the Church in the new nation were faced with the difficult question of how to reconstitute themselves without a bishop, with a severe shortage of ordained and adequately trained clergy, with the considerable unprecedented influence of the laity in actual ecclesiastical government, and in light of the general ineffectualness and unpopularity of the Church of England in some of the colonies before the Revolution. Their task was further complicated by the extreme local isolation historically experienced by each of the American colonies themselves, the varying ecclesiastical and social arrangements of the Church in them (especially differences between those colonies where the Church was established and where it was not), and by the differences in churchmanship which mirrored and fluctuated in proportion to the varieties and successes of church parties in England.

For all intents and purposes, the actual governance of the Church in the colonies and after independence was in each parish. The Church was at this time more functionally "congregational" than "episcopal" or otherwise hierarchical. Although local parishes were united under geographically-defined dioceses, none of the dioceses had a bishop. Moreover, a key to England's controlling its distant colonies had been to forbid the colonies to trade or communicate with each other directly. All legal contact between the colonies had to go through England. Thus the members of the Church in the new states might know their diocesan fellows, but, with some notable exceptions they

had little if any knowledge of members in the dioceses of other states.<sup>38</sup>

As a consequence, ideas for reconstituting the Church in the United States emerged in certain states of the new nation where the membership was most active and concerned. This resulted in essentially three major plans for the Church in the US after 1780: one from Maryland, one from Pennsylvania, and one from Connecticut.

*The Maryland Plan*

The original attitude of the Church in Maryland is illustrative of churches chiefly concerned with establishing their identity as successors to the Church of England so that they might retain legal control over property that had been held by the Church of England before the Revolution as a first step toward developing its government. At the same time, they also wished to demonstrate that they were independent of any foreign ecclesiastical control. The Church in Maryland also was careful to see that its actions towards these ends were either expressly sanctioned by the government of the State of Maryland or at least did not require state approval or disapproval. This cautiousness, found also among Episcopalians in most of the states, sprang from fears that actions by American churchmen might be interpreted in America or in England as such departures from Anglican faith or practice as to sever the bonds of continuity between the Church in America and the Church of England.

In short, the Church in Maryland was first concerned with developing its government within the

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<sup>38</sup> Robert W. Prichard, *A History of the Episcopal Church*, rev. ed. (Harrisburg: Morehouse, 1999), 63-64.

state, not with establishing a nationwide Episcopal Church. Towards this end, Dr. William Smith, leader of the Church's movement for reorganization in Maryland, was, in 1773, elected "*To go to Europe to be ordained an antistes, President of the Clergy, or Bishop (if that name does not hurt your feelings).*"<sup>39</sup> Because of a number of reasons, Dr. Smith was never consecrated, and Maryland did not have a bishop until after the organization of the Protestant Episcopal Church in 1789.

*The Connecticut (Seabury) Plan.*

Though having several points of similarity with the Maryland approach, the Church in Connecticut (and New England generally) manifested an essentially different conception of the role of the Episcopal Church. Theologically "High Church," politically Tory, and not enjoying Establishment before the Revolution, but rather, depending upon the aid of the Society for the Propagation of the Gospel, the Church in Connecticut was predisposed to react differently to the situation brought on by the defeat of England. Unlike Maryland, and the Church in the South, and, as shall be seen, unlike the Pennsylvania Plan, the Church in Connecticut felt that no departure in ecclesiastical faith or discipline could legitimately be made until a valid Episcopate had been secured. The "government" of the church *was* the bishop, it was believed. Authority to govern the Church flowed from Christ through the Apostles to the bishops.

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<sup>39</sup> Letter from the Rev. Thomas John Claggett to William Duke of September 20, 1783, in William Stevens Perry, editor, *Journals of General Conventions of the Protestant Episcopal Church*, 3 vols. (Claremont, New Hampshire: Claremont Manufacturing Company, 1874), 3:34. (Italics in source.)



To have ecclesiastical government without bishops was impossible.

Hence, Connecticut's energies were consumed, at least after March 1783, in obtaining the consecration of Samuel Seabury, at first unsuccessfully at Canterbury, and then successfully in November 1784 by non-juring but valid bishops in Scotland.<sup>40</sup> Until Bishop Seabury arrived back in Connecticut in August 1785, the Church in Connecticut rejected overtures from members of the Church in the other states to join in an ecclesiastical union for the revision of faith and discipline as the times required. "Really, Sir," the New England clergy wrote William White in reference to his plan, "we think an Episcopal Church without Episcopacy, if it be not a contradiction in terms, would, however, be a new thing under the sun."<sup>41</sup>

Moreover, the New England clergy were horrified at suggestions of presbyteral consecration of bishops. Only valid, episcopal consecration of bishops would do: "We think that the uniform practice of the whole American Church, for near a century, sending

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<sup>40</sup> The non-juring bishops were Scottish and English bishops who refused to swear allegiance to William and Mary after the Glorious Revolution of 1688 had removed James II (to whom they had already sworn allegiance) from the English throne. They and their successors maintained independent church structures in both England and Scotland. James II's grandson and final legitimate heir Henry Benedict Stuart died in 1807, eliminating any further rationale for refusing allegiance to the English royal family. See Walter H. Stowe, "The Scottish Episcopal Succession and the Validity of Bishop Seabury's Orders," *Historical Magazine of the Protestant Episcopal Church* 9 (December 1940): 322-48 and Arthur Lyon Cross, *The Anglican Episcopate and the American Colonies* (New York: Longmans, Green, 1902), 264-67.

<sup>41</sup> William White, *Memoirs of the Protestant Episcopal Church in the United States of America*, DeCosta Edition (New York: E. P. Dutton, 1880), 337.

their candidates three thousand miles for Holy Orders, is more than presumptive proof that the Church here are, and ever have been” of the opinion that validly-consecrated bishops are essential to a valid Church.<sup>42</sup>

*The Pennsylvania (White) Plan*

The Pennsylvania Plan was the only major scheme that sought first to reorganize the Church in all the states into a single ecclesiastical entity. This plan, developed by William White, who is often said to be the “Founding Father” of the American Episcopal Church,<sup>43</sup> has sometimes been called the “Federal Plan.”<sup>44</sup> This is an unfortunate misnomer. White’s program was first outlined in *The Case of the Episcopal Churches in the United States Considered*.<sup>45</sup> This document generally is

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<sup>42</sup> William White, *Memoirs*, 338.

<sup>43</sup> E. Clowes Chorley, “The General Conventions of 1785, 1786, 1789,” *Historical Magazine of the Protestant Episcopal Church* 4 (December 1935): 265. “In a very real sense his memory should be venerated at the Father of the American Church.” See also, Richard G. Salomon, “Mother Church –Daughter Church–Sister Church,” *Historical Magazine of the Protestant Episcopal Church* 21 (December 1952): 418; William J. Seabury, *An Introduction to the Study of Ecclesiastical Polity* (New York: Crothers and Korth, 1894), 193-94; and James A. Muller, *The Government of The Episcopal Church* (Cambridge, Massachusetts: Episcopal Theological School, 1929), 1.

<sup>44</sup> Chapter Three of Clara O. Loveland, *The Critical Years. The Reconstitution of the Anglican Church in the United States of America: 1790-1789* (Greenwich, Connecticut: Seabury, 1956), is entitled, “The Federal Plan for Reorganization,” and is an analysis of White’s position in the *Case*. Dr. Loveland acknowledges that she took the term “federal” from Samuel D. McConnell, *History of the American Episcopal Church*, 1904 edition.

<sup>45</sup> William White’s “*Case of the Episcopal Churches in the United States Considered*,” ed. Richard G. Salomon (Philadelphia: Church Historical Society, 1954).

considered to be the initial precursor to The Episcopal Church's Constitution of 1789 and hence must be examined carefully.

Written during the summer of 1782 at a time when White, along with many others, thought England might not recognize the independence of the American states, the *Case* was primarily concerned with outlining a scheme of union for the Church in the United States. White assumed that it would be completely impossible to secure consecration of an American bishop from the English line. Thus, although he lamented the necessity of so acting, he felt that the need for a continuing witness to the Christian faith dictated that the reorganization of the former Church of England in America be conducted in the absence of a bishop.<sup>46</sup>

Events contemporary with the publication of the *Case* in fact negated that assumption. In early August 1782 it became apparent that England was willing to recognize American independence.<sup>47</sup> If this were so, then it was more likely that the Church of England could be persuaded to consecrate an American candidate to the episcopacy. Nonetheless, the *Case* was printed and widely distributed among members of the American Church, and had considerable influence on subsequent constitutions.

Chapter Three of the *Case* contains the "sketch of a frame of government" as follows:

As the churches in question extend over an immense space of country, it can never be expected that representatives from each church should assemble in one place; it will be more

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<sup>46</sup> White, *Case*, 29-30.

<sup>47</sup> Richard G. Salomon, Introduction to White, *Case*, 9.

convenient for them to associate in small districts, from which representatives may be sent to three different bodies, the continent being supposed divided into that number of larger districts. From these may be elected a body representing the whole.

In each smaller district, there should be elected a general vestry or convention, consisting of a convenient number (the minister to be one) from the vestry or congregation of each church, or of every two or more churches, according to their respective ability of supporting a minister....

The assemblies in the three larger districts may consist of a convenient number of members, sent from each of the smaller districts, equally composed of clergy and laity, and voted for by those orders; the presiding clergyman to be always one, and these bodies to meet once in every year.

The continental representative body may consist of a convenient number from each of the larger districts, formed equally of clergy and laity, and among the clergy, formed equally of presiding ministers and others to meet once in three years.<sup>48</sup>

White's plan is cited in all major sources as being substantially identical with the final form of the Church's polity: "The Constitution of the American Episcopal Church to this day bears the imprint of his

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<sup>48</sup> White, *Case*, 25.

hand, more than that of any one man."<sup>49</sup> If so, what was White's purpose in recommending the three-tiered governmental framework? The answer seems to be provided in the first paragraph of his third chapter: because the parish churches extend over such a great expanse of territory, it is difficult to secure a single convention with representatives from each parish, so there must be instead a series of ascending conventions.

Nowhere does White declare in the *Case* his intention of establishing a federal government or of securing a distribution of governing power between a central and member governments. Rather, he is concerned with how to achieve a satisfactory system of representation within what is a unitary government. Since the territorial extent of the Church is considerable, and transportation and communication difficult, he concludes that a system of interrelated, multiple, representative conventions rising from the local congregation to the "continental representative body" is the best solution.

He does not attempt to protect the sovereign powers of the Church in the states by limiting the power of the continental convention in favor of diocesan power. Rather, he would limit governing powers of all the bodies: "The use of this and preceding representative bodies is to make such regulations, and receive appeals in such matters only, as shall be judged

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<sup>49</sup> Walter H. Stowe, "William White, Ecclesiastical Statesman," *Historical Magazine of the Protestant Episcopal Church* 22 (December 1953): 374. Consult also Muller, *Government*, 7-8. Muller states, in reference to the Fundamental Principles of 1784: "This is essentially the plan which had been proposed in White's pamphlet." Salomon, Introduction to White, *Case*, 7 says, "It contains the first draft of the organization of the Church as it is today."

necessary for their continuing one religious communion."<sup>50</sup>

White clearly favored decentralization, however. He felt it was good "... to retain in each church every power that need not be delegated for the good of the whole."<sup>51</sup> At another place in the *Case*, he says that "there is great truth and beauty in the following observation of the present Bishop of St. Asaph, "the great art of governing consist in not governing too much."<sup>52</sup> Consequently, White was interested in protecting the individual churchman from "too much" ecclesiastical legislation by setting up an elaborate system of representation; building from the individual parish member, through a series of more-inclusive representative bodies, to a final group continental in its composition and scope.

Nonetheless, the controversy concerning White's *Case* at the time it was published was not over the locus of political power. It was entirely over its

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<sup>50</sup> White, *Case*, 26.

<sup>51</sup> Salomon here, in annotating White's *Case*, footnotes Article Two of the *Articles of Confederation*: "Each state *retains* its sovereignty, freedom and independence, and *every power*, jurisdiction and right which is not by this confederation expressly *delegated* to the United States, in Congress assembled." See Salomon, annotation to White, *Case*, I25n43. (Italics in source.)

To quote a contemporary source which was designed to guarantee the sovereignty of the States in the Confederation for an inferential interpretation of White's statement is very misleading. There is no objective reason to believe that White was stressing either parochial or diocesan supremacy in the *Case*. If he were interested in protecting sovereignty, it is highly significant that he did *not* follow the obvious model of the *Articles of Confederation* which Salomon cites, and include this protection specifically in his "sketch of a frame of government."

<sup>52</sup> White, *Case*, 27.

quasi-Presbyterian plan of government and the introduction of the laity on an equal footing with the clergy to ecclesiastical councils.<sup>53</sup> The possibility of consecration by clergy of a person who was to exercise episcopal duties was rejected by the New England clergy and other persons. This group was also hesitant to accept the idea of lay representation as well.

*Connecticut and Pennsylvania Plans Opposed.* Essentially, then, there were two main views towards the reconstitution of the Church after the Revolution since Maryland was willing to participate in the Pennsylvania Plan. Connecticut and New England, on the one hand, felt that no discussion for organization among the local churches could be had until there was a bishop in The Episcopal Church in America. White and the churches of the East and South felt that the congregations should

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<sup>53</sup> The laity have always played a prominent and official role in the American Episcopal Church, and the propriety and catholicity of this has often been both challenged and defended. While the implications of lay participation are manifold, they will not be developed systematically here, though occasional reference will be made to lay governmental responsibilities and duties at various points. For varied discussions see G. MacLaren Brydon, "The Origin of the Rights of Laity in the American Episcopal Church," *Historical Magazine of the Protestant Episcopal Church* 12 (December 1943): 313-38; C.C. Edmunds, Jr., "The Revival of Minor Orders—The True Method of Enlisting Lay Help," *Church Eclectic* 17 (1889): 219- 229; Investigator, "Permanent Deacons as Assistants in Large Parishes," *Protestant Episcopalian* 7 (1836): 383-86; "The Laity in the Church. Has the Experiment of the American Church Succeeded?" *Church Eclectic* 7 (1879): 374-80; R.W. Norman, "Women's Work in the Church," 36 *Church Review* 36 (1881): 213-40; Albion K Parris, "The Place of the Laity in the Church," *Protestant Episcopal Review* 13 (1900): 301-11 (1900); "Report of a Meeting of the Standing Committee of the Diocese of M--," *Church Eclectic* 9 (1881): 842-45; and Walter H. Stowe, *More Lay Readers than Clergy: A Study of the Office of Lay Reader in the History of the Church* (Philadelphia: Church Historical Society, 1954), 11-22.

organize, make whatever minor revisions were essential in Anglican discipline and liturgy to continue the Church, and secure a bishop as soon as it was possible to do so.<sup>54</sup>

From 1784 to 1789 there were several Constitutional Conventions that drafted and debated versions of what finally became the Constitution of the Episcopal Church. White was very active in all of them. Bishop Seabury and the New England clergy only joined with the churchmen from the southern and middle states in 1789 to form the Protestant Episcopal Church in the United States of America.

*Constitutional Documents and Conventions from 1784: The "Fundamental Principles of 1784."*

The first meeting of members of The Episcopal Church from various states that included a consideration of ways of reorganizing the Church was held in New Brunswick, New Jersey on May 1784. In New York on October 1784 a larger group met, called by the New Brunswick Assembly. Present were clergy and/or laymen from Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia. This convention of only twenty-seven members presented the following "Fundamental Principles":

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<sup>54</sup> See Loveland, *The Critical Years*, 167-235 for the best discussion of the progress of these two schemes. She feels that the union was very nearly impossible, and only precariously achieved by the compromise of both groups and the alteration in the plans of each, in part due to changes in the environmental situation. Structurally and essentially, nonetheless, it was White's plan that prevailed.



- I. That there shall be a General Convention of the Episcopal Church in the United States of America.
- II. That the Episcopal Church in each State send Deputies to the Convention, consisting of Clergy and Laity.
- III. That associated congregations in two or more States may send Deputies jointly.
- IV. That the said Church shall maintain the doctrines of the Gospel as now held by the Church of England; and shall adhere to the Liturgy of the said Church, as far as shall be consistent with the American Revolution and the Constitution of the respective States.
- V. That in every State where there shall be a Bishop duly consecrated and settled, he shall be considered as a member of the Convention *ex officio*.
- VI. That the Clergy and Laity, assembled in Convention shall deliberate in one body, but shall vote separately. And the concurrence of both shall be necessary to give validity to every measure.
- VII. That the first meeting of the convention shall be at Philadelphia, the Tuesday before the Feast of St. Michael next; to which it is hoped and earnestly desired that the Episcopal churches in the respective States, will send their clerical and lay deputies, duly instructed and authorized to proceed on the necessary

business herein proposed for their deliberation.<sup>55</sup>

As in *White's Case*, the question of federalism does not appear to have been the concern of the persons who wrote these "principles of ecclesiastical union." There is no division of power. However, a case can be made for the position that the union proposal does have several federal or confederal characteristics, with the Church in the several states being the basis of the federation, because the voting procedure in the Sixth Principle was held, in the Convention of 1785, to mean that voting was counted by states and not by individuals.<sup>56</sup> But that is the extent of it.

Various proposed articles of union for Episcopal parishes within each state were drawn up during this period. It is informative to examine these proposals to see whether they evidence a concern for protection of diocesan or parish political powers.

The accounts of various state conventions of the time lead again, as in the instance of *White's Case*, to the conclusion that if the government of the national Church were to be one of restricted powers, then the residue of the governing power should rest in the parish churches and not in the dioceses. Thus, the proposed principles each of Massachusetts, Virginia, Pennsylvania, South Carolina, and Maryland contain the hope that "no powers be delegated to a general ecclesiastical government, except such as cannot conveniently be

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<sup>55</sup> Perry, *Journals*, 1:12-13.

<sup>56</sup> Perry, *Journals*, 1:18.

exercised by the clergy and laity in their respective congregations.”<sup>57</sup>

The same wording was used in one of the six “Articles of Convention” of the Church in Pennsylvania in May 25, 1784 and was cited by the convention of the Church in Maryland in June 1784 as being the basis of Maryland’s “Declaration of Religious Rights” of June 23, 1784.<sup>58</sup> It also appears in Article VI of the Articles of the Massachusetts Convention of September 8, 1784<sup>59</sup> and of the South Carolina Convention of May 1786.<sup>60</sup>

On May 23, 1785, a convention “consisting of thirty-six clergy and upwards of seventy laymen” in Virginia approved the “Fundamental Principles” of October 1784 after modifying the Fourth and Sixth Articles.<sup>61</sup> The convention added, “that this convention will however accede to the mode of voting recommended in the Sixth Article, with respect to the convention to be holden in Philadelphia, reserving the right to approve or disapprove their proceedings.”<sup>62</sup> Virginia thereby attempted specifically to reserve for herself the right to “nullify” any decisions of the Philadelphia Convention of 1785 that were contrary to her wishes.

The New Jersey Convention of July 6, 1785 also accepted the “Fundamental Principles” and elected deputies to the Philadelphia Convention, “with power to accede, on the part of this convention, to the fundamental principles...and to adopt such measures, as

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<sup>57</sup> White, *Memoirs*, 93.

<sup>58</sup> Perry, *Journals*, 3:14-34, especially 29-30.

<sup>59</sup> Perry, *Journals*, 3:64.

<sup>60</sup> Frederick Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina* (Charleston: E. Thayer, 1820), 474.

<sup>61</sup> Perry, *Journals*, 3:47.

<sup>62</sup> Perry *Journals*, 3:48.

said general convention may deem necessary for the utility of the said church, not repugnant to the aforesaid fundamental principles.”<sup>63</sup>

A convention of the Church in Maryland on June 22, 1784 added a statement of what it considered to be the necessary scope of the powers of the governing bodies of the Church.<sup>64</sup> But significantly, the Maryland Convention did not attempt to divide the powers between the Convention of the National Church and the diocesan conventions. There was no attempt to protect the diocesan powers from exercise by the national Church.

Three conventions were subsequently held that suggested various changes in the previous drafts. They were held on September 27-28, 1785 and June 20, 1786, both in Philadelphia, Pennsylvania, and October 10-11, 1786, in Wilmington, Delaware. But the main progress towards reconstituting the Church in the United States was achieved elsewhere, when Samuel Provoost of New York and William White of Pennsylvania were ordered bishop by the Archbishops of Canterbury and York with the participation of the Bishops of Bath and Wells and of Peterborough, in the Chapel of the Archiepiscopal Palace of Lambeth on February 4, 1787.<sup>65</sup> With the earlier consecration of Connecticut’s Samuel Seabury on November 14, 1784, there were now three bishops in the American Church. Valid independence by the American Church from the Church from England was finally fully possible.

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<sup>63</sup> Perry *Journals*, 3:56.

<sup>64</sup> Perry, *Journals*, 3:30-31.

<sup>65</sup> White, *Memoirs*, 27.

*The General Convention and Constitution of 1789*

It was during the two sessions in July and September of 1789 that the reorganization of the Episcopal Church was finally settled. Previous constitutional documents had been but proposals for union. On August 8, 1789, a constitution was adopted of which later revisions were only in the way of amendment. White says that there was a "conviction generally prevailing in the convention, that the formerly proposed constitution was inadequate to the situation of this Church" because it did not assume that there would be the completed episcopate (the three resident bishops needed to consecrate additional bishops) made possible by the joining of the two English-consecrated bishops and the single Scottish-consecrated into a single ecclesiastical organization.<sup>66</sup>

Indeed, the proceedings of this session were largely conditioned by that possibility. After drawing up preliminary Canons and a Constitution, and preparing a report of their actions for the English Archbishops,<sup>67</sup> the Convention adjourned until September 29, a month and a half later, sending a special request to Bishop Seabury and the New England Clergy for their presence at the coming convention. The hope was that the time was propitious for the formation of a lasting union of all the Episcopal Churches in the several states.

The expectation of participants in the summer convention that New England representatives would join them when they reconvened in the fall was achieved. On September 20, 1789, when the adjourned Convention met once again in Philadelphia, Samuel Seabury, Bishop of Connecticut, and three other New

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<sup>66</sup> White, *Memoirs*, 166.

<sup>67</sup> Perry, *Journals*, 1:63-90.

England clergymen were in attendance.<sup>68</sup> On October 2, after securing the modification of Article III,<sup>69</sup> the New England Clergy accepted the Constitution as drawn up by the summer convention. Thus, October 2, 1789, may be considered to be the date when the former Church of England in America reconstituted itself into the Protestant Episcopal Church in the United States of America. The Constitution was somewhat revised from earlier constitutional proposals, especially in regard to the governing role of bishops, the composition of General Convention, and to some extent, in the amending process.

There still, however, was no statement as to a division of powers between the General and diocesan conventions or as to the limits of the governing power of General Convention itself. It is true that the Constitution rested upon and operated primarily through the actions of the Church in the states. This is a significant change from the scheme outlined in *White's Case*, which was based essentially upon parochial action. But, as was the situation in the proposals since 1784, on the face of the 1789 Constitution, no article or section was included for the purpose of defining a constitutional division of powers between the Church's central government and the governments of the dioceses.

Therefore, in contradiction to those who believe the government of The Episcopal Church to be either confederal or federal on the basis of an alleged analogy

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<sup>68</sup> "The Rev. Dr. Samuel Parker, Deputy from the churches in Massachusetts and New Hampshire, and the Rev. Mr. Bela Hubbard and the Rev. Mr. Abraham Jarvis, Deputies from the church in Connecticut." See Perry, *Journals*, 1:93.

<sup>69</sup> Perry, *Journals*, 1:83-85.

between the Articles of Confederation or the United States Constitution's division of power, it can be said that there is neither explicit nor implicit in the Church's Constitution of 1789 any definition of a division of powers, even though the framers of the Constitution had the models of both the Articles of Confederation and the U. S. Constitution before them.

*Subsequent Constitutional Amendments*

If there was no explicit division of powers provided for at the inception of the Episcopal Church, has such a provision been added to the constitution subsequently, or, if not, can a division of powers be reasonably inferred from the totality of the Constitution of 1789 and later amendments?

The Constitution of the Church has indeed undergone considerable revision and reorganization. Aside from changes in substance since 1789 there has been considerable change in form, especially in 1901. Whereas the original Constitution was only two or three pages long and consisted of nine brief and single-paragraphed articles, the Constitution after the 2009 Convention was ten pages long with twelve articles.

Nevertheless, an examination of the constitutional amendments accepted by General Convention shows that no section has been added to the Constitution either for the specific or incidental purpose of affirming or denying the federal or confederal structure of the Church or of a division of power between the central and diocesan governments.<sup>70</sup>

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<sup>70</sup> Article 3, section 4 of the Revised Constitution as proposed by the Joint Commission on Revision in March 1895, said in part, "the powers not committed to the General Synod or to the Provincial Synods by this Constitution, nor prohibited by it to the dioceses are reserved to the

*Source and Scope of the Canons.*

The enactment of Canons by General Convention is equivalent to the passing of laws by civil governments. That is, a Canon, as far as the American Episcopal Church is concerned, is a law for the Church. When the 1789 Constitution was adopted, there were seventeen Canons not arranged in any apparent sequence. After the most recent General Convention in 2009 there were sixty-six Canons arranged under five titles.

The summer session (July 20 - August 8) of the 1789 Convention adopted ten canons.<sup>71</sup> These had been prepared largely by a committee appointed to draw up a body of canons.<sup>72</sup> Actually, these canons were passed by the Convention one day *before* the Constitution was finally accepted.<sup>73</sup> This fact has been used by some students of the Church's government to show that the Canons are not necessarily made pursuant to the Constitution; that there is, indeed, no subject about which General Convention cannot legislate.<sup>74</sup>

These early canons were concerned only with establishing the qualifications of candidates to Holy Orders throughout the Church. Consequently it was

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dioceses respectively, save that no diocese or province shall legislate in regards to doctrine or worship." See *Churchman* 71 (March 16, 1895): 379. This clause apparently was not the object of public discussion. It was not debated in the 1895 General Convention and was not reported on the floor of either House of the Convention for action. It died, for reasons unascertainable, in the Bishops' Committee on the Constitution.

<sup>71</sup> Perry, *Journals*, 1:79-82.

<sup>72</sup> Perry, *Journal*, 1:72.

<sup>73</sup> Perry, *Journal*, compare 1:79 with 1:83.

<sup>74</sup> See Hoffman, *A Treatise on the Law of the Protestant Episcopal Church*, 222; and Vinton, *Manual Commentary*, 79-80.



clearly determined that while candidates were required to have the approval of and guarantee of support from the ecclesiastical authorities in their diocese, General Convention was competent to set any qualification supplementing or obliterating those of the dioceses. The Canons ensured, for example, the approval or disapproval of candidates to the Episcopacy by representatives of the bishops, clergy, and laity in all dioceses of the Church, even though after consecration they would be jurisdictionally restricted to the exercise of their office within their own dioceses only, except by invitation.<sup>75</sup>

These first Canons also showed that General Convention could significantly control the internal instruments of government of the dioceses even though the Constitution did not give them specific authority so to do. As but one example, Canon Seven stated in part, "In every state in which there is no Standing Committee, such Committee shall be appointed at its next ensuing Convention."<sup>76</sup>

It was recognized by the very committee that drafted these first Canons that they were quite incomplete. Thus, the fall session of this Convention, at which the New England Churches were for the first time present, agreed to a list of seventeen canons. The first nine canons were identical to the ten of the previous sessions.<sup>77</sup> Canons X through XVII were newly passed,

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<sup>75</sup> More will be said about this and other implications of the governing role of bishops in relation to the question of federalism in section four of this article.

<sup>76</sup> Perry, *Journals*, 1:81. For an explanation of Standing Committees, see Dator, *Many Parts*, 116-17.

<sup>77</sup> The only exceptions were that Canon VII of the first session was joined to Canon VI; and to Canon VIII (now VII) which required that

and were concerned with guiding the conduct of the parish clergy in their liturgical and pastoral relations, and in establishing minimal discipline for the laity, or regulating aspects of parish government by clergy and laity.<sup>78</sup>

Thus, the second session of this first General Convention not only presumed competence for controlling diocesan governments and the qualifications of ministers, but for the operation of parochial government as well. Such far-reaching authority is more typical of a unitary than of a federal or confederal government, especially inasmuch as the Constitution did not specifically or by reasonable inference give General Convention these powers.

The Canons have been codified, revised, and rearranged several times in the Church's subsequent history. At no time, however, either by canonical legislation or constitutional amendment, have enacted provisions designed fundamentally to limit the power of the General Convention in favor of diocesan power been enacted, nor has a division of governing authority between the central and the affiliate governments been established.

Moreover, the Constitution of the Church not only does not specifically restrict the power of General Convention, but also it does not specifically empower the Convention to act in many significant areas. This lack of specific constitutional authority itself has only rarely been successfully invoked to attempt to prevent

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candidates for Orders know Greek and Latin, was appended a clause for exemption under certain circumstances.

<sup>78</sup> Canons X, XI, XVII, XIV, XV, and XVI; Canons XII, and XIV, and Canons XIX, XVII, respectively.

General Convention from passing canonical legislation. Thus, General Convention has enacted canons touching on almost all matters of ecclesiastical governance, and has preempted various fields from diocesan legislation. Consequently, there is little of significance about which the dioceses possess exclusive jurisdiction—and even this may at any time be removed by General Convention through canonical legislation or constitutional amendments.<sup>79</sup>

#### IV.

##### **Applying governance criteria to the Constitution**

Having examined in some detail the origins of the American Episcopal Church in relation to the unitary/federal question, it is now necessary to examine that structure in terms of the other criteria developed for determining the locus of authority.

##### *Amendment*

The process by which a constitution may be amended is as crucial a distinguishing institutional feature of federal and confederal governments as is the presence of a constitutional division of powers.<sup>80</sup> In a federation, constitutional amendment requires the joint participation of the central and associated governments. If the Constitution may be amended by the central government alone, even if the process is more difficult than ordinary legislation, the government is probably unitary. If the associated governments, together or

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<sup>79</sup> Hill Burgwin, "The National Church and the Diocese," *Church Review* 45 (1885): 423-55.

<sup>80</sup> Livingston, *Federalism and Constitutional Change*, 380 ff. Livingston considers the very test of a federal government to be the way in which the constitution is amended.

singly, are able to amend the Constitution, the government is probably confederal.

Nowhere is a unitary structure for the Church's government more strongly suggested than in the method of constitutional amendment. No formal participation by the dioceses (or parishes) in the amending process is required. General Convention is competent to amend the Constitution itself, although it does take the acceptance of two consecutive Conventions.<sup>81</sup>

*Nullification or Secession*

Closely connected to the method of amendment is the question of nullification and secession. If an associated government may nullify an act of the central government that is intended to have effect within or upon the associated government, then the structure of the union is probably confederal. If, on the other hand, the central government legally may modify or eradicate the structure or power of an associated government, then the association is unitary. In a federal government, under the division of powers, the constituent governments must obey decisions of the central government made in accordance with its constitutional powers. There is, however, a deposit of power and an essential governmental structure belonging to each associated government that the central government may not obliterate.

Neither nullification nor secession is specifically allowed or reasonably implied in the Constitution of the Episcopal Church. Until recent activities, one example of

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<sup>81</sup> Perry, *Journals*, 1:84, 100.

what at first appears to be secession occurred during the Civil War and was the result of civil action within the United States. It did not occur because of a desire on the part of the Southern dioceses to leave the American Episcopal Church because of theological or related differences. Rather, it arose entirely because of the beliefs that led to the creation of The Episcopal Church in the United States—and the Church of England itself—to begin with, namely, the Church is to be governmentally-organized according to the nation-state in which it resides. Since the Southern states tried to secede from the United States of America, the southern dioceses of the Church felt they had to do the same.

Importantly, The Episcopal Church in the United States refused officially to recognize the Confederate Episcopal Church, considering the Church in the South as remaining in the American Episcopal Church. Therefore, the confederal principle of secession has neither been vindicated in practice nor allowed in theory as far as the American Episcopal Church is concerned, although it has been asserted on occasion by various Episcopalians,<sup>82</sup> and is mistakenly sought to be exercised now.

On the other hand, the essentially unrestricted power of General Convention over the diocesan governments is clear. By virtue of the unitary method of constitutional amendment and because General Convention is in no way limited in the exercise or definition of its powers by the Constitution, the governmental structure and powers of the dioceses exist by virtue of the actual or tacit decisions of General Convention.

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<sup>82</sup> See Dator, *Many Parts*, 118-25 for a discussion of the Confederate Episcopal Church.

In conclusion, then, the nature and provisions of the Constitution, its method of enactment and amendment, and the mutual relationship of governing powers between the dioceses and General Convention are all definitely on the side of a unitary government with the locus of final power being in the General Convention.

*Voting at General Convention*

The General Convention is the supreme governing body for The Episcopal Church. It is a primarily representative body of bishops, priests, and laymen, combining within it ultimately all legislative, executive, and judicial powers for the Church in the United States.

There are, however, three questions about the characteristics of General Convention that must be answered in terms of the question of the Church's constitutional structure. What is the basis of apportionment? To whom do the Convention deputies owe responsibility or accountability? What is the voting procedure in General Convention?

The method of apportionment of the central legislature has significance for understanding the form of government. In a federal government the member governments are represented as such in at least part of the central legislature, which may be bicameral in form. In a confederal government, the associated states are represented as such in the central legislature, which may also be bicameral.

General Convention appears to be bicameral. There is a House of Bishops and a House of Clerical and Lay Deputies. But it is the Lower House (deputies) rather than the Upper that seems to exhibit a federal or

confederal organization. Moreover, the vote by Orders in this House (in which clergy and laity are polled separately) tends more towards producing a tri-cameral than a bicameral legislature.

Clerical and lay deputies to the General Convention are chosen by diocesan conventions, and in General Convention, during a vote by Orders, the votes of the members of each Order in each diocese are counted corporately as a single vote. Consequently, in a vote by Orders, it is the decision of the Orders in the dioceses that is presented in the vote, not merely the sum of a majority of individual wills.<sup>83</sup> General Convention may seem in this to evince federal or even confederal characteristics. For example, a confederal presumption is suggested by the fact that each diocese, regardless of size, is entitled to the same number of deputies as every other diocese. Coupled with the vote by Orders provision, the suggestion may at first seem convincing.

In a confederal government, all of the deputies to the central government are ultimately responsible to the associated governments rather than to "the people" of a geographic area. They are chosen by the member governments and are expected to attempt to carry out their electors' commands in order that the division of powers and the associated governments' rights may be secured. While members of the House of Deputies are elected by the associated governments, this is not true of all members of General Convention. Members of the House of Bishops hold their membership simply by virtue of being bishops. They represent no one and have no legal or formal representative responsibility to their

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<sup>83</sup> See Dator, *Many Parts*, 69-73 for a full exposition of the voting patterns at General Convention.

dioceses. It should be remembered also that bishops have executive, legislative, and judicial governing powers and responsibilities, both in regard to their dioceses and the National Church. Although their initial election is by the diocese over which they are to exercise jurisdiction, they must be confirmed in their election by a majority of all bishops, and a majority of representatives of the whole clergy and laity of the Church, either evidenced by Standing Committees or by the House of Deputies of the General Convention.

The election of a bishop is not approved by the diocesan conventions, which would be the federal or confederal method. The Standing Committees, which give approval, have a basis and continuance that is even more directly dependent upon the canonical legislation of General Convention than is that of the diocesan convention. Indeed, this entire arrangement is subject to the pleasure of General Convention, and may be altered by General Convention, either by constitutional amendment or canonical legislation.<sup>84</sup>

Thus, because of the form of membership in the House of Bishops, it is possible to conclude that the General Convention does not conform to a confederal pattern of representation (in which all legislators would represent the associated governments). It is still possible, however, to argue that the representation is federal in character, however, since in a federal government it is possible for only a portion of the central legislature's members to represent the associated governments. This premise, however, requires further

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<sup>84</sup> For a review of the history of General Convention legislation concerning voting patterns see Dator, *Many Parts*, 63-68.



examination of the method of voting in the General Convention.

The voting procedure in General Convention has interesting ramifications. If voting in the central legislature is tallied entirely on the basis of member state units rather than of individuals voting, a confederal structure is suggested; if it is tallied in part on the basis of member states, the structure may be federal. In the House of Bishops there is no formal requirement that the vote be counted by dioceses. Even when one diocese has several bishops in the House, the vote of each bishop counts separately, without regard to diocesan affiliation.<sup>85</sup>

The normal voting procedure in the House of Deputies is the same as in the House of Bishops. However, the vote by Orders requirement on some measures, and possibility on all, suggests, it may seem at first, a federal method, (but not a confederal one, since only part of the legislature is involved). The voting, however, is actually taken of the Orders in the dioceses rather than simply of the dioceses themselves. This casts the federal presumption in a different light and suggests that the method is not essentially connected with the question of federalism at all. The vote by Orders, instead, is a convenient way to secure the approval of representatives of the Church's three Orders. This voting method is designed to protect the "veto" rights of each of the Orders, rather than that of the diocesan governments. Indeed, the Constitution calls the

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<sup>85</sup> The method of voting in the House of Bishops has always been relatively simple, though not explicit in the Constitution until 1901. See *Journal of the General Convention* (1901), 35, Article 1, section 2.

procedure a “vote by Orders,” not a “vote of dioceses.”<sup>86</sup> Thus, even the voting pattern in the House of Deputies, taken by itself, does not lead to the necessary conclusion that the system of government is federal (or confederal).

Considering the structure of General Convention, then, it may appear that some of General Convention’s arrangements indicate that the Church’s government is federal or perhaps even confederal. Yet, these features do not lead to that conclusion, especially in the absence of a constitutionally guaranteed division of power. This division does not exist in the government of The Episcopal Church, and the basis of apportionment and voting procedures in General Convention when considered both by themselves and in the fact of this absence indicates a unitary government.

### *Chief Executive*

The chief executive of The Episcopal Church is the Presiding Bishop. This officer began as no more than the bishop who, according to seniority, presided over the House of Bishops. Now elective by the House of Bishops with the approval of the House of Deputies, the Presiding Bishop not only presides over the bishops, but also, in the presidency over the Executive Council, is the most important executive and administrative officer of the Church.

As far as the question of the Church’s constitutional structure and locus of authority is concerned, it is important to state that the diocesan

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<sup>86</sup> The provision to vote by order goes back to the “Fundamental Principles of 1784” and predates the provision for a bi-cameral legislature. See Perry, *Journals*, 1:13.

governments have no control over the election of the Presiding Bishop. That officer is chosen by General Convention and is dependent solely upon the General Convention for the statement of powers and responsibilities. The office is like that of a “weak-mayor” or a “weak-governor” in the American system of government. It has no federal or confederal characteristics at all.<sup>87</sup>

### *Judiciary*

In a federal or confederal government, it is necessary to have some instrumentalities by which the law of the member governments and of the central government may be adjudicated in their respective spheres. Both the central and component governments need their own system of courts to decide cases according to their assigned jurisdictions in the division of powers. It is also possible that in a confederation, the central government may be forced to rely upon the courts of the associated governments in the execution of all or part of its adjudication. At the same time, because unitary governments may be very decentralized in their operation, it may be difficult to distinguish between a confederal and a unitary judiciary without considering whether or not there is a constitutional division of judicial powers between associated and central governments. A unitary government may utilize the courts of governmental bodies inferior to it in the same way that the central government of a confederation may be required to use the courts of the associated governments. The question of whether the government of the union is finally confederal or unitary in this

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<sup>87</sup> For a review of the history of General Convention legislation concerning the office of Presiding Bishop see Dator, *Many Parts*, 89-93.

instance may be answered by determining whether or not the central government may legally alter this arrangement on its own volition, irrespective of the wishes of the other governing bodies. If it may, the government is unitary. If not, it may be federal or confederal.

According to the Constitution of the Church, the diocesan courts handle all cases involving the lower clergy and the national Canons, from which there is an appeal no higher than the courts of the provinces. And yet, courts for all cases involving bishops are provided for by procedures established by General Convention.<sup>88</sup> Inasmuch as the utilization of diocesan courts is required by the Constitution, it might appear that the Church's structure is confederal, were it not that bishops are tried only by methods specifically determined by General Convention, and the Constitution both provides for no division of power and may be amended by General Convention alone. Consequently, the arrangement is that of a unitary government utilizing the judicial systems of inferior bodies over which it enjoys ultimate control.

#### *Interpreting the Constitution*

One of the problems most crucial to the question concerning the Church's Constitution is how disputes over the meaning of the Constitution are resolved. In a confederation, constitutional interpretation is, finally, up to each associated government individually. In a unitary government, the central government possesses final interpretative authority. In a federation, there may

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<sup>88</sup> For a review of the history of General Convention legislation concerning church courts see Dator, *Many Parts*, 99-104.

be either a body independent of both governments so empowered, or the courts of the national government may assume the function.

The Constitution of the Episcopal Church makes no specific provision for a mode of constitutional interpretation. The courts of the Church do not perform this function, and the dioceses are not permitted the power. Accordingly, the Constitution is what the General Convention says it is. There is no body in the Church which can determine authoritatively whether General Convention has acted constitutionally or not, save General Convention itself.<sup>89</sup>

### *Membership*

The question of membership is significant for the constitutional problem. In a federation, there is dual membership or citizenship. The individual is citizen both of the central and associated governments. In a confederation, the individual ordinarily is not fully a citizen of the central government, but only of the associated government in which the person lives. Under a unitary system, citizenship is determined finally by the central government, although the individual may have special affiliation, ultimately according to national laws, with certain inferior governing bodies.

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<sup>89</sup> Although the Constitution since 1901 has allowed General Convention to establish a "Final Court of Appeals on matters of Doctrine, Faith, or Worship," none has thus far been established. For arguments on the merits of establishing such a court of appeals, see Harold A. Prichard, ed., *The Hartford Papers* (Spencer, Mass.: Heffernan Press, 1932), 199-252; George H. Bates, "Courts of Appeal and the General Convention," *Church Review* 48 (1886):113-30; Stephen P. Nash, "the Constitution of Ecclesiastical Courts," *Church Review* 48 (1886):284-92; and Joseph Packard, Jr., "Ecclesiastical Courts of Appeal," *Virginia Seminary Journal* 2 (1888):8-19.

The exact definition of membership in The Episcopal Church is still unclear, but one matter is certain. Membership may be authoritatively determined by General Convention. There is no dual citizenship or membership as such, but only membership in the Church (meaning that portion of Christ's Church organized as the Protestant Episcopal Church in the United States of America), ordinarily expressed by affiliation with a parish in a diocese.<sup>90</sup>

*Complete Set of Governmental Instrumentalities and Resources.*

Both the central and associated governments in a federation should possess constitutionally a complete set of governmental institutions relative to the powers assigned to them by the division of powers. They also should possess sufficient human and monetary resources to exercise their powers independently. In a confederation, it often is constitutionally necessary for the central government to rely upon the institutions and resources of the associated governments in carrying out

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<sup>90</sup> Several elements in the Canons imply membership in The Episcopal Church, rather than in a specific parish or diocese. Since 1835, "all persons who are members of this Church," have been declared by the Constitution of the Foreign and Domestic Missionary Society to be members of the Society. In addition there is the canonical provision for "Removal to another congregation," which is currently part of canon 1. 17 and dates back to 1853. Until a 1982 revision (effective in 1/1/1986) this canon spoke of "a communicant or baptized member in the parish" rather than "of the parish." Yet when speaking of a person's relationship to the general church, it used the phrase, "of the Church." After the 1982 revision, the initial reference to a "member in the parish" became a reference to "a member of this church," though a later reference in the same canon does now refer to "a member of the new congregation." See Perry, *Journals*, 2:695; and Canon I. 17 (1982).

many of its governing powers. Under a unitary system, the central government may utilize the arms and members of inferior governing bodies, but this is not a fundamentally constitutional limitation.

It may appear superficially that the national Church is reliant upon the dioceses in several areas for governmental institutions, human resources, and money in carrying out its program. The national Church is reliant upon the diocesan courts for the trial of the lower clergy, and upon the provinces for its courts of appeal. The Presiding Bishop originally was simply the oldest diocesan bishop called upon to serve as the national Church's executive and administrative head, and there was no full-time, coordinate national administration until well into the Twentieth Century. Finally, the national Church appears wholly reliant upon the dioceses and parishes financially.<sup>91</sup> Do these things indicate a confederation?

They do not, because these arrangements, while highly decentralizing and confederal-like, may be altered at any time by General Convention whether by constitutional amendment or simple canonical enactment. The system is not essential. It is dependent upon the pleasure of General Convention, and not upon a constitutional arrangement over which the General Convention has no ultimate control, as would be the case in a federation or confederation.

*Conclusion about the locus of authority.*

The final conclusion, then, about the structure of the Church's government is that the government of the

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<sup>91</sup> For further exploration of these issues see Dator, *Many Parts*, 89-93 (the Office of Presiding Bishop), 96-99 (financial support of General Convention);, and 99-104 (the Judicial System).

Protestant Episcopal Church in the United States of America is unitary with the locus of authority in the General Convention. As such, however, it is hugely decentralized. In this decentralization, it often takes on confederal, more nearly than even federal, characteristics. This, however, does not make the Church structurally confederal. There is no essential division of power between the General Convention and the dioceses. In fact, there is no limit at all upon the Convention's governing powers, unless it be the ancient Canons and the necessity for conformity with the Catholic Faith; but these are interpreted finally by General Convention alone. Thus, the government is unitary and the locus of authority is in the General Convention. Dioceses (and local parishes) may not legitimately secede from The Episcopal Church, and if they do leave, they cannot take Church property with them.

## V.

### **What the Courts of the United States will decide.**

Over and above its own constitution and canons, The Episcopal Church must act in conformity with the constitution and laws of the United States and of the several states of the union. Thus, even though the 1st Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" and the 14<sup>th</sup> Amendment has been interpreted as applying this prohibition not only to Congress but also to all agencies of government at all levels, the civil courts in the United States do hear cases involving intra-church disputes if civil or property rights are involved.



The Supreme Court of the United States declared early on and has consistently affirmed that the courts will not intervene in purely doctrinal matters, however. Moreover, the Supreme Court has repeatedly ruled that the basis upon which civil courts must adjudicate disputes among members of a church is on the courts' understanding of the meaning of the church's formal governance structure [*Watson v. Jones*, 1871], in the instance of the Episcopal Church, the Constitution and Canons of 1789, as revised. Thus, in a dispute between a diocese (or parish) and General Convention, if the civil courts can be persuaded to take jurisdiction, then the conflict should be decided with reference to the Constitution, Canons and the decisions of General Convention itself as "the highest church judicatory" to the dispute.

This is sometimes called "the deference approach." Civil courts first determine if the church is constitutionally "hierarchical" or "congregational." If the church is hierarchical, the civil courts will uphold the decisions made by the highest church judicatory as long as the church's own procedures were followed. If the courts determine that the church's procedures were not followed, it may then decide against the highest church authorities or, more likely, send the matter back for the church to decide after properly following its own procedures.

If the courts determine that the church is constitutionally "congregational" then it will uphold the decisions of the majority of the congregation, again, if the church's constitutional procedures have been followed.

More recently, in the case of *Jones v. Wolf*, 1979, the Supreme Court said that, in resolving property disputes, the courts could also rely "on objective, well-

established concepts of trust and property law familiar to lawyers and judges," while still keeping the courts free "from entanglement in questions of religious doctrine, polity, and practice." This is termed "the neutral principles approach".

There has been a flurry of local and state supreme court cases recently involving The Episcopal Church. The initial cases have resulted from parishes attempting to leave their diocese (and hence the Church) and join another entity while taking their Church property with them. A second round of cases has resulted from entire dioceses attempting to leave the Church and join another entity while taking their Church property with them.

Judgments in all of the cases have re-stated that the civil courts should not attempt to resolve doctrinal conflicts. Some have clearly stated that The Episcopal Church is hierarchical and so the courts must follow the decisions of the highest ecclesiastical authority, with the General Convention specifically named. While considering "established concepts of trust and property law" as required in the neutral principles approach, some courts have stated that, while a deed may seem to imply that the members (or officers) of a local parish are the owners of Church property, once a parish joins The Episcopal Church, the parish and its property then become subject to the Constitution and Canons of the Church, with The Episcopal Church becoming the rightful owner of the property.

Other lower courts, however, also relying on the "neutral principles" approach, have sided with the local parish in property disputes, ruling that parishes can take church property with them when they leave. As of this

writing, no state supreme court (with the possible exception of South Carolina) has upheld such a decision, and some have rejected it.<sup>92</sup> Many cases are still under litigation at the state level, often going back and forth from the state supreme and lower courts on various legal technicalities.

More importantly, so far none of the recent cases have been taken under consideration by the United States Supreme Court. Once a case does make it to the Supreme Court, one might anticipate that a Court that eschews "judicial activism" and prides itself on following precedence and a close reading of the 1<sup>st</sup> Amendment will re-affirm its previous decisions, many of which have dealt specifically with The Episcopal Church.<sup>93</sup>

There can be no doubt that by both the "deference" and "neutral principles" approach, dioceses (and parishes) lack the right to leave The Episcopal Church and take Church property with them. A careful reading of the discussions leading up to the formation of The Episcopal Church in the United States by the Constitution and Canons of 1789, and during all of the following General Conventions (including those rare times, such as 1901, when the Constitution was substantially revised and re-ordered) show that as long as the procedures described in the Constitution and Canons are followed, the General Convention is the final

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<sup>92</sup> In *All Saints Parish v. Protestant Episcopal Church*, 685 S.E. 2d 163 (S.C. 2009); 385 S.C. 428, 685 S.E. 2d 163 (2009) the South Carolina Supreme Court ruled that the Diocese of South Carolina did not exercise a trust over a parish corporation that predated the American Revolution and the organization of The Episcopal Church. It is not entirely clear how this decision would affect a parish formed at a later date. See <http://www.judicial.state.sc.us/opinions/HTMLFiles/SC/29724.htm>.

<sup>93</sup> For a partial list of civil court cases involving The Episcopal Church, see Dator, *Many Parts, One Body*, 190.

and supreme authority over all matters of interest to the Church and its members.

As I have shown, the issue of whether The Episcopal Church in the United States is or should be unitary, federal, or confederal has been discussed over and over from the very beginning of its creation. Proposals were made while drafts of the original Constitution were being debated to specify that dioceses (and/or parishes) had powers that General Convention could not abrogate. However, none of these proposals, or anything remotely suggesting them, made it into the 1789 Constitution or into subsequent revisions. While there have been numerous popular and scholarly assertions over the years and now that the Church is federal or confederal, there have been few formal attempts, and certainly no successful ones, that have altered the Constitution from its original unitary nature.

Sometimes people have asked for a "smoking gun"—a formal statement somewhere in the Constitution that declares the General Convention supreme, or that the Church is unitary and not federal and/or that the dioceses or parishes do not have inalienable governing rights including the right to secede—to prove the point once and for all. That would be nice. But it is unnecessary. The Episcopal Church is hierarchical and not congregational. Unitary governance is the default system of governance. For a polity to be federal or confederal rather than unitary, there must be a clear statement in the fundamental constituting document of a division of power between the central and constituent entities. There is no such statement in the Constitution of the Church, while both the formal structure and subsequent decisions by the General

Convention from the beginning down to the present show The Episcopal Church to be unitary with the locus of authority being the General Convention, and that neither the dioceses nor the parishes have governing rights or processes that the General Convention cannot alter as long as it follows constitutional procedures.



## The Episcopal Church and Association Law: Dioceses' Legal Right to Withdraw

Mark McCall<sup>1</sup>

Last November a California court of appeals reversed a decision by the trial court that had given a decisive victory to those within The Episcopal Church (TEC) who had sued the departing diocese of San Joaquin.<sup>2</sup> The appellate court sent the case back to the trial court with instructions to keep distinct two different kinds of issues. One, labeled “ecclesiastical facts” by the appellate court, involves matters that are purely ecclesiastical, such as the nature and identity of ecclesiastical officers and relationships. The other, which could be called “justiciable facts” or facts courts are competent to adjudicate under Supreme Court decisions about separation of church and state, involves matters having to do with the legal entities involved and their corporate governance and relationships. The courts have no role to play in the former, but are required to decide the latter using neutral principles of law.

Given this understanding of the role of the civil courts, the analysis of whether a diocese can withdraw from TEC is straightforward. We first determine what form of legal entity TEC is and then analyze that entity using “neutral principles” of law to decide whether

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<sup>2</sup> *Schofield v. Superior Court*, F058298 (Cal. Ct. App. 5<sup>th</sup> Dist.), slip op. at 8-10.

withdrawal is permitted. In the case of TEC and its dioceses, this is a very simple analysis because the law is settled and unambiguous. The first section of this article outlines this analysis and demonstrates why withdrawal is permitted under the relevant law. The second section examines the objections made to the conclusion reached under this neutral principles analysis by those arguing that dioceses cannot withdraw. It will be seen that these objections depend on transforming the question from one decided under a neutral principles analysis of justiciable or legal facts into one consisting solely of "ecclesiastical facts" and that this contravenes the constitutional principles of justiciability articulated by the Supreme Court and recently reiterated by the decision in the San Joaquin litigation.

I

**Neutral Principles:**

**TEC is Organized as a Voluntary Association of  
Dioceses from which Member Dioceses  
Have a Right to Withdraw**

A neutral principles analysis consists of three parts: first, what is the legal form of TEC; second, what are the constituent members of that legal entity; and third, what are the withdrawal rights of those members.

*TEC Is an Association*

To begin, all sides of the current disputes agree that TEC is what the law has traditionally called a "voluntary association," although the terminology typically used today is "unincorporated nonprofit association." From a neutral principles perspective, therefore, the relevant legal category is association law, which is different in important ways from that governing other forms of



organization. It is surprising how often uninformed commentators dispute that TEC is a voluntary association, but the complaints filed in court purportedly on behalf of “The Episcopal Church” (and the caution indicated by “purportedly” is because this is disputed) acknowledge in their opening paragraphs that TEC is an unincorporated association.<sup>3</sup> This is not controversial.

The legal nature of associations has undergone significant development since TEC was organized in the late eighteenth century. Indeed, until fairly recently the law did *not* recognize a voluntary association as a legal entity distinct from its members. The legal status of associations at the time TEC was organized is reflected in a case brought by an association of English Freemasons in 1802 to recover property. The court would not hear its claim, concluding it was “singular that this Court should sit upon the concerns of an association, which *in law has no existence.*” (Emphasis added.) The suit could only be brought by the members of the association.<sup>4</sup>

The rule that a voluntary association lacked a legal personality distinct from its members began to change in the twentieth century. Most states now recognize voluntary associations as legal entities and allow them to own property, enter into contracts, sue in their own names and otherwise enjoy rights and responsibilities of legal personality. This is reflected in the recommended uniform state statute on associations,

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<sup>3</sup> See, e.g., *The Episcopal Church v. Salazar*, No. 141-237105-09 (Dist. Ct. Tarrant County, Tex.), Plaintiff The Episcopal Church’s Third Amended Original Petition, par. 1 (TEC is “a non-profit association”).

<sup>4</sup> *Lloyd v. Loaring*, 31 Eng. Rep. 1302, 1305 (1802). See Harold A.J. Ford, *Unincorporated Non-Profit Associations* (Oxford: Clarendon Press, 1959).

the Revised Uniform Unincorporated Nonprofit Association Act prepared by the Uniform Law Commission.<sup>5</sup> But that was not formerly the case, and the conscious decision by TEC's founders to organize it as an association reflects their understanding of the nature of the organization they created. The crucial difference between an association and a corporation at that time was that a corporation had a legal personality distinct from its member shareholders; an association did not.

The traditional understanding of voluntary associations demonstrates the importance of the concept of membership. A frequent misconception is that all members of associations are individuals. The Revised Uniform Act provides to the contrary that members of an association can be individuals, corporations, other associations or any legal entity and that membership for legal purposes may be different than the non-legal understanding of membership: "Simply because an association calls a person a member does not make the person a member under this Act."<sup>6</sup> For example, churches such as TEC often regard communicants as

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<sup>5</sup> Revised Uniform Unincorporated Nonprofit Association Act (2008), sec. 5-9 ["Revised Uniform Act"]. The Commission, also known as the National Conference of Commissioners on Uniform State Laws, consists of practicing lawyers, judges, legislators, legislative staff, and law professors, appointed primarily by state governments to draft and promote enactment of uniform state laws. I am indebted to Mike Watson for bringing the Revised Uniform Act to my attention. See Michael Watson, "Litigation Against Disaffiliating Dioceses," Anglican Communion Institute (Sept. 2009) <http://www.anglicancommunioninstitute.com/2009/09/litigation-against-disaffiliating-dioceses-is-it-authorized-and-what-does-fiduciary-duty-require/> (accessed Dec. 7, 2010).

<sup>6</sup> Revised Uniform Act, sec. 2(4)-(5) and comment.

members for ecclesiastical purposes, but they may not be the members of the legal entity under the applicable law. Many associations, e.g., trade associations, have corporations or other entities as their members. One association that has been the subject of much litigation is the National Collegiate Athletic Association, an association of colleges and universities.<sup>7</sup> Some associations are in fact associations of associations. One example is the United Church of Christ.<sup>8</sup>

Another well-known association is the National Association for the Advancement of Colored People, which is actually a corporation at the national level that acts in states and local communities through voluntary associations. The NAACP was involved in the most important legal case on associations ever decided. During the 1950s, the NAACP had a prolonged legal battle with the state of Alabama over its right to operate as a voluntary association in that state. This single case went to the United States Supreme Court four times. In the most important of these decisions, the Supreme Court ruled that there is a right to associate that is protected by the First Amendment.<sup>9</sup> Freedom of association is not explicitly mentioned in the First Amendment, but the Supreme Court ruled that the freedom of association is inherent in the other First Amendment freedoms because they cannot be realized without the freedom of association.

The NAACP case recognized a constitutional foundation to the law of associations. All associations, whether religious organizations or not, are protected by the First Amendment. Of particular importance to

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7. *NCAA v. Univ. of Oklahoma*, 468 U.S. 85 (1984).

8. *Constitution of the United Church of Christ*, (n.d.), par. 5.

9. *NAACP v. Alabama*, 357 U.S. 449 (1958).

member withdrawal is the constitutional right to associate and its corollary, the right to disassociate. This leads to the next step in the neutral principles analysis of the voluntary association comprising TEC: identifying the members of that association.

*Dioceses Are the Members of the Association*

This question is answered by the legal document that established TEC as an association, its Constitution. Article V of the Constitution specifies quite clearly that the parties that join—it has always used a technical term from international law, “accede”—are dioceses.<sup>10</sup> A parish cannot join General Convention nor can an individual. Since dioceses are the ones that join the association, they are its members.

This structure is also reflected elsewhere in TEC's Constitution. There is no provision in the Constitution that defines a diocese. The dioceses are the undefined constituent elements out of which TEC is formed. In contrast, General Convention is created and defined in Article I, which still provides in language virtually unchanged from the original that “The Church in each diocese which has been admitted to union with the General Convention...shall be entitled to representation....” As this current language makes clear, dioceses are not created by General Convention. They are “admitted” to union with the General Convention. Dioceses are both historically and legally prior to the Constitution and the General Convention. And upon admission, it is the diocese, not any other body or group,

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<sup>10</sup> *Constitution and Canons* (2009). Unless otherwise noted, all references to TEC's Constitution are to this edition.

that is “entitled to representation” at General Convention.

This fundamental concept of dioceses as equal constituent members of TEC is manifest in the mechanisms of governance created by the Constitution, including the provisions for representation and voting at General Convention and the means by which the Book of Common Prayer and Constitution are amended.

All dioceses have equal representation. This representation, in conjunction with the voting mechanism constitutionally required in the House of Deputies, gives the dioceses collective control over the General Convention. The House of Deputies does not decide important matters by majority vote, but by a vote “by orders.”<sup>11</sup> This is a vote in which the diocesan deputations vote by diocese separately by their clergy and lay deputies. Each diocese gets one vote in each order. This procedure of voting by diocese has been the hallmark of TEC Conventions from the outset and reflects the fact that the dioceses meet in such Conventions as equal members. The first Convention in 1785 that began the organizing process and produced the first draft Constitution made explicit in its very first resolution that the states were its constituent members: the resolution was that “each State have one vote.”<sup>12</sup> The next year the Convention of 1786 passed a resolution asking “the several States” to “ratify” the constitution at the next convention.<sup>13</sup> When eventually

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<sup>11</sup> Constitution, Article I.5.

<sup>12</sup> William Stevens Perry, ed., *Journals of General Conventions of the Protestant Episcopal Church in the United States, 1785-1835*, (Claremont, N.H.: Claremont Mfg. Co., 1874), I:17 [hereafter “JGC”].

<sup>13</sup> JGC, I:42.

adopted, the first Constitution called for "suffrages by states" in the General Convention.<sup>14</sup>

All of this, of course, simply confirms the point already noted from Article I.4 that it is the *diocese*, not the individual communicant, that is represented in General Convention. Explaining General Convention's voting procedures, the Church's official commentary notes the provision in the first Constitution ("suffrages by states") and concludes "still today a vote by orders is also a vote by dioceses."<sup>15</sup>

The essential role of dioceses as the constituent members of TEC is further reflected in the procedures for dealing with the most important decisions made by the General Convention, which are amendments to the *Book of Common Prayer* and Constitution. Both require the same basic procedure. For example, Article XII, the provision governing constitutional amendments, requires that an amendment be "proposed" at one General Convention, that the proposal then be "sent to the Secretary of the Convention of every Diocese, to be *made known to the Diocesan Convention* at its next meeting," and then that the amendment be "adopted" at a second General Convention by "affirmative vote in each order by a majority of *Dioceses entitled to representation....*" (Emphasis added.) It could not be clearer that it is the dioceses that join the association and that are entitled to representation at General Convention.

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<sup>14</sup> JGC, I:83.

<sup>15</sup> Edwin A. White and Jackson Dykman, ed., *Annotated Constitution and Canons*, (New York: Seabury, 1982), I:12.

*Association Law: Members May Withdraw*

Given that TEC is an association and dioceses are the members, the answer to the question whether dioceses can withdraw is straightforward under settled association law. It has long been the rule of association law that a member is free to withdraw at any time absent an agreement to the contrary, what the Supreme Court has called “the law which normally is reflected in our free institutions -- the right of the individual to join or resign from associations, as he sees fit ‘subject to any financial obligations due and owing’ the group with which he was associated.”<sup>16</sup> This “often cited rule” applies equally to members in religious and nonreligious associations.<sup>17</sup> This rule is reflected in the Revised Uniform Act:

A member may resign as a member in accordance with the governing principles. In the absence of applicable governing principles, a member may resign at any time.<sup>18</sup>

Thus, in the absence of any restrictions on withdrawal in the Constitution—and no one has yet identified any—a diocese can withdraw at any time under the settled law governing associations. But the law is even stronger on this point. Even if TEC could persuade a court that its Constitution bars withdrawal, such a prohibition would not be judicially enforceable on constitutional and public policy grounds.

Although TEC is a church and protected under the First Amendment’s guarantee of the free exercise of

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<sup>16</sup> *N.L.R.B. v. Granite State Jt. Bd.*, 409 U.S. 213, 216 (1972); *Booster Lodge v. Int. Assoc. of Machinists and Aerospace Workers*, 412 U.S. 84, 88 (1973).

<sup>17</sup> *Okla. Bar Assoc. v. Gasaway*, 863 P. 2d 1189, 1193 (Okla. 1993); *Guinn v. Church of Christ*, 775 P. 2d 766,776 (Okla. 1989).

<sup>18</sup> Revised Uniform Act, *supra*, n.5, sec. 20.

religion—a protection that is every bit as applicable to dioceses as to other bodies in the church—TEC is also organized legally as a voluntary association and is therefore subject to the standard law governing associations. As already noted, one of the important First Amendment cases of the twentieth century was *NAACP v. Alabama*, which established a constitutional right to associate that cannot be thwarted by the government. But the right to associate is also the right to associate with others than those with whom one is currently associated. In other words, there is a right to disassociate; the government cannot compel association any more than it can prevent it. This constitutional debarment applies to the courts as well as to other branches or agencies of the government.

It has long been the law that private contracts contrary to public policy are unenforceable in the courts. For example, a contract to commit a crime or to engage in price-fixing would never be enforced by a court even if it were otherwise a valid agreement. But this rule was substantially developed in the twentieth century by extending it to include interference by private parties with rights protected by the constitution. The landmark case on this subject was *Shelley v. Kraemer*, in which the Supreme Court ruled that it is unconstitutional for the courts, as agencies of the government, to enforce racially restrictive covenants in property deeds.<sup>19</sup> Thus, even if the private conduct is itself lawful—as was the case in 1948 when *Shelley* was decided—the courts cannot constitutionally enforce such private agreements.

The relevance of this twentieth century development in constitutional jurisprudence to the

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<sup>19</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).



question of diocesan withdrawal is obvious. The right to associate or disassociate is a constitutionally protected right. Courts cannot interfere with this right, even if only by enforcing private agreements containing restrictions on disassociation. This precise point is made clear by the Law Commissioners in their commentary on the Uniform Act on associations: "Preventing a member from voluntarily withdrawing from [an unincorporated nonprofit association] would be unconstitutional and void on public policy grounds."<sup>20</sup>

This is why ultimately it would not be decisive even if TEC's Constitution did contain a restriction on diocesan withdrawal or "de-accession." TEC dioceses are distinct legal entities, constituted by their own governing instruments. They are, therefore, doubly entitled to protection from judicial interference in the exercise of their religious and association rights, including the right to withdraw.

## II

### **Response to Objections**

The argument presented in part one is succinct: (i) TEC is an association formed by its Constitution; (ii) the members of that association as defined in the Constitution are the dioceses; and (iii) association law is settled that members of associations can withdraw. The first and third premises are beyond dispute, and the second is supported by overwhelming historical evidence and careful analysis of TEC's governing legal instrument. What objections can be made to this argument by those who maintain that dioceses cannot withdraw?

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<sup>20</sup> Revised Uniform Act, comment to sec. 20.

## 202 Dioceses' Right to Withdraw

A review of the objections presented in court and published essays indicates that the contrary arguments fall into three main categories: assertions that TEC is not an association of dioceses but a unitary organization; assertions that dioceses joining TEC agree irrevocably not to withdraw; and assertions that courts cannot decide these questions but must defer to TEC's highest judicatory because TEC is hierarchical. Part two will examine these objections carefully, but it is worth noting that the first and second objections are contradictory. If a diocese joins TEC by giving an unqualified accession, it is not created by a unitary organization. And the third depends on showing that TEC's governing instrument, its Constitution, designates a highest judicatory.

### *Objection One: TEC Is a Unitary Organization*

The objection that TEC is not an association of dioceses but a unitary organization challenges the second premise of the argument presented in part one.<sup>21</sup> The flaw in this objection is that it is demonstrably false and has been repudiated repeatedly by TEC historians and legal commentators.<sup>22</sup>

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<sup>21</sup> James Allen Dator first advanced the unitary argument in his 1959 American University dissertation ("The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal or Unitary"). See his article in this issue. [Editor's note].

<sup>22</sup> For a critique of the unitary theory, see Mark McCall, *Is The Episcopal Church Hierarchical?*, (Anglican Communion Institute, Sept. 2008), App. B. [hereafter "McCall Hierarchical"]  
[http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is\\_the\\_episcopal\\_church\\_hierdoc.pdf](http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf)  
(accessed Dec. 8, 2010).

Because TEC has had the same legal structure since its creation in 1789, the argument that TEC is unitary necessarily has two parts. First, it must be established that as originally constituted TEC was not a union of preexisting legal entities. If TEC is a unitary organization, the original dioceses must have been created by the unitary body. Second, it must be demonstrated that under TEC's Constitution as it now exists new dioceses are created by the unitary body not by the diocese's own legal process.

On the historical issue, TEC relies heavily in its court submissions on arguments attempting to show that the formation of TEC was not the union of independent state churches but a "revival" of a national church.<sup>23</sup> Few things indicate the weakness in TEC's case so clearly as the need to make this argument for it is incompatible with the overwhelming historical record.

In Maryland, the second largest of the colonial churches, the revolution ended a colonial government that had jealously guarded its control of the state church, but the church remained under the control of the new sovereign and independent state of Maryland, itself part of the confederation formed by the Articles of Confederation. In 1783, the clergy had to request and receive permission from the state legislature even to meet in a convocation, at which they issued a declaration that the Maryland church was "an entire church" "independent of every foreign or other jurisdiction, so far as may be consistent with the civil

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<sup>23</sup> *The Episcopal Church v. Salazar*, No. 141-237105-09 (Dist. Ct. Tarrant County, Tex.), Third Affidavit of Dr. Robert Bruce Mullin, (sworn to Oct. 13, 2010) par. 20 ff. [hereafter "Mullin Affidavit"].

Rights of Society [i.e., state government].”<sup>24</sup> In a letter to William White, one of the Maryland clergy elaborated the meaning of this declaration:

I think that the Protestant Episcopal Church, in each particular State, is fully entitled to all the Rights and Authority that are essentially necessary to form and compleat an Entire Church; and that, as the several States in Confederation have essential Rights and Powers independent on each other, so the Church in each State has essential Rights and Powers independent on those in other States.<sup>25</sup>

The first historians of the church understood Maryland's “declaration” in precisely this way. Francis Hawks, TEC's first conservator and later its historiographer, noted that:

[The Maryland declaration] is important on more accounts than one; but is especially deserving of notice from the conclusive evidence it furnishes that the Church of Maryland, like that of Virginia, claimed to have a distinct, independent existence, without reference to any connexion with the Church in any other colony.<sup>26</sup>

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<sup>24</sup> William Stevens Perry, ed., *Journals of General Conventions of the Protestant Episcopal Church in the United States: Vol. III Historical Notes and Documents*, (Claremont, N.H.: Claremont Mfg. Co., 1874), 3:22-25 [hereafter “Perry, Documents”].

<sup>25</sup> Perry, *Documents*, 3:43-44.

<sup>26</sup> Francis L. Hawks, *Contributions to the Ecclesiastical History of the United States*, (New York: John S. Taylor, 1839) 2:294.

In the largest of the state churches, Virginia, the independence was even more pronounced. The Virginia church was so controlled by the state legislature that it could not even meet with the other state churches. Upon being invited to the first interstate meeting in 1784, the leader of the Virginia church responded to William White that:

The Episcopal Church in Virginia is so fettered by Laws, that the Clergy could do no more than petition for a repeal of those laws for liberty to introduce Ordination and Government and to revise and alter the Liturgy. The session is passed over without our being able to accomplish this.... In the Present State of Ecclesiastical affairs in this State, the Clergy could not, with propriety, and indeed without great danger to the Church, empower any Persons to agree to the least alteration whatever.<sup>27</sup>

In fact, this Virginia clergyman arranged personal business in New York and observed but did not participate officially in the first meeting. The minutes of that meeting recorded his presence as follows:

N.B. The Revd. Mr. GRIFFITH from the State of Virginia, was present by permission. The Clergy of that State being restricted by Laws yet in force there, were not at liberty to send Delegates, or consent to any Alterations in the

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<sup>27</sup> Perry, *Documents*, 3:46.

Order Government, Doctrine, or Worship of the Church.<sup>28</sup>

This meeting articulated the “fundamental principles” of “a general ecclesiastical constitution,” one of which contained the language that to this day remains the specification of the authority of the General Convention: “there shall be a general convention.”<sup>29</sup> It is simply inconceivable that such a concept of a general convention was perceived as a unitary body or as exercising supremacy over the state churches when the largest of those churches was legally prohibited even from meeting and could not agree to the “least alteration whatever” to the government of their state-controlled church. If the Virginia church was part of any larger body at that time it was the state government in Virginia, not a “national” Episcopal Church.

The church’s first historians clearly understood the significance of this initial meeting. Hawks concluded:

From Virginia, Dr. Griffith was present by permission. He could not sit as a delegate, because Virginia (a State which, through its whole ecclesiastical history since the Revolution, has always asserted its independent diocesan rights) had forbidden by law her clergy to interfere in making changes in the order, government, worship, or doctrine of the Church. Virginia asserted the entire independence of the

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<sup>28</sup> Perry, *Documents*, 3:3.

<sup>29</sup> Perry, *Documents*, 3:4.

Church within her limits of all control but her own.<sup>30</sup>

And Bishop William Stevens Perry, Hawks' colleague and successor, likewise noted:

No stronger proof could have been given of the assertion made in this connection by the Rev. Dr. Hawks, that "Virginia asserted the entire independence of the Church within her limits of all control but her own."

This was evidently the judgment of the Convention. The Committee "appointed to essay the fundamental Principles of a general Constitution for this Church" began their report with the recognition of diocesan independency.<sup>31</sup>

In summary, there is no doubt at the outset that the starting premise in the unitary organization argument is false. Prior to adopting the TEC Constitution, the state churches were independent, autonomous bodies. This general conclusion is unquestionably recognized by the leading historians throughout the church's history.

Hawks, for example, made precisely this point:

It would seem, then, that the churches of the several States came together as independent

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<sup>30</sup> Francis L. Hawks, *The Constitution and Canons of the Protestant Episcopal Church in the United States*, (New York: Swords, Stanford & Co., 1841), 6, reprinted in 1 *Journal of Episcopal Church Canon Law* 61-117 (2010) [hereafter "Hawks, *Constitution*"].

<sup>31</sup> William Stevens Perry, *The General Ecclesiastical Constitution of the American Church*, (New York: Thomas Whittaker, 1891), 87 [hereafter "Perry, *Constitution*"].

churches, duly organized, and so considered each other, for the purpose of forming some bond whereby they might be held together as one religious community throughout the whole United States.<sup>32</sup>

Later, Perry reached the same conclusion:

In short, the action contemplated and proposed in the Fundamental Principles of 1784, — principles based, as we have seen, on those of *The Case of the Episcopal Churches Considered*, — proves conclusively that the Church in each independent State of the federal union, where organized agreeably to its own pleasure, deemed itself, and was regarded by each independent Church in the other States respectively, as an independent branch of the Catholic Church of Christ, lacking, indeed, a perfect organization while the Episcopate was wanting, but fully competent to seek that perfecting order and to organize for this purpose and for such other purposes as the present need seemed to require.<sup>33</sup>

And still today this inescapable fact about the formation of TEC is recognized by TEC's own official commentaries.

Canon Powel Mills Dawley (in "The Church's Teaching Series"):

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<sup>32</sup> Hawks, *Constitution*, 8.

<sup>33</sup> Perry, *Constitution*, 99.



At the time that the American Revolution forced an independent organization upon the Anglican colonial parishes, the first dioceses existed separately from each other before they agreed to the union in 1789 into a national church. That union, like the original federation of our states, was one in which each diocese retained a large amount of autonomy, and still today the dioceses possess an independence far greater than that characteristic of most other Churches with episcopal polity.<sup>34</sup>

Similarly, White & Dykman, the official commentary on TEC's Constitution and Canons: "Before their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent." White & Dykman then describes the national body they created as "a federation of equal and independent Churches in the several states."<sup>35</sup>

A final note about the founding dioceses: they continued to operate under the same governing instruments *after* adopting the general Constitution as they had before, thereby maintaining their prior legal status. The church in Pennsylvania continued to operate under the same "act of association" after 1789 as it had before.<sup>36</sup> The church in Virginia continued to be governed by the same "fundamental canons" that it had

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<sup>34</sup> Powel Mills Dawley, *The Episcopal Church and Its Work*, (Greenwich, CT: Seabury, rev. ed. 1961), 115-16.

<sup>35</sup> White & Dykman, *Annotated Constitution and Canons*, 1:12, 29.

<sup>36</sup> *Constitution and Canons for the Government of the Diocese of Pennsylvania*, Preamble (Philadelphia: 2008).

adopted before joining the General Convention.<sup>37</sup> This effectively ends the unitary organization argument from a legal perspective. The independent founding dioceses associated to form the General Convention while maintaining their prior legal identities. They were not created by General Convention.

Leaving aside the historical fact that the General Convention had nothing whatsoever to do with the creation of the founding dioceses -- it was the dioceses that created the General Convention and not *vice versa* -- the General Convention does play a role in the admission of new dioceses under the current Constitution. There is considerable misunderstanding about this process, so the procedure must be examined carefully. It should be noted at the outset that the relevant constitutional provision, Article V, is captioned "Admission of New Dioceses" not "Creation of New Dioceses." This reflects the language, already noted, in Article I that dioceses are "admitted" to union with General Convention. Those who continue to claim that dioceses are "created" by General Convention ignore the legal precision of Article V.

The first sentence of that Article specifies General Convention's role in this process. It is to give "consent." This wording indicates that the role of General Convention is secondary, not primary. It consents to actions initiated elsewhere. The subsequent sentences in Article V specify the process by which dioceses are admitted to TEC. The proceedings "originate" with a convention of "the unorganized

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<sup>37</sup> Francis. L. Hawks, *Contributions to the Ecclesiastical History of the United States of America* (New York: Harper& Bros., 1836) 1: App. pp. 32-36, [hereafter "Hawks, *Contributions*"].

area," not with General Convention. It is the unorganized area that "duly adopts" its own constitution. *This creates a legal entity distinct from General Convention.* Article V then describes the legal entity created by the duly adopted constitution not, as before, as an "unorganized area," but as a "diocese." *But it is not yet part of General Convention.* Then the "new diocese" submits its constitution to the General Convention for consent; and upon receipt of this consent, it enters into "union with the General Convention."

In this articulation of the steps involved in the creation and then admission of a new diocese, Article V reflects the civil law. When an unorganized area adopts its own constitution, it is by definition no longer "unorganized." It is a legal entity having its own legal personality. In the terminology of Article V, this entity is called a "new diocese." This step, furthermore, occurs *before* the constitutional involvement of General Convention. What happens when the "new diocese" obtains the consent of General Convention to its application is that it is "admitted" into union with the other dioceses in General Convention. The transformation from "unorganized area" to "new diocese" occurs when the diocesan constitution is duly adopted. When General Convention gives its consent, another change occurs, but it is not the creation of a "new diocese." It is the acceptance of an unaffiliated "new diocese" as a member diocese of General Convention.

An objection often heard is that the duly constituted new entity is not a "TEC diocese" until the General Convention consents and it is admitted to union, but this misses the point. It is merely tautological to observe that the new diocese is not a member of TEC until it joins TEC. The legal issue is whether TEC is a

unitary organization or an association of dioceses. The fact that new dioceses are duly constituted *as legal entities* before being admitted to union establishes conclusively that they enjoy a separate legal personality distinct from TEC and the other dioceses. Article V thus mirrors the process by which TEC was originally created as an association of distinct legal entities, the state churches.

*Objection Two: Dioceses Give an Unqualified Accession when They Join*

A second objection made by opponents of diocesan withdrawal in fact contradicts the unitary organization objection. It acknowledges that dioceses join TEC but argues that they do so irrevocably because they give an unqualified accession to TEC's Constitution. This latter objection should ultimately be irrelevant legally for the reason noted by the Uniform Law Commissioners in their commentary on the Revised Uniform Act: any restriction on member withdrawal would be unenforceable as unconstitutional and against public policy. In addition to this legal defect, this objection also presents factual issues. Is the accession provision an attempt, whether enforceable or not, to restrict member withdrawal by making accession irrevocable? Basic legal principles indicate that there is little merit to the argument that this provision acts as a restriction on member withdrawal.

First, the term "accede" itself is a specialized term used in international law to describe the act of a sovereign state becoming a party to a treaty already

signed by others.<sup>38</sup> A treaty, of course, is a compact among sovereign and independent states. “Acceding” was the term used in the Articles of Confederation, which established a “league of friendship” of states retaining their “sovereignty, freedom and independence.” That term is not used in the United States Constitution, which established a hierarchical central government. This use of treaty language could not have been accidental. James Duane, one of the primary draftsmen of TEC’s first Constitution, was a signatory to the Articles of Confederation; John Jay, also active in the organizing conventions, besides being the nation’s Foreign Secretary and Chief Justice, negotiated the second treaty with Great Britain, known to this day as the “Jay Treaty.” These men clearly knew what the term “acceding” signified.<sup>39</sup> This further confirms that TEC was created as an association of sovereign or autonomous dioceses.

Treaties are typically subject to termination. The vast majority of them are explicitly terminable, and the ones foremost in the minds of TEC’s founders, the Treaty of Peace with Great Britain and the Articles of Confederation, were being abrogated and nullified as TEC’s constitution was being drafted.<sup>40</sup> If TEC’s founders had intended to signal by the use of “accede” irrevocable submission to a central body, they would not have borrowed a term from the Articles of Confederation that *lacked* a central hierarchy and that had just been *abrogated* by the thirteen states.

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<sup>38</sup> *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79, n. 7 (2<sup>nd</sup> Cir. 2005).

<sup>39</sup> McCall, *Hierarchical*, 11-14, 20-23.

<sup>40</sup> Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579, 1593 ff. (2005) (“denunciations and withdrawals are a regularized component of modern treaty practice”). See McCall, *Hierarchical*, 20-21.

Second, as a matter of contract law (and the constitution of a voluntary association is a legal contract) the traditional rule is all acceptances must be unqualified or unconditional. Unlike the law of treaties, in which qualified accession (with "reservations") is often permitted, contract law generally regards a qualified acceptance as a rejection, although this rule was relaxed somewhat in the twentieth century in certain codifications, such as the Uniform Commercial Code. The revised rule, more akin to treaty law, would allow some qualifications to become part of the contract unless objection is made.

Given these basic principles, it is obvious that "unqualified accession" simply requires that the joining diocese attach no conditions or qualifications to its accession. But this has nothing to do with revocability. Under contract law, the standard rule is that unless expressly agreed otherwise, a contract without a stated duration is terminable at will or upon reasonable notice.<sup>41</sup> If an unqualified acceptance made a contract irrevocable, a contract without a term of duration could never be terminated. The law is otherwise. "Unqualified accession" pertains to the formation of the contract, not its duration. "Unqualified" with "irrevocable" are distinct legal concepts.

Third, the meaning of "unqualified accession" must be interpreted in light of *TEC's own unqualified accession to the constitution of the Anglican Consultative Council, when it "acceded and subscribed to the Proposed Constitution of the said Anglican Consultative Council" by*

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<sup>41</sup> E. Allan Farnsworth, *Contracts* (New York: Aspen Publishers, 3<sup>rd</sup> ed. 1999), 511-13.

*resolution in 1969.*<sup>42</sup> It is agreed by all that the Anglican Communion is not a hierarchical organization and that accession to the constitution of the ACC is not irrevocable. This reflects the proper interpretation of an unqualified accession, both for TEC and its member dioceses.

*Objection Three: Courts Must Defer to TEC's Highest  
Judicatory*

A final objection to the legal argument in part one is broader than either of the two just examined. It does not address directly any of the premises in the legal argument, but maintains instead that this is a question that must be decided by "TEC" not the courts. TEC is a hierarchical church, according to this objection, and the courts must defer to the determination of its highest judicatory on this question, right or wrong.

The point of departure for this objection is a line of Supreme Court cases on the First Amendment, particularly two cases decided in the 1970s. Before examining these cases, two preliminary observations are in order. First, this objection ignores the distinction drawn by the California appeals court and others between "ecclesiastical facts" and "justiciable facts." This objection is based on the assumption, rejected by the California court, that the question of diocesan withdrawal is solely an ecclesiastical issue. As shown in part one, however, the matter of diocesan withdrawal can be decided under settled association law using the same neutral principles courts use to decide

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<sup>42</sup> Robert W. Prichard, "The Making and Re-making of Episcopal Canon Law," (Anglican Communion Institute, Feb. 2010), 15 <http://www.anglicancommunioninstitute.com/2010/02/the-making-and-re-making-of-episcopal-canon-law/> (accessed Dec. 8, 2010).

membership disputes in other association contexts. No issue requiring deference to a church body is relevant to that analysis.

Second, when invoking this argument that deference is required, it is obviously necessary to identify precisely the body within the church to which the courts must defer and to allege that this body has decided the issue before the courts. Church litigation by definition involves two parties from the church that disagree. Courts can only resolve such a dispute by deferring to a church body if they can determine to which body they must defer. In the cases of diocesan withdrawal, the governing body of the diocese has voted to withdraw pursuant to the diocesan constitution and canons. Other parties in TEC, both within and outside the diocese, have claimed that these votes were *ultra vires*. The first question for the courts if they are to defer to a church body on this issue is whether there is any "higher judicatory" in TEC than the diocesan convention. A court must defer to a church's highest judicatory in determining matters of ecclesiastical doctrine and discipline, but it cannot defer to one of the parties in a lawsuit in determining the identity of the highest judicatory.

Two Supreme Court cases addressing this complex question indicate the analysis required of the courts before they can constitutionally defer to a church body. The primary case on this subject is *Serbian Eastern Orthodox Diocese v. Milivojevic*,<sup>43</sup> which involved the removal of a bishop in an American diocese by the "Holy Assembly of Bishops," the council of bishops of

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<sup>43</sup> *Serbian Eastern Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 716-18 (1976).



the Serbian church, and the subsequent reorganization and division of that diocese. The determination of the “highest judicatory” in that case was easy, and indeed was agreed by all parties:

Indeed, final authority with respect to the promulgation and interpretation of all matters of church discipline and internal organization rests with the Holy Assembly, and even the written constitution of the Mother Church expressly provides:

“The Holy Assembly of Bishops, as the highest hierarchical body, is legislative authority in the matters of faith, officiation, church order (discipline) and internal organization of the Church, as well as the highest church juridical authority within its jurisdiction (Article 69 sec. 28).” Art. 57.

“All the decisions of the Holy Assembly of Bishops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church, are valid and final.” Art. 64.<sup>44</sup>

Thus, the very questions at issue in that case were committed to a body explicitly identified in the church’s constitution as the “highest hierarchical body” and “final” arbiter. These provisions of the general constitution were the basis for the Court’s conclusion that the Holy Assembly was the highest judicatory. It went on to note that this conclusion was “confirmed” by the following additional factors: the local diocese was

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<sup>44</sup> *Serbian Eastern Orthodox Diocese v. Milivojevich* at 716-18.

organized under an Illinois statute for a body that was subordinate to a higher body; proposed diocesan constitutional changes, bylaws and adjudications were sent to the Holy Assembly for prior approval; the bishops swore an "Episcopal-Hierarchical Oath" that they would "always be obedient to the Most Holy Assembly," the very body identified in the constitution as "the highest hierarchical body"; and the diocesan constitution confirmed its subordinate status.<sup>45</sup>

What permitted the Supreme Court to defer to a church body in the *Serbian* case was that it could easily determine without becoming embroiled in church doctrine which body was the highest judicatory in that church. Indeed, the litigants agreed that the Holy Assembly was the highest judicatory in the Serbian church.

What happens if the parties do *not* agree on which body is the highest judicatory and the church polity is ambiguous? When each side claims to be the highest judicatory? The Supreme Court addressed these questions three years later in *Jones v. Wolf*.<sup>46</sup> In that case, the Court ruled that it was constitutionally permissible, but not mandatory, for courts to apply the deference approach to disputes concerning church property. Responding to the dissent, which argued that deference was constitutionally required, the majority summarized both the analysis the courts must undertake before applying the deference approach and the problems that analysis could present:

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<sup>45</sup> *Serbian Eastern Orthodox Diocese v. Milivojevich* at 715.

<sup>46</sup> *Jones v. Wolf*, 443 U.S. 595 (1979).

The dissent would require the States to abandon the neutral principles method, and instead would insist as a matter of constitutional law that, whenever a dispute arises over the ownership of church property, civil courts must defer to the “authoritative resolution of the dispute within the church itself.” *It would require, first, that civil courts review ecclesiastical doctrine and polity to determine where the church has “placed ultimate authority over the use of the church property.” After answering this question, the courts would be required to “determine whether the dispute has been resolved within that structure of government and, if so, what decision has been made.”* They would then be required to enforce that decision. We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

The dissent suggests that a rule of compulsory deference would somehow involve less entanglement of civil courts in matters of religious doctrine, practice, and administration. *Under its approach, however, civil courts would always be required to examine the polity and administration of a church to determine which unit of government has ultimate control over church property. In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and “[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the*

*members of the religious association.*" In such cases, the suggested rule would appear to require "a searching and therefore impermissible inquiry into church polity." The neutral principles approach, in contrast, obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling church property disputes. (Emphasis added; internal citations omitted.)<sup>47</sup>

Thus, before the deference approach can be used "civil courts would always be required" to examine the "constitutions of the general and local church, as well as other relevant documents" to determine what the highest judicatory is, whether it has acted, and what its decision was. The courts cannot defer to a party to a lawsuit merely because it appears claiming to speak for "TEC." They must make a "careful examination" aware that the "locus of control" could be so "ambiguous" as to make deference constitutionally impermissible.

In the diocese litigation, no court has yet undertaken this careful examination of the governing legal instruments, the constitutions of TEC and the dioceses. Do they plainly identify a highest judicatory to which the courts can constitutionally defer? The "necessary" careful examination would in fact demonstrate that there is no body designated in TEC's constitution as having hierarchical priority or supremacy over the dioceses.

*No Body Is Designated as Highest, Supreme or Final in the Constitution.* As already noted, TEC is comprised of

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<sup>47</sup> *Jones v. Wolf* at 604-05.

member dioceses that join together to create various central bodies and offices, including a General Convention, Executive Council, and Presiding Bishop. What is not defined in TEC's Constitution is any legal or hierarchical relationship among these various bodies. Indeed, the Constitution is devoid of the legal terminology normally used to express hierarchies in legal documents.<sup>48</sup> On the one hand, a General Convention is created and given legislative authority to enact general canons, but the preexistent diocesan conventions are also recognized as having legislative authority, and there is no provision making the General Convention "supreme" or "highest" or providing that general canons supersede diocesan ones. Indeed, none of the following terms routinely used in legal documents to indicate hierarchical priority is found at all in TEC's Constitution: "supreme"; "supremacy"; "highest"; "hierarchical"; "subordinate"; "sole"; "preempt"; "final"; and "contrary."<sup>49</sup> This lack of hierarchical concepts in the Constitution confirms the traditional understanding of TEC's structure that was previously quoted from the official commentary: TEC is a federation (or confederation) of independent or autonomous dioceses.

*Omission of a Central Hierarchy Was Intentional.* That the omission of a central hierarchy was not inadvertent but intentional is demonstrated by a review of the historical context in which TEC was organized: first, TEC was organized and its Constitution adopted just as the American states were changing their government from a "league of friendship" of sovereign and independent

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<sup>48</sup> McCall, "Hierarchical," 10-11.

<sup>49</sup> McCall, "Hierarchical," 10-11.

states under the Articles of Confederation to the hierarchically-structured federation specified in the United States Constitution; and second, the American Revolution separated the churches in the United States from the Church of England, the Supreme Governor of which was the British monarch.

Two of the most active participants in the General Conventions that organized TEC and drafted its first Constitution were two prominent lawyers, James Duane and John Jay, who are noted to this day among legal scholars for their roles in developing the jurisprudence of hierarchy used in the United States Constitution.<sup>50</sup> Duane was a signatory to the Articles of Confederation on behalf of New York and was the mayor and first federal judge in New York. Sitting as judge in 1784, Duane ruled in a well-known case still studied by legal scholars that the lack of a routine technical term indicating hierarchical priority substantially eviscerated a New York statute purporting to nullify part of the peace treaty ending the Revolutionary War.<sup>51</sup> Six weeks later Duane was a delegate to the first interstate convention that established the fundamental principles of what was to become the Constitution of The Episcopal Church.<sup>52</sup> The first of these principles was the very language, that "there be a general convention," that remains to this day the only specification of the authority of General

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<sup>50</sup> Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 242-44, 256-57 (2000); Julian G. Ku, *Treaties As Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes*, 80 Ind. L.J. 319, 363-69 (2005).

<sup>51</sup> *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784), reprinted in Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton* (New York: Columbia U. Press, 1964) 1:392-419.

<sup>52</sup> Perry, *Documents*, 3-4.

Convention. Duane was again a delegate to the General Convention in 1785 and served on the committee that drafted the first Constitution.<sup>53</sup> That Constitution, the key language of which remains virtually unchanged in the current Constitution, contained no language giving hierarchical priority to the General Convention. Duane was also made a member of the executive committee selected to correspond with the churches in the United States and the Archbishop of Canterbury to obtain consecrations for American bishops.<sup>54</sup> He was also a delegate to the 1786 Convention.<sup>55</sup>

John Jay was the Secretary for Foreign Affairs during the Confederation and was later the first Chief Justice of the United States Supreme Court. He is also known among legal scholars for his work in drafting the hierarchical legal language that resolved the treaty nullification controversy with Great Britain and that became the prototype for the Supremacy Clause in the United States Constitution, the primary provision establishing the hierarchy of the federal government in our federal system.<sup>56</sup> Right in the middle of his work on the treaty controversy, Jay was a delegate to the General Convention in June 1786.<sup>57</sup> This Convention revised the proposed Constitution drafted the year before and continued to omit any language giving hierarchical priority to the General Convention or any central body. Although Jay arrived late, after the draft Constitution had been approved, he must have been aware of the terms of the Constitution since the draft was a primary

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<sup>53</sup> *JGC*, I:15, 18.

<sup>54</sup> *JGC*, 25, 57.

<sup>55</sup> *JGC*, 49.

<sup>56</sup> Nelson, *Preemption*, 256-57; McCall, "Hierarchical," 9-12.

<sup>57</sup> *JGC*, I:33.

item on the agenda. After his arrival, Jay took a leading role in drafting a key letter to the Archbishop of Canterbury from the Convention.<sup>58</sup> He did not attend the adjourned session of the Convention in October 1786, which occurred just as he was delivering his report to Congress with his proposed solution to the treaty crisis, including the resolutions containing the legal language that would later be incorporated into the Supremacy Clause of the United States Constitution.

It is inconceivable that these two knowledgeable lawyers, known to this day for their role in developing our jurisprudence concerning legal hierarchies, would have inadvertently drafted a Constitution devoid of hierarchical language.

Indeed, there is conclusive proof that this omission of a central hierarchy was intentional, not inadvertent. The primary imperative driving the Anglican churches in America to break formally with the Church of England was the Oaths of Supremacy, Allegiance and Due Obedience that prospective bishops and clergy were required to swear.<sup>59</sup> They are the paradigm of legal language recognizing and submitting to a hierarchical body: allegiance is pledged to the British monarch as the "only supreme governor" of the church, and obedience is pledged not only to an archbishop, but also to the "metropolitan church" of the province in which the bishop was consecrated.<sup>60</sup>

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<sup>58</sup> JGC, 43. For the role of Jay, see Paul Marshall, *One Catholic and Apostolic: Samuel Seabury and the Early Episcopal Church*, (New York: Church Publishing, 2004), 237-38.

<sup>59</sup> William White, *The Case of the Episcopal Churches in the United States Considered* (Philadelphia: Claypoole, 1782), 6-7.

<sup>60</sup> Jonathan Michael Gray, "The Sixteenth-Century Background to the Current 'Oath' of Conformity of the Episcopal Church," *Journal of*



American clergy were both unwilling and unable to give this oath. One of the main tasks of the early General Conventions was to obtain the agreement of the Church of England bishops to consecrate American bishops without this oath. James Duane was on the committee that developed a plan to achieve this objective, and he was the one who presented it to the General Convention.<sup>61</sup> Both Duane and Jay played major roles in drafting the correspondence with the English bishops on this topic.<sup>62</sup> The agreement reached was that these oaths would be replaced for American bishops by the declaration—"I do solemnly engage to conform to the doctrine and worship of the Protestant Episcopal Church...."<sup>63</sup> Submission to a *hierarchy*, the monarch, the archbishop and the metropolitanical church, was explicitly replaced not by submission to a *different* hierarchy, but by a pledge of doctrinal conformity.

Indeed, the model for this ordination Declaration for TEC was the oath specified in the pre-existing canons of the state church in Virginia, which prior to the first meeting of any "general convention" already had a canon requiring the following:

Every person hereafter to officiate in this church as a bishop...shall take the oath of allegiance to the commonwealth, and subscribe to conform to the doctrine, discipline and worship of the Protestant Episcopal Church of Virginia.<sup>64</sup>

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*Episcopal Church Canon Law* 1 (June 2010): 33, 40; *The Canons of the Church of England* (2008), C 14.

<sup>61</sup> JGC, I: 23-25.

<sup>62</sup> JGC, 14-62.

<sup>63</sup> JGC, I: 23,53.

<sup>64</sup> Hawks, *Contributions*, App. 9.

Had TEC's founders intended to create a metropolitan church or central hierarchy it would have been a simple matter to adapt this Declaration or the English oath of due obedience to require "allegiance" or "due obedience" to a central governing body. They chose not to do so.<sup>65</sup>

*TEC Has No Supreme Court.* Article IX of TEC's Constitution provides that General Convention may establish "an ultimate Court of Appeal" to review determinations of other courts on matters of "doctrine, faith or worship." This "ultimate" court has never been established.

Two consequences follow from this provision. First, it confirms that General Convention is not constitutionally the "ultimate" authority on these matters. If it were, the Constitution would not provide for a different body. Second, on other questions, such as the interpretation of the Constitution and general and diocesan canon law, there is no ultimate authority. Authority on these matters rests with the various bodies that share jurisdiction, including diocesan and other courts and the various conventions and other bodies of TEC, without any "highest judicatory."

The absence of a designated body with final interpretive or judicatory authority does not mean that there must be one somewhere and that courts should

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<sup>65</sup> Gray, "Sixteenth-Century Background," 42-43 ("These [Church of England] oaths delineated the hierarchy of the church and bound the swearer to remain loyal to his superior. By contrast, the modern declaration of conformity is not an oath of submission; the ordinand is not bound to be obedient to a specific superior or general body (such as General Convention)").

select the best candidate. It means there is none. For example, the union formed by the Articles of Confederation also lacked a central judiciary. That did not mean that Congress exercised that function (and supreme hierarchical power). It meant that the only judiciary was that found in the several sovereign states comprising that union.

This absence of an ultimate judicatory has long been recognized. Hawks concluded in 1841:

In the government of the United States an ultimate arbiter in interpretation is provided in the Supreme Court. In the Church, however, we possess no such advantage; for we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is. The House of Bishops may, indeed, express an opinion, if it pleases, and the churches generally respect it, as they should do; but such opinion is neither law, nor authorized judicial exposition of law.<sup>66</sup>

The only candidate for “ultimate arbiter” that occurred to Hawks was not General Convention, but the House of Bishops. Other commentators would undoubtedly propose different candidates for “highest judicatory.” But the undeniable fact (as Hawks recognized) is that the Constitution itself does not specify one. Hence, the constituent dioceses retain this authority that they clearly had before uniting to form TEC and that they have not surrendered. This was the very conclusion reached by Bishop Vail in the nineteenth century:

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<sup>66</sup> Hawks, *Constitution*, 9-10.

Moreover, in the Protestant Episcopal Church there is nothing analogous to the Supreme Court of the United States; for each diocese is, in respect of all judiciary concerns, independent in itself.<sup>67</sup>

That is essentially ends the argument that there is any agreed central body in TEC to which the civil courts must defer in matters of church disputes.

*Legislative Authority Does Not Mean Legislative Supremacy.* Proponents of a central hierarchy often argue that because General Convention has authority to enact canons and does so using “mandatory language” (“shall”), this establishes the supremacy of the General Convention.<sup>68</sup> But this argument profoundly misses the point. Legislative authority is not the same as legislative supremacy. Dioceses also have legislative authority and enact canons using mandatory language. Some of these diocesan canons existed before the first general canons were enacted.<sup>69</sup> Establishing the legislative *authority* of General Convention sheds no light on its legislative *supremacy* or lack thereof.

This argument that the possession of legislative authority proves the existence of supreme legislative authority—so obviously false when stated baldly—is inextricably connected with another argument made by proponents of a central hierarchy: that language in the

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<sup>67</sup> Thomas H. Vail, *The Comprehensive Church or, Christian Unity and Ecclesiastical Union* (Hartford: H. Huntington, 1<sup>st</sup> ed. 1841, New York: D. Appleton, 2<sup>nd</sup> ed. 1879), 117-18. I am indebted to George Conger for bringing Vail’s work to my attention.

<sup>68</sup> See, e.g., “Mullin Affidavit” at par. 101ff.

<sup>69</sup> See, e.g., the 1785 Virginia canons in Hawks, *Contributions*, 8-11.

first Constitution stating that General Convention actions were binding—the provision has long since been removed—proves that General Convention is supreme.<sup>70</sup> When the legal concepts are properly understood, it will be seen that this argument is nothing more than an elaboration of the argument stated baldly above. And when the historical facts are examined, they demonstrate how purposefully the founders of TEC rejected supremacy for General Convention.

Article 2 of the first Constitution provided that:

And if, through the neglect of the Convention of any of the Churches which shall have adopted, or may hereafter adopt this Constitution, no Deputies, either Lay or Clerical, should attend at any General Convention, the Church in such State shall nevertheless be bound by the acts of such Convention.<sup>71</sup>

The place to start in considering this provision is to note that it applies by its own terms only to those state churches that did not send representatives to General Convention. This apparent oddity signals right away that the purpose of this provision is something other than to serve as a half-baked supremacy clause for a church whose draftsmen did not know how to formulate

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<sup>70</sup> See, e.g., “Mullin Affidavit” at par. 83; Joan R. Gundersen, “A Response to Mark McCall’s ‘Is the Episcopal Church Hierarchical?’” (Progressive Episcopalians of Pittsburgh, Sept. 2008) <http://progressiveepiscopalians.org/html/mccall.pdf> (accessed Dec. 8, 2010); Mark McCall, “Fatal Flaws: A Response to Dr. Joan Gundersen,” (Anglican Communion Institute, Sept. 2008) <http://www.anglicancommunioninstitute.com/2008/09/fatal-flaws-a-response-to-dr-joan-gundersen/> (accessed Dec. 8, 2010).

<sup>71</sup> JGC, 99.

a proper one. What this provision seems to be addressing is one possible understanding of General Convention actions: that they did not apply to a state church until they were ratified in some fashion, either by the state's representatives to the General Convention (as the Constitution itself was ratified) or by action of the state convention.<sup>72</sup>

This issue paralleled the debate over the legal effect of acts of Congress under the Articles of Confederation. A widely held view was that they had to be enacted by the state legislatures in order to become binding law. Until so enacted, they were only requests; Congress was in effect a consultative, not a legislative, body. In the case of TEC, because the ratification by the state churches of the initial Constitution took the form of ratification by their duly authorized representatives at the General Convention, it was a reasonable interpretation that the actions of General Convention would require similar ratification. This would not have been given by a state church that sent no representatives, and General Convention actions would have no legal effect in such a state *if the General Convention were purely a consultative body like some thought the Congress of the Confederation was*. The Article 2 language answered this question by indicating that General Convention was a legislative, not a consultative, body.

But this language says nothing at all about supremacy. Those who argue the contrary fail to understand the legal meaning of the term "bound,"

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<sup>72</sup> This was one of two possible theories of General Convention's authority considered by Murray Hoffman as late as 1850. Murray Hoffman, *A Treatise on the Law of the Protestant Episcopal Church in the United States*, (New York: Stanford and Swords, 1850), 108.

particularly the technical legal usage of that term in the eighteenth century. It is significant that this language, used in its precise sense, is found in a resolution passed by Congress during the Articles of Confederation period, then later in the Supremacy Clause of the United States Constitution, and finally in TEC's first Constitution. The resolution passed by the Confederation Congress on the legal effect of the peace treaty was authored by John Jay, as already noted, an influential deputy to one of TEC's organizing conventions.<sup>73</sup> Jay's language did not signal supremacy since Congress in the Confederation was not supreme. This resolution became the basis for similar language in the Supremacy Clause, where the "binding" concept comes immediately *after* the language of "supremacy." That the concept of "binding" did not signal supremacy in the new United States Constitution is shown both from the meaning it had in the Confederation and the fact that explicit language of supremacy was added to the "Supremacy Clause."

The legal meaning of the terms "bound" and "supreme" has been the subject of an influential law review article by Caleb Nelson that examines the origins of the Supremacy Clause in detail. He begins with an analysis of the language in the Supremacy Clause that federal law is the "Law of the Land" and that "the Judges in every State shall be bound thereby" and notes that the same language was used in Jay's resolution about Congress' authority in the Confederation. Nelson explains that the text of the Articles of Confederation by itself:

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<sup>73</sup> Nelson, *Preemption*, 256-57; McCall, "Hierarchical," 9-12.

did not necessarily mean that Congress's acts automatically became part of the law applied in state courts; it could be read to mean only that each state legislature was supposed to pass laws implementing Congress's directives. If a state legislature failed to do so, and if Congress's acts had the status of another sovereign's laws, then Congress's acts might have no effect in the courts of that state.<sup>74</sup>

Congress addressed this problem by adopting Jay's resolution that the peace treaty was the "Law of the Land" and "binding and obligatory." Nelson concludes that "Law of the Land" and "binding" signal a "rule of applicability." What is described by these terms is a self-executing law that does not require ratification or enactment by another body. He then continues:

It was not enough, however, simply to declare that federal laws take effect of their own force within each state. If federal laws were merely on a par with state laws, then they would supersede whatever preexisting state laws they contradicted, but they might themselves be superseded by subsequent acts of the state legislatures. When two statutes contradicted each other and courts had to decide which one to follow, the established rule of priority was that the later statute prevailed.

Not surprisingly, the second part of the Supremacy Clause substitutes a federal rule of priority for the traditional *temporal* rule of

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<sup>74</sup> Nelson, *Preemption*, 247.



priority. The Supremacy Clause not only makes valid federal law part of the same body of jurisprudence as state law, but also declares that within that body of jurisprudence federal law is “supreme”—a word that both Samuel Johnson and Chief Justice Marshall defined to mean “highest in authority.” (Emphasis in the original.)<sup>75</sup>

Thus, to make a law “binding” signals a rule of applicability. What is described by this term is legislative authority. But without more, such a law has no hierarchical priority; it is simply on a par with all the laws of other legislatures. What signals hierarchy is not “binding,” but “supreme.” With “supremacy” one encounters a rule of priority, not merely a rule of applicability.

Thus, in the jurisprudence of the time, the language in the first TEC Constitution that dioceses not present were “bound by” acts of the General Convention simply established General Convention as a legislative rather than a consultative body. It made General Convention canons directly applicable (“binding”) in the dioceses, without having to be adopted by state conventions. But absent a rule of priority using recognizable language of hierarchy, General Convention legislation was not supreme. It was on a par with diocesan legislation, *which was also binding*, and subject to nullification by the diocesan conventions under the traditional last in time rule.

It is significant that the highly competent lawyers drafting and reviewing TEC’s first Constitution tracked part of the Supremacy Clause and expressly

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<sup>75</sup> Nelson, *Preemption*, 250.

included its rule of applicability, but omitted the language of "supremacy" that would have provided a rule of priority. Indeed, it is instructive to compare the precise language in TEC's Constitution to that in its precedents, the Supremacy Clause and the Jay resolution:

- October 1786: Jay resolution contains no language of supremacy but makes peace treaty the "Law of the Land" and "binding and obligatory";
- March 1789: New United States Constitution contains Supremacy Clause: federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."
- August 1789: TEC Constitution adds "the Church in such State [not present] shall nevertheless be bound by the acts of such Convention."

It is apparent from this chronology that TEC's initial constitutional language was patterned after the legal language used by Jay and the similar language later used in the United States Constitution. This concept was not incorporated into TEC's Constitution until after it had been used in these other documents. But it is also apparent from a careful examination that the TEC language was directly modeled on the new United States Constitution not on the Jay resolution; it tracks the language from the Supremacy Clause, but only insofar as the use of the concept of "bound by." In fact, one can see that TEC's founders took the Supremacy Clause and *rejected* the language "shall be the supreme Law of the Land," keeping only the language of applicability,

“bound by.” Thus: far from evidencing supremacy, this language actually proves the opposite. Supremacy was intentionally rejected by TEC’s founders.

*Nineteenth Century Developments.* In its court submissions, TEC relies heavily on certain nineteenth century “commentators” who are said to have “viewed the General Convention as the supreme authority” in TEC:

a survey of Nineteenth-Century commentators on the ecclesiastical law of the Church reveals an unequivocal and unanimous view of the hierarchical nature of the Church and the lack of independence of its dioceses.<sup>76</sup>

The problem with this statement is that the nineteenth century commentators were neither unanimous nor unequivocal. The earliest work cited is that of Hawks in 1841, who did, indeed, opine that the dioceses “surrendered,” *inter alia*, “such an exercise of independency as would permit them to withdraw from the union at their own pleasure, and without the assent of the other dioceses.” This opinion was expressed, however, only after he had concluded:

- “we have no tribunal that can authoritatively declare to the whole Church what the meaning of the constitution is”;
- “Its interpretation, therefore, should be liberal, and rather according to its general spirit, than to its strict letter, when the rigor of literal

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<sup>76</sup> “Mullin Affidavit” at par. 145.

interpretation would tend to defeat the great end of *union*, contemplated by its framers”;

- “It is difficult to lay down a general principle on this delicate subject, of the respective rights of the Church at large, and the churches in the several dioceses.”<sup>77</sup>

Given Hawks’ interpretive method of ignoring the “rigor of literal interpretation” and the “strict letter” when necessary to preserve the *union*, it is hardly surprising that he drew the “difficult” line on what diocesan rights were “very clearly” “retained” and what were “it seems to us” “surrendered” so that one of the few things (five altogether) surrendered was the right to withdraw. Whatever opinions Hawks may have had on the legal issue under discussion—and this was long before the twentieth century developments in association law—the one thing that is absolutely clear from Hawks’ consideration is that *there is no judicatory in TEC that can decide this issue and to which the courts can defer.*

The very year, 1841, that Hawks published his treatise Thomas Vail (later bishop) published an analysis that reached a very different conclusion. When Bishop Vail published the second edition of his book, he noted that his manuscript had been reviewed and concurred in by two other bishops (or future bishops) of TEC.<sup>78</sup> These bishops reached a conclusion opposite to that of Hawks:

Furthermore, each Diocese is absolutely independent, except in certain particulars,

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<sup>77</sup> Hawks, *Constitution*, 9-11.

<sup>78</sup> Vail, *Comprehensive Church*, 2<sup>nd</sup> ed., 17.

wherein, by its own voluntary union with the others, it transfers its own authority to the General Convention. The connection or union of each Diocese with the others, through the General Convention, is perfectly voluntary; and any diocese has a right to withdraw from that connection for absolute urgent cause morally justifying the annulling of its pledge.<sup>79</sup>

Even before going further, when three nineteenth-century bishops reach conclusions opposite to Hawks' on diocesan withdrawal, one can only regard with suspicion the claim of some "unequivocal and unanimous view of the hierarchical nature of The Episcopal Church and the corresponding lack of independence of its dioceses."

This pattern of nineteenth century debate producing opposite conclusions can be seen elsewhere. Another commentator on whom TEC places great reliance in its court submissions is Murray Hoffman, who concluded that General Convention was a body of "superior ultimate jurisdiction" in TEC. But Hoffman's reasoning is of more relevance to contemporary jurisprudence than his conclusion. He acknowledges that the authority he would give to General Convention under his "theory" is not found in the Constitution:

Looking to the source of the power of the delegates, by whom the constitution and canons were formed, we might be led to the supposition that the analogies of the Constitution of the United States would prevail; and that the question upon any law of the

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<sup>79</sup> Vail, *Comprehensive Church*, 2<sup>nd</sup> ed., 95.

convention would be, whether the power to make it had been expressly granted, or by a necessary implication was vested in it under some clause of the constitution.

But this rule of construction will be found inapplicable. *It is impossible to find in that instrument, either in express language, or by any warrantable inference, any provisions on which to rest the validity of the greater part of the canons...*

We have here a very limited foundation for the legislation of the convention over the whole Church. *In truth upon the doctrine of deriving authority from the constitution, there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops.*

And from the view we have now taken, two classes of powers exist in this body—*those conferred by the constitution and those possessed without being so conferred.* I have before stated what fall under the first head.

And as to the other powers, they vest in the General Convention by reason of its inherent sovereignty, and from their very nature cannot receive a strict definition or circumscription. (Emphasis added.)<sup>80</sup>

Hoffman is explicit about how this “inherent sovereignty” not found in the Constitution is derived:

The mere act of establishing this Council involved and attached to it every power

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<sup>80</sup> Hoffman, *Treatise*, 115-16.

inherent in such a body, and not expressly refused to it. Such powers are to be ascertained from the laws and practice of the apostles, the voice of ancient witnesses, the uninterrupted descent from age to age, from council to council, of known, and exercised, and unquestioned sway.... Now, what could possibly achieve the object of maintaining uniformity in discipline and worship, but this principle of ultimate authority in some constitutional body? What else could fulfil the primitive law of unity and perfection in a national Church — what else could have met the difficulties and exigencies of those days? Nothing saved us then, nothing but this can save us now, from being the dis severed members of separate congregations, and not the compact body of a national Church....

Thus we have a theory of the power of the General Convention, adequate, consistent, and practical. There is neither safety, union, nor progress in any other; but there is every element of discord, and every omen of decay.<sup>81</sup>

To summarize Hoffman's "theory" (which he acknowledges is a matter previously "untouched"): the supremacy of General Convention, which is necessary to "save" the church, is *not* "conferred by the constitution" but inherent and ascertained from the practices of the apostles and the ancient councils of the church.

Hoffman, therefore, cannot be used to support an argument for judicial deference. It is not the constitutionally permitted role of the courts to choose between competing ecclesiastical theories based on

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<sup>81</sup> Hoffman, *Treatise*, 111, 114.

unwanted consequences. Courts cannot “ascertain” authority not found in governing instruments by looking to the practice of the apostles and the voice of ancient witnesses in uninterrupted descent from age to age. Courts know that there are churches with congregational and other polities and are unlikely to be persuaded by the argument “what national or provincial Church has ever been known without such a predominant body?” Courts will rightly see that, whatever ecclesiological merit it may have, the argument “nothing but this can save us now, from being the dissevered members of separate congregations, and not the compact body of a national Church” is not a legal argument at all, but essentially an admission that TEC’s Constitution does not in fact specify such a “predominant body.” The role of the courts is to ascertain the powers that *are* “conferred by the Constitution,” not those that are not but should have been. And on this point, Hoffman’s conclusions are fatal to the notion that General Convention is TEC’s highest judicatory: “In truth upon the doctrine of deriving authority from the constitution, there would be no power in it, except to regulate its own organization, to govern all changes in the Prayer Book, and to direct the trial of Bishops.”

Hoffman in effect advances theological arguments to remedy perceived defects in TEC’s polity as expressed in its governing legal instrument. Most Episcopalians will be sympathetic to his ecclesiological goals of conforming to apostolic practice and the ancient witnesses. But interpretations of apostolic practice vary, as a comparison of the polities of the Roman Catholic and Orthodox Churches shows, and modern synodical governance that mirrors or complements national



parliaments is not the obvious inference of apostolic practice. The fact that there are papal, conciliar and synodical polities all claiming apostolic warrant illustrates why the courts are not competent to evaluate the theological arguments made by Hoffman. But Hoffman's theological concerns, especially what apostolic practice means for an episcopal church, are worth further consideration.

And Hoffman's views must be contrasted with those of his better-known contemporary, Bishop William Stevens Perry:

By this simple provision [the Constitution's accession article] our fathers proposed to secure the perpetuation of Diocesan independence. As they had come into the union, surrendering only those rights and powers to the central or national organization specifically stated in the Constitution or bond of union, so were other State or Diocesan Churches to come in for all time.<sup>82</sup>

This nineteenth century debate does not end, however, with dueling commentaries. It was addressed decisively by General Convention itself in the constitutional revision at the end of the century. In his extensive study of this revision Allan Haley notes that in the 1890s a Joint Commission on the Revision of the Constitution and Canons proposed revisions to the Constitution to (i) add a supremacy clause making General Convention (which was to be renamed "General Synod") the "supreme legislative authority in this church"; (ii) give General Convention "exclusive power to legislate" in

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<sup>82</sup> Perry, *Constitution*, 262.

certain broad areas of church life, including ordinations and the creation of dioceses; and (iii) require that no diocesan legislation “contravene this Constitution or any Canon of the General Synod enacted in conformity therewith.” Haley notes that this proposal was reported to the General Convention in 1895 and then overwhelmingly *rejected* in 1898. These provisions were never added to the Constitution.<sup>83</sup>

These are the very concepts, never found in TEC’s Constitution and rejected overwhelmingly when proposed for addition in the late nineteenth century, on which any argument for judicial deference depends.

*No Judicatory Higher than the Diocese.* What is the result when one undertakes the careful examination of TEC polity required by the Supreme Court in light of the *Serbian* criteria? All of the following is clear:

- TEC’s Constitution has no language making General Convention or any other central body or office the “supreme” or “highest” authority, making its decisions “final” or making dioceses “subordinate” to any other office or body.
- A central hierarchy was intentionally omitted when TEC’s Constitution was drafted and was

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<sup>83</sup> Allan S. Haley, “Constitutional Changes,” (Anglican Curmudgeon, November 2010) <http://accurmudgeon.blogspot.com/2010/11/constitutional-changes-more-on-church.html> <http://accurmudgeon.blogspot.com/2010/11/constitutional-changes-opposing.html> (accessed Dec. 8, 2010); *Journal of 1895 General Convention* (1896) App. XVI; *Journal of the 1898 General Convention*, (1899) App. XIV.

explicitly rejected a century later when the Constitution was revised.

- The Declarations that TEC requires of episcopal ordinands contain no “hierarchical oaths” by which allegiance is sworn to the hierarchical body or even any reference to a central body, but only a pledge of conformity to the doctrine, discipline and worship of The Episcopal Church.
- Dioceses are not created, extinguished or combined by General Convention as administrative districts of a hierarchically-controlled general church. The creation of a diocese “originates” in the diocese, which after being duly constituted as a legal entity is “admitted” to union with General Convention.
- The general bodies of The Episcopal Church have no right of prior review or authority to approve the actions of diocesan conventions, including in particular changes to the dioceses’ governing instruments.
- TEC is organized legally as an association of dioceses that retain the rights enjoyed by all members of associations under settled law to withdraw from membership.

These facts all point to one conclusion. There is no judicatory higher than the diocese to which the courts can defer on the question of diocesan withdrawal.

### **Conclusion**

This review of “justiciable facts” before courts considering the right of dioceses to withdraw from the General Convention of The Episcopal Church has shown

that TEC is an association of dioceses and that under association law dioceses do, in fact, have the right to withdraw. It has also addressed two possible and contradictory objections to this conclusion: the argument that TEC has a unitary form of government (in which the only rights possessed by dioceses are those extended to them by the General Convention) and the argument that dioceses held but surrendered the right of withdrawal by acceding to the Constitution of TEC. Finally, this review has considered the argument that a neutral principles analysis is unwarranted because the court must defer to TEC's highest judicatory. None of these objections is convincing.

## Notes and Resources

Lawrence R. Hitt II of the Episcopal Chancellors Network reports that:

- The Western Chancellors Conference met on May 4-7, 2011 at the Catamaran Resort Hotel in San Diego.
- The Province IV Bishops and Chancellors Conference will be meeting October 13-15, 2011 at the Dayspring Conference Center outside of Tampa, FL. The Diocese of Southwest Florida will be hosting, and the conference welcomes all Episcopal chancellors and their bishops to the session. We encourage chancellors and bishops from outside Province IV to attend and enjoy the conference. Any chancellor may contact Brad Foster ([bfoster@evanspetree.com](mailto:bfoster@evanspetree.com)) for more details.

Those interested in information on joining the Episcopal Chancellors Network, should contact Lawrence R. Hitt II, President, at [LRHitt2@msn.com](mailto:LRHitt2@msn.com).

A group of persons identifying themselves as “Virginia Laity for a Win-Win Settlement” has established a blog with details on property negotiation in the Diocese of Virginia and elsewhere: <http://commonprayercommonground.blogspot.com>.

The participants include attorneys who are active in both the Episcopal Diocese of Virginia and the

Anglican District of Virginia (the organization formed by congregations departing from the Episcopal Church in Virginia). As the name of their site indicates, they advocate settlement rather than continued litigation.

Those who do not have access to Westlaw and other legal research programs may find a new offering from Google to be helpful. Google is posting a growing number of secular legal opinions on its <http://scholar.google.com/> site. A search under “Legal Opinions and Journals” using the term “Episcopal Church” will reveal over 9,000 listings.