

TITLE IV REVISIONS UNMASKED: REPLY TO OUR CRITICS

by

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In September 2010, we published an article demonstrating that the new Title IV disciplinary canons enacted at the last General Convention are unconstitutional and unwise: unconstitutional because they infringe on the exclusive rights of dioceses to institute courts for the discipline of clergy and give the Presiding Bishop metropolitan authority over other bishops; and unwise because they deny basic due process rights to diocesan clergy.¹ Now, five months after our article was published, three participants on the task force that drafted the new title have published a paper responding to our analysis.² Our critics address only the constitutional questions in the two parts of their paper. No response is offered to our concerns about the abrogation of basic due process rights in the new canons.³ Those concerns remain, but this reply addresses only the arguments made by our critics.

I

Clergy Discipline Is the Constitutional Prerogative of Dioceses

Our original paper demonstrated that the establishment of courts for the trial of diocesan clergy has been the exclusive prerogative of the dioceses since TEC was organized. The new Title IV eviscerates this constitutional allocation of authority by determining virtually all aspects of clergy discipline, leaving the dioceses with no responsibility other than appointing diocesan personnel to bodies defined and regulated by the general canons.

The primary argument made by our critics is that while Title IV would have been unconstitutional during the first century of TEC's existence, the 1901 revision of TEC's constitution "profoundly changed" the allocation of authority and "as a result of this change General Convention is now constitutionally free to legislate in the area of clergy discipline."⁴ What was the profound change that gave the General Convention these sweeping powers for the first time? Prior to the 1901 revision the relevant article read as follows:

¹ C. Alan Runyan and Mark McCall, "Title IV Revisions: Unmasked," Anglican Communion Institute, September 2008. <http://www.anglicancommunioninstitute.com/2010/09/title-iv-revisions-unmasked/>

² Duncan A. Bayne, Stephen F. Hutchinson, and Joseph L. Delafield III, "Title IV: Constitutional Issues," Feb. 15, 2011.

^{3 3} As to those issues, the authors state, "We hope ta [sic] address those issues with which we disagree in a later paper." *Id.* at 2, n. 13.

⁴ *Id.* at 3.

In every State, the mode of trying Clergymen shall be instituted by the Convention of the Church therein.⁵

After the revision, it now reads:

Presbyters and Deacons canonically resident in a Diocese shall be tried by a Court instituted by the Convention thereof.⁶

According to our critics, the simple change in language from “mode of trying shall be instituted” to “tried by a court instituted” completely reversed the traditional constitutional allocation of responsibility for clergy discipline. Our critics cite no evidence that such a dramatic change in constitutional governance was intended by the 1901 revision, which was not limited to this article, but was instead a comprehensive re-write of the entire constitution to add greater clarity.

If the apparently minor wording change were the profound reversal of constitutional authority claimed by our critics, one would expect legislative history articulating that significance which would otherwise be obscure. Our critics cite none, only a common dictionary. One would believe that White & Dykman, as a part of their discussion about the many rejected attempts that had been made to limit diocesan authority over the discipline of its clergy, would have noticed this “profound change” if it had been made.⁷ They did not because such a reading is simply wrong.⁸

In fact, the legislative history points conclusively in the other direction. The joint commission initially charged with developing a proposed revision produced a draft that would have made numerous substantive revisions to TEC’s polity, including (i) introducing a supremacy clause making General Convention (which was to be renamed “General Synod”) the “supreme legislative authority in this church”; (ii) giving General Convention “exclusive power to legislate” in certain broad areas of church life, including ordinations and the creation of dioceses; and (iii) requiring that no diocesan legislation “contravene this Constitution or any Canon of the General Synod enacted in conformity therewith.” Among the provisions the joint commission proposed to change was the one on clergy discipline. It proposed giving the new “General

⁵ Journals of General Conventions of the Protestant Episcopal Church, William Stevens Perry, ed., vol. I, p. 100, Claremont, N.H.: The Claremont Mfg. Co. (1874).

⁶ Constitution and Canons (2009), Article IX.

⁷ Indeed one such attempt to limit diocesan authority over clergy discipline in 1874 was rejected “because it would diminish the “full and exclusive jurisdiction of the separate Dioceses” over their own courts.” White & Dykman, Annotated Constitution and Canons (1981) at 121 quoting Journal of the General Convention, 1874 at 155.

⁸ White & Dykman list the chief differences made to Article IX by the convention of 1901. The interpretation advanced by our critics of a wording change that our critics believe “profoundly changed [the] Constitutional scheme” is not listed. *Id.* at 122.

Synod” precisely the sort of sweeping powers our critics now claim the 1901 revision granted General Convention:

Sec. 2. The General Synod shall also have **power** to enact Canons of Discipline, and **exclusive power** to enact Canons defining the offences for which Bishops, Presbyters, and Deacons may be tried, and determining the penalties.... (Emphasis added.)⁹

When these proposals were submitted to the following General Convention in 1898, those granting new and enhanced authority to the General Convention **were rejected**. In the revised constitution that passed its first reading in 1898 and was finally adopted in 1901, the proposal for a supremacy clause was rejected as was the proposal to give General Convention the authority to enact “Canons of Discipline” and exclusive power to define clergy offenses and penalties. Instead, the provision reiterating diocesan responsibility for these matters was retained and restated.¹⁰

If any inference is to be drawn from the change in wording in 1901 it is that the authority of the dioceses was broadened, not narrowed. Giving the dioceses the authority to institute courts, with the system of administration of justice inherent in that concept, is the way comprehensive authority is described in constitutional language. Consider the simple provisions in Articles I and III of the United States Constitution giving Congress the authority to constitute courts—“The Congress shall have power...to constitute tribunals inferior to the Supreme Court” and “such inferior courts as the Congress may from time to time ordain and establish.” Would anyone argue that Congress does not also have the authority to determine the mode of trying, procedural matters and all other inherent aspects of judicial administration?

It must be emphasized that the new Title IV not only specifies the offenses and penalties concerning diocesan clergy—a power the 1898 convention rejected—it also specifies the nature of the diocesan courts, their names, their composition and their detailed procedures. The only role for the dioceses is to rubber stamp what the General Convention has dictated and to appoint the mandated personnel. This evacuates the constitutional language preserving the prerogative of the dioceses to “institute” courts for trying clergy of any meaning. It is tantamount to Congress

⁹ Journal (General Convention 1895), 648.

¹⁰ 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 Feb. 21, 2011); Journal of 1895 General Convention (1896) App. XVI; Journal of the 1898 General Convention, (1899) App. XIV.

sending the President the name of one and only one person it will confirm as justice to the Supreme Court while claiming it is preserving the President's constitutional right to appoint the judiciary.

Thus, our critics' reliance on an artificial distinction between "mode of trying ...shall be instituted" and "tried by a Court instituted" to carry the burden of overturning a century of well-defined constitutional jurisprudence—which even they acknowledge—is in the end misplaced. And any lingering doubt on this front is removed by considering the remainder of the current constitutional provision:

Presbyters and Deacons canonically resident in a Diocese shall be tried by a Court instituted by the Convention thereof; Presbyters and Deacons canonically resident in a Missionary Diocese shall be tried according to Canons adopted by the Bishop and Convocation thereof, with the approval of the House of Bishops; *Provided*, that the General Convention in each case may prescribe by Canon for a change of venue.

The provision making the disciplinary canons of Missionary Dioceses subject to the approval of the House of Bishops underscores the unconstrained authority of regular dioceses in this area. And if the constitution permits the General Convention to make detailed provisions for the establishment and procedures of diocesan courts, an explicit proviso on change of venue would not be necessary.

A second argument made by our critics is that the constitutional objection was waived in any event when no objection was made to the former Title IV following its passage by General Convention in 1994. But the constitutional analyses made then, if any, are legally irrelevant now for two reasons. First, South Carolina and other dioceses *consented* to the 1994 canon by voluntarily enacting it as part of diocesan canon law. Any diocese is constitutionally free to adopt disciplinary canons proposed by the General Convention. To decide whether or not to do so is the constitutional prerogative of the diocese. It can exercise that prerogative either by acceptance, as South Carolina did in 1994, or by refusal, as it has just done now.

In any event, the failure previously to make a constitutional objection, even if true, is utterly irrelevant legally to the issue of a statute's constitutionality. There is often a significant period of time when the unconstitutionality of a statute goes unrecognized. Indeed, whenever a court finds a legislative act unconstitutional it is true *by definition* that a majority of the legislators themselves had previously thought the act constitutional. And there are well known cases in which the Supreme Court itself had previously *upheld* the constitutionality of statutes it was later to strike down. As everyone knows, *Brown v. Board of Education* overruled a similar case, *Plessy*

v. Ferguson, that sixty years earlier had found segregation statutes constitutional.¹¹ Similarly, *Lawrence v. Texas* overruled a Supreme Court case decided only seventeen years earlier when it ruled state sodomy statutes unconstitutional.¹² So whether a constitutional objection has been raised to a prior canon is totally irrelevant to the legal analysis of the new Title IV. It is settled law that unconstitutional acts are *void ab initio* (“as if the law had never been passed”) and it does not matter when that conclusion is first reached.

II

The Authority of the Presiding Bishop

The second part of our critics’ paper is devoted to defending the unprecedented expansion of authority the new Title IV would grant to the Presiding Bishop. For the first time in TEC’s history the Presiding Bishop would be able to exercise archiepiscopal or metropolitan authority over other bishops.¹³ As we pointed out in our original paper, this was accomplished by a seemingly technical definition near the end of a detailed set of canons, the effect of which was not publicly recognized until after General Convention had passed the new Title IV. In a very precise way, the Presiding Bishop is made the bishop of other bishops with the same disciplinary authority over those bishops that they have over their clergy.

Our critics do not deny that this provision would give the Presiding Bishop authority to issue pastoral direction to another bishop, to suspend or inhibit a diocesan bishop “at any time” without consent from the Ecclesiastical Authority of the diocese, and to become the primary authority in determining whether disciplinary charges should be brought and prosecuted against other bishops. None of these powers has ever been given to the Presiding Bishop in TEC’s two centuries of existence.

Our critics do not dispute this fact, but argue that the new powers are constitutional because the Presiding Bishop’s authority is essentially unlimited under the constitution: “None of these provisions [referring to the Presiding Bishop] contain any language limiting the authority of the Presiding Bishop.”¹⁴ Their argument is twofold: first, that the constitutional limitation in Article II.3 on bishops acting within the jurisdiction of dioceses without the consent of the Ecclesiastical

¹¹ *Brown v. Board of Education*, 347 U.S.483 (1954); *Plessy v.Ferguson*, 163 U.S.537 (1896).

¹² *Lawrence v.Texas*, 539 U.S. 558 (2003); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹³ As noted by Dawley, “ecclesiastical autocracy was often associated with archbishops. Neither the name nor the function was given the presiding officer of the House of Bishops.” Dawley, Powell Mills. *The Episcopal Church and Its Work*, 1955 at 107.

¹⁴ P. 5.

Authority does not apply to the Presiding Bishop; and second, that the constitution permits additional “duties” to be given to the Presiding Bishop by canon.

The prohibition on acting in any diocese without the consent of its Ecclesiastical Authority has been part of TEC’s constitutional governance in almost identical language since its first constitution was adopted in 1789. It now reads as follows:

A Bishop shall confine the exercise of such office to the Diocese in which elected, unless requested to perform episcopal acts in another Diocese by the Ecclesiastical Authority thereof, or unless authorized by the House of Bishops, or by the Presiding Bishop by its direction, to act temporarily in case of need within any territory not yet organized into Dioceses of this Church.

Our critics’ argument is that this prohibition is inapplicable to the Presiding Bishop. Citing no authority, they claim that “it is apparent that the original intent of Article II, Section 3 was not to apply to the Presiding Bishop.”¹⁵ They then argue that because she is not elected “in a diocese” and therefore has no jurisdiction, her jurisdiction must be unlimited. But our critics leap to the wrong conclusion that lack of a jurisdiction means that the Presiding Bishop must instead have unlimited or universal episcopal jurisdiction. As the remainder of Article II.3 makes clear, the more sensible reading of the constitution conforms to TEC’s historical understanding of its polity: the lack of diocesan jurisdiction means that the Presiding Bishop cannot act in *any* diocese without the consent of its Ecclesiastical Authority. *See* Dawley (the Presiding Bishop “exercises no direct pastoral oversight of a diocese of his own, nor does he possess visitorial or juridical powers within the independent dioceses of the Episcopal Church”).

Read as a whole Article II.3 indicates that the Presiding Bishop is in fact explicitly bound by this prohibition on acting within a diocese without consent. Bishops, including the Presiding Bishop (at the “direction” of the House of Bishops), can act outside their own jurisdiction even when authorized by the House of Bishops only in “territory **not yet organized** into Dioceses of this Church.” (Emphasis added.) If the Presiding Bishop can constitutionally act in unorganized territory only at the direction of the House of Bishops, she can hardly be constitutionally authorized to act “at any time” in a duly constituted diocese with a recognized Ecclesiastical Authority, which the logic of our critics’ argument requires. The effect of making this article

¹⁵ P. 7.

inapplicable to the Presiding Bishop would be to create an office with universal episcopal jurisdiction. No reading of Article II.3 or TEC's history permits this conclusion.¹⁶

Our critics' second argument is that the Presiding Bishop's authority is constitutionally unlimited because Article I.3 permits the General Convention to prescribe new "duties":

The term and tenure of office and duties and particulars of the election not inconsistent with the preceding provisions shall be prescribed by the Canons of the General Convention.

But this provision quite precisely permits the specification of "duties" by canon, not the creation of additional authority, a distinction that is well recognized in the law but not by our critics, who move seamlessly in their discussion between the concepts of "authority" and "duties." As the earlier discussion of the proposed but rejected 1901 revision makes clear—in its proposal for new "powers" for General Convention—TEC's canonical jurisprudence follows the law generally in drawing a distinction between "duties" and "powers" or "authority." A primary legal duty of an officer such as the Presiding Bishop is to take action only within the scope of her actual authority.¹⁷ And the General Convention would be constitutionally prohibited from specifying duties for that office if there were no constitutional authority to perform them. Had the drafters of the constitution intended the surprising result that additional *authority* going beyond that specified in the constitution could be created by canon they would have said so, but they did not do that when referring to duties.

Even if the dividing line between duties and authority could be blurred in some circumstances, it would be unreasonable to so in an attempt to make such a significant change as to give the Presiding Bishop what amounts to metropolitanical authority. Under the constitution, the basic provisions for the government of the Church belong in the constitution, not the canons.

¹⁶ Dawley and others have noted that the essential element of Episcopal polity is the Diocese and its Bishop: it is the "chief unit of church life". *Id.* at 114. Dioceses preceded the formation of the Episcopal Church; "Diocesan participation in any national program or effort, for example, must be voluntarily given; it cannot be forced." *Id.* at 116. While the Bishop Diocesan's independence within the diocese may be restricted by the share in church governance possessed by the Diocesan Convention or the Standing Committee, his independence in respect to the rest of the church is almost complete." *Id.* It is therefore astounding for our critics to state that the Presiding Bishop already has the power that would now be usurped from Dioceses and their Bishops through these changes to Title IV.

¹⁷ Restatement (Third) of Agency § 8.09(1) (American Law Institute 2006). See Mike Watson, "Litigation against Disaffiliating Dioceses: Is It Authorized and what Does Fiduciary Duty Require?", Anglican Communion Institute, September 2009, 3–4.

Nor does the title “Chief Pastor and Primate” added by canon in the late twentieth century confer any such authority. Indeed, when the language “and Primate” was added in 1982, the legislative history indicates that this change was titular in nature with no intention to expand authority or confer archiepiscopal jurisdiction.¹⁸ In fact, the original proposal before the 1982 General Convention was to substitute “Archbishop” for Presiding Bishop. According to recent commentary prepared at the request of the current Presiding Bishop and President of the House of Deputies, the rejection of the original proposal demonstrated that there was “no inclination to even bestow the image of metropolitanical authority on a Presiding Bishop.” Even adding the title “Primate” was controversial in the House of Deputies, which eventually concurred, “but only after considerable debate as to whether or not ‘Primate’ was a slippery slope towards a feared and unwanted metropolitanical authority in the Office of Presiding Bishop.”¹⁹

To their credit, our critics do not flinch from acknowledging the remarkable authority the new Title IV would give to the Presiding Bishop. On their reading of the constitution the Presiding Bishop already has the power “to intervene in matters within a Diocese without the consent of, and in some cases over the objection of, the Bishop Diocesan. This is not new Constitutional ground.”²⁰ There is no effort to downplay or mask the sweeping nature of the new powers. They freely embrace the bestowal of broad metropolitanical powers on the Presiding Bishop when even the “image” of such authority has been unthinkable until now. The question presented to the bishops and dioceses of the Church is whether they will ratify not merely the image but the fact of metropolitanical authority inserted not through a proper constitutional amendment but through a technical definition buried at the end of a complex new title and thereby overturn the settled polity under which TEC has operated since its inception.

¹⁸ See Edwin A. White and Jackson A. Dykman, 1991 Supplement to Annotated Constitution and Canons 21–22 (Domestic and Foreign Missionary Society 1991). See Watson, *supra*, n. 17, at 6.

¹⁹ Robert C. Royce, Esq., The Roles, Duties and Responsibilities of the Executive Council, Domestic and Foreign Missionary Society, Presiding Bishop and President of the House of Deputies in the Governance of the Episcopal Church 10 (May 31, 2008). http://www.episcopalarchives.org/AR2009-011-4_Roles_by_Royce.pdf

²⁰ p.8.