

TITLE IV: ISSUES OF CONSTITUTIONALITY

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February 15, 2011

A recent paper⁴ has stated that in the opinion of its authors, the 2009 revisions to Title IV of the Canons of General Convention of The Episcopal Church are “an unconstitutional infringement on diocesan authority”⁵ and “give...unconstitutional authority to the Presiding Bishop.”⁶ Because this assertion of a lack of constitutionality has been cited as one reason for the proposed revisions to the Constitution of the Diocese of South Carolina⁷, and has been the subject of

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⁴ C. Alan Runyan and Mark McCall, Title IV Revisions: Unmasked, <http://www.anglicancommunioninstitute.com/2010/09/title-iv-revisions-unmasked/>; http://www.anglicancommunioninstitute.com/wp-content/uploads/2010/09/title_iv.pdf; September, 2010 (hereinafter cited as Runyan & McCall, with page references to the pdf version cited).

⁵ Runyan & McCall, page 2.

⁶ Runyan & McCall, page 2.

⁷ “The changes in the Title IV section of the Canons of The Episcopal Church contradict the Constitution of The Episcopal Church and they represent an unacceptable change in our polity and an indefensible infringement upon the rights to due process of all the clergy of this diocese.” Resolution R-6 of the 219th Convention of the Diocese of South Carolina, October, 2010; Address of Alan

concern expressed in the Dioceses of Central Florida⁸, Dallas⁹ and Western Louisiana¹⁰, it has been vested with weightier consequences than it might otherwise have, and is deserving of closer analysis and scrutiny.

There are two specific provisions of the Constitution of The Episcopal Church that the Runyan & McCall paper states are violated by the revisions to Title IV in 2009:

1. The provision in Article IX that states "Presbyters and Deacons canonically resident in a Diocese shall be tried by a Court instituted by the Convention thereof..."¹¹ and

2. Section 3 of Article II, which states "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."¹²

3. In addition, the paper appears to claim that the office of Presiding Bishop is limited to those duties expressly stated in the Constitution.¹³

Jurisdiction

Article 6 of the Constitution of 1789 read:

"In every State, the mode of trying Clergymen shall be instituted by the Convention of the Church therein..."¹⁴

Runyan to 219th Convention of Diocese of South Carolina at <http://www.kendallharmon.net/t19/index.php/t19/article/32708/>.

⁸ Diocese of Central Florida, 42d Annual Convention, Resolution R-2, http://www.cfdiocese.org/sites/default/files/staff_uploads/Convention/R-2.pdf; *The Living Church*, Feb 3, 2011: <http://www.livingchurch.org/news/news-updates/2011/2/3/central-florida-challenges-title-iv>

⁹ The Living Church, October 22, 2010, <http://www.livingchurch.org/news/news-updates/2010/10/22/catholic-voices-revisions-to-title-iv-are-bad-law>

¹⁰ Diocese of Western Louisiana, 29th Annual Convention, Resolution 5, <http://www.diocesewla.org/Resolution%205%202010.pdf>

¹¹ Runyan & McCall, page 14.

¹² Runyan & McCall, page 16. See also Address of Alan Runyan to 219th Convention of Diocese of South Carolina at <http://www.kendallharmon.net/t19/index.php/t19/article/32708/>.

¹³ The Runyan & McCall paper contains a number of other non-constitutional objections to the Title IV revisions which are beyond the scope of this paper. We hope to address those issues with which we disagree in a later paper.

¹⁴ White & Dykman, *Annotated Constitution and Canons*, Seabury Press, 1981 (hereinafter cited as White & Dykman), p. 119.

Between 1789 and 1901, only minor changes, from "State" to "Diocese", and from "Clergymen" to "Priests and Deacons", were made. In 1901, however, the Canon wording was changed to "Presbyters and Deacons shall be tried by a Court instituted by the Convention of the Diocese..."¹⁵ The present wording of this provision was adopted in 1919.¹⁶

The Runyan & McCall paper cites two commentators, one in 1841 and the second in 1850, as interpreting the provision to give full jurisdiction over discipline of Priests and Deacons to the several Dioceses, thus denying to General Convention the authority to legislate at all on the subject.¹⁷

Runyan and McCall then go on to apply this position to the present language of the Constitution by asserting that the Constitutional language is "essentially unchanged"¹⁸ from the original language, to which the commentators referred. On this basis they conclude that the Title IV revisions are in violation of the Constitution because they contain detailed requirements concerning the structures and procedures for disciplinary actions for Priests and Deacons. That conclusion, however, does not hold up under scrutiny.

The plain language of the two formulations makes clear the substantial change that was made in 1901. Prior to that time, the Constitution required that "the mode of trying" Priests and Deacons must be left to the several Dioceses. "Mode of trying" is certainly a broad description. "Mode" is defined as "A way or manner in which something is done or takes place; a method of proceeding in any activity, business, etc."¹⁹ In common usage, it signifies the range of activities or characteristics that make up the process or system involved. It is, therefore, understandable that commentators speaking about this formulation would come to the conclusion that the Constitution provided exclusive jurisdiction to the several Dioceses for the broad scope of activities that might be included in the discipline of Priests or Deacons.

The wording adopted in 1901, however, profoundly changed this Constitutional scheme. Instead of reserving to the several Dioceses the "mode" - the full range - of disciplinary activities, it very precisely prescribed that which is left to the Dioceses: the "institution" of the "Court" by which Priests or Deacons may be tried. No longer do the Dioceses have exclusive rights with respect to the full range of disciplinary activities; from and after 1901, the only part of those activities exclusively reserved to the Dioceses is the establishment of the Court before which trial, if there is to be one, is to be conducted. As a result of this change, General Convention is now constitutionally free to legislate in the area of clergy discipline.

¹⁵ White & Dykman, p. 119

¹⁶ White & Dykman, p. 126

¹⁷ Runyan & McCall, p. 15

¹⁸ Runyan & McCall, p. 14.

¹⁹ Oxford English Dictionary, Definition 4(a).

This change is entirely consistent with commentary preceding it. Numerous attempts were made to change the wording of the original Constitutional provision in order to impose uniformity in the mode of trial procedure in the several Dioceses.²⁰ The commentators cited in Runyan & McCall point out the lack of wisdom in the original formulation.²¹

Runyan & McCall quote language from the 1954 edition of White & Dykman stating that the Constitution gives to the Dioceses the exclusive right to institute courts for the trial of Priests and Deacons.²² In a footnote, some additional language in the 1954 edition of White & Dykman is also quoted, although the precise import of that language is not clear. There is no dispute on the first point: the Constitution in its present form clearly gives to the Convention of each Diocese the exclusive right to institute Courts for the trying of Priests and Deacons. Nonetheless, the editors of White & Dykman for the 1981 revision of that work apparently came to the conclusion that the 1954 commentary was no longer needed, for that language does not appear in the 1981 edition.

If further proof is needed that the Constitutional language no longer prevents General Convention from entering into the area of clergy discipline process, so long as it respects the right of each Diocese to establish the Courts for that process, it is provided by the actions of General Convention itself. In 1994, General Convention adopted a comprehensive revision to Title IV²³ in which it mandated that each Diocese establish a Court, but comply with certain requirements spelled out in the Canons of Title IV.²⁴ By doing so, General Convention expressed by implication its opinion that such a provision was in accordance with the Constitution, and no question of Constitutional authority was raised at the time or since, until the Runyan & McCall paper.

With respect to Article IX, the revisions to Title IV enacted in 2009 did not differ materially from the provisions existing before 2009. Title IV continues to mandate that each Diocese establish a Court (to be referred to as a Disciplinary Board) to discipline Priests and Deacons.²⁵ The only requirement of the

²⁰ White & Dykman, p. 120.

²¹ See comments of Francis L. Hawks (1841) and Murray Hoffman (1850) cited in Runyan & McCall, p. 15.

²² Runyan & McCall, p. 15.

²³ 71st General Convention, Indianapolis 1994, Resolution A019

²⁴ "In each Diocese there shall be an Ecclesiastical Court for the Trial of any Priest or Deacon subject to its jurisdiction, and it shall be the duty of each Diocese to provide by Canon for the establishment of the Court and the mode of conducting Trials of the same: *Provided, however,* that the provisions of this Canon shall be included therein." Canon IV.4.1 (1994).

²⁵ "Each Diocese shall, by Canon, create a court to be known as the Disciplinary Board as described in this Canon..." Canon IV.5.1 (2009).

Constitution in this regard is observed: Priests and Deacons may be tried only by Courts instituted by the several Dioceses, and Title IV mandates that such Courts be established by those Dioceses.

The establishment of disciplinary structures and procedures by General Convention in Title IV is, within the general legislative authority conferred on General Convention by the Constitution, so long as the institution of the courts for that purpose is left to the Dioceses.

Authority of the Presiding Bishop

In discussing the authority of the Presiding Bishop, the Runyan & McCall paper appears to make two claims of constitutional infirmity in the Title IV revisions. After stating that the revisions give the Presiding Bishop increased authority over Bishops, the paper states in a conclusory fashion “This is flatly contrary to the Constitutionally limited authority of the Presiding Bishop – that of presiding – and is also contrary to the absolute Constitutional prohibition on any Bishop acting within the jurisdiction of another Bishop without consent.”²⁶

While the paper contains no discussion spelling out the rationale for the claim that the Presiding Bishop has limited authority, it is apparent that the basis for such a claim is a perceived principle that, as a Constitutional office, the Presiding Bishop can have no authority not expressly granted in the Constitution itself. No provision of the Constitution so limits the authority of the Presiding Bishop. The only references to the Presiding Bishop in the Constitution are in Article I, Section 3, which provides for the election of a Presiding Bishop to be “the Presiding Bishop of the Church”, with such duties as “shall be prescribed by the Canons”, Article II, Section 3, which enables the Presiding Bishop to authorize a Bishop to act in a territory not yet organized into a Diocese, Article II, Section 7, which provides that the Presiding Bishop is to oversee the work of the Bishop Suffragan for the Armed Forces, and Article III, which provides for Bishops consecrated for foreign lands to be approved by vote of the House of Bishops certified to the Presiding Bishop. None of these provisions contain any language limiting the authority of the Presiding Bishop. None of them even states expressly that “presiding” is a duty of the office.

From the very beginning, however, it was contemplated that the duties of the Presiding Bishop will be prescribed by the Canons. The first Constitutional provision establishing the office of Presiding Bishop, in 1901, read, in part: “[The Presiding Bishop] shall discharge such duties as may be prescribed by the Constitution and the Canons of the General Convention.” (underscoring added).²⁷

Every iteration of the Constitution since 1901 has contained similar language, authorizing the Canons, without limitation, to assign duties to the

²⁶ Runyan & McCall, p. 16.

²⁷ White & Dykman, p. 25

Presiding Bishop.²⁸ This authority is further confirmed by Title I of the Canons, which provides that the Presiding Bishop, in addition to certain prescribed duties, “shall perform such other functions as shall be prescribed in these Canons...”²⁹

Over the years, General Convention has exercised this Constitutional authority to prescribe duties for the Presiding Bishop that have nothing to do with presiding. The Presiding Bishop is to be Chief Pastor and Primate of the Church³⁰; to provide leadership in developing policy and strategy for the Church, and to speak for the Church³¹; to speak God’s words to the world as a representative of the Church and its episcopate³²; to play an active role in a Diocese where there is no Bishop³³; to take order for the consecration of Bishops³⁴; and to visit each Diocese.³⁵ The Presiding Bishop is assigned several roles in the election and consecration of Bishops,³⁶ including the resolution of procedural objections within the Diocese to the election.³⁷ If a Bishop Diocesan fails to observe the canonical duty of visiting congregations, the Presiding Bishop is authorized to impose a Council of Conciliation on the Diocese in order to reconcile the situation.³⁸ The Presiding Bishop receives and accepts any renunciation of ordained ministry by a Bishop³⁹ and any resignation by a Bishop.⁴⁰ When a Bishop becomes incapacitated, it is the Presiding Bishop who handles the situation and is authorized to determine who is the appropriate Ecclesiastical Authority in the Diocese during the period of incapacity.⁴¹ The Presiding Bishop is given express authority to intervene in matters related to Religious Orders and Christian Communities to resolve disagreements.⁴²

²⁸ “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.” Article I, Section 3.

²⁹ Canon I.2.4(c). See also White & Dykman, p. 23 (“Canonical legislation governs the...Presiding Bishop’s...duties, responsibilities, and other matters relative to the office.”) and p. 203 (“The office of Presiding Bishop is a constitutional office, the tenure and duties of which are prescribed by canons...”).

³⁰ Canon I.2.4(a).

³¹ Canon I.2.4(a)(1)

³² Canon I.2.4(a)(2)

³³ Canon I.2.4(a)(3)

³⁴ Canon I.2.4(a)(4)

³⁵ Canon I.2.4(a)(6)

³⁶ Canon III.11.

³⁷ Canon III.11.9.

³⁸ Canon III.12.3(a)(2).

³⁹ Canon III.12.7.

⁴⁰ Canon III.12.8.

⁴¹ Canon III.12.8(p).

⁴² Canon III.14.1(d) and III.14.2(d).

Since the Constitution not only fails to limit the authority of the Presiding Bishop, but also affirmatively authorizes the Canons to spell out the duties of that office, it does not seem possible to hold, as the Runyan & McCall paper implies, that the office is limited to those duties expressly stated in the Constitution itself. The entire history of canonical legislation relating to the duties of the Presiding Bishop demonstrate that General Convention itself has never considered that office to be limited as the Runyan & McCall paper states.

The second basis cited in the Runyan & McCall paper as being violated by the revisions to Title IV is the Constitutional provision prohibiting a Bishop from exercising the office outside of the Diocese in which elected, unless requested to do so.⁴³

The requirement that a Bishop confine the exercise of the office to the Diocese in which elected has existed more or less unchanged since the Constitution of 1789, which provided "And every Bishop of this Church shall confine the exercise of his Episcopal office to his proper Diocese or District, unless requested to ordain or confirm, or perform any other act of the Episcopal office, by any Church destitute of a Bishop."⁴⁴

Since the office of Presiding Bishop did not achieve Constitutional status until 1901⁴⁵, it is apparent that the original intent of Article II, Section 3 was not to apply to the Presiding Bishop, but rather to the performance of Episcopal acts by other diocesan bishops. To seek to apply it to the Presiding Bishop, when acting *qua* Presiding Bishop, as the Runyan & McCall paper appears to do, not only stretches it beyond the contemplation of the original drafters, but contravenes common sense as well.

The Presiding Bishop is required by canon to resign her prior jurisdiction upon taking office.⁴⁶ She thus has no geographic place for the exercise of Episcopal acts customary to a Bishop in a Diocese. However, she is required by canon to perform a broad range of acts specific to her role as Presiding Bishop.⁴⁷ No

⁴³ "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." Article II, Section 3

⁴⁴ White & Dykman, p. 51.

⁴⁵ White & Dykman, p. 23.

⁴⁶ Canon I.2.3(a).

⁴⁷ See, for example, Canon I.1.2(c) (appointment of Bishops to Standing Commissions); Canons I.1.5(g) and I.1.6(f) (appointment of Registrar and Recorder to fill vacancies); Canon I.2.4(a) (enumerated responsibilities as Presiding Bishop); Canon I.3 (serve as President of Domestic and Foreign Missionary Society); Canons I.4.1(c) and I.4.3(a) (*ex officio* member and chair of Executive Council); Canon III.11

provision of either the Constitution or Canons says or implies that her performance of these duties is prohibited absent a request from the Bishop Diocesan of whatever Diocese she may be in at the time, or that may be affected by her action; yet that would be the effect of the position apparently taken in the Runyan & McCall paper.

In order to take the position that Article II, Section 3 applies to the Presiding Bishop, one would have to reconcile the language of the section referring to “the Diocese in which elected” with the concept of Presiding Bishop. When elected Presiding Bishop, there is no specific “Diocese” to which one is elected; if this is taken to mean the geographic area of the electing constituency, it would have to mean the entire geographic area of The Episcopal Church, since that is the entity conducting the election.

Many of the current canonical duties of the Presiding Bishop enumerated above require the Presiding Bishop 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, as the Runyan & McCall paper seem to assert. The Church has for many years authorized the Presiding Bishop, in defined circumstances, to intervene in diocesan situations whether or not requested to do so by the Bishop Diocesan.

The only reasonable interpretation of Article I, Section 3 is that the prohibition applies to the performance of Episcopal acts that are or might be performed by the Bishop Diocesan, but not to those acts specifically authorized by canon to the Presiding Bishop. This would be consistent with the intent of the original Constitution; with the language of the present Constitution and Canons; and with common sense.

Conclusion

Title IV in the form approved by General Convention in 2009, to take effect July 1, 2011, does not violate Article IX of the Constitution, since it clearly requires that the courts for trying Priests and Deacons must be instituted by the several Dioceses, as the Constitution requires. It does not violate any Constitutional limitation on the authority of the Presiding Bishop, as there are no such limitations in the Constitution, which leaves to canonical legislation (*e.g.* Title IV) the assignment of duties to the office of Presiding Bishop. Finally, it does not violate Article I, Section 3 of the Constitution, which must be read not to apply to the performance by the Presiding Bishop of those acts specifically designated for performance only by the Presiding Bishop.

(specific roles in process of election of Bishops); Canon III.12.7 (renunciation of ministry by a Bishop); Canon III.12.8(a) (acceptance of resignation by a Bishop); Canon III.12.8(p) (incapacity of a Bishop); and Canons III.14.1(d) and 2(d) (authority over Religious Orders and Christian Communities).

The enactment of the Title IV revisions in 2009 was Constitutional. The performance of duties assigned by Title IV to the Presiding Bishop will be within the Constitutional authority of that office.