Discussion of Proposed Constitutional Amendment, Article I, Section I

The 138th Annual Convention of the Diocese of Pittsburgh approved the first reading of an amendment to Article I, Section I of the Diocesan Constitution. That amendment reads:

> *In cases where the provisions of the Constitution and Canons of the Church in the Diocese of Pittsburgh speak to the contrary, or where resolutions of the Convention of said Diocese have determined the Constitution and Canons of the Protestant Episcopal Church in the United States, or resolutions of its General Convention, to be contrary to the historic Faith and Order of the one holy catholic and apostolic church, the local determination shall prevail.*

The amendment must be approved again at the upcoming 139th Annual Convention in order be given effect.

Questions have been raised as to whether Diocesan Convention has the authority to revise the Constitution as contemplated by the amendment. In my opinion, such an amendment to the Constitution of the Diocese of Pittsburgh is entirely reasonable and not inconsistent with canon law, secular law, church history, or the ecclesiology of the Anglican tradition.

This is not a novel issue, and there is precedent.[1] Notwithstanding the urgings of opponents of the amendment to the effect that the national church is sovereign in any and all disputes with dioceses, there is no controlling legal authority, nor act of General Convention, that conclusively affirms that position. The matter has never been litigated in the secular or ecclesiastical courts. The Constitution and Canons of the Episcopal Church are silent as to the relationship between the dioceses and the national church in this respect. More directly to the point, there is no authority that expressly forbids a diocese from nullifying an act of General Convention.[2]

The historical reality of the formation of the American Episcopal Church is that it was a confederation of colonial churches. In the closing days of the American Revolution, the Rev. William White, Chaplain to the Continental Congress and Rector of Christ Church in Philadelphia, proposed a confederated plan of organization for the remnant of the Church of England residing in America. The theoretical basis of White's plan was that "the authority to govern the Episcopal Church in America had to be derived from elected representatives from all the Churches throughout the United Stated, united by the voluntary acceptance of a Federal Constitution."[3] White's plan for church union is considered in the scholarly literature to

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[1] See Article I of the Constitution of the Episcopal Diocese of Fort Worth (revised in November, 1997).
[2] James A. Dator, *The Government of the Protestant Episcopal Church in the United States of America: Confederal, Federal or Unitary?* (Dissertation submitted for the Degree of Doctor of Philosophy to American University, Washington, DC, 1959) p. 200.
[3] Clara Loveland, *The Critical Years: The Reconstitution of the Anglican Church in the United States of America – 1780-1789* (Greenwich, CT: The Seabury Press, 1956) p. 62.

be substantially identical with the final form of the Episcopal Church's polity. "The American Episcopal Church took its form from an outline laid down in White's *Case*."[4] "The Constitution of the American Church to this day bears the imprint of his hand, more so than of any one man."[5] One of the underlying principles of White's *Case* was to limit the powers of church representative bodies. It was deemed necessary to retain at the local level "every power that need not be delegated for the good of the whole."[6] Thus, the polity of the Episcopal Church in America emulated the delegated powers model of the Articles of Confederation, rather than the more centralized model of the Constitution. What this means is that Episcopal Church governance was founded on the principle of the consent of the governed and by voluntary association rather than by centralized authority.

No official action over the intervening years has reversed White's foundational principle. In fact, attempts to resolve this issue in favor of national church supremacy during the Civil War were specifically rejected by the 1862 General Convention. Following the outbreak of armed conflict and the creation of the Confederate States of America, Southern dioceses withdrew from the Protestant Episcopal Church in the United States to form the Protestant Episcopal Church of the Confederate States of America. The Presiding Bishop, Hopkins of Vermont, opposed the secession of the Southern States and Dioceses but advocated patience and caution. "Radical Republicans" from New York argued that the Southern dioceses and bishops were schismatic and should be punished.[7] Matters came to a head at the 1862 General Convention. Judge Murray Hoffman of New York introduced a resolution seeking to punish the Southern dioceses for schism. The deputies rejected Hoffman's resolution, passing a substitute resolution expressing concern and reproof only.[8] Though they disagreed with the course of action taken, the majority opinion of General Convention was that it was within the rights of a diocese to withdraw. General Convention's decision not to condemn the South in 1862 nor require any oath of loyalty or subservience was repeated in 1865 and 1868 during the Reconstruction era. General Convention declined to introduce any canonical or constitutional legislation that would prevent a diocese from withdrawing from or nullifying an act of General Convention.

The notion that the diocese is a subset of the national church, without standing or existence outside of the national church, relies upon a theory first put forward by Hill Burgwin in "The National Church and the Diocese" in 1885.[9] Authority flows from the top down, from the national church to the dioceses, Burgwin said. In opposition to Burgwin's view were arguments made by Evangelical leaders for diocesan autonomy and federated government. Judge John Andrews argued that the national church's Constitution was controlled and limited by the power conferred by the dioceses upon

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[4] Sydney Temple, *The Common Sense Theology of Bishop White* (New York: King's Crown Press, 1946) p. 23.
[5] Walter H. Stowe, "William White: Ecclesiastical Statesman" *Historical Magazine of the Protestant Episcopal Church* 22 (1953) p. 374.
[6] William White, *The Case of the Episcopal Churches in the United States Considered*, Richard G. Solomon, editor (Philadelphia: The Church Historical Society, 1954) p. 25.
[7] Murray Hoffman, *What is Schism?* (New York: E. Jones, 1863).
[8] *Journal of the General Convention,* 1862, 37-40, 51-4, 92-4.
[9] Hill Burgwin, "The National Church and the Diocese," *American Church Review* 45 (1885) 423-455

those who framed it.[10] Because the Episcopal Church's "Constitution contemplated a federal union of, and not a central government over Dioceses" Andrews argued, the national church was the creature of the dioceses, and not the other way round.[11] Furthermore, "the Constitution confers certain limited powers essential to a National Church upon the new organization created by it, and that the General Convention is bound to continue its action within the prescribed limits."[12]

We have also heard the claim that Article V, Section 1 [Admission of New Dioceses], of the national church's Constitution subordinates each diocese to the national church's Constitution and Canons. The Section states:

> *After consent of the General Convention, when a duly certified copy of the Constitution of the new diocese, including an unqualified accession to the Constitution and Canons of this Church, shall have been filed with the Secretary of the General Convention and approved by the Executive Council of this Church, such new diocese shall thereupon be in union with the General Convention.*

Proponents of national church sovereignty read "unqualified accession" to mean unqualified submission. In order to be in union with General Convention, they assert, a diocese must become a subsidiary of General Convention. This subordination is ongoing and creates a master/servant relationship between the General Convention and the "acceding" diocese. By binding itself to the terms of the national church Canons and Constitution through accession, a diocese becomes the regional subsidiary or franchise of the parent corporation, the Episcopal Church. However, the Constitution of the Episcopal Church does not state, nor can it be reasonably derived from its language, that such a subordinate state is created by accession to the Constitution and Canons. There is no supremacy clause in the national church Constitution that subordinates dioceses to the General Convention. General Convention is a creature of the dioceses. It is an association of equals bound together in a freely contracted voluntary association. The Episcopal Church has no Metropolitan Archbishop who can compel obedience. General Convention has no juridical authority nor any mechanism to compel the ecclesiastical authority of a diocese to conform to its will.

An analogy from US Federal law may help elucidate this point. The US Supreme Court has held that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[13] In the Federal or Confederal system of church government the Episcopal Church employs, the same relationship applies. Except in matters governed by the Constitution and Canons of the Episcopal Church, the law to be applied in any ecclesiastical court is the law of the diocese. Powers not specifically delegated to the General Convention by the diocese and enumerated by the national church's Constitution and Canons are retained by the diocese.

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[10] John W. Andrews, *Church Law: Suggestions on the Law of the Protestant Episcopal Church in the United States of America: Its Sources And Scope* (Columbus, Ohio: A.H. Smythe, 1883) p 52.
[11] Andrews, p. 57.
[12] Andrews, p. 59.
[13] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

We may also look to the law of treaties for guidance. "Unqualified accession" does not mean submission, but rather ratification. "Accession" is the act whereby a state accepts the opportunity to become a party to an arrangement already negotiated and signed by other states. It has the same legal effect as ratification.[14] The original dioceses of the Episcopal Church "ratified" the Constitution. Subsequent new dioceses "acceded" to the Constitution. An "unqualified" accession means that no reservations are held out to the terms of the arrangement. It does not mean, nor can it be construed to mean absent an express statement to the contrary, that accession is the delegation of all powers, rights and prerogatives. The "unqualified accession" is the delegation of limited powers, as codified in the Constitution and Canons. The final phrase of Article V, Section 1, "union with the General Convention," reinforces this concept of delegation. Were a diocese merely a creature of Convention, it could not possess the independent power enabling it to come into union with its master.

Finally, the US Federal Courts recently have held that the sole interpreter of the Canons of General Convention is the Bishop, or Ecclesiastical Authority, of a diocese.[15] In Dixon v. Edwards, the Fourth Circuit Court of Appeals held that, in the interpretation of the Constitution and Canons, the bishop is the final arbiter of meaning.[16] Hence secular case law concurs that it is the Diocese that interprets the Canons.

We will hear concerns that adoption of the amendment will separate the Diocese of Pittsburgh from the church. Each of us should prayerfully consider exactly what is being said here. By "church" do we mean the earthly institution known as the Protestant Episcopal Church of the United States? Does "church" mean the worldwide Anglican Communion? Or does "church" mean the one holy catholic and apostolic church, the Body of Christ? Clearly our definition makes a critical difference, or it should, when we worry about separation.

Twenty-two of the thirty-eight provinces of the Anglican Communion have rejected the recent actions of the institution (ECUSA) as being incompatible with the Gospel and with the Christian fellowship of which they are a part.[17] The election of non-celibate homosexual as a bishop and the acknowledgment of the ecclesial legitimacy of same-sex blessings are viewed by most of the Anglican Communion as "actions that violate the clear teaching of Scripture and the historic faith and commitments of each of these churches' common life and of their life as members of the Anglican Communion."[18] If that is true, then ECUSA has violated the Preamble of its own Constitution which requires it to uphold and propagate the historic Faith and Order as set forth in the Book of Common Prayer. ECUSA has stepped beyond the bounds of its autonomous self-ordering and the bounds of Anglican diversity. The Diocese of

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[14] Arts. 2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969
[15] Dixon v. Edwards, 290 F.3d 699 (2002).
[16] Dixon at 717.
[17] Address to the General Synod of the Anglican Church of Canada by the Secretary to the Lambeth Commission on Communion, the Rev. Canon Gregory Cameron.
[18] *Communion and Discipline*, a submission to the Lambeth Commission by the Anglican Communion Institute, p.6.

Pittsburgh cannot be compelled to offer unquestioning allegiance in those instances where the institution has so evidently erred. To follow the institution down this path could result in a separation that we do not desire. The Anglican Communion Institute accurately assessed the stakes when, after commenting on worldwide reaction to North American activity, it wrote, "These pronouncements by other provinces then place a real pressure upon dioceses and congregations within ECUSA and Canada to seek disengagement from the policies and even the structures of their respective Churches."[19] We are being warned that separation from the church, at least "the church" defined as the Anglican Communion, is not a decision that is solely within our control. One elemental step in disengaging from ill-advised policies of intuitional leadership is to build into our Diocesan Constitution the unambiguous statement that the Diocese retains its right to assess the legitimacy of the Canons of the institutional church and the resolutions of its General Convention. Then we must act responsibly to maintain our position within the Anglican Communion and the one holy catholic and apostolic church. (So that there is no confusion on this point, let me reiterate that the Diocese does seek to disengage itself from certain policies, but not from the structure, of the Episcopal Church.)

In conclusion, I believe the Convention of the Diocese of Pittsburgh has the authority to adopt a Constitutional amendment that would cause the local determination to prevail "in cases where the provisions of the Constitution and Canons of the Church in the Diocese of Pittsburgh speak to the contrary." Further, I believe that the Convention of the Diocese of Pittsburgh has both the authority and the duty to adopt a Constitutional amendment that would cause the local determination to prevail "where resolutions of the Convention of said Diocese have determined the Constitution and Canons of the Protestant Episcopal Church in the United States, or resolutions of its General Convention, to be contrary to the historic Faith and Order of the one holy catholic and apostolic church."

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[19] Communion and Discipline, p. 8.