

**SUBVERSION OF THE CONSTITUTION AND CANONS OF THE
EPISCOPAL CHURCH:
*ON DOING WHAT IT TAKES TO GET WHAT YOU WANT***

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**I
*Introduction***

Recent actions of The Episcopal Church (TEC) in the matter of Gene Robinson have sent shock waves throughout that church and indeed throughout the Anglican Communion. These actions present both TEC and the Communion unprecedented challenges to their forms of order and governance. Indeed, an underlying assumption of this essay is that neither TEC nor the Anglican Communion as a whole at present has instruments and forms of governance capable of coping with a crisis of this magnitude. As a result, solutions (if they can be called that) are being improvised in great haste and often with little thought.

The particular concern of this essay is that the measures now being taken by the Office of the Presiding Bishop and the House of Bishops to address this crisis lack an adequate constitutional and canonical foundation. Further, because of this lack, those who belong to TEC are in fact being confronted with attempts to address the present crisis by actions that effect changes in the polity of their church that are neither constitutional nor canonical. Put bluntly, TEC's membership faces a situation in which it may come to be governed by the will of people in office rather than by constitutional and legal provision.

The changes now well underway simply described are these. At present, TEC's Constitution renders the General Convention and the Office of the Presiding Bishop as instruments of its various Dioceses. The change sought by the Office of the Presiding Bishop and many within the House of Bishops would alter this arrangement by rendering each Diocese a creature of the General Convention. Along with this change comes another. The Office of the Presiding Bishop at present serves to execute the policies of the General Convention but does not stand in a hierarchical relation to TEC's various Dioceses. The change now in progress would place the Office of Presiding Bishops in a hierarchical relation to these Dioceses, and in so doing give the holder of that office executive powers within the several Dioceses not accorded by the Constitution.

In times such as these actions of this sort are by no means unusual. Times of stress almost always lead those in power to stretch the law in order to achieve their purposes. Churches are no more immune to this temptation than are civil governments. Within TEC, one can see this dynamic clearly at work in two recent incidents, each of which reveals a strategy on the part of the Office of the Presiding Bishop to circumvent the requirements either of TEC's Constitution or its Canons. I have in mind the

replacement of the Standing Committee of the Diocese of San Joaquin and the deposition of Robert Duncan, Bishop of Pittsburgh.

These claims are both bold and controversial. Of this fact, I am fully aware. Because the issues involved are so serious, I will do the best I can to make both my claims and the major objections to them as clear as possible. To my mind the objections are unconvincing. However, a grave flaw in TEC's polity is the lack of a supreme court. As a result, the House of Bishops and the Office of the Presiding Bishop are each left in these matters to be judge in their own case. The implication of this unhappy situation is that if one excludes (as I believe one should) civil litigation as a means of establishing order in the church, the only credible arbiter left in this dispute is the court of last resort, namely, the people of the church, the court of public opinion.

Frankly, this essay constitutes an appeal to this court—to my mind TEC's last and best hope to be governed by law rather than by the will of those in power. The argument contained in the appeal moves in the following increments.

- Despite arguments to the contrary, TEC's Constitution places neither the General Convention nor the Office of the Presiding Bishop in a hierarchical relation to its various Dioceses.
- Consequently, the various Dioceses have a right (sadly now being exercised by some) to withdraw from TEC and its General Convention.
- The several Dioceses of TEC also have a right, even if contrary to the vote of its General Convention, to agree (or not) to an Anglican Covenant should one be presented for ratification.
- Because of these constitutional limitations, the Presiding Bishop does not have the sort of executive authority within the various Dioceses she is claiming.
- Because she lacks said authority, recent actions in San Joaquin on the part of the Presiding Bishop to discharge its Standing Committee, call a Special Convention, import clergy from outside the Diocese, and appoint an Interim Bishop lie outside the constitutional limits of her office.
- The deposition of the Bishop of Pittsburgh at the behest of the Presiding Bishop and with the agreement of but a portion of the House of Bishops is an action that is in violation of the Canons.
- Ruptures in the unity of TEC occasioned by the matter of Gene Robinson have revealed both the incoherence of TEC's polity and its inability adequately to address tears in the fabric of its common life.
- The only way open for TEC to address the problems of its polity revealed by the present crisis is either to change its form of governance so as to reverse the relation between the Dioceses, the General Convention, and the Office of the Presiding Bishop (thereby changing the Office of Presiding Bishop into that of a Metropolitan); *or* by adoption of a covenantal relation that links, in a relationship of

mutual subjection, the existent hierarchy of its various Dioceses with the various hierarchies of the Anglican Communion.

- The first option would amount to a renunciation of TEC's historic form of polity. The latter would be a development in keeping with the trajectory TEC set when it defined itself by relation to the Archbishop of Canterbury and so also the other Provinces in communion with that historic See.
- A search for the most adequate option should be a matter of intense debate and orderly process rather than *ad hoc* reaction or aggressive and unconstitutional/non-canonical executive action. No matter how the debate comes out, changes in TEC's polity ought to be made by means that accord with its Constitution and Canons and not by the will of people who seek to force their views upon the Church by means of highly questionable interpretations and manipulations of either or both.

II

What TEC's Constitution Has to Say

In making the case in support of its action in the matter of Gene Robinson, TEC has pleaded the unique character of its form of governance. That form is, when compared to the polity of other Anglican Provinces, at a minimum idiosyncratic. It is, however, idiosyncratic in ways other than those usually mentioned by TEC's defenders. If one is to understand adequately the issues involved in the matters of the Standing Committee of San Joaquin, one must understand the way in which TEC's polity is in fact different not only from those of other Anglican Provinces but also from the other major denominations within the United States.

The salient difference is that TEC, *at the national level*, does not have a central hierarchy. TEC's constitution lacks all the legal terms indicative of a recognized hierarchy between the General Convention on the one hand and the various Dioceses that comprise its membership on the other. To summarize, one might say that TEC is hierarchical but that hierarchy is dispersed among the various Dioceses. At the national level TEC is an association of Dioceses that meet in General Convention to elect agents (The Presiding Bishop and the Executive Council) to manage their affairs. The Presiding Bishop and the Executive Council are the creature of the Dioceses and not the reverse—a constitutional fact that, as will become plain, gives the Dioceses (which do have a central hierarchy) a constitutional right to withdraw from TEC. Should they choose to do so, neither the Presiding Bishop nor the Executive Council have a constitutional right to interfere with or impede said withdrawal.

Because the historical memory of TEC is so short, conclusions such as these will come as a surprise to many if not most. However, Mark McCall has forcefully and successfully argued this point in a recent paper entitled "Is The Episcopal Church

Hierarchical?”¹ His paper does not reveal new facts about the Constitution of TEC. Rather he provides a much-needed reminder of the way in which we have understood ourselves from the beginning. His work shows that the recent actions of the Presiding Bishop amount to a novelty, a radical break with the way in which TEC, since its inception, has understood its common life and forms of governance.

The McCall paper is both long and complex and should be read entire and with care. I give here only a summary of the argument and the conclusions that he draws from it.² The key point has already been noted, namely, that TEC’s Constitution, when speaking of the General Convention and TEC’s several Dioceses, employs none of the well-recognized terms that indicate a hierarchical relation between them. In legal discourse, hierarchy is identified by a group of widely used terms. These include supremacy, subordination, preemption and finality. The absence of these terms in TEC’s constitution is striking.

There are two matters of great import that are to be noted about the absence of this legal terminology. First, hierarchical terminology of this sort *does* appear in the foundational documents of America’s other major denominations; e.g., Roman Catholic, Evangelical Lutheran Church in America, Presbyterian Church USA, and United Methodist. Second, and of greater significance, is the fact that the very people responsible for TEC’s Constitution were also responsible for developing our nation’s jurisprudential vocabulary of hierarchy. Yet they did not employ this language in framing TEC’s Constitution! The overwhelming weight of evidence indicates that the absence of such terminology was quite deliberate. Those who framed TEC’s Constitution wished to make clear that the several Dioceses were not subordinate to the General Convention. Rather, the framers established by constitutional provision that the General Convention exists to further friendly relations between the Dioceses that voluntarily make up its membership rather than to have executive authority through the office of a Presiding (or Arch) Bishop within those Dioceses. In short, the basic principle guiding the framing of TEC’s Constitution was that of *subsidiarity* whereby power is generally reserved for a local body if not explicitly granted to a central one.

The implications of this sort of dispersed authority within TEC *as a national Church* are far reaching. In respect to the present conflicts within TEC and within the Anglican Communion several are of particular importance.

1. The highest authority within TEC is not the General Convention but the Diocese. Any attempt to challenge this conclusion in law will likely fail because the law does not assume that terms absent from the Constitution are nonetheless implied. In point of fact, the Constitution specifies that the Bishop and Standing Committee in each

¹ See anglicancommunioninstitute.com

² Other excellent summaries can be found at the following locations.
<http://accurmudgeon.blogspot.com/2008/09/is-episcopal-church-hierarchical.html>;
<http://www.standfirminfaith.com/index.php/site/article/15958/#275161>;
<http://www.fwepiscopal.org/resources/hierarchpaper.html>

Diocese comprise “*the*” (not “*a*”) ecclesiastical authority. General Convention is given no control over these internal matters. Rather the Dioceses together control the General Convention.

2. TEC’s constitutional structure cannot be altered by a simple change in its Canons. An action of this sort would be unconstitutional because TEC’s constitution does not provide for canonical alteration of its terms. The only way in which a Diocese can become subject to the Canons of General Convention is to make provision for such subjection in its own Constitution. Further, having done so, subjection would remain in force only so long as the Diocese maintains such a provision.

3. Because of the primacy of diocesan authority, should TEC refuse the terms of the proposed Anglican Covenant, there is no constitutional prohibition on individual Dioceses signing such a covenant on their own, that is if allowance were made for such action by the relevant Instrument or Instruments of Communion.³ Conversely, there is no constitutional provision that precludes a Diocese from refusing to sign the covenant even if the General Convention should agree to its terms.

4. A point of singular importance is this. When Dioceses accede to TEC’s Constitution they must do so without reservation. However, there is no prohibition in the Constitution that forbids a Diocese from revoking its accession and withdrawing from TEC. From a legal perspective, silence in respect to withdrawal is important because the law of contracts is clear that in the absence of a specified term of duration a contract may be terminated.

In respect to the present conflicts within TEC these four conclusions are of major significance, but Mark McCall points to others that suggest further complexities.

(a) As far as TEC’s Constitution is concerned, a Diocese is permitted to organize itself as it sees fit. It could be strongly hierarchical or it could be strongly congregational.

(b) A Diocese is not required to maintain sacramental communion with the other Dioceses of TEC or (since the Presiding Bishop has no See) with its Presiding Bishop.

(c) There is no prohibition of a Diocese entering into communion with a body that is not in communion with TEC.

(d) There is not even a requirement that the several Dioceses have a Bishop who is a member of TEC. For that matter there is no requirement that a Diocese have any Bishop at all. A Diocese is within its rights to be run by its Standing Committee as the ecclesiastical authority. The Standing Committee might then invite a non-TEC Bishop to perform necessary Episcopal actions.

³ The Instruments of Communion are The Lambeth Conference of Bishops, The Archbishop of Canterbury, The Meeting of Primates, and The Anglican Consultative Council. At present, it is unclear which of these bodies will submit the proposed covenant to the Provinces of the Communion for ratification. Strong indications have been given that allowance will be made for individual dioceses to become signatories of the covenant.

(e) Finally, the Constitution does not prohibit a Diocese from forming an intra-communion agreement with another Primate that would, as McCall says, “bestow sacramental communion” (through that Primate) on the Diocese in question but would not transfer to the Primate in question the very limited authority possessed by the Presiding Bishop.

III

Action and Reaction: The Case of San Joaquin

In light of constitutional constraints on the authority of both the General Convention and the Office of the Presiding Bishop, how do the actions of the Office of the Presiding Bishop in the case of the Standing Committee of the Diocese of San Joaquin appear? The following narrative both stands out and cries out for comment.⁴

In 2006 San Joaquin’s Diocesan Convention voted to withdraw from TEC and define the Diocese as “a constituent member of the Anglican Communion.” Though the Convention might have done so, these actions did not align the Diocese with any other Anglican Province. However, in December of 2007 the Convention took a necessary second vote to withdraw from TEC. As well, it voted to place itself under the authority of the Primate of the Anglican Province of the Southern Cone.

At this point, the actions of the members of the Standing Committee assume enormous importance. Two of them declared that they, along with their parishes, were joining Bishop Schofield in a move to the Province of the Southern Cone. The remaining six were members of parishes still in a process of discernment about their future. Soon after the convention however, these six indicated their intention not to follow the majority of the Diocese. Further, in mid-January the President of the Standing Committee in a telephone conversation with the Presiding Bishop stated that the majority of the Standing Committee did not intend to join the secession, and what is more wished to continue to operate under the Constitution and Canons of the Episcopal Church.

Bishop Schofield promptly fired the six dissenters. I do not know if his action was in accord with the Canons of San Joaquin. However, the matter of present importance is not his action, but that of the Presiding Bishop. In an extraordinary letter dated January 25, 2008 she wrote the six who did not leave for the Southern Cone saying that she did not recognize them as the Standing Committee of the Diocese of Joaquin. She did not give as a reason Bishop Schofield’s action. Rather, her reason for “de-recognition” was a purported action on the part of the Standing Committee to take the Diocese of San Joaquin out of TEC. This action she claimed conflicted with the

⁴ For a thorough account of the actions of the Diocese of San Joaquin and the reactions of the Office of the Presiding Bishop see “How to Follow the Canons in San Joaquin”; <http://accurmudgeon.blogspot.com/2008/05/how-to-follow-canons-in-san-joaquin.html>.

Constitution and Canons of the Episcopal Church. She mentioned in particular Canon I.17.8 that states, “any person accepting any office in this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and the Diocese in which the office is being exercised.”

As mentioned previously, this narrative not only stands out, it also cries out for comment. In the first place, despite claims to the contrary, there is no constitutional provision that prevents a Diocese either from withdrawing from TEC or aligning itself with another Province or another Primate. An action of this sort, imprudent as I believe it to be, does not lie beyond the right of any Diocese. In the second place, in contradistinction to the Presiding Bishop’s claim, the members of the Standing Committee took no actions *as members of the Standing Committee* that do not accord with the Constitution and Canons of TEC. Even if one assumes withdrawal from TEC is unconstitutional it was the Convention of the Diocese and not its Standing Committee that took the actions in question. How the members of the Standing Committee might have voted at the Convention is both unknown and irrelevant.

Moreover, if one accepts for purposes of argument the Presiding Bishop’s assumption that withdrawal is unconstitutional, the most reasonable conclusion to draw is that the six were perfectly correct when they warned the Presiding Bishop in a response to her letter, “Any attempt on your part, or the part of any other person, to circumvent or replace the Standing Committee as the Ecclesiastical Authority will be a violation of the Constitution and Canons of the Episcopal Church.” As members of the Standing Committee they had taken no action to withdraw.

The events that followed this exchange between the Presiding Bishop and the six are well known. In a canonically dubious procedure, at the instigation of the Presiding Bishop, the House of Bishops deposed Bishop Schofield. The six who did not leave for Southern Cone refused to recognize the validity of the vote, and stated that they would assume Ecclesiastical Authority in the Diocese until such time as the Bishop was properly deposed. The Presiding Bishop then made several moves, none of which are accorded to her office by TEC’s Constitution and Canons. She dissolved the Standing Committee and issued a call for a Special Convention at which all delegates were required, as a condition of attendance, to subscribe an oath of conformity to the Episcopal Church. She went on to appoint clergy from other Dioceses to serve in San Joaquin on an interim basis, and she chose a retired Bishop as Interim until confirmed by the Special Convention.

It lies beyond the scope of this paper to comment either on the anomaly of two (Anglican) Dioceses of San Joaquin or the way in which arguments over property rights drove the events. Of importance for present purposes is the constitutional propriety of the actions of the Office of the Presiding Bishop. The Diocese of San Joaquin acted within its rights to withdraw from TEC and align itself with the Province of the Southern Cone. However, even if one rejects this conclusion, neither the Constitution nor the Canons give the Office of the Presiding Bishop authority to dissolve a Standing Committee, appoint another, call a Special Convention or bypass a Standing Committee

in the appointment of an Interim Bishop.⁵ Her actions are best interpreted as aggressive attempts to assume powers not accorded her office either by TEC's foundational document or by its Canon Law. Should these claims be allowed to stand, the Constitution of TEC will have been both violated and, by said violation, changed in a way that frankly reverses its clear terms. The dioceses of TEC will, in principle, have been rendered creatures of the General Convention and the Office of the Presiding Bishop rather than, as is now the case, the reverse.

IV

Action and Reaction: The Deposition of Bishop Robert Duncan

A. Procedural Irregularities

A similar pattern of aggressive expansion of executive authority on the part of the Office of the Presiding Bishop can be seen in the way in which Bishop Robert Duncan of Pittsburgh was deposed. It is common knowledge that the Diocese of Pittsburgh has voted to leave TEC and, like the Diocese of San Joaquin, attach itself to the Province of the Southern Cone. It is also common knowledge that the Bishop of Pittsburgh had long planned such an action.

Two groups that oppose both Bishop Duncan's leadership and the recent secession (Progressive Episcopalians of Pittsburgh and Across the Aisle) have argued strenuously that the action of Pittsburgh's Diocesan Convention is contrary to the Constitution and Canons of TEC. The constitutional issues in this dispute are, nevertheless, the same as those in the case of San Joaquin and will not be revisited. The issue in the case of Robert Duncan is not the Constitution but the meaning and use to which TEC's Canons have been put in his deposition.

Similar canonical issues emerged in two previous cases, those of Bishops Cox and Schofield. However, exhibiting as it does a pattern of action similar to the previous two, the Duncan case provides clear evidence that the Office of the Presiding Bishop has a settled policy on how to deal with Bishops who re-align with a Province other than TEC. A close examination of the Canons reveals, however, that the policy being pursued by the Presiding Bishop is not only contrary to TEC's Constitution but also of extremely doubtful canonical validity.

Bishop Duncan, as in the case of Bishops Cox and Schofield, was deposed for "having abandoned the communion of this church." (Canon IV.9) The questions

⁵ It is well to note also not only that the Constitution does not grant the Presiding Bishop the authority she has claimed, but also that it leaves the six remaining members of the Standing Committee in an ecclesiastical limbo. They are in fact no longer members of the Standing Committee because they are no longer members of the Diocese of San Joaquin. Their only options under the present constitution would be (1) the formation of another Diocese and (2) application for admission to TEC as a new constituent Diocese.

concerning this action have to do first with the canonical propriety of the procedures followed, and second the meaning of the Canon itself.

The procedural irregularities are various. First a vote was taken to depose Bishops Duncan for “abandonment” prior to the time he actually had done so. A number of the Bishops who voted against the motion to depose stated this fact as *a* or *the* major reason for their opposition. How, they reasoned, can one be judged for what he might do rather than for what he has in fact done?

The most common response to this objection has been that the question is not *if* Bishop Duncan intended to leave TEC but *when* he planned to do so. Since it is (almost) certain that he would have left (at some future time), a conclusion was drawn (interestingly enough first by “the property task force” constituted by the Presiding Bishop) that it is entirely proper to judge him under the “abandonment” canon.

This argument has a certain immediate plausibility. However, its cogency is only apparent. To judge a person on good evidence that he *plans* to do something is to make a judgment about “planning” or “conspiring” to carry out an illegal act, not committing one. However, in contradistinction to the criminal law of the land, TEC’s Canons make no provision for trying a person for *planning* or even *conspiring* to commit an uncanonical act. There is in fact no provision in TEC’s canons for judging a person to have broken a law because they are considering or planning to do so.

A second procedural irregularity (or better series of irregularities) in the Duncan deposition for “abandonment” (again as in the cases of Bishops Cox and Schofield) concerns the necessary steps required before a vote on deposition can be taken. The Canons require that a decision by a Review Committee be given consent by a majority of a panel of the three most senior Bishops. They further require that the Bishop charged be inhibited and given sixty days in which to respond to the charges. In the case of Bishop Duncan, the necessary consents were not obtained and he was not inhibited. Nevertheless, he was charged with and convicted of “abandonment” at the next regular meeting of the House of Bishops. It is also of procedural significance that this item was not placed on the agenda for the meeting of the House of Bishops in the required time prior to the meeting in question.

I know of two very questionable justifications for these irregularities. The first has come through hearsay, namely, that supporters of the Presiding Bishop’s position say simply that the canons are the canons, and they must be interpreted in a way that “works.” One must ask, “Works for what purpose?” The question itself forces one to remark that tailoring the meaning and application of the law to fit a prior purpose that bears little relation to the way in which the law has previously been understood and interpreted evidences little understanding of or respect for the law and its function.

The Presiding Bishop herself offered the second justification—one that addresses questions about the failure to inhibit Bishop Duncan prior to deposition. In a letter to the House of Bishops announcing that she had decided to proceed with the deposition

without his having been inhibited she offered as one of her justifications an interpretation of the relevant Canon that verges on the bizarre. Tedious as it may be, it is worth looking in some detail at this particular justification because it provides such a clear example of the strained use of the Canons now being employed.

Canon IV.9 clearly states that unless the inhibited Bishop retracts or denies the reasons for inhibition, he or she will be liable to deposition. The plain sense of the Canon is that inhibition must precede deposition. However, in her letter to the House of Bishops announcing her intention to proceed with deposition, the Presiding Bishop quotes the following sentence from Section 2 of Canon IV.9. It reads, “Otherwise, it shall be the duty of the Presiding Bishop to present the matter to the House of Bishops at the next regular or special meeting of the House.” Citing her Chancellor’s interpretation of “the apparent intent”, she claims that the phrase means she is permitted to pursue deposition, even if there has been no inhibition.

The Chancellor’s interpretation of apparent intent, however, is a real stretch. The wording of the Canon clearly lays out what must happen prior to deposition, and does so by the use of the word “**shall**.” The “Otherwise” sentence, although it does not use the word “shall,” continues the mandatory nature of the proceedings under the Abandonment Canon by specifying the *duty* of the Presiding Bishop in the final step of this unfolding process.

That duty is as follows: to present to the House of Bishops at its next meeting the matter of a Bishop who has been inhibited according to the Canon but fails to retract or deny in the two-month period specified. The Canon’s preceding sentence provides for bringing to conclusion the inhibition of a Bishop who does retract or deny. The “Otherwise” sentence can only refer to bringing to conclusion the process against an inhibited Bishops who does not retract or deny.

Significantly, as in the other steps in this procedure, the actions to be taken by the Presiding Bishop are mandatory, not discretionary. The sentence in question is the only sentence in this Canon authorizing the Presiding Bishop to present any Bishop for deposition on grounds of abandonment. Given its mandatory language, it must refer to the normative case arising under this canon: that of a Bishop under inhibition who neither retracts nor denies the charge. It does not give the Presiding Bishop a general discretionary power to depose Bishops who have not been inhibited as directed by prior stipulations in the Canon.

All one can say, having read the Canon carefully, is that this line of reasoning is strained beyond credibility. However, there is another irregularity that is even more serious. The Canons state that, in a case like that of Bishop Duncan, the judgment must be given by “a majority of the whole number of Bishops entitled to vote.” Article 1, Section 2 of the Constitution specifies that the phrase “all entitled to vote” includes *all* Bishops, active and retired, in its number.

Nevertheless, the Presiding Bishop, her Chancellor, and her Parliamentarian, as in the previous cases of Bishops Cox and Schofield, interpreted the Canon to mean all the Bishops entitled to vote *at the meeting in question* rather than the more inclusive phrase *all entitled to vote*. A vote to depose was taken on the basis of this interpretation. Again, as in the previous two cases, many of the Bishops who voted for the deposition, in the face of widely asked questions about the interpretation and use of the abandonment canon, responded simply by saying that the Presiding Bishop, her Chancellor, and her Parliamentarian had given assurances that the vote was canonically proper. In view of the extensive argumentation that took place prior to the vote to depose Bishop Duncan, one must conclude that the brevity and declarative nature of so many of the justifying statements on the part of the Bishops hardly suggests “due diligence” on their part.

Having said these things, I do not wish to suggest that there is no argument to be had—only that the argument has not been carried on in a responsible manner. However, even if the objections to their arguments can be sustained, the Presiding Bishop and her allies have a final response to those who question this interpretation. They have argued that the action of the House of Bishops in the cases of Cox and Schofield had been established by precedent in the cases of Bishops Donald Davies of Ft. Worth in 1993 and Neptalie Larrea of Ecuador Central in 2004. In both these instances the same procedures were followed as in the cases of Cox and Schofield. A vote was taken not by the whole number of those entitled to vote but by the whole number of those actually present at the meetings. Further, in both cases no procedural objections were raised.

It can be argued not only that there is precedent for the actions of the Presiding Bishop and the House of Bishops, but also that fairness to those judged in the past requires that those judged in the present be judged in the same way. Certainly it is correct to say that this fundamental law of justice be upheld. However, the principle that equal cases be treated equally does not imply that similar *misinterpretations* and *misapplications* of the law be upheld simply because they have occurred, perhaps more than once. Common law certainly recognizes that bad decisions can be overturned, and surely such recognition should be allowed in the canon law of the church as well.

In this all too brief rehearsal of the procedures used in the depositions of Bishops Cox, Schofield, and Duncan, it has not been my purpose to establish in a way that is beyond question that The Office of the Presiding Bishop and the House of Bishops have proceeded in ways contrary to the very Canons they claim to uphold. I believe they have in fact done so. However, my primary purpose has been otherwise. It has been to show (1) that they did not exercise due diligence in apprising themselves of the legal complexities connected with their actions; (2) that the Presiding Bishop pursued her goals in canonically impermissible and/or highly dubious ways that both expand the powers of her office beyond their constitutional limits and subvert the procedures the Canons lay down for the maintenance of order within the Church; and (3) that TEC, by implication, does not have adequate constitutional and canonical means to settle constitutional and legal disputes. The result of this lacuna is that both are, *per force*, settled by the exercise of political power rather than by legal argument, judgment, and due procedure. TEC finds itself in a situation where those in power, when faced with a constitutional crisis,

will almost certainly employ the Constitution and Canons, no matter what their plain sense might be, in ways they believe necessary to achieve the outcome they desire.

B. Misconstrual of the Canon's Meaning

This rather aggressive means of conducting the affairs of the Church can be seen also in the manner in which the Abandonment of Communion Canon is now being interpreted and applied.⁶ The question is, “Just what does it mean to abandon the communion of this church.” There is little disagreement that the Canons framed in 1853, 1859, and 1874 were intended to apply, and indeed were applied, to Bishops who either left (then) PECUSA (now TEC) and joined themselves to a church that was not part of the Anglican Communion, or who left because they did not wish to face trial for moral turpitude⁷

Further, in earlier versions of the Canon, there were two conditions for determining abandonment—“either by open renunciation of the Doctrines, Discipline and Worship of this Church, or by formal admission into any religious body not in Communion with the same...” In these earlier versions, Doctrine, Discipline and Worship were related *conjunctively*. That is, they were tied together, as it were, in a single bundle. Further, they were understood to be closely linked with joining another body not in communion with this church. However, the revision of 1904 created a *disjunctive* relation between Doctrine, Discipline, and Worship. Any one or any combination of the three could now be taken as an indication of abandonment. The reason for the change was a Bishop of the Reformed Episcopal Church who was changed with abandonment but claimed that while he may have abandoned the Doctrine and Discipline of the church he had not abandoned its Worship.

In short, the change was brought about because of the actions of a person who had in fact become a member of a church not in Communion with (then) PECUSA but nonetheless continued to claim a relationship with it. The historical circumstances make clear the reason for the canonical change. However, the alteration had an unintended consequence in that it opened the possibility of lodging charges of abandonment for one or more of three separate reasons (Doctrine, Discipline, *or* Worship) that need not be connected with joining another church. These possibilities were carried forward so that the two abandonment canons now in place (IV.9 & IV.10) are virtual duplicates of Canon

⁶ For a thorough account of the history and interpretation of the abandonment canons see the work of A. S. Haley on the blog Anglican Curmudgeon:
<http://accurmudgeon.blogspot.com/2008/05/history-of-abandonment-of-communion-html>
<http://accurmudgeon.blogspot.com/2008/04/abuses-of-abandonment-canons-i.html>
<http://accurmudgeon.blogspot.com/2008/04/abuses-of-abandonment-canons-ii.html>

⁷ In 1852 Bishop Levi Ives became a member of the Roman Catholic Church; in 1873 Bishop George D. Cummins left to organize the Reformed Episcopal Church; and in 1878 Bishop Samuel McCaskey left for Europe in order to avoid morals charges.

IV.1 that provides for proceedings that include a presentment and a trial in ways that Canons IV.9 & IV.10 do not.

The previous review is an all too brief summary of a complex legal history, but it is sufficient to put on display two questions about the present interpretation and use of the abandonment canons. First, is it in keeping with the meaning the history of the Canons attaches to the notion of “abandonment of the communion of this church?” To be precise, neither Bishops Schofield nor Duncan left TEC for a church not in communion “with this church.” Had they become Roman Catholic, the long history of the Canon’s interpretation would indicate that they had indeed abandoned the communion of *this* church. However, they left TEC and joined themselves to a Province of the Anglican Communion with which TEC has not broken communion. There seems nothing in the history of the Canon’s interpretation and application that would support the notion that the “communion of this church” can rightly be understood as referring only to the internal relations of its various dioceses.

Further, to interpret “the communion of this church” in such a narrow way runs against the very definition of TEC given in the Preface to its own Constitution. There TEC is defined as “a constituent member of the Anglican Communion” that in turn is defined as “a Fellowship within the One, Holy Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury...” It seems hardly credible that joining oneself to another Province of the Anglican Communion amounts to abandonment of the communion of this church.

The second question is this. Even if, as is probable, it is within the meaning of the present Canons to charge a person with abandonment for renunciation of either the Doctrine, Discipline, or Worship of the Church; and even if these collectively or individually are separated from becoming a member of another church, is it “meet and right” to use the abandonment canons (IV.9&IV.10) rather than Canon IV.1 as means of discipline when one or another of these are in question?

It has certainly proved tempting to do so because use of IV.9 or IV.10 avoids a trial and all that goes with it. It also places the decision within a political rather than a legal context. It is precisely a shift from a legal to a political process that we have witnessed in the deposition of Bishop Duncan. Proper procedure was bypassed and renunciation of communion was given a dubious interpretation. It is generally agreed that the reason for the highly questionable procedures deployed in the cases of Bishops Schofield and Duncan is tied to the Presiding Bishop’s conviction that she has an obligation to protect the property entrusted to TEC. Though far from indisputable, if the analysis of TEC’s Constitution provided above is correct, it is hard to see what basis there is for the Office of the Presiding Bishop claiming responsibilities in property disputes that properly belong in TEC’s various Dioceses.⁸

⁸ It has not been my purpose to discuss these legal tangles, particularly those in which the Office of the Presiding Bishop is seeking to use the so called Dennis Canon as a means of claiming the property held in the name of a Diocese that has chosen to leave

V

Which Way is the More Excellent Way?

As stated at the outset, the matter of Gene Robinson has demonstrated that neither TEC nor the Anglican Communion as a whole has mechanisms in place adequate to address satisfactorily a crisis of the magnitude now before them. Within TEC, several improvised strategies have been deployed, and others may well follow. This essay has tracked the assertion of executive authority on the part of the Office of the Presiding Bishop—a strategy that in effect strains or subverts the plain sense of TEC's Constitution and Canons. As most know, this strategy has received strong support from TEC's progressive majority.

The previous discussion has also put on display a reaction on the part of traditionalist dissenters that, though I believe both imprudent and theologically questionable, is nonetheless (in the case of Dioceses) in accord with TEC's Constitution. Many Parishes and a handful of Dioceses, for very understandable reasons, have made a decision to withdraw from TEC and seek a relation with another Province of or Diocese within the Anglican Communion. Some even wish to create a new Province, and have (with the public support of at least three Primates) announced that intention.

It is sad but true to say that the Parishes and Dioceses in question are now or soon will be embroiled in lawsuits with either the Dioceses in which the Parishes are located or, in the case of the Dioceses that have withdrawn, with the Office of the Presiding Bishop. These lawsuits all concern the disposition of property. Sad to say, no matter how the cases are decided, there will be a most unfortunate outcome. The order of the church in the end will have been determined by the decisions of civil courts—an outcome St. Paul would have found entirely unacceptable.

These two responses, one on the part of progressives and the other on the part of traditionalists, are well known and well fought over. However there is another reaction to the crisis that I have as yet not touched upon. This is the course set by traditionalist dissenters who wish to present an alternative witness to that of the progressive majority within TEC but at the same time do not wish to leave. I shall say more about this reaction at the conclusion of this essay.

TEC. However, it is important to note that the Canon is questionable in two ways. First, it is odd to have the party who is to benefit from a trust arrangement also to be the one who, as it were, draws up the trust. Second, the status given the national church appears to place the Office of the Presiding Bishop in a hierarchical relation with a Diocese that either intends to leave TEC or has actually done so. If such be the case, it would appear that a Canon is in fact being used in a way that attempts to amend TEC's Constitution. As noted previously, the Constitution makes no allowance for its amendment by means of canonical change.

Before I do so, however, I must call attention to the fact that there has been no discussion at all of the reaction of the Communion as a whole to the present crisis. The primary form that reaction has taken to date is the proposed Anglican Covenant now being framed. For present purposes, I shall simply assume that the Communion as a whole will choose a Covenant as the way ahead. I shall also make the more uncertain assumption that the terms of said covenant will require certain limits on the autonomy of the various Provinces who ratify it—limits that may well prove unacceptable to TEC’s General Convention when and if it comes before that body for ratification.⁹

What the terms of the Anglican Covenant ought to be will form the subject of a future essay. For the moment, the issue is what the appropriate response on the part of TEC’s instruments of governance and its various Dioceses to this horrendous crisis ought to be. As I suggested at the outset, the tack taken by the Office of the Presiding Bishop (and with her the House of Bishops by means of a series of questionable votes) is an aggressive use of the Canons that in fact reverses the relation between the General Convention and the Presiding Bishop on the one hand and TEC’s several Dioceses on the other. The actions of the Office of the Presiding Bishop in the case of the Standing Committee of San Joaquin and that of the deposition of Bishop Duncan are indeed ones associated with a Metropolitan Bishop who enjoys a hierarchical relation with the Dioceses in his or her charge, but not for a Presiding Bishop who does not enjoy such a relationship.

However, the course set by the Office of the Presiding Bishop, if successful, will bring about a change in the relation between Dioceses, General Convention and Presiding Bishop by political power rather than by an orderly process of constitutional amendment. TEC will then be confronted with a change in the historical form of its polity that takes place without debate and outside the procedures set forth for its amendment. Its common life will have been altered in ways out of keeping with its history by people who have simply done what is necessary to get what they want.

The course taken by traditional Parishes and Dioceses that either have or soon will leave TEC is often referred to as “an outside strategy.” It has as yet not been made clear to the general public what the goal of this strategy is. Is it simply the establishment of an Anglican Province distinct from TEC that is in its belief and practice more “orthodox,” or is it the establishment of a more “orthodox” Province that will one day replace TEC altogether, (or almost so)? Or is there yet some other goal to this strategy.

Whatever the case may be the “outside strategy” raises a number of very difficult and painful issues that have yet to receive adequate attention. The costly, bitter, and numerous legal battles have already been mentioned. It is difficult to escape the conclusion, more serious than their cost, that they bring shame upon a Church whose members seem to the world to lack all charity.

⁹ The Presiding Bishop has indicated that she does not wish a covenant to be considered when next the General Convention gathers.

There are other complications attached to the “outside strategy”. These have to do with the unity of the Anglican Communion itself. If indeed a separate Province were to receive the approval of some portion of the Primates, as seems to be the plan, would those Provinces that do not accept a second Province then be divided from those that do? Further, even if a majority of the Primates were to give approval to a separate Province within North America what of the other “Instruments of Communion?” What would be the reaction of the Archbishop of Canterbury, the Anglican Consultative Council, even the Lambeth Conference itself? In short, the “outside strategy” has the potential of weakening, even dividing, the very communion it seeks to strengthen.

And finally there is the theological issue of how Christians are to confront false teaching and practice in their midst. If argument, exhortation, and witness are to no avail and if the levers of power in the church are in the hands of those in error, what is the Godly response? Is it to leave and start another Church or Province? Or is it to remain, be faithful, and suffer the consequences?

These questions have received far too little attention, but they force one to ask if there is not “a more excellent way” than the ones now being followed? It would be disingenuous not to say that those who choose to remain believe there is a more excellent way. This way is often referred to as an “inside strategy.” It is often assumed that the goal of the “inside strategy” is to reform TEC from within.

This assumption is false. Those with whom I speak who are supposed to have an “inside strategy” do not pin their hopes on the reform of TEC. Indeed, beyond seeking to find ways to band together with and give support to others who share their views, they have no strategy save to bear faithful witness and wait patiently for God to do what God will do with the church of which they are a part. Their desire is to form more than “bonds of affection” with other Anglicans both within TEC and in other parts of the Anglican Communion. Their intention is to model what they believe communion in Christ implies.

For these reasons they support the effort to frame an Anglican Covenant whose basic principle is mutual subjection within the body of Christ. This is a way of looking at relations within the Communion and within TEC that is consistent with an earlier Anglican formulation of the same principle—“mutual responsibility and interdependence within the body of Christ.” It is also a way of relating to other Provinces within the Communion that is in keeping with TEC’s self-definition as a constituent member of the Anglican Communion.

Mutual subjection appears to this group not as a strategy, be it inside or outside, but a more excellent way to show forth the Lord’s death until he comes. It is also a way to address the entropic possibilities lodged deeply in TEC’s Constitution and in the autonomous forms of governance characteristic of the Communion’s various Provinces. How will the creative energy the principle of subsidiarity seeks to promote be harnessed to common purpose and common life? How will the hierarchies of TEC’s various

Dioceses be linked to other hierarchies in the Anglican Communion and to purposes greater than their own?

The answer to these questions contained in the proposal before the Communion and before TEC is through a Covenant whereby each subjects itself to the others in a fellowship of both truth and love. Is this not in fact a more excellent way than the sovereign assertion of authority and autonomy on the one hand or a reactive attempt to separate from erring brothers and sisters on the other? I believe it is. I believe also that, though it will prove a way of suffering, it is a way that will lead to the development of mechanisms for the preservation of communal order in a way that the creation of new Provinces (on both the left and the right) does not.