TITLE IV REVISIONS: UNMASKED

C. Alan Runyan[1] and Mark McCall[2]

Introduction

On July 1, 2011 complex, far reaching and polity changing revisions to the disciplinary canon (Title IV) of The Episcopal Church ("TEC") become effective. The revisions are a product of a multi-year process begun in 2000[3] whose stated purpose is to change Title IV's "overly militaristic and rigid application." [4] The revisions are intended to provide a speedier disciplinary process based on a "reconciliation model".[5] Commenting on the Task Force's progress in February 2008, the Chairman stated the revisions place "an emphasis on pastoral resolution" while moving away from a criminal-justice model.[6] "Title IV Resources" made available for Diocesan use on the General Convention website state that the changes "emphasize pastoral care for all" and "reflect more clearly our theology."[7]

The revisions certainly will change the character of the disciplinary process making the disciplinary landscape *appear* less formal, speedier and more pastoral. However, these goals mask other very unsettling realities of the new disciplinary process, more suggestive of another pastoral analogy: a wolf in sheep's clothing.[8]

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[1] Mr. Runyan is a partner in Speights & Runyan, Beaufort, South Carolina. He has been a practicing trial attorney for 33 years. He is counsel for the Diocese of South Carolina.
[2] Mr. McCall is a member of the New York bar and former partner of an international law firm where he practiced in the firm's New York, Washington and Paris offices.
[3] In 2000, the General Convention through A028 established a Task Force on Disciplinary Policy & Procedure to review Title IV. Journal of the General Convention, 2000 at 300.
[4] Title IV Task Force II on Disciplinary Policies and Procedure, Report to the 76th General Convention, 2009. ("Task Force")
[5] *Id.*
[6] "…The proposed revisions are meant to be "about truth finding and reconciliation for the benefit of all" with a "little more even-handed balancing of facts and evidence." ENS, February 7, 2008.
[7] *Introducing the New Title IV*, presentation at 2.
[8] "Beware of false prophets, who come to you in sheep's clothing but inwardly are ravenous wolves." Matthew 7:15 (ESV).

Unmasked, these revisions do not simply change the *form* of the process in ways that dramatically alter Clergy's due process but they also make very significant changes to the *substantive* discipline of Clergy, as well as to the very polity of TEC as it relates to the Dioceses, Bishops Diocesan and the Presiding Bishop. In summary, these revisions:

- remove procedural safeguards for accused Clergy, greatly increase the number and nature of Clergy offenses, broaden the reach of existing offenses, and dramatically allow a Bishop (and Presiding Bishop *infra* at 16-18) not only to be involved in the decision to charge Clergy with offenses, but also effectively to control those decisions;
- are an unconstitutional infringement on diocesan authority;
- give unprecedented and unconstitutional authority to the Presiding Bishop;
- were passed without adequate disclosure and debate.

I. Revised Title IV Expands Offenses and Removes Procedural Protections

The present disciplinary canon's "criminal justice model" is primarily what guarantees due process. The "move away from a criminal justice model" brings with it a vastly changed landscape where clergy due process is concerned. The new, pastorally-appearing procedural changes place Clergy at the mercy of a disciplinary system fundamentally lacking that fairness which is the hallmark of progressive justice systems. The elimination of procedural protections is reflected throughout the disciplinary process, from the proliferation of new and broadened definitions of offenses to the procedures for initiating disciplinary actions to the conduct of the trial.

The Nature and Scope of New and Redefined Clergy Offenses

Revised Title IV adds new offenses never before part of Clergy discipline. These include:

- Not only violating but "attempting to violate" directly or "through the acts of another person" the Constitution or Canons of the Church or of any Diocese ("C&C") IV.3.l(a) (2009);
- Failing to cooperate with a Title IV investigation or proceeding IV.3.1(b) (2009);

- Failing to abide by any Accord, Order, Pastoral Direction, restriction on ministry or administrative leave requirement IV.4.1(d) (2009) (previously disobedience or disregard of a Pastoral Direction was covered in defined circumstances);
- Failing to "safeguard the property and funds of the Church and Community" IV.4.1(e) (2009); and
- Failing to report (oneself or another for) "all matters which *may* constitute an offense" IV.4.1(f) (2009) (emphasis added).

The increased scope of Clergy offenses is breathtaking. Coupled with the expansive involvement of a Bishop (or the Presiding Bishop) in the prosecution of offenses, (*infra* at 9) it takes little imagination to see that pastoral appearances are just that. Nor does it stop there. Not only have new offenses been added, but existing offenses also have been broadly redefined. *See* Table I.[9]

- "Violations" of the ordination vows, of the rubrics of the Book of Common Prayer ("BCP") and of the C&C have all been rephrased to broaden their scope:
- With respect to ordination vows, a "violation" has been rephrased as the failure to "abide" by the "promises and vows made when ordained" IV.4.1(c) (2009);
- A "violation" of the rubrics of the BCP will soon be a requirement that Clergy "conform" to these rubrics IV.4.1(b) (2009);
- The present clergy offense of "violating" the C&C includes a failure to "exercise their ministry in accordance with" the C&C. Additionally, the offense is no longer limited to the C&C. It has been broadened to include the Clergy's failure to exercise their ministry in accordance with "ecclesiastical licensure or commission and Community rule or bylaws" IV.4.1(g) (2009). [10]

An odd change is the twist on what crimes may also be offenses. Since 1832 the Canons of TEC have listed a "crime" as an offense for which Clergy could be

[9] The inclusion of "Tables" which appear throughout the balance of this article is intended to make these confusing changes more readily apparent.
[10] Community is a new term: "Community shall mean that part of the Church in which a Member of the Clergy performs his or her ministry, such as a Diocese, Parish, Mission, school, seminary, hospital, camp or any similar institution." IV.2 (2009).

disciplined.[11] Next July, the definition of "Crime" will be removed, IV.15 (2006), and Clergy will no longer be subject to discipline for criminal acts unless the act "reflects adversely on the Member of the Clergy's honesty, trustworthiness or fitness as a minister of the Church" IV.4.1(h)(5) (2009).

Table 1: **Redefined Offenses (Partial)**

Title IV (2006)	**Title IV (2009)**
"crime", IV.1.1(a)(2006) "Crime" is defined. IV.15 (2006)	"any criminal act that reflects adversely on the [Clergy's] honesty, trustworthiness or fitness as a minister of the Church" IV.4.1(h)(5)(2009 Definition of "crime" removed.
"Violation of Ordination vows" IV.1.1(h) (2006)	failure to "abide by the promises and vows made when ordained", IV.4.1.(c)(2009)
"Violation of Rubrics of the Book of Common Prayer", IV.1.1(d)(2006)	failure to "conform to the Rubrics of the Book of Common Prayer", IV.4.1.(b)(2009)
"Violation of the Constitution or Canons of the General Convention…or a Diocese…." IV.1.1(e),(f),(g),(2006)	"violating or attempting to violate, directly or through the acts of another person" **plus** failure to "Exercise his or her ministry in accordance with [C&C]" **plus** "… ecclesiastical licensure or commission and Community rule or bylaws." IV.4.1(g) (2009)

There are also new definitions, which impact the scope of conduct for which Clergy may be charged.

Terminology Changes

There is no better encapsulation of the sweeping nature of the changes than the wholesale introduction of new terminology. Indeed, many of the most profound changes

[11] White & Dykman, Annotated Constitution and Canons for the Government of the Protestant Episcopal Church, 1981 ed., at 965 ("White & Dykman"). The offense was listed as "crimes or immorality" from 1868 until 1994 when crimes or immorality were separately listed.

are introduced by re-defining terms, a practice rightly criticized for its lack of transparency in the corporate legal world. Forty-six of the fifty-eight definitions in the present Title IV have been removed and seventeen new definitions have been added.[12] Several of these weaken due process and broaden the nature of offenses for accused Clergy.

Currently to bring a charge against Clergy, the Diocesan Review Committee (usually the Standing Committee) must have "reasonable cause" to believe an offense has been committed and that the accused Clergy committed it before it can present the accused for trial. IV.3.14 (2006). This same standard applies to the Review Committee for Bishops. IV.3.43(c) (2006). "Reasonable cause" means "grounds sufficiently strong to warrant reasonable persons to believe the charge is true." IV.15 (2006). Reasonable cause is no longer a defined term and does not appear anywhere in revised Title IV.

"All the Members" is a definition relevant to the voting process in Title IV proceedings against Clergy. Currently, the Standing Committee (Priest or Deacon) or the Review Committee (Bishop) plays a role in the disciplinary charging process through a vote of "All the Members." Revised Title IV removes this definition. A vote of All the Members essentially operates this way: However many must vote in favor of, or against, such as a majority, the vote must consist of a majority of the total number of members not simply those present. IV.15 (2006). [13] Furthermore, Revised Title IV has no specific vote requirement in deciding whether Priests, Deacons or Bishops are guilty of an offense making the quorum rule the default for voting. The practical effect of this silence is to dramatically lessen the number required from what would be required under the present Title IV.[14]

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[12] The change in the formality of the process accounts for 11 of the 17 additions and for 26 of 46 removals from the present Title IV. However, there are significant additions and removals that do not relate to those process changes.

[13] "**All the Members** shall mean the total number of members of the body provided for by Constitution and Canon without regard to absences, excused members, abstentions or vacancies." IV.15 (2006).

[14] The quorum provision states, "a majority of the members of the body shall be a quorum; and a majority of those members present when a quorum exists shall be competent to act." IV.19.9 (2009). Using the Diocese of South Carolina's Discipline Canons as an example, today of the 12 total members of the Standing Committee, seven votes would be required to charge. By removing the defined term "All the Members" the

Definitional changes are also made which diminish the involvement in, and the authority of a Diocese's duly elected leadership with respect to, the disciplinary process of Clergy. The "ecclesiastical authority" is the ultimate Diocesan authority. It is the Bishop, Standing Committee or another authority established by the Diocese. The Ecclesiastical Authority is referenced 51 times in the current disciplinary Canons, while revised Title IV references it only 4 times. In addition, the Standing Committee is referenced 32 times in the current disciplinary canons while the revised Title IV references it only 7 times.[15] By diminishing the role of the ecclesiastical authority and the Standing Committee, and removing the definitions of the diocesan convention and canonical residency, the drafters of revised Title IV intended to weaken Diocesan authority in the discipline of its clergy and thus make dioceses less independent.

Table II (Definitions)

Title IV (2006)	Title IV (2009)	# Of Appearances 2006	 2009
58 Definitions	46 removed		
"All the Members"[16]	Removed	13	0
"Ecclesiastical Authority"[17]	Removed	51	4
"Standing Committee" (undefined)	"Standing Committee" (undefined)	32	7
"Crime"	Removed	14	0
"Convention" (Diocesan)[18]	Removed	6	2
"Canonically resident"[19]	Removed	42	9
"Reasonable Cause"[20]	Removed	6	0

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number required to charge is reduced from 7 to 2 since the decision to charge will be vested in the 3 person Reference Panel in July.

[15] The Standing Committee is the Ecclesiastical Authority in the absence of the Bishop so eliminating a reference to the ecclesiastical authority would not necessarily remove the Standing Committee from the disciplinary process.

[16] "**All the Members** shall mean the total number of members of the body provided for by Constitution or Canon without regard to absences, excused members, abstentions or vacancies." IV.15 (2006).

[17] "**Ecclesiastical Authority** shall mean the Bishop of the Diocese or, if there be none, the Standing Committee or such other ecclesiastical authority established by the Constitution and Canons of the Diocese." IV.15 (2006).

[18] "**Convention** shall mean the governing body or assembly of a Diocese by whatever name it is styled in that Diocese." IV.15 (2006).

[19] "**Canonically Resident** shall mean the canonical residence of a Member of the Clergy of this Church established by ordination or letters dimissory." IV.15 (2006).

The Nature & Scope of the Changed Disciplinary Procedure

Who May Charge

The present disciplinary canons limit those who may charge clergy with an offense to those who are likely to know something about the clergy or the offense. The seven categories consist of the victim or their family or those with some canonical relationship to the Clergy; Vestry, other Diocesan Priests, the Bishop Diocesan, or the Standing Committee.[21] IV.3.3 (2006). As of July 2011, "any person" is required to send information about an offense to the Intake Officer. IV.6.3 (2009). This mandatory reporting goes hand in hand with the new offense of failing to report "all matters which *may* constitute an offense…." IV 4.1(f) (2009). (emphasis added). With respect to a Bishop (other than for an Offense concerning Doctrine or Abandonment), the expansion to "anyone" also applies. Currently, those who may charge a Bishop are the victim (or family members); three Bishops or ten or more Priests, Deacons or Lay Persons (70% of whom must be from the Bishop's Diocese). No longer must the accuser have some knowledge with a reasonable basis – anyone can and must report anything that "may" constitute an offense.

Table III (Who May Charge)

CLERGY (IV.3.3 (2006)	**Title IV (2009)**	**BISHOPS (IV.3.23 (2006)**
Majority of clergy's vestry	"Any person other than the Intake Officer who receives information regarding an offense shall promptly forward the information to the Intake Officer." IV.6.3 (2009)	
3 Priests in clergy's Diocese		
7 adult communicants in good standing in clergy's Diocese		Three Bishops
Ordination vow or Bp's pastoral direction violation: clergy's Bp or the EA		Ten or more Priests, Deacons, adult communicants in good standing. Seven of ten (including one Priest) must be from Bishop's Diocese.
Crime, immorality or conduct unbecoming: the victim or		

[20] "**Reasonable Cause** shall mean grounds sufficiently strong to warrant reasonable persons to believe that the Charge is true." IV.15 (2006).

[21] The only exception is where the offense is alleged to have been committed outside of the Clergy's Diocese. In that instance the Ecclesiastical Authority of the Diocese where the acts allegedly occurred may charge.

family members/guardians		Victims (or their family)
Majority of clergy's Standing Committee		
EA of the Diocese where committed if different from Clergy's		

Who Determines If A Charge Has Merit

Today the Standing Committee (Diocesan Review Committee) is vested with the sole authority to investigate and refer charges for prosecution. Its role is similar to that of the Grand Jury in the United States criminal justice system. It does so without involvement by the Bishop Diocesan. It receives the charges, appoints a licensed Church Attorney who investigates them. The Church Attorney represents the Diocese in future proceedings. The Standing Committee, after consideration of the Church Attorney's confidential report, decides materiality and probable cause. By a majority of "All the Members," the Standing Committee must vote to present the accused Clergy for trial only after finding that the offense relating to the constitution and canons or rubrics is "intentional, material and meaningful" in their judgment and that the "grounds are sufficiently strong to warrant reasonable persons to believe the Charge is true." IV.3.14(c); IV.14.5 & IV.15 (2006).

Next July, the "Intake Officer," "Investigative Officer" and "Reference Panel" will assume most of the Standing Committee responsibilities. The Intake Officer (appointed by the Bishop[22]) receives charges and works with the Investigator (also appointed by the Bishop). The Intake Officer participates as one of three members of the Reference Panel in the decision to prosecute. IV.2 (2009). The other two members are the Bishop (Presiding Bishop) and the President of the Disciplinary Board (Disciplinary Board for Bishops). A majority vote (two of the three members) causes the matter to go forward. IV.6.8 (2009).

The standard applied to consider whether a charge should go forward has been materially weakened. There is no "reasonable cause" requirement and for canonical

[22] This is the default requirement ("shall") unless the Diocese affirmatively chooses another method of selection. IV.2 (2009). The Bishop Diocesan must consult with the Disciplinary Board before this appointment but is not required to have their consent.

offenses materiality has been weakened from "intentional, material and meaningful as determined by the Diocesan Review Committee (Standing Committee)…" [IV.14.5 (2006)] to "material and substantial *or* of clear and weighty importance to the ministry of the Church." IV.3.3 (2009) (emphasis added). See Table IV.

The presence of the Bishop in the charging process considerably colors, if not the outcome, the appearance of fairness. Today a Bishop may not "prefer a charge" and is limited to asking the Standing Committee to investigate facts "without judgment or comment on the allegation." VI.3.5 & 7 (2006). Next July, the Bishop can appoint all those involved in the receipt and investigation of charges. The Bishop may initiate the process by orally suggesting to the Intake Office that an offense "may" have been committed. He then may vote with one of his appointees in a "two-out-of-three" decision on whether to refer the charges. The Bishop has gone from virtual exclusion to virtual control of the initial Clergy charging process. However, it does not stop there.

Today, a Bishop must disqualify himself when he exercises any authority with respect to a Title IV proceeding and he is likely to be a witness. IV.14.13.(a)(2) (2006). No longer under revised Title IV. Any other party to the proceedings remains disqualified if they are likely witnesses but not necessarily the Bishop. IV.19.14 (2009).[23]

Table VI (Bishop's Expanded Role in Prosecuting Clergy)

Title IV (2006)	**Title IV (2009)**
Standing Committee has exclusive jurisdiction over initial charges IV.3(A).1 (2006)	Reference Panel: Bp, Intake Officer ("IO") and Pres. Of Disciplinary Board. Bp can appoint IO and appoints Investigator
Standing Committee makes prosecution decision IV.3.13 (2006)	Reference Panel (Bp may effectively decide whether to prosecute.)
Standing Committee decides not to prosecute. IV.3.13 (2006)	Bishop must consent to the IO's decision not to prosecute. IV.6.5 (2009)
Bp can refer "facts in writing" to Standing Committee for investigation, but without a stated opinion	Bishop can refer information "in any form" to IO if Bp "believes" an offense "may" have been committed. IV.6.3 & .3 (2009)
Bp is disqualified from testifying if he "likely will be a witness in the proceeding." IV.14.13(a) (2006)	Bp may be a witness in the proceeding. if he disqualifies himself from the Reference Panel. IV.19.14(a) (2009)

[23] The only exception is where he is on the Reference Panel and the Church Attorney wanted to use a Bishop as a witness.

Trial

Currently when accused Clergy go to trial, they are before the Ecclesiastical Court whose members are elected by Diocesan Convention (a majority must be clergy). IV.4.2 (2006).[24] There are specific, well recognized rules that govern trial procedure: Code of Judicial Conduct (Judges), Rules of Professional Conduct (Attorneys), Federal Rules of Evidence and Rules of Procedure taken from the Federal Rules of Procedure. IV.4.9, 10 (2006). Under revised Title IV, since the Hearing Panel cannot be the entire Disciplinary Board, it can be composed of a majority of laypersons. IV.6.7 (2009). Next July, a well-ordered process following established evidentiary rules is transformed into one driven almost exclusively by the discretion of the President of the Hearing Panel. IV. 13.6(c) (2009). Except for the exclusion of privileged evidence and the right to cross-examine, present evidence and argument, the other "rules" are permissive ("may" versus "shall"). Hearsay evidence can be used to convict since it cannot be excluded on that basis.[25]

Under the present Title IV, licensed attorneys (1-3 "Lay Assessors") assist the Court in most dioceses by hearing objections to evidence, assisting with proposed instructions to the judges and evidentiary rulings. Next July, not only are there no mandatory lay assessors[26] but also there is no longer any requirement that the Church Attorney be licensed.[27] IV.2 (2009) ("duly licensed" removed).

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[24] The minimum number of trial court members in 2006 is three, of whom two have to be clergy. In the Diocese of South Carolina, the canons set this number at 11. Canon XXIX.2 (2010). In 2009, the hearing panel "shall consist of not less than three persons." IV.6.7 (2009).

[25] Hearsay evidence may <u>not</u> be excluded simply because it is hearsay. IV.13.6.b.5 (2009).

[26] The 2006 Title IV references the use of mandatory lay assessors with the Review Committee, Trial Courts of both of Priests and Deacons and of Bishops, and the Courts of Review. IV.3.35, 4.13, 4.18, 4.44, 5.14, 5.23, 6.12, and 15 (2006).

[27] The Hearing Panel does have the discretion to hire legal counsel but this is not required nor is such counsel necessarily a part of the hearing process, which would allow either party to be heard concerning that attorney's "advice" to the Panel. IV.19.22 (2009).

Currently, Title IV does not require the trial proceedings to be public. Next July, the proceedings will be public.[28] Today, the members of the Court must vote by two-thirds in order to convict and to sentence. IV.4.20, 24 (2006). In the Diocese of South Carolina, that would be 8 out of 11. Next July, the Hearing Panel proceedings are public [IV.13.4 (2009)] and the Hearing Panel simply confers "privately to reach a determination of the matter" by a simple majority of those present. IV.13.7 (2009). IV.19.9 (2009) Under the new Title IV, in a diocese with a 7 member Disciplinary Board, 3 of which are on the Conference Panel and the remaining three on the Hearing Panel,[29] Clergy could be convicted by the vote of two people. [30]

Table V (Trial Process)

Title IV (2006)	Title IV (2009)
Standing Committee receives charges, investigates and charges. IV.3(A) (2006)	Intake Officer (who can be appointed by Bp) receives charges, Investigator (appointed by Bp) investigates and Reference Panel (can be controlled by Bp) charges.
Ecclesiastical Court ("EC") (minimum of 3 with majority clergy) IV.4.2 (2006)	Disciplinary Board ("DB") (7 with majority clergy); Conference Panel (1); Hearing Panel (3)[31]
Lay Assessor (1-3 Licensed Attorneys). Give opinions on legal objections/evidence to EC. IV.4.13 (2006)	Attorneys no longer required.
Church Attorney ("duly licensed") IV.15 (2006)	Church Attorney (no license requirement) IV.2 (2009)
All proceedings may be private.	Hearing Panel proceedings are public. IV.13.4 (2009)
Code of Judicial Conduct (Ecclesiastical Court), Rules of Professional Conduct (lawyers), Rules of Procedure, Federal Rules of Evidence.	All procedural/evidentiary decisions made by the President of the HP with limited restraints. IV.13.6 (2009)

[28] In the new Title IV, all proceedings before a Hearing Panel are public. IV.13.4 (2009). The Diocese of South Carolina's Discipline Canons specifically makes these trials closed to the public expect those specifically indicated in the Canon. XXIX.5.23 (2010).
[29] A conference panel shall be more than one member and a hearing panel shall consist of not less than three persons. The president is ineligible to serve on either panel.
[30] A quorum of 3 members would be two and a majority of that quorum would be 2.
[31] These are the minimum members for each respective panel.

Ecclesiastical Court must vote by 2/3 to convict and to sentence. IV.4.20, 24 (2006)	Hearing Panel confers "privately to reach a determination of the matter." IV.13.7 (2009).

Other Significant Due Process Changes

The ability to have reasonable notice of charges is a hallmark of traditional due process standards. Today, Clergy must get at least 60 days notice prior to their required appearance if notice is sent by certified mail. Where notice is by publication, it must last for 4 weeks (one each week) and end 3 months before the appearance date. IV.14.20(a) (2006). Not only have these time requirements been reduced, IV.12.3; 13.2; 19.20 (2009) but there also is a new provision which, upon the Clergy's failure to appear, allows a panel to proceed and "accept as true the matters described in the notice." IV.19.6 (2009). Other substantive due process changes include:

- In July, 2011, statements made by Clergy can be used against them while today Clergy are not required to incriminate themselves. IV.14.11 (2006).[32]
- Today, Clergy may have the assistance of a consultant, hired by the Diocese "to consult with and advise" and those communications are privileged **and** the consultant is not required to answer questions about those client consultations. IV.14.8(d) (2006). In July, the "Advisor," (who has the same role as the Consultant) presumably can be required to respond to questions about his Clergy client as the prohibition against inquiry has been removed.

Restriction of Ministry

The present Title IV allows a Bishop or Presiding Bishop to "inhibit" the ministry of Clergy. Clergy (including Bishops) can be "inhibited" only in precisely defined circumstances. If a presentment has been issued or there has been a conviction in a secular court on grounds of immorality, the inhibition lasts until the conclusion of the

[32] This entire section that comprehensively deals with "Involuntary Statements" has been removed.

ecclesiastical trial. A "temporary inhibition" can be issued if the Clergy is "charged with an offense" or "serious acts are complained of that would constitute grounds for an offense" **and** these are "supported by sufficient facts." IV.1.2(a); 5(a) (2006). In the case of a Bishop, the Diocesan Standing Committee must consent before the Presiding Bishop can inhibit the Bishop Diocesan. IV.1.5(a),(e) (2006).

Inhibition prevents Clergy from exercising "gifts of ordination" in the case of Priests and Deacons and in the case of a Bishop, from "episcopal, ministerial or canonical acts." IV.15 (2006). Temporary inhibitions are of limited duration. They expire after 90 days for Priests and Deacons (subject to 90 day "good cause" renewals) and after one year for Bishops,. IV.1.2(f) & 5(f) (2006). The inhibition canon significantly concludes with this statement: "The temporary inhibition shall be an extraordinary remedy, to be used sparingly and limited to preventing immediate and irreparable harm to individuals or to the good order of the Church." IV.1.7 (2006). This provision is now gone and along with it any semblance of thoughtful restraint.

Next July, a new method of discipline is available that replaces but bears little resemblance to inhibition. Clergy can have their ministry restricted (in unspecified ways) when the Bishop or Presiding Bishop "determines" that the Clergy "*may* have committed any offense" or that "the good order, welfare or safety of the Church or any person or Community may be threatened." IV.7.3 (2009). These unspecified restrictions do not automatically expire and their duration is at the discretion (subject to appeal) of the Bishop (Presiding Bishop) .IV.7.5 (2009). In the case of a Bishop Diocesan, Standing Committee consent is no longer required to restrict the Bishop's ministry. Furthermore, while inhibition currently keeps a Priest/Deacon from exercising the "gifts of ordination" and a Bishop from "episcopal, ministerial and canonical acts," after July, 2011, that changes. Next year, Clergy under a restriction of ministry "shall not exercise any authority of his or her office over the real or personal property or temporal affairs of the Church…." IV.19.7 (2009). Effectively, all the day-to-day activities of Clergy whose ministry is restricted will cease.

Table VII (Restriction of Ministry)

	Inhibition IV.1.2-7 (2006)	**Restricted Ministry/ Administrative Leave**

		IV.4.7 (2009)
Reason For	Clergy is charged with Offense, or reports made to Bp of "serious acts" that could be an offense… supported by sufficient facts" IV.1.2(a) (2006)	Bp "determines" that clergy "may have committed any Offense", or "the good order, welfare or safety of the Church or any person or the Community may be threatened" IV.7.3 (2009)
What Happens	Cease: "exercising the gifts of ordination" (Priest/Deacon) Cease: "all Episcopal, ministerial or canonical acts" (Bp)	PLUS, cease any authority of office over real, personal property or the Church's "temporal affairs" IV.19.7 (2009)
Duration	Priest/Deacon: 90 days Bishop: 1 year	Can be indefinite IV.7.5 (2009)
PB Against Bp	PB needs consent of Standing Committee IV.1.5(a), (e) & .6 (2006)	PB needs no consent
On the Use Of	"An extraordinary remedy, to be used sparingly and limited to preventing immediate and irreparable harm" IV.2.7 (2006)	Removed

II. Revised Title IV is an Unconstitutional Infringement on Diocesan Authority

The sweeping Title IV revisions to the nature of charges against clergy and the procedure associated with clergy prosecution impermissibly intrude into an area the TEC Constitution commits exclusively to the determination of the Dioceses.

Article IX of TEC's Constitution allocates to the Dioceses the exclusive prerogative for establishing courts for the trial of priests and deacons: "Presbyters and Deacons canonically resident in a Diocese shall be tried by a Court instituted by the Convention thereof."[33] This allocation of constitutional authority is essentially unchanged

[33] The General Convention may, by Canon, establish one or more Courts for the Trial of Bishops.
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.
Article IX (2006) (emphasis added)

since the first TEC Constitution in 1789 when what was then Article VI provided: "In every State, the mode of trying Clergymen shall be instituted by the Convention of the Church therein."[34]

Early nineteenth century commentators such as Francis Hawks recognized that this provision in the Constitution gave exclusive authority over Clergy discipline to the Dioceses: "The General Convention cannot legislate on the subject, until the sixth article of the constitution is altered."[35] Similarly, Murray Hoffman, the foremost advocate of inherent authority for the General Convention, reached the same conclusion about the effect of the original Constitution: "But the several dioceses did in the constitution declare that the mode *should* be instituted by the particular conventions — thus, it must be admitted, excluding the General Convention from acting at all."[36] Equally, the 1954 edition of White & Dykman, analyzing the current language of Article IX, concluded: "This provision gives to the diocese the exclusive right to institute such courts."[37]

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.

[34] *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).

[35] Francis Hawks recognized this even though he concluded that this was unwise: "We need two things: first, a uniform mode of proceeding in constituting courts, and conducting trials in the dioceses. This, as the constitution now stands, we cannot have, unless all the dioceses, by their several canons, adopt the same rules; and this is not to be expected. The General Convention cannot legislate on the subject, until the sixth article of the constitution is altered." Francis L. Hawks*, Constitution and Canons of the Protestant Episcopal Church in the United States*, p. 57, New York: Swords, Stanford & Co. (1841) (emphasis added).

[36] "Had the constitution of 1789 contained nothing respecting it, the right would have been vested in the General Convention, leaving the power in the diocese to legislate previous to an action by that body, but then superseding that power. But the several dioceses did in the constitution declare that the mode should be instituted by the particular conventions — thus, it must be admitted, excluding the General Convention from acting at all." Murray Hoffman, *Treatise on the Law of the Protestant Episcopal Church of the United States,* p. 165, New York: Stanford and Swords (1850) (emphasis added; italics in the original).

[37] "**This provision gives to the diocese the exclusive right to institute such courts. …**
At present each diocesan bishop is a lawgiver and, consequently, a law unto himself. The result of this will be discussed when the marriage canons are treated (infra). At

Prior to 1994, the only general canon relating to diocesan disciplinary trials recognized the constitutional authority of Dioceses to establish trial courts and determine their procedures. But in 1994, without amending the Constitution, Title IV was revised to include detailed provisions purporting to govern the establishment and procedures of diocesan trial courts. As has been recognized from TEC's inception, such provisions infringe on the exclusive constitutional prerogative of the Dioceses and are therefore unconstitutional. The 2009 revision significantly attempts to expand this unconstitutional overreach.

The systematic changes made to clergy discipline noted above are the result of an attempt by the General Convention to impose its will on Dioceses in direct violation of the Constitution's explicit allocation of clergy discipline to the authority of the Dioceses.

III. Revised Title IV Purports to Give the Presiding Bishop Unprecedented and Unconstitutional Authority over Other Bishops.

The most revolutionary aspect of the revised Title IV is that it attempts to give the Presiding Bishop the same authority over other Bishops that they have over diocesan clergy. The Presiding Bishop becomes the bishop of bishops—an attempt to make the Presiding Bishop an archbishop or metropolitan. 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.

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present the Church is in the same position in which the United States would be without a federal judiciary to enforce the supreme law of the land. We have the supreme law of the Church made quite uncertain by the power of each bishop to declare and pronounce differently upon it. Neither evenhanded justice nor dignity is so achieved." White & Dykman, Vol. 1, p. 119 (1954). The only change to the second paragraph of Article IX since 1954 has been to change "Missionary District" to "Missionary Diocese."

“Bishop Diocesan Shall Mean The Presiding Bishop”

In one small phrase on page 150 of a 262-page document, the previous references to “Bishop Diocesan” “in all matters in which the member of the Clergy who is subject to proceedings is a Bishop” are transformed to mean the Presiding Bishop. IV.17.2(c) (2009). . It would be easy without this understanding to believe that the broad new powers of Bishop Diocesan are limited to that office. However, what new Title IV gives the Bishop Diocesan with one hand, it effectively (and stealthily) takes away from him with the other.

Thus, under the revised Title IV, the Presiding Bishop would control the outset of the process in the case of Bishops by appointing the Intake Officer and sitting with that appointee on the three-member Reference Panel that makes the initial determinations to investigate and proceed. The Presiding Bishop would issue “restrictions on ministry” of other Bishops. Nowhere is the unconstitutional authority purportedly given to the Presiding Bishop more egregious than in the case of the inhibition of Bishops, now called restriction on ministry. As is the case when a Bishop Diocesan restricts the ministry of his clergy under these new revisions, revised Title IV allows the Presiding Bishop “at any time” and “without prior notice or hearing” to place a Bishop on restricted ministry. This can be based solely on the Presiding Bishop’s determination that the Bishop “may have committed any Offense.” Even more ill defined is the Presiding Bishop’s ability to restrict the ministry of a fellow Bishop whenever she determines that “the good order, welfare or safety of the Church or any person or Community may be threatened” by that Bishop. As with the new restriction of ministry for diocesan clergy, there is not even a requirement that a disciplinary proceeding ever be initiated against the restricted Bishop, and the restriction can be of indefinite duration.

Moreover, the Presiding Bishop no longer needs Standing Committee consent to restrict a Bishop’s ministry (offenses other than Abandonment) nor the consent of the three senior Bishops to restrict the ministry of a Bishop for abandonment. *Compare* IV.9.1 (2006) *with* IV.16 (2009). The Bishop retains the right to appeal the restriction,

but this is after the Bishop's ministry and the life of the Diocese have been interrupted without the consent of the Diocese.[38]

"Fiddling While Rome Burns?"[39]

Given the breadth and substantive nature of these changes, one is forced to wonder how this could happen. Why was there no outcry from liberal, moderate or conservative Clergy about what can only be termed "excesses?" While we were not there as the process unfolded in Anaheim on July 13, 2009, there are at least three apparent reasons these massive revisions were passed without thorough deliberation by the House of Deputies.

First, there was an explicit attempt to minimize the extent of the changes. The Task Force II Report states:

> EXTENT OF CHANGES
>
> An unfortunate outgrowth of a revision such as here brought forth is an appearance that the changes are vast. Such is simply not the case here. The large bulk of Title IV is, or will be, unchanged. Task Force II did not attempt to reinvent the wheel, but simply to express in new language much of what already

[38] And the question must be asked whether the technical definitions evidence an attempt to broaden the powers of the Presiding Bishop even further to include giving pastoral direction to other Bishops. Canon IV.17.1 states that the new provisions apply to Bishops "except as otherwise provided in this Canon." And IV.17.3 includes the pastoral direction provision among those in which the Presiding Bishop functions as the Bishop Diocesan with respect to other Bishops. On the other hand, the plain meaning of the provision on pastoral direction itself would rule out such action by the Presiding Bishop since she is not the "pastor, teacher and overseer" of other Bishops nor are other Bishops resident or licensed in the same Diocese as the Presiding Bishop. But if Bishops were not meant to be *included* in this provision, why were they not *excluded* with the same technical precision with which they were included elsewhere? Obviously, any attempt by the Presiding Bishop to give pastoral direction to another Bishop would be an unconstitutional usurpation of power unprecedented in the history of The Episcopal Church.

[39] This almost certainly inaccurate attribution refers to Emperor Nero's fiddle playing while Rome burned in AD64. It means the occupation of one's time by unimportant matters to the neglect of a crisis. We do not imply through use of the Nero analogy that Clergy were engaged in idle pursuits. Nevertheless, it is striking that these dramatic and polity-changing revisions did not cause Clergy (liberal or conservative) to realize what was happening even with the less than candid discussion about them.

existed. The abandonment provisions, appeals and modifications are essentially untouched, as is most of the other content of the Canon. What has changed is the process by which complaints are brought and heard.

One cannot seriously entertain the belief, given the revisions described in detail above, that a candid description of those revisions is that they were made "simply to express in new language much of what already existed."

Second, the Rules of Order were not followed. Resolutions that seek to amend a Canon either must show each change by overstrikes (deletions) and underlining (additions) or if the entire Title is to be covered by one enactment, "the proponent shall make adequate written explanation of the changes." Rules of Order, House of Deputies 21.(d) (2006). Neither of these was done. The delegates were provided the proposed Title IV revisions with additions and deletions shown *from the proposal* not from the existing Canons. Nor were delegates provided the alternate "adequate written explanation" measured by any rational definition one might give these words.

Third, if live reports and blogs distributed during the period when these changes were "debated" are given any weight, a concerted effort was made to keep debate to a minimum. "When the time came to debate the main resolution, there was a long line of people to talk at the microphones," according to one reporter[40] who noted that **one** person was heard for 15 minutes before the time expired for debate. A motion to extend time for debate was denied. Then a deputy pointed out the absence of the required explanation of the changes (set forth above) and sought reconsideration of the chair's ruling concerning extending debate. Deputy: "May I speak to my motion," President: "No Sir."[41]

[40] Stand Firm's attendee (Sarah Hey).

[41] http://standfirminfaith.com/?/sf/page/24159. It appears that meaningful debate and comment were discouraged throughout. We have heard this directly both from members of the relevant General Convention committee and those who tried to offer helpful comments. One notorious example is that "sexual misconduct" is defined in the new Title IV to include marital relations between a member of the Clergy and his or her spouse if the spouse is a member of the "same congregation." This was pointed out to the committee but the comment was rejected!

Conclusion[42]

There are few descriptive terms that adequately describe what faces all Clergy next July, regardless of where they fall in the spectrum of church politics. One cannot help but be both simultaneously saddened and angered by the extensive revisions masked with soothing rhetoric like "pastoral reconciliation." Underneath this veneer lies a disciplinary strategy, which places all Clergy at the mercy of those in power and weakens Diocesan independence. That this has been deliberate is obvious. That communication about the extent of these changes has been less than candid seems obvious unless one believes that the Clergy of the Episcopal Church simply do not care about their future. The deafening silence about these revisions forces us to believe that the sheep's clothing strategy has been successful.[43]

[42] For a list of other interesting changes, see Table VIII.
[43] "Beware of false prophets, who come to you in sheep's clothing but inwardly are ravenous wolves." Matthew 7:15 (ESV).

Table IV (Who Determines If The Charge Has Merit)

Today

- Standing Committee (aka, Diocesan Review Committee)
  - Receives charge from those entitled to charge;
  - Appoints Church Attorney who investigates charge and appears on behalf of Diocese in future proceedings;
  - Determines "materiality"; "reasonable cause"
  - Determines if probable cause exists to go forward;
  - May change venue of trial where good cause shown;
  - Is the EA when the Bp is not available;
  - Consent required before PB can secure or dissolve a temporary inhibition against a Bp and before PB can secure an "inhibition until judgment" against a Bp.

July 1, 2011

- "Intake Officer", "Reference Panel", "Investigating Officer" assume Standing Committee responsibilities
- Intake Officer
- Bp (PB) May appoint after consultation with the Disciplinary Board.
  - Can only dismiss with Bp's consent.
- Investigator:
  - Appointed by Bp (PB)
  - Investigates the charges
- Reference Panel: Intake Officer, Bp (PB) and President of Disciplinary Board
  - Reference Panel decides if charge should go forward (2/3).
- PB no longer needs Standing Committee consent to restrict ministry of a Bp.

Table VIII (Miscellaneous Changes)

2006		2009
References to "this" Church	will be	"the" Church
The offense of abandoning the "Communion of the Church"	will become	the offense of abandonment of the "Episcopal Church." *Compare* IV 9 & 10 (2006) *with* IV.16 (2009).
The prohibition of resorting to secular Courts for "any member of the Clergy" IV.14.2 (2006)	will be	A prohibition for "any member of the Church whether lay or ordained" IV.19.2 (2009)
The Diocese (Standing Committee Or Diocesan Review Committee) has the burden of proof in a case against Clergy and the Church, in a case of a Bishop. IV.14.16 (2006).	will be	The "Church" has the burden of proof. IV.19.17 (2009)
Definitions for "Chancellor" and "Presiding Bishop". IV.15 (2006)	are	Removed. IV.2 (2009)
		"Injured Person" definition now includes "Community" IV.2 (2009)
For abandonment by a Priest or Deacon, there are 6 months between their inhibition and their possible deposition. IV.10 (2006)		The period between when the restriction on ministry is imposed and deposition has been reduced to 60 days. IV.16 (B) (2009)