CAUSE NO. 141-237105-09

THE EPISCOPAL DIOCESE OF FORT WORTH ET AL.,	)	IN THE DISTRICT COURT OF
	)	
	)	TARRANT COUNTY, TEXAS
Plaintiffs,	)	
	)	
v.	)	
	)	
FRANKLIN SALAZAR ET AL.,	)	
	)	141st JUDICIAL DISTRICT
Defendants.	)	
	)	

FIRST AFFIDAVIT OF DR. ROBERT BRUCE MULLIN

Robert Bruce Mullin, being of more than eighteen (18) years of age, fully competent to make this expert affidavit, and duly sworn according to law, upon his oath deposes and says:

AFFIDAVIT OF ROBERT BRUCE MULLIN

Robert Bruce Mullin, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am an historian and teacher at the General Theological Seminary in New York City, one of the accredited seminaries of The Episcopal Church. I serve as the Professor of Modern Anglican Studies and the Society for the Promotion of Religion and Learning Professor of History and World Mission. I have held these positions since 1998.

2. I received my Bachelor's degree in history from the College of William and Mary and my Ph.D. in the History of Christianity from Yale University in 1984. I also received Master's degrees in religion from Yale Divinity School and from the Berkeley Divinity School at Yale, another accredited seminary of The Episcopal Church.

3. Since 1984, I have been teaching, researching, and publishing in the area of religion in America, with a special focus on The Episcopal Church. Prior to obtaining my

current positions, I taught in these fields at North Carolina State University, Duke Divinity School, the University of North Carolina, Wesleyan University, and Yale University.

4. In connection with litigation involving certain former members of The Episcopal Church who have claimed the right to control and use Episcopal diocesan and parish property for the mission of other churches, I have been asked by the Presiding Bishop of The Episcopal Church to render expert opinions in the following general area within my professional expertise: The current and historical hierarchical organization and structure of The Episcopal Church and the consequent reasons why dioceses and parishes of the Church, as opposed to their individual leaders, may not, consistent with the Church's polity, articulated in its Constitution, canons, and Book of Common Prayer, unilaterally withdraw or disaffiliate from the Church and its governing body, the General Convention, or, in the case of parishes, from their dioceses.

5. My conclusions are based on over 30 years of study and publication in the fields of American history, American religious history, the history of The Episcopal Church, and the history of the Anglican Communion. In addition to the general knowledge that I have gained in that work, in preparation for this statement I have extensively surveyed the Journals of the General Convention of The Episcopal Church; the diocesan journals of many dioceses of The Episcopal Church; the Constitution and canons of The Episcopal Church; the standard commentaries on the Constitution and canons of The Episcopal Church; the Constitutions and canons of many of the dioceses of The Episcopal Church; various Episcopal journals that cast light on the understanding of The Episcopal Church's relationship to property; relevant contemporary historical sources that shed light on issues of churches and property law; contemporary literature on various questions concerning the history of The Episcopal Church; the standard Episcopal Church histories; modern monographs on the history of The Episcopal

Church; comparative studies of other denominational families in order to identify Episcopal distinctiveness; and journalistic accounts that shed light on the Nineteenth- and Twentieth-Century history of The Episcopal Church. I have also incorporated the understanding of the international Anglican Communion that I have acquired through almost 20 years of participation in official ecumenical dialogue on behalf of The Episcopal Church. Finally, I have incorporated the insights I have gained from having directed a number of doctoral dissertations in the field of Episcopal/Anglican studies.

INTRODUCTION

6. The following is an analysis of the question of whether The Episcopal Church has been, and has understood itself to be, a hierarchical Church over its history, and of the subsidiary question of whether, consistent with the Church's polity, a diocese may exercise a purported right to withdraw from participation in and from the governance of the General Convention of the Church. I understand that a "hierarchical" church has been defined by courts, in essence, as a religious denomination that is organized as a united body of constituent regional and/or local affiliates with a common convocation or ecclesiastical head, and in which the regional bodies and individual worshiping congregations are subject to the rules, regulations, and authority of that common convocation or ecclesiastical head. This definition also comports with my understanding, as an expert in church history and polity, of what constitutes a hierarchical church in the United States. Under this definition, The Episcopal Church has throughout its existence been, and has understood itself to be, a hierarchical church.

7. What follows in Part I is a brief discussion of the English roots of The Episcopal Church and an overview of the structure of the Church. This structure is, without question, a hierarchical one. Parts II through V then contain an extended historical and theological analysis of the development of the Church's hierarchical structure from its earliest days to the present. This analysis also responds to a series of essays and other statements that have recently claimed that there is no – or perhaps only limited – hierarchical authority vested in the General Convention of the Church and that ultimate authority in the Church is vested in its dioceses and not in the synodical or general Church.

That discussion will focus on four areas of inquiry:

Evidence from the period of the organization of the Episcopal Church from 1784 to 1789 (Part II);

Evidence from the first Episcopal Church canons and Constitution in 1789 (Part III);

Evidence from actions by the General Convention from 1790 to the present (Part IV); and

Evidence from Nineteenth-Century commentators on the Constitution and other aspects of the Church's polity (Part V).

8. What will become evident is that The Episcopal Church has consistently understood itself as a hierarchical church, governed ultimately by its General Convention, from its very beginning. What will also become clear is that the ultimate source of authority in The Episcopal Church is its General Convention, not its individual dioceses, and that every diocese, once formed by and admitted into union with the General Convention, remains bound by the rules of the Church and may not unilaterally withdraw or disaffiliate from the General Convention.

I. THE EPISCOPAL CHURCH IS HIERARCHICAL.

A. Formation from English Roots

9. The Episcopal Church has its roots in the extension of the Church of England into the colonies of the New World. Permanently planted in the colonies in 1607, the Church of England was present in all of the original colonies during the Colonial period.

10. The Church of England was, and is, a three-tiered hierarchical church, governed at present by a national synod at the topmost level, with regional, geographically-defined "dioceses" at the middle tier, and local congregations (usually called "parishes") at the lowest tier. Each diocese was, and is, under the oversight of a bishop who visits and oversees the parishes and other congregations of the diocese. Congregations in the New World colonies were under the oversight of the Bishop of London, who appointed a special representative to the colonial congregations.

11. The governmental structure of the Church of England was historically defined by synodical bodies (those of Canterbury and York) – legislative bodies composed of bishops and clergy – over which the King and Parliament asserted ultimate authority, at least since the time of the English Reformation in the Sixteenth Century.[1] In particular, the Crown had the right of appointing bishops, the power to create dioceses, the right of visitation, and the right to approve all synodical legislation.

12. Synodical legislation, once approved by the Crown, was binding on all parts of the Church of England. For example, in 1603-1604, Canons were passed (first by synod, then by Parliament) which governed the Church on a variety of levels. They dictated worship practices; outlined the duties and responsibilities of clergy and other church officials; dictated educational

[1] James S. M. Anderson, The History of the Church of England in the Colonies and Foreign Dependencies of the British Empire, 2 vols. (London: Francis and John Rivington, 1845-8) at 1: 130. Anderson here was quoting Henry Hallam, The Constitutional History of England.

requirements for clergy; outlined the proper maintenance of church property; and set forth a system of discipline. These canons bound all clergy and church officials and served as the basis of governance of the Church. They were national in nature and were an essential part of the national Church.

13. The American Revolution created a crisis for the Church of England congregations in this country. Political independence meant that American worshipping congregations could no longer be part of the Church of England, because, *inter alia*, the leaders and members of these congregations could no longer take an oath of loyalty to the English Crown as the Church of England's rules required. Independence also meant that the Church of England liturgy would have to be revised to remove prayers that reflected royal supremacy. But the American Anglicans fervently wanted to retain their Anglican identity, traditions, and mode of worship, as well as their church buildings and other properties, in the new country. A new general church had to be formed, therefore, to succeed to the old.

14. As I set out more fully below, in 1784, Anglicans from several of the former colonies gathered for the purpose of "the revival" of their church "which had existed before the Revolution"; and in 1785, clergy and laity from the former congregations of the Church of England in seven new states met in what was styled as the first meeting of the "Convention of the Protestant Episcopal Church."[2] After several more meetings, in August 1789 the Convention adopted bylaws, called "canons." Then in October 1789, clergy and laity from the former

[2] Journals of the General Conventions of the Protestant Episcopal Church in the United States of America from the Year 1784 to the Year 1814, Inclusive, Preface and 1-16 (1817). The Journals of the General Convention of the Church have been published individually as well as in collected reprints. From this point forward they will be cited as "JGC" unless otherwise noted.

colonial congregations met again, this time with two of the three newly-ordained bishops in attendance, and adopted a Constitution and additional canons for the entity.

15. The canons and thereafter the Constitution of the newly-formed Episcopal Church set out a structure that mirrored that of the Church of England – significantly different from that of the new United States, whose Constitution was also adopted in 1789. Like its predecessor, the new Episcopal Church was a three-tiered hierarchical church, governed by a national parliamentary body and comprised of regional bodies containing local parishes.[3] The American Church was distinctive, however, in allowing lay participation in church governance and having both lay and clerical representatives elect bishops, as well as in lodging the highest authority in the Church in its General Convention, rather than in a monarch or a primate.

B. The General Church

16. The same basic three-tiered structure exists today. At the highest tier is The Episcopal Church, traditionally a national body that in the Twentieth Century has expanded outside of the United States on a missionary basis into several other countries that lacked an established Anglican presence. Next are regional, geographically-defined dioceses, which belong to, are subordinate to, and are under the jurisdiction of The Episcopal Church. Finally, there are local worshipping congregations, generally called parishes or "missions," which belong to, are subordinate to, and are under the jurisdiction of The Episcopal Church and the individual diocese in which the worshipping congregations are located.

17. As stated above, at the topmost level The Episcopal Church is governed by its General Convention, a bicameral legislative body made up of a House of Bishops, composed of most of the Church's active and resigned bishops, and a House of Deputies, composed of clergy

[3] JGC 1789 at 99-100 (Articles 1-3 of 1789 Constitution, describing General Convention), 101 (setting out Deputies by state and parish).

and lay representatives elected from each of the Church's dioceses. Const. Arts. I.2, 4. Legislation must be approved by both houses. Const. Art. I.1.

18. The General Convention meets at least once every three years to establish the policies, rules, and programs of the Church. It has adopted and from time to time amends the Church's governing documents, its Constitution, canons, and Book of Common Prayer. Together, these documents are the ultimate authoritative statements governing the spiritual and temporal affairs of the Church and are applicable to every tier of the Church.

19. The General Convention is the highest authority for questions of the Doctrine, Discipline, and Worship of The Episcopal Church and cannot be limited by actions of other bodies in the Church, including its dioceses.

20. The "Chief Pastor and Primate" of the Church is its Presiding Bishop, who is elected by the General Convention. The Presiding Bishop is charged with, among other duties, responsibility for leadership in initiating and developing policy and strategy in the Church and speaking for the Church as to the policies, strategies, and programs authorized by the General Convention. Const. Art. I.3; Canon I.2(4).

21. Between meetings of the General Convention, an elected Executive Council of bishops, priests, and laypersons manages the fiscal and programmatic affairs of the Church under the direction of the Church's Presiding Bishop as Chair. Canons I.4(1), (3).

C. The Dioceses

22. At the next level, the Church is comprised of 111 dioceses, including the Episcopal Diocese of Fort Worth. Episcopal Church Annual (2009) at 16-19. All dioceses are "formed, with the consent of the General Convention and under such conditions as the General Convention shall prescribe by General Canon or Canons." Const. Art. V.1.

23. All dioceses and their clergy acknowledge the applicability to them of the Constitution and canons of the general Church and their authoritative nature. All dioceses, as a condition of their formation as entities in "union" with the General Convention, promise "an unqualified accession to the Constitution and Canons of this Church." Const. Art. V.1; *see also* Canon I.10(4) (new dioceses "shall have . . . acceded to the Constitution of the General Convention in accordance with Article V, Section 1 of the Constitution"). All clergy at their ordinations subscribe to the following written declaration (known as the "Declaration of Conformity"):

> "I do believe the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and I do solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church." Const. Art. VIII; Ordination Services of the Book of Common Prayer at 513, 526, 538.

In addition, a bishop-elect is required by the Prayer Book to promise to "guard the faith, unity, and discipline of the Church" and to "share with [his or her] fellow bishops in the government of the whole Church." Book of Common Prayer at 518. And, all persons accepting "office[s]" in the Church "shall well and faithfully perform the duties of [those] office[s] in accordance with the Constitution and Canons of [the] Church and of the Diocese in which the office is being exercised." Canon I.17(8).

24. The governing body of each diocese is generally called its "Convention," or sometimes its "Council," "Synod," or "Convocation," and is comprised of the Bishop of the diocese, other bishops and clergy, and lay members elected by the Episcopal worshipping congregations in that diocese.

25. Each diocese's Convention has adopted, and from time to time amends, its own Constitution and canons that supplement, and must not be inconsistent with, The Episcopal

Church's Constitution and canons. Const. Art. V.1; Canon I.10(4). The Constitution and canons of each diocese are authoritative for the governance of the diocese and the worshipping congregations in that diocese. As a matter of history, dioceses have required of all parishes explicit accession to the rules of the general Church and of the diocese.

26. Each diocese has a diocesan bishop, a person elected by the diocesan Convention and ordained as a bishop, by at least three bishops of the Church designated by the Presiding Bishop, with the consent of the leadership of a majority of the other dioceses. Const. Art. II.1, 2; Canons III.11(1), (3), (4). The diocesan bishop serves as the "Ecclesiastical Authority" and chief executive officer in charge of both ecclesiastical and temporal affairs within that diocese. Const. Arts. II.3, 5; Canon III.12(3), IV.15. The diocesan bishop is advised by, and as to certain matters shares authority with, a "Standing Committee," a body of clergy and laity elected by the diocesan Convention. Const. Art. IV; Canon I.12(1). When a diocese has no bishop, the Standing Committee serves as the Ecclesiastical Authority. Const. Art. IV; Canon IV.15.

D. The Parishes

27. At the third level of governance, the 111 dioceses together contain the Church's approximately 7,600 worshipping congregations. Episcopal Church Annual, supra, at 16-19. Most of these congregations are called parishes; others, usually newly-forming congregations that do not meet all of the requirements for parish status, are generally called missions; and still others include cathedrals, chaplaincies at educational institutions, and other institutions. See, e.g., id. at 132-34 (listing congregations in the Episcopal Diocese of Alabama).

28. An Episcopal parish has a governing body called a "vestry," which is comprised of the rector of the parish and lay persons elected by the voting membership of the parish. Canons I.14(1)-(3). Members of the vestry serve as officers of the parish. Canons I.14(1), (2).

29. The rector of a parish in the Church is a priest elected by the vestry in consultation with the bishop of that diocese and is in charge of the spiritual and temporal affairs of the parish. Canons I.6(1); I.17(4); III.9(3)(a), (5).

E. Anglican Communion Membership

30. The Episcopal Church is "a constituent member of the Anglican Communion." *See, e.g.,* Constitution Preamble. The "Anglican Communion" is a name generally used to describe a worldwide fellowship among a group of churches "in communion with the See [*i.e.*, seat of the Archbishop] of Canterbury." Id. Each individual member church, or "Province," within the group is self-governing and autonomous: Each of the 38 individual churches has its own prime bishop (in the United States, the Presiding Bishop), governing bodies, Constitution, canons, and Prayer Book. While The Episcopal Church is a hierarchical church, the Anglican Communion is not.

31. The churches of the Anglican Communion have their roots in the Church of England and were generally established in their respective countries or regions by English immigrants or missionaries adhering to the Church of England's doctrine and worship. The term "Anglican Communion" dates back only to the mid-Nineteenth Century, long after a number of the churches that currently comprise the Anglican Communion were formed; and the first meeting of bishops of those churches as such did not occur until 1867.[4]

32. Since 1867, the bishops of the churches in the Communion have met every ten years (with two breaks occasioned by the two World Wars) at gatherings known as "Lambeth Conferences." Among other things, the Lambeth Conferences discuss issues related to Anglican

[4] Colin Podmore, Aspects of Anglican Identity. London: Church House Publishing (2005) at pp. 36-38.

doctrine and discipline and issue advisory "resolutions" with respect to those issues. Because the member churches of the Anglican Communion are not themselves "governed" by the Lambeth Conference or by the Archbishop of Canterbury, the Lambeth resolutions are not binding on a particular member church.[5]

33. The historic tradition of the Anglican Communion is that each Province forms its own constituent units and exercises jurisdiction within its own geographic territory, and not within the geographic territory of any other Province. This principle dates back to the Ecumenical Council of Nicaea in 325 A.D.

II. THE HIERARCHICAL NATURE OF THE EPISCOPAL CHURCH WAS EVIDENT DURING THE CHURCH'S ORGANIZATIONAL PERIOD, 1784-1789.

34. The goal and outcome of the organizational period of The Episcopal Church was the creation of a national church with an authoritative General Convention. Only such an organization could assure a united Church and the reception of the episcopate from the Church of England.

A. Development of the General Convention

35. The hierarchical nature of The Episcopal Church was clear from the very beginning of its organization in the decade of the 1780s. The norm in Anglicanism, as shown above, has always been the national Church -- i.e., a church representing the communicants of a sovereign state. With the independence of the American colonies from Britain in 1783, such a church became the goal of American Episcopalians. But unlike the Church of England, where the topmost authority of the Church was vested in Parliament and the Crown, The Episcopal Church placed ultimate authority in a General Convention consisting of a House of Bishops and

[5] See "Lambeth Conference," in Don S. Armentrout and Robert Slocum, eds., An Episcopal Dictionary of the Church (New York: Church Publishing (2000) at 291-292).

a House of Clerical and Lay Deputies. The innovation of including laity in the Church's governance structure may be attributed in part to William White of Pennsylvania, the architect of the organization of The Episcopal Church in America. White's organizational plan was laid out in The Case of the Episcopal Churches Considered (1782). Significantly, under White's Case, no ultimate rights were reserved for states or dioceses.[6]

36. Movement towards organization of the Protestant Episcopal Church in the United States of America began at a meeting of clergy and laity in New Brunswick, New Jersey, in May 1784. This led to a first, informal "convention" of clergy and laity from different states in New York City later in 1784, which then called for a formal meeting of a "general convention" in Philadelphia, Pennsylvania, in 1785.

37. The first principle of ecclesiastical union recommended by the members at the New York meeting was

> "That there shall be a general convention of the Episcopal Church in the United States of America."[7]

For this to occur, members of the newly-forming Episcopal Church would need to be officially represented in the General Convention (there were no official representatives at the New York meeting). Thus, the New York meeting called for the Episcopal Church in each state to organize and send delegates to a meeting in Philadelphia in 1785.[8] Hence, the second recommendation by the members of the meeting for ecclesiastical union was:

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[6] William White, The Case of the Episcopal Churches in the United States Considered, edited by Richard G. Salomon ([Philadelphia]: Church Historical Society, 1954) at 26.

[7] William White, Memoirs of the Protestant Episcopal Church in the United States of America, 2nd ed. (New York: Swords, Stanford, and Co., 1836) at 80.

[8] In the discourse of the 1780s, the language referred to Episcopalians organizing themselves into state conventions at the behest of the newly-forming General Convention; one sees no

"That the Episcopal Church in each state, send deputies to the convention, consisting of clergy and laity." Id.

38. The various states chose different means for gathering to choose deputies to the General Convention. In Pennsylvania and New York, Episcopalians organized themselves for the first time into formal state conventions, calling themselves "The protestant Episcopal church in the state of Pennsylvania"[9] and "the Protestant Episcopal Church in the State of New York."[10] In other states, such as New Jersey, Episcopalians simply came together, without formally organizing, to choose delegates,[11] and in still others, such as Delaware (which had only two congregations in the state), there is no evidence that any meeting was even held.[12]

39. In each of these instances the national nature of the Church was clearly recognized. From the initial calling together of Episcopalians to form an American church, the summoning language referred to the Episcopal "Church" in each state, rather than separate "Churches" in the states. Nor did these state meetings speak of state churches. Rather, they referred to the Episcopal Church in a given state. There was no language of the Episcopal Church of a given state. A national model was clearly presupposed.

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discussion of dioceses, which was a different ecclesiastical concept and not present in early America.

[9] Journal of the Meetings Which Led to the Institution of a Convention of the Protestant Episcopal Church in the State of Pennsylvania (Philadelphia, 1790) at 12.

[10] Journals of the Conventions of the Protestant Episcopal Church in the Diocese of New York (New York: Henry M. Onderdonk, 1844) at 6.

[11] Proceedings of a Convention of the Protestant Episcopal Church in the State of New Jersey (NP, 1785), NP

[12] Charles A. Silliman, The Episcopal Church in Delaware, 1785-1954 (Wilmington: The Diocese of Delaware, 1982) at 6.

40. The first meeting of the General Convention was in Philadelphia in September of 1785, with representatives from seven states and presided over by William White. This Convention undertook three primary projects.

41. First, it began the task of revising the Book of Common Prayer.

42. Second, it addressed a letter to the Archbishops and other bishops of the Church of England requesting the bestowal of the office of the episcopacy. In the deputies' view, this request could not be made by any body lesser than the General Convention itself. As the Convention stated in its letter to the English bishops:

> "[I]t was not until this Convention that sufficient powers could be procured for addressing your Lordships on this subject."[13]

This view was affirmed the next year when the English archbishops and bishops insisted that any individuals proposed for the office of bishop for the new American Church come with the recommendation of the General Convention, not merely of a state convention.[14]

43. Third, the General Convention in 1785 drafted a proposed Constitution, which in a modified form would be approved in 1789. Although much of the language of that Constitution is still to be found in the current Constitution, including its first line, "There shall be a General Convention," the 1785 version also included a preamble that explained why such a General Convention was necessary:

> "The Deputies being now assembled, and taking into consideration the importance of maintaining uniformity in doctrine, discipline, and worship in the

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[13] William Stevens Perry, ed., Journals of the General Convention of the Protestant Episcopal Church in the United States, 1785-1835, Published by Authority of General Convention 2 vols. (Claremont, NH: The Claremont Manufacturing Co., 1874) at 1: 26. All references to actions of General Convention 1785-1835 will be cited from these volumes.

[14] See JGC 1786 at 1: 55 (setting out the testimony that the English archbishops and bishops required from the General Convention).

said Church, do hereby determine and declare: That there shall be a General Convention of the Protestant Episcopal Church in the United States of America...." Id. at 1: 21.

44. The General Convention, therefore, was to be the instrument to maintain "uniformity in doctrine, discipline, and worship" in the American Church. This was in keeping with the long-held Anglican concept of a unified national church.[15] In the words of the Hon. Murray Hoffman, the leading Nineteenth-Century expert on Episcopal Church law:

> "Now what could possibly achieve the object of maintaining uniformity in discipline and worship, but this principle of ultimate authority in some constitutional body? What else could fulfil the primitive law of unity and perfection in a national Church—what else could have met the exigencies of those days? Nothing saved us then, nothing but this can save us now, from being the dissevered members of separate congregations, and not the compact body of a national Church."[16]

The role of the General Convention in securing uniformity in worship and discipline was for Hoffman the crowning achievement of the organizational period.

45. The General Convention met twice in 1786, in Philadelphia in June and Wilmington, Delaware, in October. In both meetings, the authority of the General Convention over the state conventions was reasserted. One such instance involved the ratification of the Book of Common Prayer. The General Convention of 1785 had invited the state conventions to comment on proposed changes to the Prayer Book, and the result was a cacophony of voices and liturgical diversity. As William White described, a system in which the individual states exercised controlling authority "appeared so evidently fruitful of discord and disunion, that it

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[15] Thus, Article XXXIV of the Articles of Religion (the Sixteenth Century Anglican statement of doctrine) provided that "[e]very particular or national Church hath authority to ordain, change and abolish, Ceremonies or Rites of the Church ordained only by Man's authority so that all things be done to edifying." Book of Common Prayer (1662) at 708.

[16] Murray Hoffman, A Treatise on the Law of the Protestant Episcopal Church in the United States of America (New York: Stanford and Swords, 1850) at 114.

was abandoned from this time"; and "the necessity of a duly constituted ecclesiastical body" was confirmed. White, Memoirs, supra at 115 (emphasis added). Hence, Article IX of the proposed Constitution was reworked to permit state conventions to determine whether to use the proposed revised Prayer Book only until "further provision is made, in that case by the first General Convention which shall assemble with sufficient power to ratify a Book of Common Prayer for the Church in these States." Id. at 1:42. This declaration of the right of the General Convention alone to change the Book of Common Prayer was crucial in asserting the national and hierarchical nature of the Church.

46. The General Convention meeting in Philadelphia in 1786 also rewrote Article XI of the proposed Constitution to state that the Constitution would be ratified not by the individual state conventions, but by the General Convention itself:

> "This Constitution of the Protestant Episcopal Church in the United States of America, when ratified by the Church in a majority of the States assembled in General Convention, with sufficient power for the purpose of such ratification, shall be unalterable by the Convention of any particular State, which hath been represented at the time of said ratification." Id. at 1: 40 (emphasis added).

47. This decision was remarkable in that it flew in the face of the overwhelming political sentiment of the time. Whereas other organizations regularly expressed a fear of centralization and emphasized that power should be kept on the lowest level possible, Episcopalians chose a different course. The General Convention would ratify its own Constitution!

B. The Connecticut Experience

48. While William White and the Episcopalians of the southern and middle states were planning to organize by means of a General Convention, some Episcopalians in the northern states were acting on a different front. In response to the publication of White's Case,

which called for the organization of The Episcopal Church before bishops could be secured, Episcopalians in Connecticut, New York, and Massachusetts argued that the office of the bishop was essential for any church organization. Despite this difference, they held the same view as their southern counterparts of the preeminence of a national church over its dioceses.

49. In 1783, Connecticut clergy elected Samuel Seabury to seek episcopacy from the Church of England. Although elected by the clergy of Connecticut, he was always understood to be representing a larger community. For example, Seabury's application for the episcopacy received the testimonial of clergy from New York.[17] One contemporary described the office he sought as "Bishop for America."[18]

50. The English bishops refused Seabury's request. Seabury did, however, receive the support of the unestablished (and politically marginal) Episcopal Church of Scotland, which consecrated him to the episcopate.

51. Once consecrated by the Episcopal Church of Scotland, Seabury's actions confirmed that he regarded himself, and was regarded, as a bishop of the larger Church. For example, he claimed the right to ordain candidates from states other than Connecticut. Among his early ordinands, two were from New Jersey, and one was a candidate from Maryland. Beardsley, Seabury, supra, at 238.

52. Thus, when Seabury and his supporters from Connecticut and Massachusetts joined the General Convention in 1789, they did so not in the spirit of an autonomous diocese,

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[17] Francis L. Hawks and William Stevens Perry, ed., Documentary History of the Protestant Episcopal Church in the United States of America, 2 vols. (New York: James Pott, 1864) at 2 :217.

[18] E. E. Beardsley, Life and Correspondence of the Right Reverend Samuel Seabury, D.D. (Boston: Houghton, Mifflin and Co, 1881) at 104.

but as representing a part of the Episcopal Church. In order to accommodate Seabury and the New England churches, the Constitution was modified to reflect their view of the importance of the episcopate, by allowing a separate House of Bishops and making lay delegates optional. No modification was made, however, affecting the powers of the General Convention vis-à-vis the rest of the Church.

53. Unlike the representatives from the Church in the other states, Seabury and his supporters had not been officially chosen to represent the Church in their states at the 1789 General Convention. Accordingly, in 1790 the clergy in Connecticut formally adopted the Constitution and Prayer Book.[19] However, even before this action was taken, Seabury urged the clergy in that state to use the Prayer Book that had been adopted by the General Convention in 1789, and the one cleric who refused was eventually deposed.[20] And, in 1792, the Convocation of the Protestant Episcopal Church in Connecticut decreed that a congregation that did not approve "the Constitution of the Protestant Episcopal Church as settled by the General Convention at Philadelphia in October 1789" could not be a member of The Episcopal Church in Connecticut.[21]

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[19] Diocese of Connecticut: The Records of Convocation A.D. 1790 – A.D. 1848, Edited by Joseph Hooper (New Haven 1914) at 37.

[20] Paul Victor Marshall, One Catholic and Apostolic: Samuel Seabury and the Early Episcopal Church, (New York 2004) at 261-63. In deposing him, Seabury stated that the cleric had "deprav[ed] the Liturgy, contraven[ed] the government, and despis[ed] the discipline of the Protestant Episcopal Church in America." Id.

[21] Diocese of Connecticut: The Records of Convocation A.D. 1790 – A.D. 1848 at 40-41.

III. THE HIERARCHICAL NATURE OF THE EPISCOPAL CHURCH WAS REFLECTED IN THE 1789 CONSTITUTION AND CANONS.

54. The Constitution of the Protestant Episcopal Church as it developed between 1785 and 1789 was a unique document, in that it reflected a political vision far different from that in other contemporary documents. The Church's first canons – adopted before the Constitution was ratified – echoed the same vision.

A. Relation of the General Convention to the Church Constitution

55. It is a common misunderstanding to interpret The Episcopal Church Constitution in terms of the Federal Constitution of the United States. The Constitutional Convention authored the Federal Constitution, which was ratified by the states and thus empowered the structures of the national government (i.e., Congress, the Executive, and the courts), carefully delineating their powers. This was not the case with The Episcopal Church. Rather, the Church's Constitution was a product of the General Convention, and that same General Convention continues to exist to this day.

56. As noted above, the first meeting of representatives of the Episcopal church in the various states was held in New York in October of 1784, and it called for a meeting of a "general convention" to gather in Philadelphia in September of 1785. Also as noted above, one of the tasks of the first meeting of the General Convention was to begin to author the Constitution. This point is central. It was the General Convention that authored the Church's Constitution and not the reverse.

57. As also noted above, at its first meeting the General Convention took other actions. It began the process of revising the Book of Common Prayer, and addressed a letter to the English Archbishops and bishops requesting the establishment of the episcopacy in the new church, establishing a committee of correspondence to oversee this process. Significantly, none

of these acts was explicitly authorized by any language found in the forming Constitution. Instead, the General Convention assumed the authority, just as it did the authority to author a Constitution.

58. The Constitution's primary goal was to ensure continuing meetings of the General Convention. As William White explained, the Constitution was expressly written so that further meetings of the General Convention would occur:

> "In order that the present convention might be succeeded by bodies of the like description, they framed an ecclesiastical constitution...."[22]

59. This unique relationship of Convention to Constitution gave to the Church Constitution a number of distinctive aspects.

1. Lack of Federal Language

60. Although written in the same period as the Federal Constitution, the Church's Constitution is far more hierarchical in nature and is strikingly bare of language of federation. (Neither the word "federal" nor the word "federation" is found in the Church Constitution.) Federal language has been used to describe the Constitution by some commentators and historians.[23] Such language cannot be found in contemporary sources, however. The Church's Constitution was written by persons well versed in the U.S. constitutional discussions of the 1780s, and James Duane, one of the persons on the 1785 drafting committee of the Church Constitution, had been a signer of the Articles of Confederation and was a strong backer of the

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[22] William White, Memoirs of the Protestant Episcopal Church in the United States of America, From its Organization Up to the Present Day, 2nd ed. (New York: Swords, Stanford and Co., 1836) at 24.

[23] Most notably Clara O. Loveland in The Critical Years: : The Reconstitution of the Anglican Church in the United States of America, 1780-1789 (Greenwich, CT: The Seabury Press, 1956) at 62-118.

new Federal Constitution. But the Constitution of the Church was a strikingly different document.

61. The Church Constitution differed from the U.S. Constitution in its lack of language limiting national power and reserving authority to more local units. The Church Constitution had no language such as that found in the Tenth Amendment to the Federal Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

62. Thus, while the U.S. Constitution conceives of the Federal Government as one of limited, defined powers with the residuum of authority remaining in the states, the Church Constitution assumes the plenary authority of the General Convention and is a mechanism through which the General Convention grants powers to, and sets limits on, the Church in the states and, later, dioceses. For example, concerning the episcopate the Constitution stated:

> "Art. 4. The Bishop or Bishops in every State shall be chosen agreeably to such rules as shall be fixed by the Convention of that State."[24]

Here, the General Convention gave to the state conventions a new power – the authority to select their own candidates for bishop (by means of election). That this was not understood as an inherent right is evident from the fact that it had not been exercised in Anglicanism for over 700 years. There was thus no understanding that the state conventions reserved the right to elect bishops; rather, they were given the authority to elect bishops by the General Convention.

63. The absence of any language of federalism in the Church Constitution should not be surprising. In the political realm, the framers of the U.S. Constitution had to balance carefully the necessary powers and privileges claimed by the national government and the powers of

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[24] This provision exists in Article II.1 today; see also Canon III.11(1).

sovereign states, which had exercised considerable, if not unlimited, legislative and judicial authority for well over a century as colonies. Such was not the case in the Church. During the colonial period, Church of England congregations did not legislate for themselves but received all their laws from the Church of England, where full authority to legislate lay at the national level. Thus, the assumptions of the Episcopal Constitution of 1789 were that the General Convention was to be the chief legislative authority and that state conventions would possess only that authority which the General Convention chose not to exercise itself, either expressly or implicitly. The principle of hierarchy is here clearly evident.

64. The Constitutions of certain other religious bodies appear to use more intentional language than that found in The Episcopal Church's Constitution in articulating the superior authority of the national body, in large part because they have arisen in different circumstances. In three Twentieth-Century church constitutions, those of the United Methodist Church, the Presbyterian Church USA, and the Evangelical Lutheran Church of America ("ELCA"), which some writers have contrasted with the Constitution of The Episcopal Church, explicit language of hierarchy was necessary, because in each case the present church was a union of earlier churches with long traditions of legislative independence. The United Methodist Church represented the merging of Southern and Northern branches that had been separate since 1844. Presbyterians similarly re-joined churches divided by the Civil War, while the ELCA represented the union of three churches (the Lutheran Church of America, the American Lutheran Church, and the Association of Evangelical Lutherans) that had been historically independent. When there have been competing traditions of legislative autonomy, federal language may be necessary to delineate authority. But in the case of The Episcopal Church in the 1780s, where no such

competing authorities existed, language of federalism was unnecessary and, indeed, inappropriate.

2. Lack of Enumerated Powers

65. As is well known, the Federal Constitution carefully delimits the rights and powers of each branch of the U.S. Government. By contrast, the Church Constitution acknowledges a General Convention without specifically defining its authority, thus placing no limitations on that authority. Indeed, from the very beginning, the primary function of the Church Constitution was simply to describe the structure of the General Convention, define its membership, and mandate its continued existence. The Constitution was never intended to prescribe the scope of, and in that way set limits on, the General Convention's authority.

66. This concept of the legislative authority of the General Convention was evident from the very beginning. As early as August of 1789, the General Convention asserted the right to legislate, not from constitutional mandate, but out of its very nature as representing the wider Church. At that meeting, the General Convention adopted a series of canons, even though the Constitution had not yet been finally ratified!

67. This action of legislating before there was a Constitution would be revolutionary from the perspective of contemporary secular politics. Yet, it was in keeping with understandings about the nature of the Church discussed in Sections I and II above. The right to adopt canons was seen not as a right derived from a written Constitution, but rather as part of the fundamental nature of the Church. Since the early centuries, ecumenical councils had claimed the right to issue canons binding on the Church, and national churches had claimed the same right within their spheres of authority. As we have seen, the Church of England did so in 1603-

1604 without possessing any written Constitution. Similarly, the General Convention of The Episcopal Church in August of 1789 was claiming this right by adopting canons before the Constitution was in place.

68. Nor is there any language in the Church Constitution parallel to the following language of the Ninth Amendment to the Federal Constitution reserving rights and powers to the local levels: "The enumeration in this Constitution, of certain rights, shall not be construed to deny or disparage others related by the people." Although such language was originally proposed in 1784, it found no place in the Church Constitution of 1789 (or subsequently).[25]

B. Evidence in the 1789 Constitution of the Supremacy of the General Convention

69. The supremacy of the General Convention over the whole Church, including over the Church in the states (and, later, dioceses), was made clear in early Constitutional provisions governing seven important aspects of Church governance and life.

70. The first was liturgical. The first Constitution reflected the General Convention's absolute authority in revising the Book of Common Prayer and in making use of the Prayer Book mandatory throughout the Church. Article 8 stated that "A book of common prayer . . . when established by this or a future General Convention, shall be used in the Protestant Episcopal Church in these United States, which shall have adopted this Constitution." (Emphasis added). The Book of Common Prayer had (and has) been seen as one of the foundations of Anglicanism, and the General Convention has always had sole authority to define its content.

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[25] The language proposed in 1784 (and later rejected) stated: "That no powers be delegated to a general ecclesiastical government, except such as cannot be conveniently exercised by the clergy and laity, in their respective congregations." Convention Journals of Pennsylvania 1785-1814 at 6. As described below, another attempt to insert a provision reserving rights to the dioceses was rejected in 1895.

71. A second place was the establishment of compulsory requirements for admission to holy orders, including a mandatory declaration for ordination. Article 7 provided that "[n]o person shall be admitted to holy orders" unless certain requirements were met, "[n]or shall any person be ordained" until he subscribed to a specific oath:

> "I do believe the holy scriptures of the Old and New Testament to be the word of God, and to contain all things necessary to salvation: And I do solemnly engage to conform to the doctrines and worship of the Protestant Episcopal Church in these United States."

Thus, all clergy were held to a mandatory national standard and were required to promise conformity with the larger Church.

72. A third area was the binding nature of the General Convention's legislation. During the meetings leading up to the ratification of the Constitution in 1789, attendance was erratic. Hence, Article 2 of the Constitution provided that if any state Convention failed to send Deputies to the General Convention, "the Church in such State shall nevertheless be bound by the acts of such Convention." (Emphasis added). Here again, submission to the decisions of the General Convention was not optional.

73. Fourth was the lack of a judiciary. The absence of any judiciary in the Church Constitution demonstrated that the General Convention was the final interpreter of the Constitution (as well as of the canons and the doctrine, discipline, and worship of the Church). In these circumstances, the General Convention – like the English Parliament – could legislate in areas on which the Constitution was silent.

74. The fifth and sixth areas involved the authority to ratify and amend the Constitution. As previously noted, one of the singular aspects of the Church Constitution was the manner of its own ratification. In 1786, the Constitution was amended so that ratification

took place within the General Convention itself, and not by the state conventions, as had been proposed in the 1785 version:

> "The Constitution of the Protestant Episcopal Church in the United States of America, when ratified by the Church in a majority of States assembled in General Convention, with sufficient power for the purpose of such ratification, shall be unalterable by the Convention of any particular State, which has been represented at the time of ratification." Art. 9. (Emphasis added.)

In the secular political process of the ratification of the Federal Constitution, much weight was put on the participation of the states themselves. In The Episcopal Church context, however, this power was vested in the General Convention. Similarly, Article 9 also committed the amendment power to the General Convention:

> "This Constitution shall be unalterable, unless in General Convention, in a majority of States which may have adopted the same; and all alterations shall be first proposed in one General Convention, and made known to the several State Conventions, before they shall be finally agreed to, or ratified, in the ensuing General Convention."

Unlike in the U.S. Constitution (or in a less hierarchical polity such as that of the Presbyterian Church), there is no step in the amendment process where an amendment needed to receive the approval of the states (or in the case of Presbyterians, the presbyteries) themselves. The General Convention had – and still has – sole power to amend its Constitution.

75. Finally, and perhaps most fundamentally, was what was required for a state convention to become a part of the General Convention. Article 5 provided:

> "A Protestant Episcopal Church in any of the United States not now represented may, at any time hereafter, be admitted on acceding to this Constitution."

For a state convention to join the General Convention, it had to acknowledge the powers of the General Convention. Indeed, as will be shown, in a number of instances state conventions were denied membership because they failed adequately to accede.

C. Evidence in the 1789 Canons of the Supremacy of the General Convention

76. As noted above, one compelling piece of evidence in the canons of the supremacy of the General Convention is the fact of their adoption by the General Convention before its adoption of the Constitution. But the early canons also reveal the supremacy of the General Convention in two other respects: From 1789, the General Convention asserted the right to pass canons in a number of areas that had no foundation in the Constitution itself, and in so doing often used mandatory language that confirmed the supremacy of the General Convention's authority.

77. The first such area concerned the selection of bishops. Although the Constitution delegated to state conventions the right to set the rules for electing their own bishops, the canons confirmed the General Convention's plenary authority in this area. Thus, Canon II of 1789 set out the mandatory requirement that "[e]very Bishop elect, before his consecration, shall produce" to the consecrating bishops certificates from the electing state convention and the General Convention. (Emphasis added).

78. A second area in which the General Convention asserted its authority in a mandatory fashion on a subject not addressed by the Constitution involved the duties of bishops. Canon III commanded that "[e]very bishop shall, as often as may be convenient, visit the churches within his Diocese or district, for the purpose of examining the state of his Church, inspecting the behaviour of the Clergy, and administering the apostolic rite of Confirmation." (Emphasis added).

79. A third area concerned requirements for ordination. The authority to dictate ordination requirements is nowhere made explicit in the Church Constitution, yet from the very beginning the General Convention assumed this responsibility. Four of the original canons

passed by the same Convention that ratified the Constitution made mandatory certain details relating to ordination: Canon IV provided that "Deacon's orders shall not be conferred" on anyone until he reached the age of 21, "nor Priest's orders" until the age of 24; and "[n]o man shall be consecrated a Bishop of this church" until the age of 30. (Emphasis added). Canon V commanded that "[n]o person shall be ordained" unless he produced a certificate showing a potential for gainful employment within the Church. (Emphasis added). Canon VI required that "[e]very candidate for holy orders shall be recommended to the Bishop" by the convention's standing committee and set out the precise language for the recommendation, which "shall be signed by the names of a majority of the committee." (Emphasis added). Finally, Canon VIII set the appropriate times for ordination: "the stated times of ordination shall be on the Sundays following the Ember weeks." (Emphasis added).

80. A fourth area concerned clergy education. The Constitution nowhere specified that this was in the purview of the national Church, yet Canon VII assumed the right of the General Convention to establish mandatory learning requirements, providing that "[n]o person shall be ordained in the Church" until he has "satisfied the Bishop and . . . two Presbyters . . . that he is sufficiently acquainted with the New Testament in the original Greek, and can give an account of his faith in the Latin tongue, either in writing or otherwise, as may be required." (Emphasis added).

81. A fifth area involved the duties of clergy. Here, too, the Constitution was silent, but the General Convention exercised authority by imposing mandatory requirements in this area. These included Canon XI (providing that ministers "shall" prepare and present confirmands to the Bishop and "shall" inform the Bishop of the state of the congregation); and Canon XV (all ministers "shall" keep a register of baptisms, marriages, and funerals in the

parish). In addition, Canon X expanded on the Constitutional requirement that the Prayer Book "shall be used," mandating that "[e]very minister shall . . . use the Book of Common Prayer, as the same shall be set forth and established by the authority of this or some future General Convention...and no other prayer shall be used besides those contained in the said book." (Emphasis added).

82. A sixth area concerned clergy behavior and discipline. The right of the General Convention to establish rules of behavior and discipline for clergy was not specified in the Church Constitution, but from the very beginning the General Convention asserted its right to do so. Canon XIII thus prohibited clergy from "resort[ing] to taverns," engaging in "base or servile labor," "drink[ing]," "riot[ing]," or "spending [] their time idly," and provided that offenders "shall be liable" to sanctions "according to such rules or process as may be provided either by the General Convention or by the Conventions of the different States." (Emphasis added).

83. Similarly, in Canon XII the right to discipline laity for "wickedness of life" is asserted, although nowhere found in the Constitution. Here again, the General Convention not only described a list of offenses for which laity could be punished, but required that offenders "shall be repelled from the Holy Communion," and reserved the right to establish the process for prosecution of those offenses.

84. In sum, the powers exercised in these original canons came not from enumerated powers found in the Constitution, but from the right of the Church to self-governance; and their mandatory nature reflected the nature of the General Convention's authority. In this way, they reflect the same over-arching powers that lay behind the English Canons of 1603-1604.

IV. THE SUPREMACY OF THE GENERAL CONVENTION HAS CONTINUED TO BE REFLECTED IN GENERAL CONVENTION ACTIONS FROM 1790 TO THE PRESENT.

85. Since the promulgation of the Constitution and canons of 1789 and up to the present, the General Convention has continued to exercise its authority over bishops and their dioceses and to legislate on such matters as requirements for ordination, clerical practice, discipline, and church property.[26] These actions confirm that the Church Constitution (unlike the U.S. Constitution) was never intended to limit the actions of the General Convention. Rather, the Church has always regarded the General Convention as having full authority to legislate for the well-being of the Church.

86. At various times the General Convention has explicitly defined its understanding of its hierarchical authority to take such actions, as shown in the following two examples. In 1964, the General Convention formally defined the levels of authority in the Church:

> "The Protestant Episcopal Church accepts as its authority the Holy Scriptures, the Nicene and Apostle's Creeds and speaks through the Book of Common Prayer and the Constitution and Canons of the Church. The Protestant Episcopal Church speaks also through the Resolutions, Statements and actions of the General Convention. In these ways the Church speaks at the highest level of responsibility for the Church to the Church and to the world." JGC 1964, 312-313.

Likewise in 1994, the General Convention, in reordering its clergy disciplinary judicial system, made the following declaration:

> "Disciplinary proceedings under this Title [IV] are neither civil nor criminal, but ecclesiastical in nature and represent determinations by this Church of who shall serve as Members of the Clergy of this Church and further represent the polity and order of this hierarchical Church. Clergy who have voluntarily sought and accepted ordination in this Church have given their express consent and subjected themselves to the discipline of this Church and may not claim in proceedings

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[26] The Constitution of 1789 spoke of "the Church in each State." Art. 2. By the 1830s, The Episcopal Church in the State of New York had grown so large that it asked the General Convention to consider Constitutional and canonical changes that would allow for the division of the Church in a given State into multiple dioceses. JGC 1835 at 87. The General Convention took this occasion to initiate legislation replacing all references in the Church's Constitution to a "State" with the term "Diocese." Id. at 138.

under this Title constitutional guarantees afforded to citizens in other contexts." Canon IV.14.1 (emphasis added).

A. Bishops

87. The General Convention has continued to exercise authority over the selection of bishops, providing in 1799 for consents to be given by a majority of bishops and Standing Committees when the General Convention was not in session. Canon II ("Of the Consecration of Bishops in Recess of General Convention"). [27] In 1832, it adopted Canon XXXII ("On Episcopal Resignations") (now Canon III.12(8)) which required the General Convention's consent for a bishop to resign; and in 1853, it adopted Canon III ("Of Bishops absent from their Dioceses because of Sickness, or other sufficient reason") authorizing bishops to take temporary leave from their dioceses provided they turn over ecclesiastical authority to the Standing Committee. On several occasions, the General Convention has refused to consent, for the various reasons, to the ordination of bishops.[28]

88. The General Convention amended the Constitution in 1901 to specify the minimum age for the ordination of bishops (30) (Const. Art. II.2); to specify that consents to episcopal ordinations be given only by bishops with jurisdiction (in addition to consents by the House of Deputies or Standing Committees as provided earlier) (id.); and to provide that bishops may not resign without the consent of the House of Bishops (Const. Art. II.4, now II.6). In

[27] This provision is now found in Canon III.11(4).

[28] The Convention withheld its consents on various grounds in the cases of the bishops-elect of Vermont (JGC 1795 at 205), New Jersey (JGC 1801 at 264), Illinois (JGC 1874 at 97-100), and others.

1943, the General Convention went further and provided a mandatory resignation age for bishops (72) (Const. Art. II.9), and provided for the House of Bishops to declare a bishop's position "terminated" if this requirement was not obeyed. (Canon 43.7(c), now II.12(8)(c)).

89. In its amendment of Article I.2 of the Constitution in 1901, the General Convention expanded the membership of the House of Bishops beyond only diocesan bishops to include coadjutors and certain resigned bishops, so that membership in the House became based not on diocesan representation but episcopal status. In the same vein, the General Convention authorized the ordination of suffragan bishops in 1910 and made them non-voting members of the House of Bishops (Const. Art. II.4); it gave the vote to suffragans in 1943 (Const. Art. I.2(1)); and in 1982, it created the position of "Assistant Bishop" with full membership in that House (id.).

90. The General Convention has also made bishops subject to discipline and removal by the general Church, as set forth in Title IV of the Church's canons. Until 1841, a bishop could be charged with an offense only by his Diocesan Convention, but in that year the General Convention provided in the canons that any three bishops could lodge a complaint against a fellow bishop, thus making bishops accountable to the larger Church in yet another respect. Canon IV ("Of the Trial of Bishops"). Canon IV also prescribed detailed procedures for trying bishops. Also in 1841, the General Convention by amendment to Article 6 removed the right to try bishops from the diocese and gave it to the bishops themselves. Grounds for such discipline or removal include "Abandonment of the Communion" of the Church under Canon IV.9, and violation of the Church's or Diocese's Constitutions or canons or of the vows required of a bishop-elect in the Ordination Service for a bishop under Canon IV.1.

B. Dioceses

91. The General Convention has consistently exercised authority over the formation of dioceses. In 1795, it set minimum sizes for the establishment of new dioceses (Canon I ("Of Episcopal Visitation")); in 1835, it provided a mechanism for combined dioceses to be divided (Canon I ("Of the Election of Bishops")); and in 1838, it provided for the division of existing dioceses with the General Convention's consent (Canon VIII ("On the Organizing of New Dioceses Formed Out of Existing Dioceses")). It continued to exercise its authority to determine whether or not a diocese should be formed as part of the Church, withholding consent, on various grounds (including in some cases failure to accede adequately to the Church's Constitution and canons) to petitions regarding the proposed Dioceses of Ohio (JGC 1817 at 1: 459), Indiana (JGC 1835 at 2: 614), and California (JGC 1853 at 57-58). It has also exercised its authority to determine whether a diocese could divide, deciding in 1871 that the Diocese of Illinois could not because it did not meet the canonical requirements (JGC 1871 at 361-62, 366-67). In 1835, the General Convention provided for the election by it of "Missionary Bishops" to exercise episcopal functions in areas in which the Church was not organized, asserting that the "jurisdiction of this Church extend[ed] in right, though not always in form, to all persons belonging to it within the United States . . . ." (Canon II ("Of Missionary Bishops")).

92. In 1979, the General Convention adopted Canon I.10(3)(b) ("Transfer of Area Missions") (now Canon I.11(3)(f)) providing that an extra-territorial "Missionary Diocese" could, with the consent of the General Convention, be released from union with the General Convention to form or become part of another province of the Anglican Communion – an

opportunity never provided by the General Convention to any dioceses of the Church other than Missionary Dioceses outside of the United States.[29]

93. In 1856, Article II of the Constitution was amended to require that deputies elected by the dioceses to the General Convention be "Communicants in this Church."

94. The General Convention has also continued to exercise authority over the relationship between bishops and their dioceses. In 1795, it required that congregations could only be members of the diocese in which they were situated. Canon VIII ("To prevent a Congregation in any Diocese or State to unite with a Church in any other Diocese or State"). In 1808, the General Convention required that the bishop deliver a Charge to the Clergy" at least every three years. Canon XXIII ("Of Episcopal Charges and Pastoral Letters"). In 1856, the General Convention required bishops to visit their congregations at least once every three years, and established a procedure for a panel of bishops to impose further requirements upon a bishop who failed to do so. Canon II.1 ("Of Episcopal Visitations"). The General Convention has also set forth requirements and conditions for the formation and operation of parishes and other worshipping congregations under the oversight of the dioceses (such as in current Church Canon I.13, "Of Parishes and Congregation"), as well as detailed rules and procedures under which dioceses must select, train, ordain, deploy, and supervise the clergy of parishes and other worshipping congregations (found in current Const. Arts. VIII, X and Canons I.8, 12, 13; II.3; III.5-12, 15).

95. The General Convention has also required each diocese to report regularly to the Church concerning its activities and official actions. Canon I.6(5)(a) requires dioceses to

[29] For example, in 1994, the General Convention voted to "release the Dioceses of the Mexican Episcopal Church from the jurisdiction of the Episcopal Church of the United States of America for the purpose of forming a new Province of the Anglican Communion." JGC 1994 at 306-07.

forward to the Secretary of the House of Deputies and to the Archives of the Church "immediately upon publication, two copies of the Journals of the Convention of the jurisdiction, together with Episcopal charges, statements, and such other papers as may show the state of the Church in that jurisdiction," while Canon I.6(4) requires dioceses to file annual reports "in the form authorized by the Executive Council" to that body.

96. Relations between bishops and their dioceses were further regulated by the requirement that each diocese have a Standing Committee to advise the bishop. Canons adopted in 1795 and 1808 stipulated tasks for Standing Committees, but in 1832, the General Convention dictated that every diocese have a Standing Committee "whose duties, except so far provided by the Canons of the General Convention, may be prescribed by the Canons of the respective Dioceses." Canon IV.1 ("Of Standing Committees"). This provision subordinating the canons of the dioceses to those of The Episcopal Church was placed in the Constitution in 1901. Art. IV.

97. The General Convention in 1901 eliminated the last vestige of diocesan voting when it amended the Constitution to provide that amendments to the Constitution be adopted, not "in General Convention, by the Church in a majority of the States" as the Constitution of 1789 had provided (Art. 9), but by a majority in both Houses, the deputies voting by orders. Art. XI. Thus, the diocese no longer voted as a single unit in the House of Deputies.

98. Finally, an amendment to the Constitution in 1904 made explicit two principles that hitherto had been assumed. The Constitution of 1789 had required that in order for a new diocese in a previously unrepresented area to become part of the General Convention it must first accede to the Church's Constitution. It was always assumed that accession to the Constitution implied accession to the Church's canons, as well, and this requirement was made explicit in

1904. In addition, the 1904 amendment expressly required accession of every new diocese, not only of those dioceses that previously had not been represented in the General Convention, including Missionary Districts applying for diocesan status and dioceses created from the division of previously existing dioceses. Art. V.1.

99. Some have asserted that the removal from the Constitution in 1901 of the provision that dioceses absent from a meeting of the General Convention "shall nevertheless be bound" by the acts of the General Convention suggests that the General Convention's authority since then has not been supreme. Contemporary commentators, however, noted that the provision was no longer necessary, since the authority of the General Convention had never been challenged.[30] As we have seen, in 1901 a number of new Constitutional provisions were added in which the General Convention assumed, and asserted, its supremacy over the entire Church. Indeed, when the original version of the Constitution that would be ultimately ratified in 1901 was presented in 1895, it included a proposal to insert into the Constitution a provision reserving rights to the dioceses, which stated: "The powers not committed to the General Synod or Provincial Synods by the Constitution, nor prohibited by it to the Dioceses are reserved to the Dioceses respectively." JGC 1895 at 649. This language was rejected and viewed as "revolutionary."[31] The rejection of the proposal in combination with the new provisions adopted in 1901 that so clearly assume the supremacy of the General Convention prove that the deletion of the "shall be bound" provision was, in effect, meaningless.

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[30] William J. Seabury, Notes on the Constitution of 1901 (New York: Thomas Whitaker, 1902) at 38 ("as [the General Convention's] supremacy in legislation has been established from the beginning of the System, and had always been and still was acquiesced in by all the Dioceses, it was not necessary to continue the stipulation").

[31] John H. Egar, "General Convention or General Synod – Which?" The Churchman September 14, 1895 at 279.

C. Ordination Requirements

100. The Constitution of 1901 strengthened the required "Declaration of Conformity" of 1789 by providing that each person to be ordained "solemnly engage to conform" to the "Discipline" of the Church in addition to the "Doctrine" and "Worship." Art. VIII.

101. The General Convention has continually asserted its authority over ordination in other respects. In 1795, it established the procedures for candidates' preparation for the ordained ministry. (Canon VI ("Of the Preparatory Exercises of a Candidate for the Ministry"); in 1808, it set rules of conduct for candidates (Canon VIII ("Of the conduct required in Candidates for Orders")); and in 1804, it first set rules, modified over time, regarding the ordination of candidates previously rejected for ordination (Canon IX ("Of Candidates Who May Be Refused Orders")). Beginning in 1795, the General Convention exercised authority over the education requirements for ordinands (Canon IV ("Of the Learning of those who are to be Ordained")), further directing in 1801 that the House of Bishops establish a mandatory "Course of Ecclesiastical Study" for ordinands. JGC 1801 at 1: 268. Over time, those requirements have grown into an elaborate system, reflected in Title III of the present canons, prescribing the required areas of theological education. Since 1970, every diocese has been required to have a Commission on Ministry to assist the bishop in the selection of persons for ministry, but here too, the power of such commissions was also limited by the Church's canons:

> "The Commission on Ministry may adopt rules for its work, subject to the approval of the Bishop *Provided*, the same are not inconsistent with the Canons of the General Convention and the Diocese." Canon III.2(3).

102. Numerous other ordination requirements set by the General Convention over time deal with such matters as age, health, prior education, testimonials, and minimum time frames for ordination. *See, e.g.,* Canons III.5, 6, 8.

D. Clerical Practices

103. The General Convention has continued to dictate clerical practices, adopting a canon in 1795 restricting clergy from ministering in the parish of other clergy without consent (Canon V ("Of the Officiating of Ministers of this Church in the Churches or within the Parochial Cures of other Clergymen")); and other canons in 1804 considerably expanding the requirement that clergy keep records of their sacramental actions (Canon XI ("Providing for an accurate view of the State of the Church from time to time")); providing the required procedure for induction of rectors (Canon I ("Concerning the Election and Induction of Ministers Parishes or Churches")); and establishing rules for clergy desiring to move from one diocese to another (Canon III ("Concerning Ministers removing from one Diocese or State to another").

104. The General Convention in 1804 also adopted canons governing procedures for resolving differences between clergy and congregations (Canon II ("Respecting the dissolution of all pastoral connection between Ministers and their Congregations") and Canon IV (Respecting differences between Ministers and their Congregations")). The General Convention's concern for the responsibility of clergy vis-à-vis Episcopal visitations culminated in a canon in 1832 setting forth their duties (Canon XXVI ("Of the duty of Ministers in regard to Episcopal Visitation")).

105. The Twentieth Century brought important new requirements for clergy provided by the General Convention. In 1904, the General Convention defined the role of parish rectors vis-à-vis the lay vestry stating:

> "The control of the worship and the spiritual jurisdiction of the Parish, are vested in the Rector, subject to the Rubrics of the Book of Common Prayer, the Canons of the Church, and the godly counsel of the Bishop. All other Ministers of the Parish, by whatever name they shall be designated, are to be regarded as under the authority of the Rector." Canon 15.1(1) ("Of Ministers and their Duties").

106. Among other new requirements, in 1916, the General Convention began a series of requirements, first contained in Canon 50 ("On Business Methods in Church Affairs") and culminating in current Canon I.7, to require parishes to adopt numerous business practices relating to such matters as audits of accounts, maintenance of adequate insurance for church property, maintaining integrity of treasurers, and expanded reporting to the diocese.

107. In 1919, the General Convention further required each diocese to establish a Finance Committee to ensure adequate fiscal oversight of the diocese and all its parishes and other congregations.

108. Finally in 1955, the General Convention adopted a mandatory retirement age (72) for all deacons and priests (having already passed one for bishops earlier), and dictated the terms under which clergy could continue in limited employment thereafter. Canon 45.8 ("Of Ministers and their Duties"). Just as in the case for bishops, the General Convention claimed the authority to decide when and how active ordained ministry should be ended as well as when and how it should begin.

E. Tenure of Church Property

109. Treatment of church property, a long-held Anglican concern, was incorporated into early Church governance in a number of ways and has continued to be refined over time.

110. The Anglican concern for the sanctity of Church property and its protection for the mission of the Church, a concern whose roots go well back into the English church in the Middle Ages, can be seen in the Church's inclusion in its Book of Common Prayer in 1799 the

service "The Form of Consecration of a Church or Chapel." That rite, or "liturgy," formally set apart a church building for the sacred work of worship and has been included ever since.[32]

111. Thus, the early versions of the Prayer Book adopted by the General Convention directed that the "Bishop, sitting in his chair, shall have the instruments of Donation and Endowment, if there be any, presented to him," indicating that the property was being dedicated to the interests of the Church, and was being set apart from "all unhallowed, worldly and common use." The "instruments of donation" that parishes used in the early Nineteenth Century stated that such property was being appropriated and devoted to the worship and service of God, according to the ministry and doctrine of The Episcopal Church and by a congregation in communion with the Church. BCP 1789 at 572.

112. These principles put into effect by the General Convention through the Prayer Book, over time came to be expressed in the canon law of the Church as situations arose that required that such principles be made explicit.

113. Thus, in 1868, the General Convention passed Canon I.21 ("Of the Consecration of Churches"), which provided as follows:

> "I. No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently certified that the building and ground on which it is erected have been fully paid for, and are free from lien or other encumbrance.
>
> "II. It shall be not lawful for any Vestry, Trustees, or other body authorized by law of any State, or territory, to hold property for any Diocese, Parish, or Congregation, to incumber or alienate any consecrated Church or Chapel without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese in which such Church or Chapel be situated. *Provided,* that this Section shall not be operative in any State with the laws of which, relating to the title and holding of property by religious corporations, the same may conflict.

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[32] Massey Hamilton Shepherd, The Oxford American Prayer Book Commentary (New York: Oxford University Press, 1950), 563-8.

> "III. No consecrated Church or Chapel shall be removed, taken down, or otherwise disposed of for an "unhallowed, worldly, or common use," without the previous consent of the Bishop, acting with the advice and consent of the Standing Committee of the Diocese in which such Church or Chapel may be situate."[33]

Section 1 of Canon I.21 was strengthened in 1871 to read as follows:

> "I. No Church or Chapel shall be consecrated until the Bishop shall have been sufficiently certified that the building and ground on which it was erected have been fully paid for, and are free from lien or other incumbrance; and also such building and ground are secure, by the terms of the devise, or deed, or subscription by which they are given, from the danger of alienation from those who profess and practice the doctrine, discipline, and worship of the Protestant Episcopal Church in the United States of America."

These provisions are now found in Canon II.6.

114. Three times during the Twentieth Century the General Convention acted to expand the rules concerning the tenure of Church property. In 1904, the General Convention adopted a canon providing:

> "For the purposes of his office, and for the full and free discharge of all functions and duties pertaining thereto, the Rector shall, at all times, be entitled to the use and control of the Church and Parish buildings, with the appurtenances and furniture thereof." Canon 15.1(11) ("Of Ministers and their Duties").

This language is currently found in Canon III.9.(5)(a).(2).

115. In 1940, the General Convention adopted Canon 57(4) ("Of Parishes and Congregations") to extend the earlier restrictions on alienation to all church real property:

> "No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage or administer real property for any Parish, Mission, Congregation, or Institution, shall encumber or alienate the same or any part thereof without the written consent of the Bishop and Standing Committee of the Diocese of which the Parish, Mission, Congregation or Institution is a part, except under such regulations as may be prescribed by Canon of the Diocese."

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[33] The proviso in Section II of this canon was removed in 1904. JGC 1904, Canon 45, at 108-09

This canons is now I.7(3).

116. A third canonical extension of the rules concerning the treatment of property was set forth by the General Convention in 1979. New Canon I.6(4) ("Of Business Methods in Church Affairs") (now Canon I.7(4)) clarified that all parish property was held in trust for the Church and the Diocese:

> "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission, or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission, or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to this Church and its Constitution and Canons."

Similar language concerning property was added in what is now Canon II.6(4).

F. Clergy and Lay Discipline

117. In 1832, the General Convention in Canon XXXVII ("Of Offenses for which Ministers shall be tried and Punished") amended earlier canons to specify the grounds on which priests and deacons could be disciplined, including "violation of the Constitution and Canons of [the] Church." Dioceses were permitted to hold ecclesiastical trials, but only "until otherwise provided for by the General Convention." While such trials may still be conducted by diocesan courts, a plenary system for the diocese to follow is now prescribed by Title IV of the Church's canons; and review of decisions of such trial courts has been conducted outside the dioceses by Courts of Review in the Provinces ever since the provincial system was established by canon (Canon 29 ("Of Courts of Review of the Trial of Presbyters and Deacons")) in 1904.

118. The General Convention has also made provision for the discipline of laity. The original Canon XII of 1789 ("Notorious Crimes and Scandals to be Censured") had provided that

persons engaged in offensive conduct "be repelled from the Holy Communion"; and in 1817, Canon III ("For Carrying into Effect the design of the second Rubric before the Communion Service") further specified the procedures to be followed in this regard, also providing persons could be deprived of "all privileges of Church membership, according to such rules or process as may be provided by the General Convention." Modern versions of the General Convention's specifications are now set forth in the "rubrics" of the Prayer Book (p. 409) and in Canon I.17(6).

119. The General Convention exercised its authority over the laity concerning Holy Matrimony starting in 1808 when it passed a joint resolution determining that the Church "shall not unite in matrimony a person who is divorced, unless it be on account of the other party having been guilty of adultery." JGC 1808 at 1: 348. A stronger statement was contained in an 1868 canon, Canon II.13 ("Of Marriage and Divorce"); and in 1877, Canon II.13.3 added provisions against divorced persons receiving the sacraments without the consent of the bishop. Over time, such restrictions have been relaxed considerably, but the terms on which marriages can be performed in the Church are still prescribed in detail by the General Convention in Canons I.17 and I.18.

120. Still another important way in which the General Convention has exercised its authority is through the passage of non-discrimination legislation. In 1964, in the midst of the Civil Rights struggle, the canon respecting laity ("Of Regulations Respecting the Laity") was amended to state:

> "Every communicant or baptized member of the Church shall be entitled to equal rights and status in any Parish or Mission thereof. He shall not be excluded from the worship or Sacraments of the Church, nor from parochial membership, because of race, color, or ethnic origin." Canon 16.

In 1994, the language was expanded to prohibit exclusion on the basis of "marital status, sex, sexual orientation, disabilities or age, except as otherwise specified by Canons." Similar language can be found in Title III.1 ("Of the Ministry of All Baptized Persons"), in which it is required that no person shall be denied access to the discernment process for any ministry because of "race, color, ethnic origin, national origin, marital status, sex, sexual orientation, disabilities or age, except as otherwise specified by Canons."

G. The Church Pension Fund

121. The care of retired clergy and their families had been a long-standing concern for The Episcopal Church. Notwithstanding an ambitious capital campaign early in the Twentieth Century, the General Convention determined that a national pension system could not succeed unless contributions were mandated from every parish and other institution in the Church.[34] Hence, in 1916, Canon 56 ("Of the Church Pension Fund") was adopted authorizing the newly-created "Church Pension Fund ... to levy upon and to collect from all parishes and congregations of the Church and any other societies or organizations in the Church ... assessments based upon the salaries of the clergymen employed by them respectively in the office and work of the Ministry." The substance of this canon is now in Canon I.8(3). Contributions to the Pension Fund were thus not voluntary. Never before in its history had the Church mandated a payment from every congregation. Few actions by the General Convention show its authority over the temporal affairs of the Church as much as does the passage of the Canon forming the Church Pension Fund.

[34] Harold C. Martin, Outlasting Marble and Brass: The History of the Church Pension Fund (New York: Church Hymnal Corp., 1986) at 81 ff.

V. NINETEENTH-CENTURY COMMENTATORS UNEQUIVOCALLY VIEWED THE GENERAL CONVENTION AS THE SUPREME AUTHORITY IN THE EPISCOPAL CHURCH AND DIOCESAN ACCESSION AS IRREVERSIBLE.

122. Given the background of the formation of the General Convention and its actions in adopting and amending the Church's Constitution and canons over the years, as described in the foregoing parts of this statement, it is not surprising that a survey of Nineteenth-Century commentators on the ecclesiastical law of The Episcopal Church reveals an unequivocal and unanimous view of the hierarchical nature of The Episcopal Church and the corresponding lack of independence of its dioceses.

A. Supremacy of the General Convention

123. Francis Hawks, the first historiographer of The Episcopal Church and author of the first commentary on the Church's Constitution and canons, wrote in 1841 of the authority of the General Convention as reflected in Article 2 of its Constitution:

> "[T]he rights of the whole united Church were protected with equal care. The union was not sacrificed to diocesan independence. If any diocese sees fit to neglect its privilege of representation, and sends no delegates, it is nevertheless, as much bound by the acts of the General Convention, as if it had its full complement of representatives in the House."[35]

The supremacy of the General Convention over the dioceses was axiomatic for Hawks and is a basic theme in his volume.

124. Murray Hoffman was the best-known authority on the laws of The Episcopal Church in the first half of the Nineteenth Century. His Treatise on the Law of the Protestant Episcopal Church in the United States (1850) was often cited as the standard authority on church law. In it he described the power of the General Convention as follows:

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[35] Francis L. Hawks, The Constitution and Canons of the Protestant Episcopal Church in the United States (New York: Sword, Stanford and Co., 1841) at 21.

> "[T]he power of the Convention of 1789 involved the power of rendering the system of government stable and enduring. Its office was not to establish a fugitive coalition, but a perpetual union. It possessed the right of instituting and providing for the continuance of a body in which should reside all authority necessary for the purpose and commensurate with the object of the Church; a body of superior ultimate jurisdiction."[36]

For Hoffman the power of the General Convention was "superior ultimate jurisdiction."

125. In 1870, Francis Vinton, another Nineteenth-Century commentator and Professor of Ecclesiastical Polity and Canon Law at the Church's General Theological Seminary published the first full commentary on the Constitution and canons since Hawks. Using a question-and-answer style, he asked, "What is the relation of the General Convention to the Diocesan Conventions?" To which he answered:

> "It is that of a Supreme Legislature, whose Constitution is the fundamental Law of the Protestant Episcopal Church in the United States, and whose Canons either overrule or sanction the Canons of the several Diocesan Conventions."[37]

126. A fourth authority, Francis Wharton, a clergyman and expert in canon law, wrote in the 1880s, addressing the topic of "Distribution of Sovereignty" as follows:

> "After a careful and anxious scrutiny of the constitution and canons of our General Church, the power of General Convention seems to me unlimited, while that of the Diocesan Convention is only that which the General Convention is pleased to concede."[38]

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[36] Murray Hoffman, A Treatise on the Law of the Protestant Episcopal Church in the United States (New York: Stanford and Swords, 1850) at 110 (emphasis added).

[37] Francis Vinton, A Manual Commentary on the General Canon Law and the Constitution of the Protestant Episcopal Church in the United States (New York: E. P. Dutton & Co., 1870) at 62.

[38] This essay, "How Far We Are Bound by English Canons," forms part of the appendix of William Stevens Perry, ed., The History of the American Episcopal Church 1587-1883, 2 vol. (Boston: James R. Osgood and Co., 1885) at 2: 400.

Wharton contrasted the circumscribed powers of the U.S. Government in the national Constitution with the virtually unlimited powers of the General Convention in the Church's Constitution:

> "It would have been easy for the constitution of our Church to have limited the powers of the General Convention. We have several examples of such limitations in the constitution of the United States. Congress can pass no law taking away jury trials, or destroying the liberty of the press, or interfering with the right of the people to assemble together, or restraining religious liberty. It would have been within the power of those who framed our ecclesiastical constitution to have provided that General Convention shall pass no law depriving the dioceses of certain enumerated rights, or conflicting with certain leading sanctions of our faith. It would have been within their power, also, to have provided, in analogy with corresponding clauses of the constitution of the United States, that all legislative powers not expressly granted to the General Convention be reserved to the dioceses. So far, however, from these or similar limitations on the power of the General Convention being introduced, that power on the face of the constitution is unlimited."[39]

127. Still another expert analyst of Episcopal Church law was John W. Andrews, a lawyer and leading layman from Ohio, whose work was regularly cited as authoritative. In an 1883 work, he wrote:

> "From the foundation of Christianity there never has been a Church without a body in which resided the ultimate and absolute power of government....When then, in 1789 the whole Church of the United States, through its competent representatives, declared, 'there shall be a General Convention of the Protestant Episcopal Church in the United States,' it enunciated the great principle that it was a National Church, and that such a Convention was to be its highest Council. The mere act of establishing this Council involved and attached to it every power inherent in such a body, and not expressly refused to it."[40]

128. Yet another legal expert was Hill Burgwin, the author of many learned articles on the polity and laws of The Episcopal Church and the first Chancellor of the Diocese of

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[39] Id. at 2: 400.

[40] John W. Andrews, Church Law: Suggestions on the Law of the Protestant Episcopal Church in the United States of America, Its Sources and Scope (New York: T. Whittaker, 1883) at 85.

Pittsburgh, serving from 1887 to 1895. In "National Church and the Diocese," he wrote, in 1885:

> "1st. That our National Church within the proper scope of ecclesiastical legislation, and subject to the Divine law and that of the One Catholic Church is under no restriction or limitations, whatsoever, as to its power of legislation.
>
> "2d. That our Dioceses are the creation of the National Church, and have no absolute, reserved or organic rights, nor any of which they may not be deprived in due legal course of legislation, by the National Church."[41]

129. Finally, in 1912, William J. Seabury, Professor of Ecclesiastical Law at the General Theological Seminary and author of An Introduction to the Study of Ecclesiastical Polity, described the power of the General Convention as follows:

> "The common government [of the Church]...has direct and immediate authority over the individual members of its component parts and dependencies. This authority results from the provisions of the Constitution whereby the acts of General Convention, constitutionally performed, are made obligatory upon the Church in each Diocese, whether the consent of such church has been given or not (Art. 2); and whereby such acts so performed are declared to have the operation of law."[42]

B. The Binding Nature of Diocesan Accession

130. The question of whether dioceses have the right to leave The Episcopal Church, or to nullify or withdraw their accession to the Constitution of the Church, was a topic from time to time discussed by scholars in the Nineteenth Century. The following is a summary and analysis of these discussions – which firmly and overwhelmingly reject any such right by the dioceses.

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[41] Hill Burgwin, "The National Church and the Diocese," American Church Review 45 (April, 1885) at 424.

[42] William J. Seabury, An Introduction to the Study of Ecclesiastical Polity, 2nd ed. (New York, 1912) at 264.

131. Francis Hawks, who, as noted above, wrote the first commentary on the Constitution and canons, explained that union was perpetual. In listing the rights surrendered when a diocese acceded to the Constitution and came into union with the General Convention, he named as the first:

> "Such an exercise of independency as would permit them to withdraw from the Union at their own pleasure, and without the assent of other dioceses."[43]

While in other respects protective of diocesan authority, on the issue of secession he was adamant that dioceses could not leave without the consent of the General Convention.

132. Murray Hoffman in his Treatise on the Law of the Protestant Episcopal Church in the United States had emphasized the authority of the general Church and referred, as previously noted, to the work of 1789 as the creation of a "perpetual union." He specifically addressed the question of secession in 1863 in a separate work in which he affirmed Hawks' conclusion that, in acceding, dioceses surrender "[s]uch an exercise of independency as would permit them to withdraw from the Union at their own pleasure, and without the assent of other dioceses," and added:

> "Before the ratification of the Constitution, there was no bond holding the Churches of this continent together, but the bond of a common faith. The work begun in 1784, and consummated in 1789, constituted a National Church; bound every member of the Church in every diocese which then or hereafter adhered to it, to one strict system of duties and obligations."[44]

133. Francis Vinton addressed the question of secession in his 1870 work, and under the category, "Admission of New Dioceses," he asked:

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[43] Francis L. Hawks, The Constitution and Canons of the Protestant Episcopal Church in the United States (New York: Sword, Stanford and Co., 1841) at 10-11.

[44] Murray Hoffman, Remarks Upon the Question of What is Schism? According to the Law of the Protestant Episcopal Church in the United States of America (New York: Edmund Jones and Co, 1863) at 18-19.

"Q. How may a New Diocese be admitted into union with the other Dioceses and with General Convention?

"A. By 'acceding' to the Constitution and Canons of the Protestant Episcopal Church in the United States.

"Q. Does the act of 'acceding' to the Constitution imply the right of any Diocese to secede from the union established by the Constitution?

"A. No. Dr. Hawks says, 'The several Dioceses surrendered...such an exercise of independency as would permit them to withdraw from the union at their own pleasure, and without the assent of the other Dioceses.'"[45]

134. The expert analyst John W. Andrews in Appendix C ("Of the Constitution") of his Church Law (at 101), also reiterated and quoted this principle enunciated by Hawks.

135. The same principle was articulated in an 1885 monograph by S. Corning Judd, a leading authority on Church law and Chancellor of the Diocese of Chicago, who wrote a commentary on Hawks, "Notes Upon Dr. Hawks's Comments on the Constitution." In it, he reprinted Hawks's statement on dioceses being bound and approved of Hawks's assertion that dioceses could not leave the Church by saying:

"The churches in the several States, having once united and consented to jurisdiction on the terms and conditions specified in the General Constitution, the authority of the General Convention...became supreme save as otherwise provided in the constitution."[46]

136. The only significant suggestion that dioceses may be permitted to secede was in a report to the Diocese of Virginia in 1878. Some in the Diocese during the decade of the 1870s had complained about the growth of ritualistic practices in the larger Church, and a study was commissioned, "On Diocesan Autonomy and Federal Relations," in which it was asserted that

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[45] Francis Vinton, A Manual Commentary on the General Canon Law and the Constitution of the Protestant Episcopal Church in the United States (New York: E. P. Dutton & Co., 1870) at 143 (emphasis added).

[46] William Stevens Perry, The History of the American Episcopal Church, 2 vols. (Boston: James R. Osgood and Co., 1885) at 2: 404.

the Diocese had the right to leave. In support of its assertion, this report invoked political principles of secession which were dear to the hearts of unreconstructed Virginians but had little to do with the polity of the Church. The report was never approved or adopted by the Diocese, which in fact did not attempt to leave the Church, but ironically served to prompt others in the Church to state what would be the result of such an attempt.

137. The first such response is found in a study commissioned by the Diocese of Pennsylvania which carefully outlined the organization of the Diocese and its relationship to the General Convention and concluded:

> "[W]e hold it to be a fundamental rule of law governing the Episcopal Church . . . that while individual members may separate from our Church and decline any further communion with us, according to the dictates of their own consciences, no Congregation or Diocese can undertake to depart in form of worship, discipline, or essential Articles of Faith, as established by the General Convention ..., without imperiling not only their Church membership and organization as a part of the Episcopal Church , but also the rights of property in the Church edifices and other possessions which have been conferred upon them by members of our communion, which they hold in trust, to use the same for purposes of worship adopted by the General Convention..., which it would be a clear misappropriation to use for any other purpose."[47]

Thus, a diocese that attempted to sever its connection with the General Convention would lose its property, which was held in trust for the larger Church, and a diocese could no more secede from the larger Church than a parish could secede from its diocese.

138. A similar point was made by another legal expert referred to above, Hill Burgwin, Chancellor of the Diocese of Pittsburgh. In "The National Church and the Diocese," Burgwin argued that the Virginia assertion was wrong on both historical and legal grounds and outlined what would be the consequences, including those relating to diocesan property, of any attempt for a diocese to withdraw from the larger Church:

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[47] Journal of the Proceeding of the Ninety-Fifth Convention of the Protestant Episcopal Church in the Diocese of Pennsylvania (Philadelphia, 1879) at 292-293.

"But suppose ... that the Convention of a Diocese..., resolve to withdraw from Union with the National Church, and thereupon set up an independent organization, what would be the ecclesiastical and civil status of the different parties concerned? As to the former, all those who should remain faithful to the National Church, whether as individuals or Parishes, however small a remnant, ... would compose the Protestant Episcopal Church in that Diocese; if not strong enough to organize themselves as a Diocese, they would be taken under the fostering care of the National Church, and perhaps be organized temporarily as a Missionary Jurisdiction.

"As to the others, their act would be that of individuals only, being beyond the scope of their powers as members of the Convention. It would be of no legal effect, and the Diocese would still remain potentially, and when subsequently reorganized, actually in Union with the National Church, while any subsequent organization of the majority would be simply schismatical, especially after their Bishop had been deposed, as he would be at once.

"Not only would this be the ecclesiastical status of all the parties as held by the National Church, but they would be regarded in the same light by the civil law, and with this most important consequence, that all the property in the Diocese held in trust for Church purposes, whether by the Diocese at large, by Parishes, or by any other corporations or individuals, would remain for the use and benefit of those whom the law held to be , though in a minority, yet members of the ... Church ..., and her lawful representatives in the Diocese concerned. The Courts would permit no property to be diverted by any unlawful schism, ... from the purposes of the original trust, ..."[48]

139. Even those commentators who argued for other rights of dioceses recognized that an act of secession would be unavailing. A. S. Richardson, an Episcopal layman from the Diocese of Texas, in 1886 authored a work in which he argued that if a diocese refused to accept a decision by the General Convention, the results would be severe, particularly as to diocesan property:

"The Diocese might be deprived of its church buildings and other property, as under the laws of the land it might, and probably would be held to belong to the

[48] Hill Burgwin, "The National Church and the Diocese," American Church Review 45 (April, 1885) at 454-455.

organization adhering to the General Convention, as being 'the representative of the Protestant Episcopal Church in the United States of America.'"[49]

140. So unthinkable has it been for Episcopalians for a diocese to claim the right to leave the Church that after the 1880s the topic was never again seriously discussed until the present period.

141. The experience of The Episcopal Church during the Civil War provides no support for the right of dioceses to withdraw from the General Convention, as some have recently claimed. Indeed, the language of Southern churchmen at the time reflected an adherence to the Anglican principle that churches should conform to national boundaries, and thus an understanding that any separation by the Southern dioceses was the result of secular political factors rather than an exercise of diocesan autonomy.[50] Further, the actions of the General Convention clearly showed that it did not recognize the departure of the Southern dioceses. At the meeting of the General Convention in 1862, there was no recognition that the absent Southern Dioceses had separated from the Church - - they were listed in the roll call (JGC 1862 at 26); and their bishops were merely noted among the list of bishops as "absent," (id., 1862 at 16), and the Southern clergy were included in the appended list of clergy (id. at 282). In the House of Deputies, a claim that the Southern dioceses were absent because of willful separation (and hence guilty of the sin of schism) was formally rejected.[51]

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[49] A. S. Richardson, "Can the General Convention Prescribe the Qualifications of Members of Diocesan Convention?" Church Review 48 (August, 1886) at 141.

[50] See Journal of the Twenty-Third Annual Conference of the Protestant Episcopal Church in the Diocese of Louisiana (New Orleans 1861) at 30 (statement by the Bishop of Louisiana that "[o]ur separation from our brethren of 'The Protestant Episcopal Church in the United States' has been effected because we must follow our Nationality. Not because there has been any difference of opinion as to Christian Doctrine or Catholic usage.").

[51] See Robert Bruce Mullin, "After Establishment What? The Paradox of the History of the Episcopal Church in America," in Douglas A. Sweeney and Charles Hambrick-Stowe, ed.,

142. At the meeting of the General Convention in 1865, representatives of two Southern dioceses (North Carolina and Texas) were welcomed and resumed active participation, with no re-admission ritual that would have signified that those dioceses had ever left the Church -- their dioceses were not, for example, required to re-accede to the Constitution and canons. JGC 1865 at 38. Furthermore, at this meeting, a proposal was made to divide the Church into geographical provinces, and the provinces proposed included other Southern dioceses that had not yet resumed sending Deputies to the meetings of the General Convention. Id. at 49.

143. Not surprisingly, then, as we have seen, the Nineteenth Century commentators were emphatic that dioceses could not unilaterally leave the Church. Throughout the Nineteenth Century, the idea that a diocese might willfully leave the larger Church on the basis of supposed diocesan independence was specifically, consistently, and forcefully rejected.

CONCLUSION

144. The Episcopal Church has been hierarchical from its very beginning. The Church is the child of a hierarchical church, the Church of England, and has attempted to continue that sense of hierarchy in a way that reflected the political principles of the American Republic. But it is also clear that from the beginning final ecclesiastical authority was not vested in a monarch, a primate, or even a Constitution, but in the Church itself, acting through its General Convention.

145. The General Convention – with its House of Bishops and House of Clerical and Lay Deputies – represents the highest authority within the Church. It determines the Book of Common Prayer and who shall be bishops in the Church. Its legislation instructs on education, clerical responsibilities, rules for ordination, discipline, and many other vital matters. Over the history of the Church, it has been the final authority. The relationship of the General Convention

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Holding on to the Faith: Confessional Traditions in American Christianity (Lanham, MD: University Press of America, 2008) at 96-100.

to the Constitution of the Church is fundamentally different from the relationship of the Federal Government to the U.S. Constitution. The General Convention was the author of the Constitution and alone has the power to amend it.

146. Contrary to those who stress the similarities between the Church's Constitution and that of the United States, what is far more striking are their dissimilarities. The Constitution contains none of the federal language found in the U.S. Constitution. It neither limits the power of the General Convention nor reserves any powers to the dioceses or states. From its very beginning, the General Convention has been free to legislate in areas not mentioned in the Constitution. It has legislated on issues of education, discipline, and ordination requirements and has dictated how congregations and dioceses are to operate.

147. This sole unqualified authority of the General Convention was regularly recognized by earlier commentators. They affirm that the General Convention had, and has, supreme authority.

148. We have also seen that there is virtually no tradition in the history of the Church claiming the right of dioceses to voluntarily withdraw from the General Convention, and, indeed, the overwhelming testimony of the commentators surveyed rejected any such action. The Church was united and central by purpose, because in only that way could it be The Protestant Episcopal Church in the United States of America. It was to be "a perpetual union" according to the great legal expert Murray Hoffman, and only in so doing could it fulfill its mission.[52]

149. The authority of the General Convention is the center of the hierarchical nature of The Episcopal Church. Its authority gives unity and leadership to the Church and its mission.

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[52] Murray Hoffman, A Treatise on the Law of the Protestant Episcopal Church in the United States of America (New York: Stanford and Swords, 1850) at 110.

State of New York)
) ss.
County of)

My name is Robert Bruce Mullin. I am above the age of eighteen (18) years and am fully competent to make this expert affidavit. All the statements contained in this affidavit are true and correct to the best of my knowledge and belief.

This 4TH day of August, 2009.

Robert Bruce Mullin

SUBSCRIBED AND SWORN TO
before me, the undersigned authority,
on this 4TH day of August, 2009.

Notary Public

My commission expires:

FEB. 12, 2011

CHRISTOPHER MCFADDEN
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MC6160771
Qualified In New York County
My Commission Expires February 12, 2011