

MEMORANDUM

May 27, 2008

To: House of Bishops
From: Task Force on Property Disputes
Re: Proper Use of Abandonment Procedures for Bishops

Subsequent to our meeting at Camp Allen, some Bishops of The Episcopal Church¹ and some commentators² have suggested that we may have failed to follow our own rules for giving consent to the deposition of a Bishop for abandoning the communion of this Church. A careful analysis and examination of the canon law, however, confirms that consent to deposition was procedurally appropriate, as the House's Parliamentarian ruled and the Presiding Bishop's Chancellor has advised.³

This memorandum is intended to provide the Members of the House with necessary legal background and the reasoning supporting that conclusion for the assurance of the Members as to past actions and in advance of their consideration of any additional such actions in the future.

Conclusion

The House of Bishops followed the proper canonical procedure for consenting to the depositions of John-David Schofield and William J. Cox from the Ministry of The Episcopal Church as provided in Canon IV.9 of the Constitution and Canons of The Episcopal Church (2006) for the following reasons:

A. The intended meaning of Section 2 of Canon IV.9 of the Constitution and Canons of The Episcopal Church (2006) is that the consent of a majority of the Bishops voting at a meeting of the House of Bishops constitutes valid consent for the deposition of a Bishop.

¹ "Diocese of South Carolina Protests Presiding Bishop's failure to follow the Canons," (Diocese of South Carolina, 27 March 2008) <http://www.dioceseofsc.org/mt/archives/000337.html>.

² See, e.g., George Conger, "Call for Review after Trial 'Flouted Church Rules,'" *Church of England Newspaper*, 28 March 2008, p. 5.

³ "House of Bishops' Votes Valid, Chancellor Confirms," (*Episcopal News Service*, 15 March 2008) http://www.episcopalchurch.org/79901_95735_ENG_HTML.htm.

- B. *Precedent establishes that the House of Bishops acted appropriately in considering and acting upon the Presiding Bishop's referral to it of the abandonment of communion certified to her by the Review Committee.*
- C. *Procedural safeguards assure fairness and justice in the case of Bishops accused of having abandoned the Communion of this Church.*

Background

The House of Bishops met for its annual, and duly noticed, spring meeting at Camp Allen, Navasota, Texas on March 7-12, 2008. As is its custom, the House scheduled a business session during that meeting. Members were notified in advance of the business session that the certification of the abandonment of the communion of this Church by the Rt. Rev. John-David Schofield, Bishop of San Joaquin, and the Rt. Rev. William J. Cox, Bishop Suffragan of Maryland, Res., would be considered. The business session was held, as planned, on March 12, at which time the subject of consent to deposition was before the House. With respect to each Bishop, a voice vote was taken, which was not unanimous and included abstentions but which clearly indicated majority consent to the depositions of Bishops Schofield and Cox by a wide margin in each case. Presiding Bishop Katharine Jefferts Schori, as required by Section 2 of Canon IV.9, has since deposed both from the Ministry of The Episcopal Church.⁴

Reasoning

- A. *The intended meaning of Section 2 of Canon IV.9 of the Constitution and Canons of The Episcopal Church (2006) is that the consent of a majority of the Bishops voting at a meeting of the House of Bishops constitutes valid consent for the deposition of a Bishop.*

⁴ The Deposition of a Bishop (John David M. Schofield) dated March 12, 2008 and the Deposition of a Bishop (William J. Cox) dated March 12, 2008, in both cases signed by the Most Rev. Katherine Jefferts Schori and witnessed by the Rt. Rev. Richard S. Chang and the Rt. Rev. Kenneth L. Price, Jr.

The procedure for deposing a Bishop of The Episcopal Church for abandonment of the communion of this Church requires, upon certification of the abandonment by the Review Committee, that the Presiding Bishop “present the matter to the House of Bishops at the next regular or special meeting of the House.” The Canon goes on to provide in its next sentence:

If the House, by a majority of the whole number of Bishops entitled to vote, shall give its consent, the Presiding Bishop shall depose the Bishop from the Ministry, and pronounce and record in the presence of two or more Bishops that the Bishop has been so deposed.

The current language of the Canon has evolved over time, and some understanding of that evolution is necessary to understand the meaning of the Canon’s current language.

The abandonment Canon (currently numbered IV.9) was originally enacted in 1853, and pertinently amended in 1859, 1874, and 1904.⁵ It has consistently provided for Bishops found to have abandoned the communion of this Church, *with required consent*, to be deposed by the Presiding Bishop. It is the giving of that consent that is primarily at issue now.

The method and requirements for giving consent have evolved over the Canon’s 165 year history, as follows:

- 1853: “with the consent of the majority of the Members of the House of Bishops.”⁶
- 1859: “with the consent of a majority of the House of Bishops.”⁷
- 1874: “a majority of the whole number of Bishops entitled at the time to seats in the House of Bishops” at a duly convened meeting of the House.⁸

⁵ Edwin Augustine White and Jackson A. Dykman, *Annotated Constitution and Canons* vol. 2 (1981 ed.) (New York: Office of the General Convention, 1985) 1079-1082 (herewith cited as White and Dykman).

⁶ White and Dykman (n 5) 1079.

⁷ White and Dykman (n 5) 1080.

⁸ White and Dykman (n 5) 1081.

- 1904: “consent of the House, by a majority of the whole number of Bishops entitled to vote.”⁹

Absent evidence to the contrary, we must interpret the General Convention’s choice to change the language defining the necessary consent from one version to another also to indicate an intention to change the definition itself.

Relegating some explanation of the rationale behind the original enactment and its amendments to the footnotes, the meaning of the consent definition evolved over time as follows:

- 1853: the consent of a majority of all Members of the House of Bishops was required without the necessity of a meeting being held.¹⁰
- 1859: the consent of a majority of the Members in attendance at a meeting of the House of Bishops (the meeting requirement being implicit and established by subsequent interpretation).¹¹
- 1874: the consent, at a meeting of the House of Bishops, of a majority of the total number of Members entitled to a seat, whether or not present.¹²

⁹ White and Dykman (n 5) 1082.

¹⁰ The canon was originally enacted in response to the decision of Bishop Levi S. Ives, Bishop of North Carolina, to become a Roman Catholic in 1852.

¹¹ The language of the amended Canon does not explicitly require a meeting, but does change the consent required from that of the Members thereof to being that of the House itself. There seems to have been some dispute, possibly relating to the change in language, over whether a meeting was required when the Bishops were forced to consider the abandonment of Bishop George D. Cummins, the Assistant Bishop of Kentucky, in order to found the Reformed Episcopal Church in 1873. Presiding Bishop Benjamin Bosworth Smith (Bishop of Kentucky) obtained the consent of a majority of the total number of Bishops without calling a meeting after which Bishop Smith deposed Cummins. Concern that the intention was to require the action at a meeting of the House led the House, meeting at the General Convention of 1874, to reaffirm the consent in the context of a meeting, and in October of 1874, Bishop Smith repeated the deposition. [White and Dykman (n 5) 1081]. A logical argument can be made that the change from the definite article *the* to the indefinite article *a* in the 1859 amendment together with the change to requiring the consent of the House as such implied that a meeting was required and redefined the consent requirement as meaning as given by a majority at a meeting.

¹² The extraordinary requirement of a majority of the total number of Bishops entitled to a seat was likely a reaction to the crisis of the Reformed Episcopal Church schism and confusion surrounding the deposition of Cummins.

- 1904: the consent of the House as determined by a majority of the Members entitled to vote *at that meeting* (not entitled to vote whether or not present)¹³

The interpretation of the 1904 language is governed by five considerations: (1) the issue of who gives consent, (2) canonical context, (3) evolutionary context, (4) analogous provisions, and (5) the actual purpose of the word *whole* in Canon IV.9.

(1) The Issue of who Gives Consent

The 1904 amendment replaced the consent of the Members acting individually with the consent of the body itself. This is a significant difference with practical implications. The election of Bishops, for example, requires the consent of certain individual Members (those Bishops having jurisdiction) and not the consent of the House of Bishops expressed in a vote thereof, even when the consents are given during General Convention.¹⁴ When the Members act individually, the majority is determined based on the total number of individuals and not based on the number of those individuals present at the meeting. On the other hand, when the House acts as a body, a majority is determined based on the number of those eligible to vote who are present.¹⁵ In changing who gives consent from the individual Members (1874) to the House itself (1904), a difference in how a majority is to be determined was presumably intended. Otherwise, there would be no practical difference between the 1874 language and the 1904 language. Not only is there not clear intent to the contrary, on the whole, evidence of intent favors the general rule as set forth in Canon V.3, as explained below.

(2) Canonical Context

¹³ The 1904 language was originally proposed to 1895 Convention by the Joint Commission on Revision of the Constitution and Canons [General Convention, *Journal of the General Convention of The Episcopal Church, 1895* (General Convention, New York 1895) 679]. The report was taken up by the Convention in sections, the abandonment canon being revised in 1904 [General Convention, *Journal of the General Convention of The Episcopal Church, 1904* (General Convention, New York 1904) 325-326, 598.

¹⁴ Cf. Canon III.11.3 (c) and (d).

¹⁵ Canon V.3.

It is noteworthy that the reference to “a majority of the whole number of Bishops entitled to vote” in the current Canon immediately follows the requirement of a meeting of the House and is specifically linked to the House itself and not to the individual Members thereof. Therefore, the plainest reading in context is that it means “a majority of the whole number of members entitled to vote” *at that meeting*.

(3) Evolutionary Context

In its evolutionary context, “the whole number of Bishops entitled to vote” (1904 language) must mean something different than “the whole number of Bishops entitled at the time to seats in the House of Bishops” (1874). The 1904 amendment was enacted as part of a process of comprehensive constitutional and canonical revision. One of those revisions was making allowance for suffragan bishops,¹⁶ which were constitutionally authorized for the first time in 1910 under Article II, Section 4 of the Constitution.¹⁷ The contemporaneous constitutional revision of 1901 did not, however, extend the right to vote in the House of Bishops to suffragan bishops. Thus, suffragan bishops were legally entitled to seat and voice but not vote. In these circumstances, it was necessary to amend the 1874 language of the abandonment Canon,¹⁸ which had set the standard for determining abandonment based on the number of bishops entitled to seat rather than those entitled to vote.

The operative phrase in the 1874 Canon for determining the standard for determining abandonment, “a majority of the whole number of Bishops entitled at the

¹⁶ The title “suffragan” had been previously but rarely used in TEC, but the so-called suffragan bishops functioned as canonical “assistant” bishops.

¹⁷ White and Dykman (n 5) 62.

¹⁸ Although the office of Suffragan Bishop was not created constitutionally until after the 1904 amendment to the abandonment canon (the creation of the office of suffragan having been passed on first reading in 1907, the next General convention, and on second reading in 1910), the creation of the office had long been contemplated. It had been proposed as early as 1847, and gained serious interest for missionary reasons at the General Convention of 1871 (the year after the Church of England began again appointing Suffragan Bishops) and thereafter [White and Dykman (n 5) 60-62].

time to seats in the House of Bishops,” was altered with this change in mind in two important ways. First, “to vote” replaced “to seats.” Indeed, before Suffragan Bishops became entitled to vote in 1943,¹⁹ there were as many as 24 of them serving in the House of Bishops at one time,²⁰ which would have radically altered the standard for determining abandonment were it not for the 1904 amendment.

The 1901 constitutional amendment also deprived bishops resigning for non-constitutionally specified grounds of both seat and vote, although the House itself, through Rule XXV, makes it possible for those resigned Bishops, when moral reasons are not involved in the resignation, to be granted seat and voice. House rules also make it possible to seat honorary and collegial Members (Rule XXIV) as well as guests (Rule XXVI). Guests with seat and voice, as opposed to honorary and collegial Members, are not entitled to be present during Executive Session. Again, were it not for the 1904 amendment to the abandonment canon, the presence of these non-voting Members would have an impact, potentially significant, in the determination of abandonment.

Second, and very significantly, the 1904 amendment revised the 1874 language in one other crucial respect. The amended Canon omitted the important words “at the time” from the operative phrase as used in 1874. Their omission in 1904 meant that the standard for determining abandonment was not the whole number entitled *at the time* to vote, thus not requiring that those entitled to vote but not present at the meeting be counted as had been the case with respect to those entitled to a seat theretofore. It is a change that makes sense given the 1904 amendment’s decision to vest the responsibility for determining abandonment in the House as a body and not in the Bishops as individuals.

¹⁹ White and Dykman (n 5) 21.

²⁰ *The Episcopal Church Annual: 2008* (Harrisburg: Morehouse Publishing, 2006).

In context, then, it is highly likely that the canonical drafters in 1904, in choosing the language “whole number of Bishops entitled to vote,” did so with the primary intention of correcting the 1874 language so as to provide for the new potential (and actuality) of significant numbers of Members with seats but without vote and making the finding of abandonment an action of the House as a body and not of the individual bishops.

(4) Analogous Provisions

Similar canonical language and situations support interpreting the phrase “whole number of Bishops entitled to vote” as meaning entitled to vote at that meeting. Canon IV.9 itself uses the phrase “all the Members” with respect to the Review Committee when it means a majority of the total number of Members and not the phrase “the whole number of Members.” The constitutional provision for defining a quorum for a meeting of the House of Bishops states: “A majority of all Bishops entitled to vote, exclusive of Bishops who have resigned their jurisdiction or positions, shall be necessary to constitute a quorum for the transaction of business.”²¹ Similarly, both Canons I.12.2 (regarding Diocesan Standing Committees in some circumstances) and Canon V.3 (regarding bodies of General Convention) successfully define quorums with reference to all Members without using the word “whole” as an adjective even when using the word “whole” as a noun to describe the total number of Members for purposes of giving notice. The use of the word “whole” as an adjective is not necessary to define the set of Members necessary for a quorum, and since it is unnecessary for that purpose, cannot be held to require such an interpretation in Section 2 of Canon IV.9. Indeed, it has a different purpose therein.

(5) The Actual Purpose of the Word *Whole* in Canon IV.9

²¹ Constitution of The Episcopal Church, Art. I, Sec. 2 (2006).

If the word *whole* in Section 2 of Canon IV.9 is not intended to refer to the total number of Bishops entitled to vote whether or not present, what is its purpose? It would be improper to interpret the Canon in a way that rendered the language chosen by the 1904 General Convention, in whole or in part, meaningless if doing so would be unnecessary. It cannot be ignored that the General Convention, while making significant changes in the definition of the consent requirement for deposition, chose to retain the word *whole*. Again, however, the meaning of that word is completely consistent with the interpretation of this memorandum. Indeed, the word *whole* has important application in the Canon thus understood in that it requires counting abstaining Members present at the meeting, for the purpose of determining what constitutes a majority at a meeting, thus making failures to vote, or abstentions, have the same net effect as a negative vote, which has the effect of making a majority more difficult to obtain than would otherwise be the case. It is not difficult to posit a situation in which Members might express their displeasure at a given Bishop's conduct and at the same time refuse to consent to the sanction of deposition by registering an abstention. Indeed, the 2008 votes included several abstentions.

B. Precedent establishes that the House of Bishops acted appropriately in considering and acting upon the Presiding Bishop's referral to it of the abandonment of communion certified to her by the Review Committee.

In recent history, the House of Bishops has taken similar action regarding two Bishops, Donald Davies of Ft. Worth (1993) and Neptali Larrea of Ecuador Central (2004). In both cases, the exact procedure followed with respect to John-David Schofield and William Cox was used. Decisions were taken based on a majority vote of those present at a meeting of the House of Bishops. Although the minutes of both meetings leave much to be desired, it appears that 131 Bishops of the 276 total eligible to vote

attended the 1993 meeting and of that 143 Bishops of the over 300 total²² eligible to vote attended the 2004 meeting. In neither case did a majority of those eligible to vote attend. Very tellingly, no objection was made at all. Even more tellingly, no objection was made at the time by either Schofield or Cox, or by any Bishop present at the time, which included, in the case of Bishop Larrea, many current Members of the House. There is no legitimate distinction to be made between the former cases and the present ones. Indeed, a fundamental unfairness would arise were Bishops similarly situated as to the Review Committee's findings and certification treated differently. Impartial administration of the Canons of The Episcopal Church requires recognizing the legitimacy of the present depositions and not the contrary as some have argued.²³

C. Procedural safeguards assure fairness and justice in the case of Bishops accused of having abandoned the Communion of this Church.

Canon IV.9 provides several important safeguards to assure a fair and just consideration of the cases bishops accused of abandoning the communion of this Church. Those assurances of due process begin before deposition is even a remote possibility.

First, abandonment is carefully defined by Section 1 of the Canon. A Bishop may abandon the communion in one of three ways:

- (i) by an open renunciation of the Doctrine, Discipline, or Worship of this Church, or (ii) by formal admission into any religious body not in communion with the same, or (iii) by exercising episcopal acts in and for a religious body other than this Church or another church in communion with this Church, so as to extend to such body Holy Orders as this Church holds them, or to administer on behalf of such religious body Confirmation without the express consent and commission of the proper authority in this Church.

²² *The Episcopal Church Annual 2004* (Harrisburg, Pa.: Morehouse Publishing, 2004) 429-436.

²³ "Western Louisiana Bishop: 'Two Sets of Rules for One Church,'" *The Living Church* (17 April 2008) http://www.livingchurch.org/news/newsupdates/2008/4/17/western_louisiana_bishop_two_sets_of_rules_for_one_church.

The Review Committee, composed of five Bishop peers of the accused (a majority of the Committee) along with two Priests and two confirmed adult lay communicants,²⁴ must first find by a majority vote of all its Members that at least one of the three circumstances constituting abandonment is present and certify that fact to the Presiding Bishop. Inhibition of a Bishop so certified is possible only with the consent of the “three senior Bishops having jurisdiction in this Church.”

Even after the certification and, in some cases, inhibition, the certified Bishop has two months to make a Verified written statement to the Presiding Bishop that the facts alleged in the certification are false. If the Presiding Bishop finds that the statement is a good faith retraction or denial, she or he may, with the consent of a majority of the three senior Bishops, dissolve the inhibition and drop the matter. The Presiding Bishop’s discretion is limited (in favor of the accused) by a standard of good faith, to which she or he is canonically accountable. The accused is protected by the necessity of majority consent in the House of Bishops, composed entirely of his or her peers to whom the accused is presumably well known. The House has the right to initiate further investigation, which indeed the accused might request. It should also be noted that a Bishop accused of abandoning the communion of this Church can also avoid further proceedings by renunciation pursuant either to Canon III.7.12 or Canon IV.8.

In the present cases all the procedural safeguards were followed. It is particularly noteworthy that neither Bishop certified as having abandoned the communion at any point whatsoever disputed the allegation of the abandonment as certified by the Review Committee, renounced the actions, denied the actions in any way, requested a further hearing, made any rebuttal, issued any defense, or contested the allegation whatsoever. Nor did either do so despite having an affirmative canonical duty to do so to avoid

²⁴ Canon IV. 3.26.

deposition.²⁵ The fair opportunity to do so having been provided, but ignored, the right must at this point be considered waived.

Finally, it must be noted that no Member of the House of Bishops, present or not present, requested further action, investigation, or hearing as permitted under House rules. No challenge was made to the Parliamentarian's ruling on the meaning of Canon IV.9. Similarly, no Member of the House of Bishops, as permitted by Rule XVII, requested reconsideration of the House's action. Again, no request having been made at the time, the right to do so must now be considered waived.

Under the circumstances, then, the House can only conclude that a fair and lawful procedure was followed, as provided by the Canon, and that the decision canonically made stands as the legitimate judgment of the House.

²⁵ White and Dykman (n 5) 1082.