

## DO BISHOPS DESERVE DUE PROCESS?

*By Mark McCall*

On Friday the Presiding Bishop notified the House of Bishops that she would seek the deposition of Bishop Duncan next week. This announcement was contrary to other public statements by her office and the published agenda of the upcoming meeting. Any bishops wishing to speak against this unprecedented use of summary procedures against a sitting bishop of the church were given five days notice. She also served notice that she intends to run roughshod over the canons in seeking to depose Bishop Duncan and that only a two-thirds vote of those present and voting will deter her. It will take two-thirds of the bishops present to overrule her gross misreading of the canons, but only a simple majority to remove without presentment or trial a diocesan bishop who even today is fulfilling his responsibilities as the bishop of Pittsburgh. Is TEC still under the rule of law?

### **1. The process against Bishop Duncan has been flawed from the start.**

The Presiding Bishop's letter of September 12, 2008, to the bishops states that she made a submission to the Title IV Review Committee in November 2007 "suggesting" that Bp. Duncan had abandoned the communion of this Church. She states that the "thrust" of her submission was not that he had already left TEC, but that by claiming that the diocese had a right to do so and should exercise that right he had made an open renunciation of the discipline of TEC. She then states that the Review Committee "evidently" agreed with her analysis because it sent her a certification of abandonment.

The reason for the Presiding bishop's uncertainty about what the Review Committee concluded is that the Committee did not specify the basis for its certification, which is plainly contrary to the requirement of Canon IV.9 that the certification contain "a statement of the acts or declarations which show such abandonment." The certification simply referred to voluminous evidence of news clippings and other materials dating back to 2003.

Taking a different approach, a memorandum from the Task Force on Property Disputes, dated September 5, 2008, claims that "Bishop Duncan has conclusively *completed* his own separation from TEC" and that "there is no doubt that Bishop Duncan *has left* The Episcopal Church." (Emphasis supplied.) This submission relies on materials obtained in August 2008 in the civil lawsuit brought against Bp. Duncan, raising the question whether the purpose of that lawsuit was not to use the civil courts to assist in the deposition attempt. In six pages of highlighted documents from the lawsuit, the Task Force memorandum manages only to establish the unsurprising conclusion that Bishop Duncan proposed that the diocese amend its canons to permit re-alignment and supports passage of the canon amendments. And that conclusion is not made any more surprising by attaching the adverb "actively" to every bullet point. Note the inconsistency between the Task Force's claim that Bp. Duncan "has conclusively completed his own separation" and the Presiding Bishop's complaint that "Bishop Duncan has unfortunately announced that he will not attend this meeting of the House." And not even the Presiding Bishop knows where the Review Committee stands on this issue, but she assumes they "evidently" agree with her.

It is one thing for the Presiding Bishop to speculate as to what the basis of the Review Committee's certification was, but another thing for the respondent to have to guess. The most

basic element of due process is for the defendant to be informed of the charges against him. And it is plainly required by Canon IV.9. All Bp. Duncan could reasonably have discerned from the certification itself is that he said something sometime since 2003 that was considered an open renunciation. All that can be determined from the conflicting statements made now by those who seek to depose him is that they do not know whether he has already left or merely plans to leave or whether he should be at the meeting of the House or is already gone. This is hardly the manifestation of a well-ordered process.

The issue of whether a diocese can leave TEC can be argued at length, but it will serve neither the purposes of Bp. Duncan nor of those arguments to introduce them into this proceeding. Therefore, this section will conclude by simply noting three sets of questions. First, the expedited procedures of Canon IV.9 are being used to circumvent the procedural protections established in detail elsewhere in Title IV. Virtually any act on which a presentment could be issued could be considered an open renunciation of the doctrine, discipline or worship of the church. Does TEC want to abandon all notion of due process? Is it now the position of TEC that taking a controversial position on its canons is a renunciation of those canons? What about open communion or same-sex weddings? With this precedent, will taking a controversial position on doctrine likewise invoke the summary procedures of this canon in the future?

Second, the theory on which the Presiding Bishop is proceeding fails to recognize the distinction so fundamental in well-ordered legal systems between actions, on the one hand, and opinions and statements, on the other. The law does recognize that some statements can be so definitive that they constitute a repudiation of a party's contractual obligations. For TEC to embrace this principle, however, is likely to prove short-sighted because it will surely be used against TEC itself. For example, has TEC renounced the principles expressed in the preamble to its own constitution?

Third, establishing the precedent that a sitting diocesan bishop of the church, whose ministry has not been inhibited in any way and who is even now performing his episcopal and sacramental duties, can be deposed for abandoning "the communion of this Church" demonstrates that TEC's understanding of what constitutes its communion is so deeply flawed as to be totally incoherent. The Task Force memorandum states that "even if he has joined a Church in communion with this Church, it alters not the least that he has abandoned the communion of 'this Church'." Is this the self-understanding of communion, so foundational that it is invoked in the preamble to the constitution, that TEC wants to exhibit to the wider communion and the world?

## 2. **Presentation to the House of Bishops**

The Presiding Bishop intends to present the matter of Bp. Duncan to the House of Bishops notwithstanding the fact that he has never been inhibited as Canon IV.9 mandates as a prerequisite to deposition. That canon clearly states that "Unless the **inhibited** Bishop [retracts or denies], the Bishop will be liable to Deposition." This is the only provision making a bishop liable to deposition under this canon. Contrary to the Presiding Bishop, there is no ambiguity here. Inhibition is required.

The Presiding Bishop claims she is nonetheless authorized to present Bp. Duncan for deposition by the following sentence in Section 2 of Canon IV.9: "Otherwise, it shall be the duty of the Presiding Bishop to present the matter to the House of Bishops at the next regular or special meeting of the House." This is her chancellor's reading of "the apparent intent" of the canon. The unquestionable intent of this canon, however, is to deal with those who have already

left the church for another communion, not to depose a sitting bishop who even now is performing his duties. But the Presiding Bishop's strained interpretation of the canon is not only at odds with the intent of this procedure, it also makes complete nonsense of the canon as worded. Canon IV.9 contains a series of mandatory duties in considering the possible abandonment of communion by a bishop of TEC. First, "it **shall** be the duty of the Review Committee" to certify the abandonment to the Presiding Bishop in precisely defined circumstances. Next, the Presiding Bishop "**shall** then inhibit" the bishop after obtaining the consents of the three senior bishops. Then, the Presiding Bishop "**shall** forthwith give notice" to the inhibited bishop giving him two months to issue a retraction or denial. Then follow two sentences specifying what is to happen at the end of the two-month period. The first provides for terminating the inhibition if a retraction or denial is offered: "If the Presiding Bishop is reasonably satisfied that the statement constitutes (i) a good faith retraction of the declarations or acts relied upon in the certification to the Presiding Bishop or (ii) a good faith denial that the Bishop made the declarations or committed the acts relied upon in the certificate, the Presiding Bishop, with the advice and consent of a majority of the three senior Bishops consenting to Inhibition, terminate [sic] the Inhibition." But if there is no retraction or denial: "**Otherwise**, it shall be the duty of the Presiding Bishop to present the matter to the House of Bishops at the next regular or special meeting of the House."

To suggest that this sentence concerns bishops who have not been inhibited and gives the Presiding Bishop authority to depose such bishops is not only nonsensical in the context in which this sentence occurs, it renders nonsensical the entire canon. This is the **only sentence** in the canon authorizing the Presiding Bishop to present a bishop to the House of Bishops for consent to deposition. If the "otherwise" sentence applies to **uninhibited** bishops, there is then no provision in the canon specifying what is to be done in the normative case arising under this canon: that of an **inhibited** bishop who fails to make the necessary retraction or denial. A canon that is replete with mandatory duties at every step then becomes inexplicably silent at the crucial step of the typical case. Put differently, if the "otherwise" sentence deals with uninhibited bishops such as Bishop Duncan, there is no provision under which the Presiding Bishop is authorized to depose an inhibited bishop, as was Bishop Schofield.

### 3. Majority vote required

The Presiding Bishop claims that the voting requirement, although ambiguous, "should be interpreted to give practical effect" to the canon's requirement that the vote occur at a meeting of the House of Bishops. In other words, the ambiguity arises from the admitted fact that she cannot assemble a majority of bishops eligible to vote at this meeting. The appropriate "practical effect" (and legal effect) in such circumstances is that the vote fails. First, in interpreting legal documents, one always starts with the plain meaning of the words. The phrase "whole number of bishops entitled to vote," not defined to the contrary anywhere in the canons, is to be understood in its ordinary meaning of all members of the House of Bishops. (Article I.2 of the constitution provides that "Each Bishop of this Church having jurisdiction, every Bishop Coadjutor, every Suffragan Bishop, every Assistant Bishop, and every Bishop who by reason of advanced age or bodily infirmity, or who, under an election to an office created by the General Convention, or for reasons of mission strategy determined by action of the General Convention or the House of Bishops, has resigned a jurisdiction, shall have a seat and a vote in the House of Bishops.")

Any doubt that might otherwise exist that the voting requirement in Canon IV.9 specifies a majority of all members of the House of Bishops is removed by considering other voting provisions in the canons. First, the key phrase, "the whole number of Bishops entitled to vote," also occurs in Article XII of the Constitution (relating to amendments) in a context that makes clear that absent bishops are included within its parameters. Amendments must be passed by "a

majority of all Bishops, excluding retired Bishops not present, of the whole number of Bishops entitled to vote in the House of Bishops....” This constitutional provision utilizes the same concept, “whole number of bishops entitled to vote,” as is found in the “abandonment” canon except that Article XII of the constitution includes a “carve out”: retired bishops not present are excluded from the “whole number of bishops entitled to vote.” The fact that retired bishops not present are explicitly carved out in the provision on constitutional amendments indicates that they would be included otherwise within the whole number. And it is quite clear that active bishops not present are included in the “whole number of bishops entitled to vote.”

Thus when the same phrase appears in Canon IV.9 it is clear that “whole number of bishops entitled to vote” includes bishops both present and absent, and for a vote on abandonment, absent retired bishops are not carved out from the total for purposes of calculating the requisite majority. The constitutional provision on amendments is conclusive for the interpretation of Canon IV.9. It is a fundamental principle of legal interpretation that language is to be interpreted the same way when it occurs repeatedly in the same instruments. (See also Canon V.3, which defines a quorum by distinguishing it from the “whole having been duly cited to meet.”)

Second, the interpretation given to the key phrase by the Presiding Bishop and her chancellor, that “a majority of the whole number of Bishops entitled to vote” means simply a majority of “those present,” is untenable given that the canons clearly use the term “a majority of those present” when that understanding is intended. See, e.g., Canon III.12.8(d), (requiring that a bishop’s resignation be accepted “by a majority of those present.”) It is a fundamental principle of legal interpretation that when a concept is clearly stated in one place, other language is not to be twisted to convey what the drafters knew how to state clearly when that was their intention.

Finally, note that the Presiding Bishop’s letter states that her rulings from the chair on these disputed interpretations of the canon can be overruled by “a two-thirds vote.” And note also that Rule V of the General Rules of the House of Bishops specifies that a proposal to recess during a debate “to form small groups for a ten-minute conference” “to define and clarify the issues of the debate” requires a “two-thirds vote of those present and voting.” Yet the Presiding Bishop is seeking to depose a current diocesan bishop on the vote of a simple majority of those present.

#### **4. “Ambiguity” in the rules**

The Presiding Bishop claims repeatedly in her letter that any “ambiguity” in the canons should be resolved in favor of proceeding with the deposition. This makes a mockery of any notion of due process. What is at issue here is the deposition of a sitting bishop of the church, on a theory that is novel and self-contradictory and in circumstances that could lead to the dissolution of TEC and the Anglican Communion. Is it too much to require in such circumstances that an institution have clear rules, that such rules be scrupulously followed, and that every procedural protection given? Is it not an indictment of TEC itself that it cannot bring to bear at such a moment a coherent procedural mechanism for dealing with its disputes? These canons are not in fact ambiguous; they are precise. But it is their very precision that is now inconvenient. In the Presiding Bishop’s words “any ambiguity should be resolved in favor of making this important provision work effectively”; the “discipline of the Church should not be stymied....” Proceeding down the course urged by the Presiding Bishop will be an admission to all who are watching that TEC has abandoned the rule of law and is simply making it up as it goes along.

## **5. Disregarding TEC's own rules will jeopardize its position in the civil courts.**

The Presiding Bishop and her advisors act as if TEC is immune from scrutiny under the civil law. Although the First Amendment precludes courts from entanglement in religious disputes, this does not mean that religious bodies can ignore their own rules with impunity. An illustrative case on this point is *Little v. First Baptist Church*, 475 U.S. 1148 (1986). In that case, a church in Virginia brought an action against its pastor alleging he had been fired by a duly held meeting of the church's governing body. The state court issued a preliminary injunction against the pastor barring him from church premises, appointed a commissioner to hold a church election, and then entered a permanent injunction against the pastor when a majority of the church voted in this court-induced election to fire him. He appealed to the United States Supreme Court, which refused to hear his case and allowed these extraordinary interventions by the lower court to stand.

It is an elementary principle of Supreme Court jurisdiction that a denial of review does not constitute a decision on the merits and is without any authority as precedent. No one can conclude therefore that the Court in fact approved of the intrusive measures taken by the Virginia court. What is significant, however, is the opinion by Justices Marshall and Brennan, two of the Court's most consistent advocates of judicial disentanglement in religious disputes, dissenting from the court's refusal to hear the case. Their opinion outlines what the proper procedure should have been:

The court took respondents' word [the apparent church majority] that they represented the Church without any evidence, although petitioner [the pastor] contested the fact. The court made no inquiry into whether the alleged meeting at which petitioner was fired actually took place, whether a quorum was present, or how the members voted. Lacking any evidence that the authorized decisionmaker had acted, the court induced a decision on its own initiative. This participation in the decisionmaking of an ecclesiastical body is both dangerous and unwarranted. Courts have no business "helping" a religious organization to make its wishes known. The court in this case should have limited its inquiry to the terms of petitioner's employment contract and to whether the Church had taken the actions requisite to terminating that contract. If the authorized body had indeed terminated petitioner's employment, then the court could validly have taken steps to enforce the Church's right to keep petitioner off Church property. Until respondents, who bore the burden of proof, demonstrated that such termination had taken place, the court's only proper response was to do nothing.

This case indicates that even the most ardent advocates of restraint in religious controversies require proof that the proper church body acted in accordance with its rules. Does anyone believe that is happening here?

## ATTACHMENT

### Canon IV.9: Of Abandonment of the Communion of this Church by a Bishop

Sec. 1. If a Bishop abandons the communion of this Church (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; it shall be the duty of the Review Committee, by a majority vote of All the Members, to certify the fact to the Presiding Bishop and with the certificate to send a statement of the acts or declarations which show such abandonment, which certificate and statement shall be recorded by the Presiding Bishop. The Presiding Bishop, with the consent of the three senior Bishops having jurisdiction in this Church, shall then inhibit the said Bishop until such time as the House of Bishops shall investigate the matter and act thereon. During the period of Inhibition, the Bishop shall not perform any episcopal, ministerial or canonical acts, except as relate to the administration of the temporal affairs of the Diocese of which the Bishop holds jurisdiction or in which the Bishop is then serving.

Sec. 2. The Presiding Bishop, or the presiding officer, shall forthwith give notice to the Bishop of the certification and Inhibition. Unless the inhibited Bishop, within two months, makes declaration by a Verified written statement to the Presiding Bishop, that the facts alleged in the certificate are false or utilizes the provisions of Canon IV.8 or Canon III.12.7, as applicable, the Bishop will be liable to Deposition. If the Presiding Bishop is reasonably satisfied that the statement constitutes (i) a good faith retraction of the declarations or acts relied upon in the certification to the Presiding Bishop or (ii) a good faith denial that the Bishop made the declarations or committed the acts relied upon in the certificate, the Presiding Bishop, with the advice and consent of a majority of the three senior Bishops consenting to Inhibition, terminate the Inhibition. Otherwise, it shall be the duty of the Presiding Bishop to present the matter to the House of Bishops at the next regular or special meeting of the House. 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.

### Constitution Article XII:

No alteration or amendment of this Constitution shall be made unless the same shall be first proposed at one regular meeting of the General Convention and be sent to the Secretary of the Convention of every Diocese, to be made known to the Diocesan Convention at

its next meeting, and be adopted by the General Convention at its next succeeding regular meeting by a majority of all Bishops, excluding retired Bishops not present, of the whole number of Bishops entitled to vote in the House of Bishops, and by an affirmative vote by orders in the House of Deputies in accordance with Article I, Section 5, except that concurrence by the orders shall require the affirmative vote in each order by a majority of the Dioceses entitled to representation in the House of Deputies.

Notwithstanding the provisions of the foregoing paragraph, the adoption of any alteration or amendment of this Constitution which inserts or repeals an Article, or a Section or Clause of an Article, shall effect the necessary change in numbers or letters of Articles or Sections or Clauses of an Article, that follow, and in references made in this Constitution to any other part, without the necessity of specific provision therefor in the alteration or amendment.

Each duly adopted alteration or amendment to this Constitution, unless otherwise expressly stated therein, shall take effect on the first day of January following the adjournment of the General Convention at which it is finally adopted.

#### Canon V.3: Of a Quorum

Sec. 1. Except where the Constitution or Canons of the General Convention provide to the contrary, a quorum of any body of the General Convention consisting of several members, the whole having been duly cited to meet, shall be a majority of said members; and a majority of the quorum so convened shall be competent to act.