

amended accordingly. Such alteration or amendment shall take effect thirty (30) days after the adjournment of the Convention. Typographical errors may be corrected by the Committee on Constitution and Canons and reported to the Convention.

Revised October, 1991.”

The plain language of this constitutional article does not limit the subject or substance of any amendment to the Constitution. Thus, if the Diocese is prohibited from taking the action it did through its delegates it can only be because of language in a document outside of those of the Diocese.

Plaintiffs’ “Accession” Argument

The Episcopal Church is an unincorporated association with its headquarters in New York City. The Supreme Court of Texas describes an unincorporated association in *Cox v. The Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1991), as “a voluntary group . . . formed by mutual consent.” Plaintiffs argue that the word “accedes” **formerly** in Article 1 of the Diocese’s Constitution precludes the diocese once affiliated with The Episcopal Church from ever withdrawing. Article 1 titled “AUTHORITY OF GENERAL CONVENTION” previously read as follows:

“The Church in this Diocese accedes to the Constitution and Canons of The Episcopal Church, and recognizes the authority of the General Convention of said Church provided that no action of General Convention which is contrary to Holy Scripture and the Apostolic Teaching of the Church shall be of any force or effect in this Diocese.”

The language of accession is also the basis of the argument that the action taken by the delegates at the Annual Convention of the Diocese in voting to leave its relationship with The Episcopal Church and realign with another Anglican province is *ultra vires*.

However, an examination of the word “accedes” as it is normally understood does not support Plaintiffs’ arguments. “Accedes” is a technical term from international law used to describe the act of a sovereign state becoming a party to a treaty signed by other sovereign states.

The Second Circuit Court of Appeals in *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79, n.7 (2nd Cir. 2005), writes that “ ‘Accession’ is ‘the act whereby a State accepts the offer or the opportunity of becoming a party to a treaty already signed by some other States.’” It is novel and without support in law to argue that a State loses its sovereignty by joining with other States. Thus, this term as commonly understood does not connote irrevocability in entering into a relationship, but the very opposite.

Ultra vires acts of an artificial entity such as an unincorporated association or a corporation fundamentally are acts “without any authority to act on subject,” according to *Black’s Law Dictionary*. Since Article XIX of the Diocese’s constitution does not limit the amendments that can be made to the constitution and since there is no language in Article 1 or any other article of the Constitution of The Episcopal Church that prohibits this Diocese or any other diocese from withdrawing from its affiliation with The Episcopal Church, the action taken by the Annual Convention cannot meet the legal definition of *ultra vires*.

Representation of Autonomy of Dioceses

The Episcopal Church has represented to the Internal Revenue Service that all of the dioceses affiliated with it are autonomous. This representation was made by Ellen F. Cooke, Treasurer of The Episcopal Church, in a written communication dated July 15, 1987, wherein in the first sentence it is stated that “The Episcopal Church is comprised of 117 **autonomous** dioceses, 98 of which are domestic and 19 foreign.” Since this representation is a public record, the Court is requested to take judicial notice of it. The entire communication of the Treasurer is found in the appendix to these answers to the questions of the Court.

Bishops of The Episcopal Church and Anglican Theologians Also Agree on Autonomy of The Dioceses

Significantly, on April 22, 2009, fifteen Bishops of The Episcopal Church joined by three distinguished Anglican theologians known for their long service throughout the Anglican Communion, published what is titled “*Bishops’ Statement on the Polity of The Episcopal Church.*” These Bishops and eminent Anglican theologians within The Episcopal Church write in Section 2 of that paper that The Episcopal Church is made up “of a voluntary association of equal dioceses.” Bishops’ Statement, p.2. For the convenience of the Court, this publication in its entirety is found in the appendix to this document.

These Bishops and Anglican theologians begin by tracing the history of The Episcopal Church, illustrating how from its inception the term “voluntary association,” has been repeatedly used of the dioceses’ relation to one another and to The Episcopal Church. Bishops’ Statement, p.2. It “was the dioceses that created the General Convention and not vice versa.” Bishops’ Statement, p. 2. “All dioceses have equal representation,” the publication observes, regardless of the size of these dioceses, which range from those “with over 80,000 communicants” to those “with fewer than 2,000.” Bishops’ Statement, p. 3. Article 5 of The Constitution of The Episcopal Church is captioned “**Admission of New Diocese**” not “**Creation of New Diocese**,” the Bishops’ Statement notes. Bishops’ Statement, p. 3. Thus, dioceses are “admitted” into union with the General Convention of The Episcopal Church, not created by it. Bishops’ Statement, p. 3. In summary, the Bishops’ Statement declares:

- “New dioceses organized now are duly constituted entities with distinct legal personalities prior to admission to The Episcopal Church.”
- “Dioceses retain their distinct legal personalities as defined by their constitutions when they join The Episcopal Church.”

- “The constituent members of General Convention are its dioceses; it is the dioceses that are ‘represented’ and vote as equals.” Bishops’ Statement, p. 4.

The Bishops’ Statement goes on to explain that the Constitution of The Episcopal Church “is devoid of the legal terminology used to express hierarchies in legal documents.” Bishops’ Statement, p. 4. There is “no provision making the General Convention ‘supreme’ or ‘highest’ or providing that general canons supersede diocesan ones,” the Bishops’ Statement observes. Bishops’ Statement, p. 4. The Bishops’ Statement goes on to point out numerous terms that are found in documents of hierarchical bodies that are totally absent in the Constitution of The Episcopal Church. Bishops’ Statement, p. 7. This section of the Bishops’ Statement concerning the language used in the Constitution of The Episcopal Church concludes with the following statement:

“This lack of hierarchical concepts in the Constitution confirms the traditional understanding of our structure that already has been quoted from the official commentary: **‘The Episcopal Church is a federation (or confederation) of independent, or better, autonomous, dioceses.’**” Bishops’ Statement, p. 4. (Emphasis added)

The Bishops’ Statement is also in agreement with Defendants’ argument on the proper understanding of the term “accede.” Bishops’ Statement, p. 5. This agreement is found in the following:

“It is the term used in international law to describe a sovereign state’s becoming a party to a treaty already signed by others, a treaty being a contract among sovereign and independent states. ‘Acceding’ was the term used in the Articles of Confederation, which established a ‘league of friendship’ of states retaining their ‘sovereignty, freedom and independence.’ The term ‘acceding’ is not used in the United States Constitution which established a hierarchical central government. This use of treaty language could not have been accidental. James Duane was a signatory to the Articles of Confederation; John Jay, besides being the nation’s Foreign Secretary and Chief Justice, negotiated the second treaty with Great Britain, known to this day as the ‘Jay Treaty.’ These men clearly knew what the term ‘acceding’ signified.” Bishops’ Statement, p. 5.

Proof the Court Will Not Receive

Defendants also consider it significant that Plaintiffs will not be able to offer any admissible proof of any constitutional provision or canon of The Episcopal Church that states in understandable language that once a diocese is accepted into a relationship with The Episcopal Church that diocese can never withdraw. In fact, there is no reasonable interpretation of any language in the constitution and canons of The Episcopal Church that would support such an interpretation.

Therefore, the foregoing supports the position that The Fort Worth Episcopal Diocese acting through its delegates at its last Annual Convention had the authority to act as it did, thereby defeating any argument that the action taken was *ultra vires*. The Court is correct that if the action taken at the last Annual Convention was legally effectual, then the Diocese still continues to exist and the attorneys for Plaintiffs will not be able to establish the necessary authority that they are required to prove that has been raised by the Rule 12 motion filed against them.

What Was the Effect of the Annual Convention Vote of the Delegates on Its Elected Officials and Those It Elected to the Diocesan Corporation?

Under Texas unincorporated association law, the vote of the delegates, which over 80% voted in favor of the actions taken, was a vote of the association, not any individual office holder in the Diocese. There is no basis in Texas unincorporated association law that would make the vote of the delegates of an association an abdication of a position of an officer of the association and certainly not of a corporate entity that did not participate in the action. Therefore, these previously elected officials of the Diocese and the Diocesan Corporation by the delegates of the Annual Convention still hold their respective offices.

Likewise, there is no constitutional provision or canon of the Diocese nor is there a constitutional provision or canon of The Episcopal Church declaring that these Diocesan officials or the Diocesan Corporation Trustees have resigned or abdicated their offices by virtue of the vote of an Annual Convention of a diocese.

As the Court wisely noted during the hearing, those who were present at the February 7, 2009, meeting were those who disagreed with the vote of the delegates of the Diocesan Convention in November of 2008. The result is the action taken at the February meeting was of no effect. In connection with this point, Defendants request the Court to take judicial notice of Article 4 of the Constitution of The Episcopal Diocese of Fort Worth stating that a special meeting of the Convention can only be called by the Bishop or a majority of the Standing Committee, and Plaintiffs have judicially admitted that the special meeting was called by the Presiding Bishop of The Episcopal Church, who is not named in Article 4. Therefore, the February meeting was not legally called, making all of the actions at that meeting without authority, which include the election of those individuals who have hired Jonathan D. F. Nelson and Kathleen Wells to prosecute this suit on behalf of The Episcopal Diocese of Fort Worth and The Corporation of The Episcopal Diocese of Fort Worth.

Are Defendants Entitled to Use “Episcopal” In Their Names?

The Court asked if Plaintiffs were entitled to keep Defendants from using the word “Episcopal” in their names. The word “Episcopal” is a descriptive word like Baptist or Lutheran. The Episcopal Church took its name from the Church in Scotland. Other Anglican Provinces using the word Episcopal in their names are Igreja Episcopal Anglicana do Brasil, The Episcopal Church in Jerusalem & The Middle East, The Episcopal Church in the Philippines, L’Eglise Episcopal au Rwanda, The Scottish Episcopal Church, and The Episcopal Church of the

Sudan. There are churches which are not provinces that use this name such as Iglesia Episcopal de Cuba and The Reformed Episcopal Church of Spain. Accordingly, The Episcopal Church has no legal basis for objecting to Defendants using the word "Episcopal" in their names.

Your Defendants trust that the foregoing answers the questions posed to their counsel as the Court was recessing the Rule 12 hearing and that these answers will assist the Court in concluding that hearing when it reconvenes.

Respectfully submitted,



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WORTH a/k/a/ THE ANGLICAN
PROVINCE OF THE SOUTHERN
CONE'S DIOCESE OF FORT WORTH**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DEFENDANTS' ANSWERS TO QUESTIONS OF THE COURT POSED DURING THE RULE 12 HEARING has been served by facsimile transmission on Jonathan D.F. Nelson and Kathleen Wells on the 15th day of September, 2009.


J. Shelby Sharpe

APPENDIX

Founded 1821

Incorporated 1846

**THE DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE
PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA**

+ EPISCOPAL CHURCH CENTER · 815 SECOND AVENUE · NEW YORK, NEW YORK 10017 +
Telephone (212) 867-8400 · Cable Fenalong, N.Y. · Telex 971271 DOM FOR MIS NYK

The Episcopal Church is comprised of 117 autonomous dioceses, 98 of which are domestic and 19 foreign. Each Episcopal Congregation is in canonical union with a specific diocese. The church's governing body is the General Convention which convenes every three years to determine the course of ongoing mission operations. These operations are carried out primarily by The Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the U.S.A., Inc. (hereafter called "The Society"). The Society's Board of Directors is the Executive Council, members of which are elected by the General Convention and the Nine Provinces of the church. The Presiding Bishop is the President of the Society.

"The Episcopal Church and Institutions Thereof" has been determined to be exempt from Federal income tax as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1954. Contributions made in the name of the church and subordinate units are deductible in the manner and to the extent provided by Section 170 of the Internal Revenue Code of 1954.

We are listed twice in the "Cumulative List of Organizations" as described in Section 170(c) of the Internal Revenue code of 1954 (see Cumulative List of Organizations as revised to October 31, 1986) as follows:

Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the U.S.A., New York, N.Y.

Episcopal Churches & Dioceses in the U.S. & Inst. Thereof, New York, N.Y. (Code 1)

Code 1, as defined by Department of the Treasury, Internal Revenue Services is "generally a central organization holding a group exemption letter, whose subordinate units covered by the group exemption are also included as having contributions deductible even though they are separately listed."

The listing of "The Society" in the foregoing manner should help to establish the deductibility of individual gifts to particular parishes and dioceses, although the Internal Revenue Service may take the position that the listing does not necessarily establish such deductibility.

Yours sincerely,

Ellen F. Cooke

Ellen F. Cooke
Treasurer

EFC:es
Enclosures
7/15/87

THE ANGLICAN COMMUNION INSTITUTE, INC.

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Bishops' Statement on the Polity of the Episcopal Church

Written by: [The Anglican Communion Institute, Inc.](#)
Wednesday, April 22nd, 2009

[PDF Version of Text With Endnotes is Available Here](#)

We write as Bishops of The Episcopal Church, the Anglican Communion and the One, Holy, Catholic, and Apostolic Church. We are joined by distinguished theologians known for their long service throughout the Anglican Communion.

The Historic Episcopate has always been recognized as an essential non-negotiable element of our Anglican identity, including by the Bishops of The Episcopal Church "in Council assembled as Bishops in the Church of God" and recorded in the Chicago-Lambeth Quadrilateral. Bishops are successors to the apostles and upon their consecration receive the authority and responsibility inherent in the sacred and unbroken apostolic office. The people of God are united in one local church by their communion with their Bishop, and through the communion of all the Bishops in a college of Bishops the people of God around the world are joined in one communion. Resolution 49 of the 1930 Lambeth Conference, quoted in part in the preamble to our Constitution, notes that the Anglican Communion consists of "those duly constituted Dioceses, Provinces and regional Churches in communion with the See of Canterbury" that are "bound together not by a central legislative and executive authority, but by mutual loyalty sustained through the common counsel of the bishops in conference."

This understanding of the Historic Episcopate derives first from the authority Jesus bestowed on his disciples and second on the Apostles' subsequent provision for the continuation of their ministry without interruption by those consecrated to the office of Bishop. The joint Anglican Roman Catholic International Commission described the understanding of episcopal authority shared by the two communions:

The Spirit of Christ endows each bishop with the pastoral authority needed for the effective exercise of episcopate within a local church. This authority necessarily includes responsibility for making and implementing the decisions that are required to fulfill the office of a bishop for the sake of koinonia. Its binding nature is implicit in the bishop's task of teaching the faith through the proclamation and explanation of the Word of God, of providing for the celebration of the sacraments, and of maintaining the Church in holiness and truth. Decisions taken by the bishop in performing this task have an authority which the faithful have a duty to receive and accept.

I

The Bishop Is the Ecclesiastical Authority in the Diocese

The Constitution and Canons of General Convention make the Bishop the Ecclesiastical Authority in the diocese. That authority is always properly exercised in accordance with the constitution and canons of the diocese, but from the perspective of the Constitution it is the Bishop (or the Standing Committee in the absence of a Bishop) that is the Ecclesiastical Authority, not any central body or officer.

Our Constitution does not purport to define the authority inherent in the office of Bishop, but recognizes in Article II that our jurisdiction is that of an "Ordinary" and affirms through the use of this significant term that the Bishops of The Episcopal Church possess the full authority of the apostolic office. "Ordinary" is a term of art in Anglican and Roman Catholic ecclesiology and canon law that refers to the power inherent in the office given by the Lord to Peter and the Apostles. In the Roman Catholic Church, "ordinary power" is the power exercised by the Bishop of Rome as successor to Peter in a supreme and universal manner and by the diocesan bishops within their sees. It is the power that derives from divine office, not canon law.

The Church of England, which itself received the Historic Episcopate from the Roman Catholic Church, continues to recognize in its canon law that its diocesan bishops exercise "jurisdiction as Ordinary." The Anglican co-chairman of the Anglican Roman Catholic International Commission explained the inherent authority of bishops as follows: "The essential powers and responsibilities of apostolic ministry are inherent in the gift of this ministry. They may be ordered and given shape by human law, but they are not the creation of human law." The inherent nature of this authority was noted by the seminal thinker on Anglican polity, Richard Hooker, who followed St. Augustine in emphasizing that this authority was "not by force of any council (for councils do all presuppose bishops, nor can there any council be named so ancient, either general, or as much as provincial, [since] the Apostles' own time, but we can shew that bishops had their authority before it,

and not from it).”

Following the American Revolution, the several Episcopal Churches in this country received this same apostolic office from the Church of England prior to the formation of The Episcopal Church itself. This point must be emphasized: the Historic Episcopate existed among Anglicans in this country prior to the adoption of our Constitution. By subsequently using the term “Ordinary” to describe its diocesan Bishops, our Constitution affirms this historic office as understood in both Anglican and Roman Catholic tradition and recognizes the inherent authority of its Bishops, an authority they possess by means of their apostolic office and not through administrative powers enumerated in our Constitution and canons.

This inherent authority of a Bishop is also given constitutional recognition by two other provisions in our Constitution. The first, already noted, describes the Bishop and Standing Committee in the absence of a Bishop as “the Ecclesiastical Authority” in the diocese. The second prohibits any Bishop from acting in another diocese without consent of the diocesan authority. Not even the whole House of Bishops or, indeed, the entire General Convention acting unanimously could override this constitutional reservation of ecclesiastical authority to the diocesan Bishop and Standing Committee. Lest there be any doubt about this issue, the Constitution specifies that Bishops can act outside their own dioceses even when authorized by the House of Bishops only in “territory not yet organized into Dioceses of this Church.”

It is significant in this regard that the office of Presiding Bishop, unlike that of diocesan Bishop, is a constitutionally-defined office. The Presiding Bishop does not have a see and does not exercise ordinary power, but only the limited authority delegated by the Constitution and duly enacted canons. Included in this defined authority is jurisdiction over the small number of churches known as the “Convocation of American Churches in Europe,” but even this limited jurisdiction is exercised with the consent of other Anglican Bishops having authority in Europe. The Presiding Bishop at the “direction” of the House of Bishops may also act or authorize others to act in unorganized territory, but the primary responsibility of the Presiding Bishop is, as the name implies, to preside at the meetings of the House of Bishops and to act as its agent in canonical matters. But neither the House of Bishops as a whole nor the Presiding Bishop on its behalf has ecclesiastical authority to act within or speak on behalf of a diocese.

We emphasize this significant feature of our governance at the outset because in the recent controversies surrounding the withdrawal of several dioceses from The Episcopal Church the Presiding Bishop and others acting on her behalf, including the Presiding Bishop’s chancellor, have purported to act within dioceses, to “recognize” or “de-recognize” diocesan officers and to speak on behalf of The Episcopal Church in civil litigation involving dioceses. We respect the desire of the Presiding Bishop to provide pastoral assistance in these areas, and indeed we too want to do all that we can to reach out to persons in those dioceses who wish to remain in The Episcopal Church. But neither she nor anyone acting on her behalf has constitutional authority to act without consent from the Ecclesiastical Authority except in unorganized territory. Nor are they authorized to speak for The Episcopal Church in civil litigation within a diocese. That is not among the constitutional powers conferred on the Presiding Bishop or the House of Bishops or the General Convention as a whole. That is the constitutional prerogative of the Ecclesiastical Authorities of the dioceses, their Bishops and Standing Committees. However we respond to the pastoral needs of continuing Episcopalians in the seceding dioceses, it must be done in accord with our Constitution and Canons.

II

The Fundamental Structure of The Episcopal Church Is That of a Voluntary Association of Equal Dioceses

Given the constitutional reservation of authority within the diocese to the Bishop and Standing Committee, it is not surprising that the fundamental structure of our Church is that of a voluntary association of equal dioceses.

It is significant that the same term, “voluntary association,” has been used by both the founding father of The Episcopal Church to describe the organization he was so instrumental in forming and by the civil law to describe religious societies and other unincorporated voluntary organizations in general. Our Church’s primary architect was, of course, William White, and his blueprint was The Case of the Episcopal Churches in the United States Considered, published in 1782 as the Revolutionary War was nearing an end. As a result of American independence, many of the former Church of England parishes had become independent churches while others were still organized as state churches under the control of state legislatures. White’s concept, later accepted by others in the former colonies, was that the Anglican churches would first be organized into state churches and then the state churches would organize themselves nationally as a voluntary association of state churches (now called “dioceses”). Pursuant to this plan, White was one of the first two Americans consecrated by the Archbishop of Canterbury in 1787 to serve in the Episcopal Churches. When The Episcopal Church eventually was duly organized in 1789, Bishop White and Bishop Samuel Seabury, consecrated by the Scottish Episcopal Church, sat as the first House of Bishops at the first General Convention.

Just as the thirteen states were the “independent and sovereign” constituents of the American confederation that existed when the church now known as The Episcopal Church was being formed, the state churches were the bodies that combined to constitute what was initially called the Protestant Episcopal Church. It was the dioceses, then co-extensive with the newly-independent states, that created our Church’s Constitution and General Convention. The constitutional mechanisms of governance they created preserved their status as equal members of a voluntary association of dioceses. As noted by the official commentary on our Constitution and canons, “Before their adherence to the Constitution united the Churches in the several states into a national body, each was completely independent.” It then describes that national body they created as “a federation of equal and independent Churches in the several states.”

As this brief summary of our founding history shows, the fundamental structure of The Episcopal Church from the outset has been that of a voluntary association of dioceses meeting together in a General Convention as equals. This structure is clearly reflected in our Constitution. There is no provision in the Constitution that defines a diocese. The dioceses are the undefined constituent elements out of which The Episcopal Church is formed. In contrast, General Convention is created and defined in Article I, which still provides in language virtually unchanged from the original that “The Church in each diocese which has been admitted to union with the General Convention...shall be

entitled to representation....” As this current language makes clear, “Churches” in dioceses are not created by General Convention. They are “admitted” (upon their application and its acceptance) to union with the General Convention. Dioceses are both historically and ontologically prior to the Constitution and the General Convention. And upon admission, it is the diocese, not any other body or group, that is “entitled to representation” at General Convention.

This fundamental concept of dioceses as equal constituent members of The Episcopal Church is manifest in the mechanisms of governance created by the Constitution, including the provisions for representation and voting at General Convention, the means by which the Book of Common Prayer and Constitution are amended, and the procedures by which new dioceses are admitted to membership in The Episcopal Church after they are constituted.

Representation and Voting

All dioceses have equal representation. The largest dioceses, with over 80,000 communicants, have the same number of deputies as the smallest, with fewer than 2,000. This representation, in conjunction with the voting mechanism constitutionally required in the House of Deputies, gives the dioceses collective control over the General Convention.

The House of Deputies does not decide important matters by majority vote, but by a vote “by orders.” This is a vote in which the diocesan deputations vote by diocese separately by their clergy and lay deputies. Each diocese gets one vote in each order. This procedure of voting by diocese has been the hallmark of our Conventions from the outset and reflects the fact that the dioceses meet in such Conventions as equal members. The first Convention in 1785 that began the organizing process and produced the first draft Constitution made explicit in its very first resolution that the states were its constituent members: the resolution was that “each State have one vote.” The next year the Convention of 1786 passed a resolution asking “the several States” to “ratify” the constitution at the next convention. When eventually adopted, the first Constitution called for “suffrages by states” in the General Convention. In the Convention in 1789, at which the organization of The Episcopal Church was completed, the issue before the Convention was “proposed union with the Churches in the States of New Hampshire, Massachusetts, and Connecticut.”

All of this, of course, is simply a reflection of the provision already noted in Article I.4 that it is the diocese, not the individual communicant, that is represented in General Convention. Explaining General Convention’s voting procedures, the Church’s official commentary notes the provision in the first Constitution (“suffrages by states”) and concludes “still today a vote by orders is also a vote by dioceses.”

Constitutional Amendments

The essential role of dioceses as the constituent members of The Episcopal Church is further reflected in the procedures for dealing with the most important decisions made by the General Convention, which are amendments to the Book of Common Prayer and Constitution. Both require the same basic procedure. For example, Article XII, the provision governing constitutional amendments, requires that an amendment be “proposed” at one General Convention, that the proposal then be “sent to the Secretary of the Convention of every Diocese, to be **made known to the Diocesan Convention** at its next meeting,” and then that the amendment be “adopted” at a second General Convention by “affirmative vote in each order by a majority of Dioceses entitled to representation....” It could not be clearer that it is the dioceses that are entitled to representation.

Diocesan constitutional changes, in contrast, receive no prior review or approval from General Convention or other central bodies. As already noted, our first Constitution was ratified by the preexisting state (diocesan) churches. There was no review or approval at that time of the constitutions of the state churches. Under the current provisions, a new diocese joining The Episcopal Church ratifies our Constitution when it joins, typically by an accession clause in its own constitution. Apart from an initial review when a new diocese applies for membership in The Episcopal Church, there is no provision for prior review or approval of diocesan constitutional changes, canons or other actions. A diocese within The Episcopal Church, as opposed to one applying to join, has unconstrained authority in terms of its own constitution and canons. This is not merely an inference from silence, but an authority that is expressly granted. See, e.g., Article II (diocese selects bishop “agreeably to rules prescribed by the Convention of that Diocese.”)

Admission of New Dioceses

Leaving aside the simple historical fact that the General Convention had nothing whatsoever to do with the creation of the founding dioceses — it was the dioceses that created the General Convention and not vice versa — the General Convention does play a role in the admission of new dioceses. There is considerable misunderstanding about this process, so the procedure must be examined carefully. It should be noted at the outset that the relevant constitutional provision, Article V, is captioned “Admission of New Dioceses” not “Creation of New Dioceses.” This reflects the language, already noted, in Article I that dioceses are “admitted” to union with General Convention. Those who continue to claim that dioceses are “created” by General Convention ignore the legal precision of Article V.

The first sentence of that Article specifies General Convention’s role in this process. It is to give “consent.” This wording indicates at the outset that the role of General Convention is secondary, not primary. It consents to actions initiated elsewhere. The subsequent sentences in Article V specify the process by which dioceses are admitted to The Episcopal Church. The proceedings “originate” with a convention of “the unorganized area,” not with General Convention. It is the unorganized area that “duly adopts” its own constitution. Article V then describes the legal entity created by the duly adopted constitution not, as before, as an “unorganized area,” but as a “diocese.” Then the “new diocese” submits its constitution to the General Convention for consent; and upon receipt of this consent, it enters into “union with the General Convention.”

In this articulation of the steps involved in the creation of a new diocese, Article V reflects the civil law. When an unorganized area adopts its own constitution, it is by definition no longer “unorganized.” It is a legal entity. In the terminology of Article V, this entity is called a “new

diocese." This step, furthermore, occurs before the constitutional involvement of General Convention. What happens when the "new diocese" obtains the consent of General Convention to its application is that it is "admitted" into union with the other dioceses in General Convention. The transformation from "unorganized area" to "new diocese" occurs when the diocesan constitution is duly adopted. When General Convention gives its consent, another change occurs, but it is not the creation of a "new diocese." It is the acceptance of an unaffiliated "new diocese" as a member diocese of General Convention.

The logic of this process can be grasped by a hypothetical case. Suppose an unorganized area holds its convention and duly adopts a constitution. Suppose further that before applying to The Episcopal Church for admission to General Convention it votes at its convention to apply not to The Episcopal Church but to another province of the Anglican Communion. By definition, the General Convention has yet to give consent and admit the new diocese. Nevertheless, the diocese is fully constituted by adopting its own constitution and so legally capable of acting on its own behalf. This can be seen by reading carefully the provisions of Article V and recognizing that this article reflects the operation of the civil law on the creation of religious societies and voluntary associations.

To summarize the conclusions of this section, the following are fundamental features of the governance and structure of The Episcopal Church:

- The state churches were independent legal entities prior to their organization of The Episcopal Church.
- New dioceses organized now are duly constituted entities with distinct legal personalities prior to admission to The Episcopal Church.
- Dioceses retain their distinct legal personalities as defined by their constitutions when they join The Episcopal Church.
- The constituent members of General Convention are its dioceses; it is the dioceses that are "represented" and vote as equals.
- The most important matters decided at General Convention, amendments to the Constitution and Book of Common Prayer are referred to the diocesan conventions for consideration prior to action by General Convention and the final vote is taken at General Convention by diocese.

III

Dioceses Are Not Subordinate to a Metropolitan or Central Hierarchy

We are now in a position to address the nature of authority in The Episcopal Church. Because this material is complex and some of the conclusions may seem surprising, we will proceed by looking first at the actual language used in the Constitution. We will then place that language in three contexts that help illuminate it: the historical circumstances in which the governance of The Episcopal Church was created; the principle of subsidiarity, which was invoked by our founders and has long been recognized as a key feature of Anglican polity; and the governing instruments of other churches that have the central hierarchical language and structures that our Church lacks. We will then conclude with a review of the factors demonstrating the lack of such structures and the autonomy of dioceses in The Episcopal Church.

The Language Used in the Constitution

As what we have said above indicates, The Episcopal Church is comprised of member dioceses that join together to create various central bodies and offices, including a General Convention, Executive Council and Presiding Bishop. What is not defined in our Constitution is any legal or hierarchical relationship among these various bodies. Indeed, a recent legal analysis of our Constitution and history has shown that the Constitution is devoid of the legal terminology used to express hierarchies in legal documents. On the one hand, a General Convention is created and given legislative authority to enact general canons, but the preexistent diocesan conventions are also recognized as having legislative authority and there is no provision making the General Convention "supreme" or "highest" or providing that general canons supersede diocesan ones. Indeed, none of the following terms routinely used in legal documents to indicate hierarchical priority is found at all in our Constitution: "supreme"; "supremacy"; "highest"; "hierarchical"; "subordinate"; "sole"; "preempt"; "final"; and "contrary". Other terms used to indicate hierarchical relationships, including "exclusive", "subject to", "consent", "notwithstanding", and "inconsistent" are found in the Constitution, but they are not used to indicate a central hierarchy. This is often assumed and is even alleged in civil cases instituted in the name of The Episcopal Church by the Presiding Bishop and her chancellor, but there are no provisions to this effect in our Constitution as a simple search with any search engine will demonstrate. The only instance that is even debatable is the use of the term "consent" in Article V governing the admission of new dioceses, but as we have already discussed that consent is to a process initiated and controlled by the diocese, whose own consent is thereby presumed.

This lack of hierarchical concepts in the Constitution confirms the traditional understanding of our structure that already has been quoted from the official commentary: The Episcopal Church is a federation (or confederation) of independent, or better, autonomous, dioceses. We will not revisit the work that has already been done on this topic, but we will now review three factors that reinforce this understanding of our polity.

The Historical Context in which The Episcopal Church Was Organized

Understanding our structures of governance requires familiarity with the historical context in which The Episcopal Church was organized. Two features of this context are paramount: first, The Episcopal Church was organized and its Constitution adopted just as the American states were changing their form of government from that of a "league of friendship" of sovereign and independent states under the Articles of Confederation to the hierarchically-structured federal form of government specified in the United States Constitution; and second, the fact that by virtue of the American Revolution the churches in the United States were necessarily forced to change the fundamental governance they had previously experienced as part of the Church of England, the Supreme Governor of which was the British monarch.

On the first point it is necessary to recognize that two of the most active participants in the General Conventions that organized The Episcopal Church and drafted its first Constitution were two men, James Duane and John Jay, noted to this day among legal scholars for their

roles in developing the jurisprudence of hierarchy used in the United States Constitution. Duane was a signatory to the Articles of Confederation on behalf of New York and was the mayor and first federal judge in New York. Sitting as judge in 1784, Duane ruled in a well-known case still studied by legal scholars that the lack of a routine technical term indicating hierarchical priority substantially eviscerated a New York statute purporting to nullify part of the peace treaty ending the Revolutionary War. Six weeks later Duane was a delegate to the first interstate convention that established the fundamental principles of what was to become the Constitution of the Episcopal Church. The first of these principles was the very language, that "there be a general convention," that remains to this day the only specification of the authority of General Convention. Duane was again a delegate to the General Convention in 1785, one of only two from New York, and served on the committee that drafted the first Constitution. That Constitution, the key language of which remains virtually unchanged in the current Constitution, contained no language giving hierarchical priority to the General Convention. Duane was also made a member of the executive committee selected to correspond with the churches in the United States and the Archbishop of Canterbury to obtain consecrations for American bishops. He was once again a delegate to the 1786 Convention.

John Jay was the United States Secretary for Foreign Affairs during the Confederation and was later the first Chief Justice of the United States Supreme Court. He is also known among legal scholars for his work in drafting the hierarchical legal language that resolved the treaty nullification controversy with Great Britain and that became the prototype for the Supremacy Clause in the United States Constitution, the primary provision establishing the hierarchy of the federal government in our federal system. Right in the middle of his work on the treaty controversy, Jay was a delegate to the General Convention in June 1786. It was this Convention that amended and then approved the Constitution drafted the year before containing no language giving hierarchical priority to the General Convention or any central body. Although Jay arrived late, after the Constitution had been approved, he had to have been aware of the terms of the Constitution since the draft was a primary item on the agenda. After his arrival, Jay took a leading role in drafting a key letter to the Archbishop of Canterbury from the Convention. He did not attend the adjourned session of the Convention in October 1786, undoubtedly because it occurred just as he was delivering his report to Congress with his proposed solution to the treaty crisis, including the resolutions containing the legal language that would later be incorporated into the Supremacy Clause of the United States Constitution. It is inconceivable that these two knowledgeable lawyers, known to this day for their role in developing our jurisprudence concerning legal hierarchies, would have inadvertently drafted a Constitution devoid of hierarchical language.

One distinctive feature of our Constitution is its use of an unusual technical term from international law, "acceding," to describe the act of dioceses' accepting the Constitution. It is the term used in international law to describe a sovereign state's becoming a party to a treaty already signed by others, a treaty being a compact among sovereign and independent states. "Acceding" was the term used in the Articles of Confederation, which established a "league of friendship" of states retaining their "sovereignty, freedom and independence." The term "acceding" is not used in the United States Constitution, which established a hierarchical central government. This use of treaty language could not have been accidental. James Duane was a signatory to the Articles of Confederation; John Jay, besides being the nation's Foreign Secretary and Chief Justice, negotiated the second treaty with Great Britain, known to this day as the "Jay Treaty." These men clearly knew what the term "acceding" signified.

Indeed, there is conclusive proof that this omission of a central hierarchy was intentional, not inadvertent. The primary imperative driving the Anglican churches in America to break formally with the Church of England was the Oath of Supremacy that all prospective bishops and clergy were required to swear. It was the paradigm of legal language recognizing a hierarchical body: allegiance was pledged to the British monarch as the "only supreme governor" of the church. American clergy were both unwilling and unable to give this oath. One of the main tasks of the early General Conventions was to obtain the agreement of the Church of England bishops to consecrate American bishops without this oath. James Duane was on the committee that developed a plan to achieve this objective, and he was the one who presented it to the General Convention. He was one of six members on the committee designated to implement the plan, along with the first three prospective bishops, William White, Samuel Provoost and William Smith (Smith was never consecrated) and two other prominent lawyers, one a member of the Continental Congress and the other the mayor of Philadelphia. Between October 1785 and October 1786, no fewer than six letters were exchanged between the General Convention and the English bishops on this topic. Both Duane and Jay played major roles in drafting this correspondence. The agreement reached was that the Oaths of Supremacy and Allegiance to the monarch and the Oath of Due Obedience to the Archbishop would be replaced for American bishops by the recital "I do solemnly engage to conform to the doctrine and worship of the Protestant Episcopal Church..." Submission to a hierarchy, the monarch and the archbishop, was explicitly replaced not by submission to a different hierarchy, but by a pledge of doctrinal conformity. On this basis, after much negotiation as to what that doctrine really was, the British Parliament passed an act expressly exempting "for the time being" American bishops from these oaths. It surely is no coincidence that the Archbishop of Canterbury advised the General Convention of the new act of Parliament by letter dated July 4, 1786, precisely ten years after the Declaration of Independence.

Thus, the two primary legal influences on the structure of The Episcopal Church, the English Act of Supremacy and the United States constitutional framework, were of preeminent interest at precisely the time our Church was organized. None of the participants organizing our structures would have missed the significance of removing the hierarchy stipulated by English law. It was their primary objective. Nor could it have been accidental that just as the United States was creating a hierarchical federal government, with significant jurisprudential inspiration from the very people guiding the formation of The Episcopal Church, the young church elected not to include an explicit central hierarchy in its governance. And although our Constitution has been amended many times since its adoption, including several times since the major decisions of the Supreme Court on religious hierarchies in the 1970's, that original structure has never been changed.

The Principle of Subsidiarity

The principle of subsidiarity is crucial to understanding the relationship between dioceses and central bodies in The Episcopal Church and the effect of silence in our Constitution. It can be succinctly defined as follows: "Subsidiarity expresses a preference for governance at the most local level consistent with achieving government's stated purposes." It is the principle behind the Tenth Amendment to the United States Constitution and is fundamental to European law and Roman Catholic social teaching. And it is described by both the Windsor and Virginia Reports as a key strand of Anglican governance. Subsidiarity may be a principle applicable to hierarchical structures, in which case it is usually the subordinate body in favor of which the presumption for local governance operates. But it is also applicable to non-

hierarchical organizations as well as is shown by its importance in the Anglican Communion. The distinction drawn by subsidiarity, however, is between local and central, not between subordinate and supreme. The Windsor Report defines the principle as follows: "the principle that matters should be decided as close to the local level as possible."

Of particular relevance to the formation of The Episcopal Church is the fact that subsidiarity was also emphasized by Bishop White in The Case, was later adopted as a "fundamental principle" by the nascent Pennsylvania church in 1784, and through the influence of Bishop White and the Pennsylvania church guided The Episcopal Church as a whole. This fundamental principle was expressed as follows: "That no powers be delegated to a general ecclesiastical government, except such as cannot conveniently be exercised by the clergy and laity in their respective congregations." Especially important is the term "delegated." Powers are delegated by the local body to the central body, not vice-versa. This is an explicit statement that the reservoir of authority was to be in the local bodies, not the central one. Thus, such powers must be explicitly, not implicitly, delegated by the local body to the general body. In other words, this principle creates the presumption that silence indicates that the local body retains the power. To limit the authority of a local body, whether a parish or a diocese, an explicit prohibition must be stated.

Other Churches

We have seen that our Constitution does not create hierarchical central bodies or offices and that this was an intentional decision by our founders pursuant to the principle of subsidiarity they articulated at the very outset of our Church's organization. The difference between The Episcopal Church and the Church of England in this regard has already been noted, but equally instructive is a review of the governing instruments of other churches that do have such central hierarchies. Here one sees readily the language, structures and mechanisms of hierarchy that are not found in our Constitution.

For example, the concepts of hierarchy, i.e., the operative legal terms indicating supremacy, subordination, preemption and finality, are clearly articulated in the code of canon law of the Roman Catholic Church. In the chapter entitled "The Hierarchical Constitution of the Church," Section I, "The Supreme Authority of the Church," Article 1, "The Roman Pontiff," are the following:

Can. 331 The bishop of the Roman Church, in whom continues the office given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ, and the pastor of the universal Church on earth. **By virtue of his office he possesses supreme, full, immediate, and universal ordinary power in the Church, which he is always able to exercise freely.**

Can. 333 §1. **By virtue of his office, the Roman Pontiff not only possesses power over the universal Church but also obtains the primacy of ordinary power over all particular churches and groups of them.** Moreover, this primacy strengthens and protects the proper, ordinary, and immediate power which bishops possess in the particular churches entrusted to their care.

§2. In fulfilling the office of supreme pastor of the Church, the Roman Pontiff is always joined in communion with the other bishops and with the universal Church. He nevertheless has the right, according to the needs of the Church, to determine the manner, whether personal or collegial, of exercising this office.

§3. **No appeal or recourse is permitted against a sentence or decree of the Roman Pontiff.**

Dioceses are known as particular churches in Catholic canon law. Canon 373 specifies how they are created: "It is only for the supreme authority to erect particular churches; those legitimately erected possess juridic personality by the law itself." Unlike the dioceses of The Episcopal Church, which are duly organized before admission to our Church, Roman Catholic dioceses are created by the pontiff and have no legal personality until after they are created.

Canon 377 specifies how bishops are chosen: "The Supreme Pontiff freely appoints bishops or confirms those legitimately elected." Diocesan bishops possess ordinary power over their dioceses, subject to decrees of the supreme pontiff who has full ordinary power over all particular churches. The people of God in the dioceses are in sacramental communion with their diocesan bishop, who himself is in "hierarchical communion" with the "Supreme Pontiff."

To take another example, the polity of the Serbian Orthodox Church is of paramount legal significance because it has been the subject of the most extensive analysis to date of religious hierarchies by the United States Supreme Court. Like the Roman Catholic Church, the Serbian Orthodox Church expresses its governance in unambiguous hierarchical language. Unlike the Catholic hierarchy, however, Serbian supremacy resides in a body not an individual. The highest legislative, judicial, ecclesiastical, and administrative authority of the Serbian Church is the Holy Assembly of Bishops, a body composed of all diocesan bishops presided over by its patriarch. An executive body, the Holy Synod of Bishops, consists of the Patriarch and four bishops selected by the Holy Assembly. The hierarchical structure is indicated by the following provisions of its constitution:

The Holy Assembly of Bishops, as the **highest hierarchical body**, is legislative authority in the matters of faith, officiation, church order (discipline) and internal organization of the Church, as well as the **highest church juridical authority** within its jurisdiction.

All the decisions of the Holy Assembly of Bishops and of the Holy Synod of Bishops of canonical and church nature, in regard to faith, officiation, church order and internal organization of the church, are **valid and final**.

[The church's] main administrative division is composed of dioceses, both in regard to church hierarchical and church

administrative aspect... Decisions of establishing, naming, liquidating, reorganizing, and the seat of the dioceses, and establishing or eliminating of position of vicar bishops, is decided upon by the [Holy Assembly], in agreement with the Patriarchal Council.

These provisions in the Serbian Orthodox constitution led the Supreme Court to conclude that the Holy Assembly of Bishops was the central hierarchy in that church. It is clearly designated as "the highest hierarchical body," its decisions are "final," its dioceses are "administrative division[s]," and they and their bishops exist and serve at the pleasure of the Holy Assembly. In addition, as we discuss below, the bishops swear an "Episcopal-Hierarchical Oath" of "perpetual obedience" to the hierarchical body, the Holy Assembly.

Similarly, the constitution of the Evangelical Lutheran Church in America specifies a clearly identified hierarchy:

The Churchwide Assembly shall be the **highest legislative authority of the churchwide organization** and shall deal with all matters which are necessary in pursuit of the purposes and functions of this church. The powers of the Churchwide Assembly are limited only by the provisions of the Articles of Incorporation, this constitution and bylaws, and the assembly's own resolutions.

The Evangelical Lutheran Church's constitution also contains explicit provisions giving its constituent synods only such powers as are conferred by the general canons and bodies and requiring that synod enactments be consistent with decisions of the general body and that prior ratification by the general body of synod constitutional amendments be given before the amendments take effect.

Likewise, the constitution of the Presbyterian Church USA indicates unequivocally the hierarchical relationship of its bodies:

The General Assembly is the highest governing body of this church and is representative of the unity of the synods, presbyteries, sessions, and congregations of the Presbyterian Church (U.S.A.).

The General Assembly is also given the explicit power "to provide authoritative interpretation of the Book of Order which shall be binding on the governing bodies of the church..."

Finally, the governing instrument of the United Methodist Church gives its highest legislative body, its General Conference, the express authority to define the powers and duties both of its regional and local conferences and of its bishops. The United Methodist Church has a Judicial Council with the authority in specified instances to determine the constitutionality and legality of actions taken by the General Conference and lower conferences. It is the final arbiter of all matters within its jurisdiction: "All decisions of the Judicial Council **shall be final.**"

The Episcopal Church Lacks the Structures and Mechanisms of Central Hierarchical Control

What this survey of other church's governing instruments shows quite plainly is not only that our Constitution lacks the relevant hierarchical terminology seen at a glance in these other constitutions, but also that the general bodies in The Episcopal Church lack the mechanisms by which hierarchical authority is exercised.

- The Constitution lacks any language making General Convention the "supreme" or "highest" authority, making its decisions "final" or making dioceses "subordinate" to any other office or body.
- The Episcopal Church lacks any metropolitan or archbishop with authority over its diocesan bishops. To the contrary, the episcopal authority of the diocesan bishop and diocese is given explicit constitutional protection.
- Our episcopal vows contain no reference to a hierarchy, but only a pledge of conformity to the doctrine, discipline and worship of The Episcopal Church. This stands in marked contrast to churches with central hierarchies, including the Church of England, the Roman Catholic Church and the Serbian Orthodox Church, which have explicit "hierarchical oaths" by which allegiance is sworn to the hierarchical body.
- General bodies play no substantive role in the selection of bishops or in giving consents. Consents are given by dioceses. Even when occurring close to General Convention, consents are given by the diocesan bishop and delegations, not the House of Bishops or the House of Deputies collectively.
- Church discipline is handled almost exclusively at the diocesan level. Even in the case of bishops it is handled by ad hoc courts, not by the general bodies.
- Dioceses are not created, extinguished or combined by General Convention as administrative districts of a hierarchically-controlled general church. The creation of a diocese "originates" in the diocese, which after being duly constituted is "admitted" to union with General Convention.
- The general bodies of The Episcopal Church have no right of prior review or authority to approve the actions of diocesan conventions, including in particular changes to the dioceses' governing instruments. The lack of a right of prior review and approval clearly establishes General Convention's lack of hierarchical authority. One fundamental characteristic shared by hierarchical churches is the prior review and approval by the hierarchy of the subordinate body's actions. This is a key mechanism of hierarchical control.

The autonomy of our dioceses has long been recognized as an essential feature of the polity of our Church. For example, in the volume on the polity of The Episcopal Church included in the widely-distributed series in the 1950s and 1960s entitled "The Church's Teaching," written by the long-time professor of church history at the General Theological Seminary with the assistance of an "Authors' Committee" composed of professors, leading rectors and a bishop of the Church, the author, Dr. Powell Dawley summarized the role of the diocese as follows:

Diocesan participation in any national program or effort, for example, must be voluntarily given; it cannot be forced. Again, while the bishop's exercise of independent power within the diocese is restricted by the share in church government possessed

by the Diocesan Convention or the Standing Committee, his independence in respect to the rest of the Church is almost complete.

This autonomy was again confirmed as recently as February 2009 by the ecclesiastical court deposing Charles Bennison as Bishop of Pennsylvania. In the Bennison case, the Diocese of Los Angeles refused to cooperate with the court and to produce documents that had been requested not only by the parties, but also by a representative of the Presiding Bishop and even the court itself. The court concluded that it had no authority to compel the diocese to comply: "Unfortunately, the diocese refused all of those requests and the Court had no ability to obtain those documents.... Rather, the Diocese of Los Angeles, a wholly autonomous entity which is not a party to these proceedings, chose not to produce the documents notwithstanding entreaties from the Court."

We agree with the conclusion of the court in the Bennison decision that dioceses are autonomous under our Constitution and are not subject to hierarchical control by central bodies, whether they be the Presiding Bishop, the General Convention, the Executive Council or the courts of The Episcopal Church. Our dioceses work together as a matter of comity in fellowship and communion, but legally we remain autonomous bodies with distinct legal personalities.

IV

The Nature of Our Vows

The charge is frequently made that those who reject the understanding of our polity now being asserted by the Presiding Bishop, most recently in a civil lawsuit in Pittsburgh, have violated their ordination vows to uphold the doctrine and discipline of The Episcopal Church. We regard these sacred vows as inviolable and therefore take this allegation with the utmost seriousness. We begin by emphasizing the full extent of the vows, not often noted, that we made at our episcopal consecrations:

In the Name of the Father, and of the Son, and of the Holy Spirit, I, N.N., chosen Bishop of the Church in N., solemnly declare that 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.

We reaffirm these vows without reservation.

The engagement we made and reaffirm is to conform to the "doctrine, discipline and worship" of The Episcopal Church. The objection that those who do not accept the interpretation of that "discipline" (polity) proposed by the Presiding Bishop are in violation of their episcopal vows is mere question begging. The objectors assume without argument that the discipline of our Church is such that anyone with a different understanding is in violation of that discipline. But this is to assert what must be proved. What the discipline of The Episcopal Church requires is precisely the question at issue. It is the Presiding Bishop's interpretation that is novel and it is not less so for being advocated in civil court.

In this context, we must again emphasize that our vows contain no pledge of obedience to a metropolitan or central hierarchy as is explicit in the episcopal oaths taken in churches that have such hierarchies. For example, Serbian Orthodox bishops swear an "Episcopal-Hierarchical Oath" that they will "always be obedient to the Most Holy Assembly," the very body identified in that church's constitution as "the highest hierarchical body." Similarly, Roman Catholic bishops are required to answer in the affirmative the following questions:

Are you resolved to build up the Church as the body of Christ and to remain united to it within the order of bishops under the authority of the successor of the apostle Peter? Are you resolved to be faithful in your obedience to the successor of the apostle Peter?

A Bishop in the Church of England is required by canon law not only to swear an oath of allegiance to the monarch as already noted, but also to take "the oath of due obedience to the archbishop and to the metropolitan Church of the province wherein he is to exercise the episcopal office." This oath is as follows:

In the Name of God, Amen. I, N., chosen Bishop of the Church and See of N. do profess and promise all due reverence and obedience to the Archbishop and to the Metropolitan Church of N. and to their Successors: So help me God, through Jesus Christ.

Indeed, our consecration vows in The Episcopal Church, often called the "Declaration of Conformity," resemble only the third part of the Church of England consecration vows, the Declaration of Assent:

Archbishop: In the declaration you are about to make, will you affirm your loyalty to this inheritance of faith as your inspiration and guidance under God in bringing the grace and truth of Christ to this generation and making Him known to those in your care?

Ordinand: I, AB, do so affirm, and accordingly declare my belief in the faith which is revealed in the Holy Scriptures and set forth in the catholic creeds and to which the historic formularies of the Church of England bear witness; and in public prayer and administration of the sacraments, I will use only the forms of service which are authorized or allowed by Canon.

This Declaration by itself, absent the hierarchical oaths to the sovereign and metropolitan authorities, resembles that of the profession traditionally made by a bishop upon his election to the See of Rome:

I will firmly believe and hold the catholic faith, according to the tradition of the apostles, of general councils and of other holy fathers, especially of the eight holy universal councils ... as well as of the general councils... and to preserve intact this faith unchanged to the last dot, and to defend and preach it to the point of death and the shedding of my blood, and likewise to follow and observe in every way the rite handed down of the ecclesiastical sacraments of the church.

No longer subject to another hierarchical authority the newly-elected pope declares only his doctrinal assent and conformity.

We also have been given our apostolic office in trust. When the American churches requested that the Church of England bestow the Historic Episcopate on our developing church, nineteen Bishops of the Church of England stated in reply that

we cannot but be extremely cautious, lest we should be the instruments of establishing an Ecclesiastical system which will be called a branch of the Church of England, but afterwards may possibly appear to have departed from it essentially, either in doctrine or in discipline.

Indeed, we received the Episcopate only after a special enactment of the British Parliament exempted our Bishops from "the oaths of allegiance and supremacy, and the oath of due obedience to the Archbishop for the time being," accepting our vows of conformity in substitution, and after our state churches passed an "Act of General Convention" "declaring their steadfast resolution to maintain the same essential Articles of Faith and discipline with the Church of England."

Our episcopal vows contain no pledge of obedience to a higher office or body, as do churches with metropolitanical hierarchies, but we do hold our apostolic office in trust. We understand our vow to require conformity to the doctrine and worship we hold in trust and to the discipline of The Episcopal Church as set forth in this statement. We intend to remain faithful to that sacred undertaking.

V

Maintaining Constituent Membership in the Anglican Communion Is Our Constitutional Right

Not only is the diocese the fundamental unit of The Episcopal Church, it is also the fundamental unit in catholic ecclesiology by which the people of God in the particular or local churches relate to the wider communion. In a 2007 communication sent by the Archbishop of Canterbury to Bishop Howe, the Archbishop emphasized this point:

The organ of union with the wider Church is the Bishop and the Diocese rather than the Provincial structure as such.... I should feel a great deal happier, I must say, if those who are most eloquent for a traditionalist view in the United States showed a fuller understanding of the need to regard the Bishop and the Diocese as the primary locus of ecclesial identity rather than the abstract reality of the 'national church'.

We are committed to remaining faithful members of The Episcopal Church and the Anglican Communion. We have noted with increasing concern statements by leaders and bodies of The Episcopal Church questioning our participation in the proposed Anglican covenant and opining that dioceses may not sign the covenant if The Episcopal Church as a whole were to refrain from doing so on behalf of all its dioceses.

The preamble to our Constitution identifies continuing constituent membership in the Anglican Communion as one of the fundamental conditions on which our governing agreement is based. The failure to maintain that membership would plunge The Episcopal Church into a constitutional crisis. It is an elementary principle of law that agreements can be terminated in the event of material breach or repudiation by another party or by fundamental changes of circumstances. The application of this principle depends in part on the intentions of the parties to the agreement. It is, among other things, to the preambles of agreements that courts may look to discern what the parties themselves considered material or fundamental. In this regard, it is significant that the preamble to our Constitution makes only two points: (1) that The Episcopal Church is a "constituent member of the Anglican Communion, a Fellowship within the One, Holy, Catholic, and Apostolic Church, of those duly constituted Dioceses, Provinces, and regional Churches in communion with the See of Canterbury"; and (2) that the constitution "sets forth the basic articles of government of this Church."

Given that representatives of over half the active membership in the Anglican Communion have declared that they no longer recognize The Episcopal Church, the circumstances specified in the preamble already have fundamentally changed in that our Church no longer remains in fellowship with a significant number of the "dioceses, provinces and regional churches" identified in our own Constitution. Failure to sign the proposed covenant would be decisive in this respect. And were The Episcopal Church to attempt to change its constitutional governance to restrict diocesan autonomy, particularly in the case of an Anglican covenant, it would constitute a material breach or repudiation of its "basic" governing agreement.

We must speak plainly here. Any attempt to prevent willing dioceses from signing the covenant would be unconstitutional and thereby void.

VI

Conclusion

We have found it necessary to address these issues as a matter of faithfulness to our apostolic vocation and our Constitution. The traditional doctrine and worship and the historic polity of the Church are in grave peril. For this reason, we emphasize that The Episcopal Church consists of autonomous, but interdependent, dioceses not subject to any metropolitanical power or hierarchical control. The Ecclesiastical Authorities in our dioceses are the Bishops and Standing Committees; no one else may act in or speak on behalf of the dioceses or of The

Episcopal Church within the dioceses. We intend to exercise our episcopal authority to remain constituent members of the Anglican Communion and will continue to speak out on these issues as necessary.

April 18, 2009

The Right Reverend James M. Adams, Jr.
Bishop of Western Kansas

The Right Reverend Peter H. Beckwith
Bishop of Springfield

The Right Reverend William C. Frey
Assisting Bishop of Rio Grande; Retired Bishop of Colorado

The Right Reverend Alden M. Hathaway
Retired Bishop of Pittsburgh

The Right Reverend John W. Howe
Bishop of Central Florida

The Right Reverend Russell E. Jacobus
Bishop of Fond du Lac

The Right Reverend Paul E. Lambert
Bishop Suffragan of Dallas

The Right Reverend Mark J. Lawrence
Bishop of South Carolina

The Right Reverend Edward S. Little II
Bishop of Northern Indiana

The Right Reverend William H. Love
Bishop of Albany

The Right Reverend D. Bruce MacPherson
Bishop of Western Louisiana

The Right Reverend Edward L. Salmon, Jr.
Retired Bishop of South Carolina

The Right Reverend Michael G. Smith
Bishop of North Dakota

The Right Reverend James M. Stanton
Bishop of Dallas

The Right Reverend Don A. Wimberly
Bishop of Texas

Also Endorsed By:

The Reverend Canon Professor Christopher Seitz
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