TITLE IV AND THE CONSTITUTION:

DIOCESES' EXCLUSIVE AUTHORITY FOR CLERGY DISCIPLINE

By
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In our previous papers we have shown that the new Title IV is unconstitutional in two key respects: it usurps the exclusive constitutional authority given to dioceses for the trial of priests and deacons and it gives the Presiding Bishop unprecedented and unconstitutional authority over diocesan bishops. These conclusions continue to be disputed, both publicly and privately, by those primarily responsible for drafting the revised Title IV even as these issues are under review by others throughout the church. Given the purposes of our previous papers, we have presented only the highlights of the extensive historical analysis that supports our conclusions. In light of the continued defense of the constitutionality of these revisions, however, we think it is important to present the full analysis. We begin with this review of the historical background of Article IX of the Constitution, the article that commits clergy discipline to the exclusive authority of the dioceses. We submit that this review demonstrates conclusively that Title IV as enacted is unconstitutional.[1]

1789: All Disciplinary Authority Reserved to Dioceses for Bishops, Presbyters and Deacons

We start at the beginning with the article on discipline in TEC's first Constitution, adopted in 1789:

> In every State, the mode of trying Clergymen shall be instituted by the convention of the Church therein. At every trial of a Bishop there shall be one or more of the Episcopal Order present: and none but a Bishop shall pronounce sentence of deposition or

[1] We have already addressed in detail the extent to which the revised Title IV purports to give unconstitutional metropolitical authority to the Presiding Bishop. C. Alan Runyan and Mark McCall, "Title IV Revisions: Unmasked," Anglican Communion Institute, September 2010 http://www.anglicancommunioninstitute.com/2010/09/title-iv-revisions-unmasked/ ; "Title IV Revisions Unmasked: Reply to Our Critics," Anglican Communion Institute, February 2011 http://www.anglicancommunioninstitute.com/wp-content/uploads/2011/02/title_iv_reply.pdf

degradation from the Ministry on any Clergyman, whether Bishop, or Presbyter, or Deacon.[2]

The second sentence of this article, then Article VI, was added at the request of the Archbishops of Canterbury and York to conform to ancient understandings of the nature of the episcopal office.[3] For present purposes, however, it is the first sentence that is important: authority for the discipline of all three orders of clergy, bishops, presbyters and deacons, was vested at the outset in the diocesan convention subject only to the condition that the diocese arrange to have a bishop pronounce the sentence.

1841: Authority to Try Bishops Transferred to General Convention

The only substantive amendment to the disciplinary article in the nineteenth century came in 1841 when authority to provide for the trial of bishops was removed from the dioceses and given to General Convention. As amended, Article VI then read:

> The **mode of trying** Bishops **shall** be provided by the General Convention. The Court appointed for that purpose, shall be composed of Bishops only. In every Diocese, the **mode of trying** Presbyters and Deacons, **may** be instituted by the Convention of the Diocese. None but a Bishop shall pronounce sentence of admonition, suspension or degradation from the Ministry, on any Clergyman, whether Bishop, Presbyter or Deacon.[4]

Note that the terminology used to specify the authority of both General Convention and the diocesan conventions in their respective spheres is the same: providing or instituting the "mode of trying." There were no courts of appeals at this stage, so only trial courts were in view. The only difference in terminology was the use of the mandatory "shall" for General Convention's authority and the permissive "may" for that of the dioceses, which was a change from the use of "shall" in the original provision in 1789. The significance of this change was debated later in the

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[2] Journals of General Conventions of the Protestant Episcopal Church, William Stevens Perry, ed., Claremont, N.H.: The Claremont Mfg. Co. (1874) I:100 [citations to "JGC" are to the Perry edition; references to General Conventions after 1835 are to the individual journals and are cited "[year] JGC"].

[3] JGC 22, 53; White & Dykman, Annotated Constitution and Canons (1981) I: 119.

[4] The authority transferred to General Convention in respect of bishops was the authority to conduct trials (interpreted at the time to include appeals from trials). It did not include the creation of any metropolitical authority over bishops or authority to instruct or discipline before or independent of trials.
Here and throughout we use emphasis to highlight terms that are important in the analysis. Unless indicated otherwise, the emphasis in each case is ours.

nineteenth century, but it was ultimately viewed as inconsequential. We will return to this point below.

1853-1892: Unsuccessful Attempts to Transfer to General Convention Authority to Try Presbyters and Deacons

Starting in 1853 there were repeated attempts to transfer to General Convention authority for the trial of clergy other than bishops in order to establish a uniform system of justice throughout the church. That year the General Convention passed the first reading of a constitutional amendment that would have revised Article VI as follows—italics in the original journal to indicate the changes:

> The mode of trying Bishops shall be provided by the General Convention. The Court appointed for that purpose, shall be composed of Bishops only. In every Diocese, the mode of trying Presbyters and Deacons may be instituted by the Convention of the Diocese *until the General Convention shall provide a uniform mode of trial*. None but a Bishop shall pronounce sentence of admonition, suspension, or degradation from the ministry, on any clergyman, whether Bishop, Presbyter, or Deacon.[5]

Note that the authority to be transferred to General Convention was expressed in the same terminology as that previously vested in the diocesan conventions: authority to establish the "mode of trial," but that the stronger "shall" was used to specify General Convention's superseding authority in the proposed change. In anticipation of approval of this amendment, the 1853 General Convention asked a joint committee from the two houses to prepare canons implementing the new authority, which were submitted to the General Convention in 1856.[6] But the drafting of implementing canons was premature. The proposed amendment was rejected on its second reading in 1856 by both houses, including by a two to one margin in the House of Bishops.[7]

This was only the first, however, of many attempts over the next forty years—all unsuccessful—by a minority in the House of Deputies to create a uniform judicial system under the authority of the General Convention. For example, in 1874 it was proposed to require by general canon that clergy could only be convicted for teaching an erroneous doctrine on the vote of two thirds of the trial court. The committee to which this proposal was referred concluded that it was within the

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[5] 1853 JGC unnumbered prefatory page.

[6] 1853 JGC 100–101, 107, 141, 229; 1856 JGC 306ff.

[7] 1856 JGC 38, 163–64.

authority of General Convention only with respect to bishops but unconstitutional with respect to other clergy:

> But it will be perceived that in the case of the trial of a Presbyter or Deacon for teaching erroneous or false doctrine, or for any other offence, the case is wholly different.
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> The General Convention has no jurisdiction whatever in the latter case. The Constitution has expressly committed the trial of Presbyters and Deacons for any and all offences to the exclusive jurisdiction of the separate Dioceses. They are clothed with full and exclusive power of prescribing the court and the manner and the mode of the trial of Presbyters and Deacons, and there is no limitation in the Constitution upon the power of any Dioceses, in determining what number of the persons constituting the Court shall be necessary for the conviction of a Presbyter or a Deacon.[8]

In 1889 another attempt was made to transfer authority for the trial of other clergy to General Convention. The report of a special "Committee on the Judicial System of the Church" described the constitutional allocation of authority and the options:

> At the last General Convention, a Joint Select Committee on the Judicial System of the Church were unanimously of opinion that a change in that system is desirable. This opinion was approved by the House of Deputies, apparently without a dissenting voice, and is concurred in by every member of the present Committee.
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> Starting then from this well established position, we find that only two modes have been suggested for obtaining that relief of which all seem to admit the necessity. One is that the General Convention recommend to the Dioceses, for adoption by them, a Canon for the trial of Clergymen, making provision both for Courts of First Instance and for Courts of Appeal. The other is that the General Convention change Article 6 of the Constitution, and then enact a uniform Canon for the whole Church.[9]

The special committee recommended the second mode of amending the constitution. It then identified two further options:

> As to the proper form which this change should take, two plans have had their respective advocates: One, that the change be restrictive, so that the General Convention have power to establish only Courts of Appeal, without interfering with the present mode of trial in Courts of First Instance instituted by the respective Dioceses; the other, that the change

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[8] Debates of the House of Deputies, Hartford: M. H. Mallory, (1874) 269 [hereafter "1874 Debates"].

[9] 1889 JGC 245.

> be unrestrictive, so that the General Convention may either establish Courts of Appeal only, or if that be found impracticable or ineffective, it may establish a uniform and complete system throughout all the Dioceses.[10]

The special committee recommended the "unrestrictive" option and proposed a constitutional amendment virtually identical to that rejected in 1856: adding a qualification to the authority vested in dioceses through the proviso "until the General Convention shall otherwise provide."[11] The special committee also produced proposed canons to implement their constitutional amendment. When these proposals were considered by the House of Deputies, however, they were rejected.[12]

1856-1892: Unsuccessful Attempts to Give General Convention Authority to Establish Courts of Appeals

Parallel to the attempts to transfer all authority over the disciplinary trials of other clergy to the General Convention were repeated unsuccessful efforts to create authority in General Convention to provide for appeals from diocesan trial courts. The first such effort was made at the same convention in 1856 that decisively rejected the transfer of broader authority. That convention passed the first reading of a constitutional amendment that would have added to the provision concerning trials of other clergy the following:

> but the General Convention may establish a Court of Appeals for the revision of the Diocesan Courts; such Courts of Appeal not to revise the determination of any question of facts.[13]

This proposal was almost unanimously rejected on second reading in 1859.[14]

As White & Dykman note, however, the "advocates of an appellate jurisdiction were not easily discouraged."[15] Efforts to amend the Constitution were made at almost every General Convention for the remainder of the nineteenth century. In 1874, when there was an extended debate in the House of Deputies on the constitutionality of General Convention legislation on clergy discipline, its committee on the Constitution issued the following report:

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[10] 1889 JGC 246.

[11] 1889 JGC 248.

[12] 1889 JGC 292.

[13] 1856 JGC 122, 136-37.

[14] White & Dykman, Annotated Constitution and Canons (1954) I:109.

[15] White & Dykman, Annotated Constitution and Canons (1981) I:120.

> The judicial system of the Church as existing under that instrument [the Constitution] is simple and well defined, both as to its objects, extent, and jurisdiction. By the Sixth Article, where reference is had to Ecclesiastical Courts, trials, and sentences, it is declared that in *every Diocese* the modes of trying Presbyters and Deacons may be instituted by the Convention of the Diocese. Here is a jurisdiction and mode of trial designated, and this grant of power and the mode of exercise exclude its exercise in any other way. The language, 'every Diocese,' locates the jurisdiction. The term used, *trying,* indicates in the trial and its incidents a complete act. To these reasons may be cited the construction which has ever been given by the Church in somewhat analogous cases, leaving the Diocese perfectly free and independent to manage their own local affairs without any interference from the National Church. [Emphasis in the original.][16]

Both the committee and the House of Deputies as a whole rejected the proposed constitutional amendment.[17]

In 1889 following the defeat of the broader proposal to transfer authority for clergy discipline to General Convention, the special committee of the House of Deputies somewhat reluctantly proposed a constitutional amendment for the creation of courts of appeal after first concluding:

> That they are of opinion that the General Convention has no power to establish any Court of Appeals for the review of the judgments of Diocesan Courts, but that it is within the power of each Diocese to establish one or more Appellate Courts as it may deem expedient.[18]

This proposal was not considered by the 1889 convention, but referred to the next General Convention to meet in 1892.[19]

Conclusions of Nineteenth Century Commentators

It is clear from these reports by General Convention itself that the accepted analysis of the Constitution at the end of the nineteenth century was that dioceses had exclusive authority over the disciplinary trials of other clergy. This understanding of the Constitution was shared even by those who vigorously supported a constitutional amendment to authorize a uniform judicial system. And it was also shared by the three preeminent nineteenth century canonical commentators.

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[16] 1874 Debates 169.

[17] 1874 Debates 268, 358-59.

[18] 1889 JGC 298-99, 330, 362,

[19] 1889 JGC 385.

In 1841, Francis Hawks, the first of the great historians and canonical commentators, recognized that dioceses had exclusive authority for clergy disciplinary trials even though he thought that was unwise:

> We need two things: first, a uniform mode of proceeding in constituting courts, and conducting trials in the dioceses. This, as the constitution now stands, we cannot have, unless all the dioceses, by their several canons, adopt the same rules; and this is not to be expected. The General Convention cannot legislate on the subject, until the sixth article of the constitution is altered. Secondly, we need a court of appeals, with power authoritatively and finally, to settle the true interpretation of constitution and canons, *ut sit finis litium.*[20]

Similarly, Judge Murray Hoffman, the foremost advocate of an inherent authority for the General Convention, reached the same conclusion about the effect of the original constitution:

> Had the constitution of 1789 contained nothing respecting it, the right would have been vested in the General Convention, leaving the power in the diocese to legislate previous to an action by that body, but then superseding that power. But the several dioceses did in the constitution declare that the mode should be instituted by the particular conventions — thus, it must be admitted, excluding the General Convention from acting at all.[21]

Hoffman was the first to consider the argument that the change in 1841 from "shall" to "may" in specifying the authority of the dioceses might have opened the door to concurrent jurisdiction by General Convention over clergy discipline. Hoffman himself appeared to accept this possibility in his treatise in 1850, but later changed his mind.[22] This issue was debated vigorously at the 1874 General Convention, which as already noted decided conclusively that it did not have concurrent jurisdiction. Even the foremost advocate of concurrent jurisdiction in 1874, Hill Burgwin, later reversed his position.[23] We will consider this issue again in the context of the 1901 constitutional revisions.

Finally, writing in 1890, the greatest of the historian-commentators, Bishop William Stevens Perry, summarized the situation on church discipline at the end of the nineteenth century:

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[20] Francis L. Hawks, The Constitution and Canons of the Protestant Episcopal Church in the United States, New York: Swords, Stanford & Co. (1841), 57, reprinted in 1 Journal of Episcopal Church Canon Law 61-117 (2010) .

[21] Murray Hoffman, A Treatise on the Law of the Protestant Episcopal Church in the United States, New York: Stanford and Swords (1850) 165.

[22] 1874 Debates 56.

[23] Compare 1874Debates 56-59; 1889 JGC 245-48.

> We have in this Article the only provision in this Constitution relating to the Judiciary. It is evident from the history of the evolution of this Article as it now stands, or as it was adopted in 1789, that had the effort been made at first to remand this matter to the General Convention it would have lessened materially the chances of union. All that could at first be hoped for was the removal of the oppressive and derogatory provisions at first suggested, making the Bishop amenable to trial not by his peers, but by his priests and people assembled in Convention. The provision of a complete judicial system for the Church at large has been the dream of our canonists from the first. The labors of Hawks, Hoffman, and others distinguished for their accurate knowledge of canonical law and procedure, have again and again been directed towards securing uniformity of judicial proceeding and judicial decision. That this result is of no little importance to the peace and prosperity of the Church, may be admitted without discussion. That the most inefficient and defective part of our ecclesiastical system is the judiciary of the Church, cannot be denied; but the Church in General Convention has again and again stopped short on the threshold of instituting an appellate system, and it is doubtful, in view of the great principle of Diocesan independence, whether such a system can ever obtain. In this as in many other mooted questions, it may be better to bear the ills of which we are fully cognizant than fly to others of which we know little or nothing at all.[24]

Title IV Revisers Claim Constitutional Allocation of Authority "Profoundly Changed" in 1901

The defenders of the recent Title IV revisions acknowledge that from the inception in 1789 and throughout the nineteenth century the General Convention did not have constitutional authority to enact a uniform disciplinary canon for presbyters and deacons. They argue, however, that the constitutional allocation of authority was "profoundly changed" in 1901:

> The wording adopted in 1901, however, profoundly changed this Constitutional scheme. Instead of reserving to the several Dioceses the "mode" - the full range - of disciplinary activities, it very precisely prescribed that which is left to the Dioceses: the "institution" of the "Court" by which Priests or Deacons may be tried. No longer do the Dioceses have exclusive rights with respect to the full range of disciplinary activities; from and after 1901, the only part of those activities exclusively reserved to the Dioceses is the establishment of the Court before which trial, if there is to be one, is to be conducted. As

[24] William Stevens Perry, The General Ecclesiastical Constitution of the American Church, New York: Thomas Whittaker (1891) 267-68.

> a result of this change, General Convention is now constitutionally free to legislate in the area of clergy discipline.[25]

If the apparently minor wording change from "mode of trying instituted" to "tried by a court instituted" were the profound reversal of constitutional authority claimed by the revisers of Title IV, one would expect legislative history articulating that significance which would otherwise be obscure. The revisers cite none, only a common dictionary. One would also expect that White & Dykman, as a part of its discussion about the many rejected attempts that had been made to limit diocesan authority over the discipline of its clergy, would have noticed this "profound change" if it had been made. They did not because such a reading is simply wrong.[26]

In fact, the legislative history of the 1901 constitutional revision points conclusively in the other direction.

1892-1901: Revision of the Constitution

The General Convention in 1892 created a special "Joint Commission on the Revision of the Constitution and Canons" to consider a comprehensive revision to the Constitution to clarify, harmonize and adapt its provisions. It was to report to the next General Convention in 1895.[27]

Prior to the creation of the Joint Commission another proposal was introduced in the House of Deputies in 1892 to transfer authority for clergy discipline to the General Convention, but it was not acted on after the creation of the Joint Commission and was instead referred to that Commission.[28] The wording of this latest proposal is significant, however, in light of later developments. It would have added after the sentence allocating to the dioceses the authority to institute the "mode of trying" the following language:

> But Ecclesiastical **Courts for the trial** of presentments from any Diocese, with **provisions for appeals**, may be **established by the General Convention**; Provided, however, that no Presbyter or Deacon shall be put on trial before any such court except

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[25] Duncan A. Bayne, Stephen F. Hutchinson, and Joseph L. Delafield III, "Title IV: Constitutional Issues," Feb. 15, 2011, 3. http://www.titleiv.org/ As they note, the authors of this paper played a prominent role in drafting the revised Title IV.

[26] White & Dykman list the four "chief differences" made to Article IX by the convention of 1901. The interpretation advanced by the revisers of Title IV that a wording change "profoundly changed [the] Constitutional scheme" is not listed. Id. at I: 122.

[27] 1892 JGC 49-50, 77, 133, 144, 383.

[28] 1892 JGC 201, 282.

upon a presentment allowed by the Bishop of the Diocese in which such Presbyter is canonically resident.[29]

This proposal did not break new ground conceptually. Like other proposals repeatedly rejected over the previous four decades, it would have given General Convention authority over both trials and appeals. It did, however, present a new drafting concept: it used the language of "establishing a court" for both trial and appeals courts, thereby eliminating the difference between trial courts ("mode of trying") and appeals courts ("court established") that had been used before. However appropriate "mode of trying" was as legal language, "mode of appealing" was awkward and had never been proposed. When speaking of appeals courts, the language had always been the more natural "court established." Now when combining the two courts, trial and appeals, in one provision the obvious language was "court established." That this was not seen as a lesser authority than that of instituting "mode of trying" is manifest from the fact that the purpose of this proposal was to transfer authority **from** the dioceses **to** the General Convention.

Before considering the difficult process of revising the constitution that was ongoing between 1892 and 1901, it is important to summarize the constitutional authority for church discipline as it existed at the outset of that process. First, the authority of both General Convention (concerning bishops) and diocesan conventions (concerning other clergy) was expressed using the terminology of "mode of trying." Second, there was no constitutional provision for a court of appeals so there was no existing language expressing authority for appeals, i.e., no occasion yet to use an alternative formula to the awkward "mode of appealing." Third, an argument had been made, although ultimately rejected, that the use of the permissive "may" rather than the mandatory "shall" gave General Convention concurrent jurisdiction over diocesan clergy. Finally, over the preceding forty years there had been numerous unsuccessful attempts to expand General Convention's authority in this area. These took three primary forms: (i) giving General Convention authority over trials of other clergy by qualifying the diocesan authority though the addition "until General Convention shall provide a uniform mode of trial" or "until General Convention shall otherwise provide"; (ii) giving General Convention the authority to "establish" courts of appeals; and (iii) combining both of these in one formula by giving General Convention authority to "establish courts" for both trials and appeals for other clergy. This framework helps one understand the numerous proposals considered during the revision process. (We will refer back to these forms of amendment, e.g., "Form (i)," in our discussion below.)

The first proposal for revising the Constitution was that submitted by the special Joint Commission to the 1895 General Convention. Its proposal involved extensive organizational and terminological changes. For example, the name of General Convention was to be changed to

[29] 1892 JGC 201.

"General Synod" and the discipline provisions were combined with other provisions substantially expanding the authority of General Convention in a new Article III. That article would have made numerous substantive revisions to TEC's polity, including (a) introducing a supremacy clause making General Convention ("General Synod") the "supreme legislative authority in this church"; (b) giving General Convention "exclusive power to legislate" in certain broad areas of church life, including ordinations and the creation of dioceses; and (c) requiring that no diocesan legislation "contravene this Constitution or any Canon of the General Synod enacted in conformity therewith."[30]

As to discipline, the proposal of the Joint Commission was substantively the same as that proposed as early as 1853 and identified as Form (i) above although the terminology was slightly different. The House of Bishops and the diocesan conventions would retain authority for the "mode of trial" of bishops and other clergy respectively, but the General Convention would be given new authority to supersede the diocesan authority:

> Sec. 2. The General Synod shall also have **power** to enact Canons of Discipline, and **exclusive power** to enact Canons defining the offences for which Bishops, Presbyters, and Deacons may be tried, and determining the penalties….[31]

When combined with the provisions making General Convention supreme and requiring diocesan canons to conform to general canons, this new "power" for General Convention would have operated in practice in substantially the same way as the earlier proposals to limit diocesan authority in this area to the time "until" General Convention acted.

The Joint Commission's entire constitutional proposal was so controversial that the House of Deputies never even considered the new disciplinary article at the 1895 convention. In fact it only completed work on one article (Article I) and part of another before it decided to refer all other proposals to a special committee of Deputies only to report to the 1898 General Convention.[32] Among the proposals referred to the special committee was the one first introduced in 1892 and later re-introduced in modified form by the same deputy in 1895 that would provide "Courts for the trial of presbyters and deacons, with provisions for appeal, may also be established by the General Convention."[33] As noted above, this proposal shifts authority to General Convention, but uses the terminology of "courts established by" rather than "mode of trying."

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[30] 1895 JGC 648.

[31] 1895 JGC 648.

[32] 1895J GC 274.

[33] 1895 JGC 269, 314.

Allan Haley has examined carefully the broader issues considered by the 1895 and 1898 conventions and the marked change in attitude that prevailed in 1898 after the extensive constitutional changes proposed by the Joint Commission in 1895 had been studied by the dioceses.[34] He notes that one of the first things the House of Deputies did in 1898 was to reject the one complete article it had passed on first reading at the previous convention. Only four dioceses voted in favor of the article they had approved three years earlier. The House of Deputies even rejected the title of the new Constitution they had approved three years earlier without a single diocese voting in favor of keeping the revised title.

The Deputies then began to consider a revised draft Constitution prepared by its own special committee. The new proposal had none of the supremacy language proposed initially by the Joint Commission, and it rejected the approach of wide scale terminology changes. On church discipline, however, the Deputies' committee proposed a substantial change in authority using language familiar from earlier proposals. Discipline would be moved to a new article, IX, and would read as follows:

> The **mode of trying** Bishops **shall** be provided by the General Convention. The Court appointed for that purpose shall be composed of Bishops only. In every Diocese, the **mode of trying** Presbyters and Deacons **may** be instituted by the Convention of the Diocese, **until the General Convention shall provide a uniform judicial system**. The decisions of all Courts of First Instance shall be subject to review by **Courts of Revision or Appeal, when the same shall be established or provided for by the General Convention.** None but a Bishop shall pronounce sentence of admonition, suspension, or degradation from the Ministry, on any Clergyman, whether Bishop, Presbyter, or Deacon. A sentence of suspension shall specify on what terms, or at what time the penalty shall cease.[35]

This proposal consisted of two changes that had been rejected before and combined Forms (i) and (ii) noted previously. Authority for trial was still described using "mode of trying" language as in the existing constitution, but General Convention would be given the explicit authority to override diocesan authority with a uniform judicial system. Reflecting the earlier debates on the use of "shall" and "may" the authority of the dioceses, which could be superseded by General Convention, was framed using the permissive "may" while General Convention's authority

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[34] Allan S. Haley, "Constitutional Changes: Opposing the Centrist Model," (Anglican Curmudgeon, November 11, 2010) http://accurmudgeon.blogspot.com/2010/11/constitutional-changes-opposing.html

[35] 1898 JGC 608.

concerning bishops used the stronger "shall." In addition, authority for appeals would be given to General Convention using "courts established" language.

This proposal, however, went nowhere on the floor of the House of Deputies where it was subjected to numerous proposed amendments before being re-committed to the special committee.[36] After further debate and consideration by the special committee, the House of Deputies finally approved a proposed constitutional article as follows:

> The General Convention **may**, by Canon, **establish a Court** for the trial of Bishops, which shall be composed of Bishops only.
>
> Presbyters and Deacons **shall** be tried by a **Court instituted** by the Convention of the Diocese to which they belong.
>
> The General Convention may, in like manner, **establish, or provide for the establishment of, Courts of Review** of the Determinations of Diocesan or other trial Courts.
>
> The Court for the review of the determination of the trial Court, on the trial of a Bishop, shall be composed of Bishops only.
>
> The General Convention may, in like manner, establish an ultimate Court of Appeal, for the review only of the determination of any Court of Review on questions of doctrine, faith, or worship.
>
> None but a Bishop shall pronounce sentence of admonition, or of suspension, deposition, or degradation from the ministry, on any Bishop, Presbyter, or Deacon.
>
> A sentence of suspension shall specify on what terms or conditions and at what time the suspension shall cease.[37]

This removes completely any authority of General Convention for the trial of other clergy. It provides for appeals by giving General Convention authority to "establish" courts. It conforms the terminology concerning the authority of both General Convention (for the trial of bishops) and diocesan conventions (for the trial of other clergy) to the "establish courts" or "courts instituted" language used for the appellate courts. Finally, it removed completely the argument advanced earlier that the permissive "may" opened the door to concurrent jurisdiction over clergy by General Convention by reversing the language in both the existing Constitution and the

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[36] 1898 JGC 265-66.

[37] 1898 JGC 353, 355-56. See also 278-79, 314.

earlier House of Deputies draft that was rejected: the stronger "shall" is used for the dioceses' authority and the permissive "may" for that of General Convention.

The House of Bishops initially refused to concur with this article and proposed instead to leave the disciplinary article as it was. When the Deputies rejected this, the Bishops reconsidered and agreed to pass the first reading of this article with the caveat that it did so "without expressing full approval, and in order to secure time for further consideration"[38] In 1901, however, this proposed article passed both houses of General Convention without recorded debate and became Article IX of the Constitution. It remains the operative constitutional language, with minor changes, to this day.

With this careful study of the legislative history of Article IX, we can summarize the conclusions and readily see that the 1901 revision to the Constitution did not "profoundly change" the constitutional allocation of exclusive authority for the trial of other clergy in the diocesan conventions:

- The authority of **both** General Convention and diocesan conventions in their respective areas was preserved, but restated using the terminology of "establish courts" rather than "mode of trying." If the authority of diocesan conventions was "profoundly changed," the authority of General Convention was as well.
- The authority of General Convention for appeals is expressed using the same terminology as used in the cases of trials.
- That the authority to "establish courts" was not seen as lesser than the authority to institute the "mode of trying" is apparent from the unsuccessful proposals using that language as a means of **transferring** authority from diocesan conventions **to General Convention**.
- Changing "may" to "shall" closed the argument debated in the nineteenth century that the use of "may" signaled concurrent jurisdiction by General Convention.
- White & Dykman do not suggest any change in the allocation of authority in their summary of the changes to the disciplinary article made in 1901.

Indeed, notwithstanding the repeated attempts of canonical commentators and a minority of General Convention "again and again" to provide for a uniform judicial system, including the preparation of draft canons to implement hoped for constitutional amendments, no such canon was passed for almost a century after the 1901 revision. This was not done until 1994, only

[38] 1898 JGC 176. See also 168, 385.

seventeen years ago, when the current Title IV was passed with inadequate constitutional review. And that unprecedented and unconstitutional canon had been in effect only a few years before General Convention began working on its complete revision. The conclusion that the 2009 Title IV revision is unconstitutional cannot reasonably be denied.