**LOSING THEIR NERVE:**

**WHAT THE COURTS WOULD DISCOVER IF THEY EXAMINED TEC POLITY AFRESH**

Several years ago I was in a meeting at a large London law firm. We were working on a very complex matter, and this was one of a series of meetings that went on for several years. This particular one was quite large with 30 or so lawyers from several London and New York law firms. Representatives of Her Majesty’s Government were also there. During the morning, one of the junior partners of the host firm was asked to address a difficult legal question. He spoke for a considerable time, over an hour, without notes, and then lunch arrived and we went off to a different conference room to eat. But as we were filing back into the meeting room after lunch we noticed, piled up on this lawyer’s chair and the table in front of his seat, an enormous stack of law books with little handwritten notes and post-its stuck in here and there. As we walked in and saw the pile of books, his senior partner turned to this lawyer and said “what happened, David? Did you lose your nerve?”

Today I want to speak briefly about what the courts would see if they lost their nerve and went back to look again at the law books and the facts concerning TEC polity. But first, one more story about that London law firm. One of their lawyers was my age and we came up through our respective ranks at the same time and worked together on many projects and became good friends. He once shared with me this advice he claimed to have received concerning the practice of law. If a client requests difficult advice on an important matter, give them your best advice orally and then follow up a week or so later with a long, detailed, highly technical written opinion that reaches the opposite conclusion. The client will never read the long written opinion unless the oral advice was wrong, in which case you will be proved right!

Now, I wrote a long, detailed, highly technical paper for ACI on TEC polity…but I am going to ignore my friend’s advice. Today I am going to reverse his recommended order and give you an oral summary of the detailed paper already written—and I am going to say the same things! I want to extract from that paper five points the courts would see if they lost their nerve and looked afresh at the facts and the law concerning TEC polity.

1. First, TEC is organized legally as a voluntary association of dioceses.

I want to break this point down into two parts: first, a voluntary association; and second, an association whose members are dioceses.

To begin, all sides of the current disputes agree that TEC is what the law has traditionally called a “voluntary association.” This kind of entity is sometimes referred to today as an unincorporated nonprofit association, but voluntary association is the traditional terminology. So, from a civil law perspective, that puts us immediately into the category of association law, which is different in important ways from that governing other forms of organization.

A church does not have to be an association. The Southern Baptist Convention—a church named by the way for its convention; TEC is named for the office of bishop—is a Georgia corporation. And after American independence, the largest of the state churches in the former colonies, the one in Virginia, was incorporated in that state by the Virginia legislature. But TEC itself has always been and remains a voluntary association. Everyone agrees.

This leads us to the question, “what are the essential legal characteristics of voluntary associations, the things that distinguish them from other forms of organization”? And the answer is “they’re not what they used to be.” Until fairly recently, the law did not recognize a voluntary association as a legal entity distinct from its members. In other words, when the law looked at a voluntary association, it only saw the members; the association itself was simply an aggregate of its members. That rule was changed in the twentieth century in most, but not all states, typically by statute. Most states now recognize voluntary associations as legal entities and allow them to own property, enter into contracts, sue in their own names and enjoy the rights and responsibilities of legal personality. But that was not formerly the case.

This brings us to the second part of this first point. If traditionally members were the legally cognizable element of a voluntary association, who its members are becomes of paramount importance in understanding the legal structure of the association. So, who are the members of the voluntary association that is TEC? We answer this question by looking at TEC’s governing agreement, its constitution. The constitution specifies quite clearly that the entities that join TEC are dioceses. A parish cannot join General Convention and show up for meetings, nor can an individual. Only dioceses. And it is dioceses that are entitled to representation at General Convention. That is stated in the constitution and is also reflected in the way important matters are voted on in the House of Deputies. They vote “by orders,” which means that each diocese gets one vote when the lay order votes and one vote when the clergy vote. At the General Convention just concluded in Anaheim, the two controversial resolutions were both voted on by orders. That is why when you read the results of the votes, they were given as, e.g., 78 yes. There were over four hundred deputies in each order, but the votes were not 290 yes to 150 no. They were 78 yes, 22 no and 8 divided. This reflects the number of dioceses present and voting, not the number of people.

Legally, the conclusion that the members of the association comprising TEC are its dioceses has significant consequences. I will return to this later. But first, a bit more about association law. It is a foundational principle of association law—constitutional in fact—that associations can order their governance however they choose. So, given that the members of the TEC association are the dioceses and the law says the members can organize themselves however they see fit, how does TEC governance work? The first hint is something I have already said: the founders of TEC chose a form of organization that was not at that time recognizable as a legal entity apart from its members. And we still see that basic concept today when we look at the governing principles in TEC’s constitution. We find there a recognition of several bodies and offices. There is a General Convention, but there are also diocesan conventions. There are bishops, and there are other entities and offices as well. But to ask the question posed in the title of this conference: “who’s in charge?” And this leads to the second point that the courts would notice if they were to lose their nerve and look afresh at the law and the facts.

2. TEC’s constitution does not have a Supremacy Clause making any of these bodies the supreme or highest authority.

What is not defined in TEC’s Constitution is any legal or hierarchical relationship among the various bodies and offices it creates or whose pre-existence it recognizes. Indeed, TEC’s Constitution is devoid of the legal terminology used to express hierarchies in legal documents. 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.

What we find instead when we look at the various bodies and offices and governing principles in TEC’s constitution is overlapping jurisdiction—we call it concurrent jurisdiction in the law. And it is not as odd as it might seem at first glance. Indeed, it is common. The Congress and state legislatures frequently legislate on the same things and many court cases could be filed in either the state court or the federal court. And on a more practical level, this concept of overlapping authority is familiar to everyone through property law. We probably all have joint bank accounts, and we know that any owner of the account can draw on the entire account. Any partner can bind a partnership; both a principal and its agent can bind the principal. In fact, this notion of concurrent authority has a very ancient pedigree. Think of the Roman republic and its two consuls who shared authority to guard against a monarchy. This was so ingrained in Roman law and culture that even in the Roman Empire, the office of consul remained and the emperor often appointed himself and a family member as the two consuls.

But in the case of concurrent legislative jurisdiction the question quickly arises as to which legislature has priority. This is a question to which the law gives two answers: there is a traditional or default rule of priorty; and a special rule. The traditional rule, going back to the Romans if not before, is called the “last in time” rule. The last legislature to speak prevails.

To take only one example here, you may not realize that there are actually two lawmaking bodies in the federal government. One, Congress, you all know. The other is the President acting in international matters with the concurrence of two thirds of the Senate. This kind of law is called a treaty, and the constitution provides that both statutes and treaties are the “law of the land” and gives no priority to either type. Occasionally, a treaty will be inconsistent with a statute and in this case the courts apply the last in time rule. Whichever was later, statute or treaty, prevails.

But another rule of priority developed in the law to change the last in time rule. This is a rule that gives priority to a legislative body based not on temporal sequence, but on identity. And for centuries this priority has been expressed legally in a very precise way, through the language of “supremacy.” The oldest law code now in use, the Code of Canon Law of the Roman Catholic Church, uses this language. One need only look at the Table of Contents to see the chapter entitled “The Hierarchical Constitution of the Church,” section I of which is “The Supreme Authority of the Church.” The first canon in this chapter specifies that the Pope possesses “supreme ordinary power in the Church.” Note the subtlety!

Not surprisingly, at the time of the English Reformation, when the Church of England broke with Rome, this break was expressed legally in the “Supremacy Act,” which made the British monarch the “supreme governor” of the Church of England. All clergy and government officials had to swear an “oath of supremacy” recognizing the king as the supreme governor. It is still required of bishops in the Church of England.

And to take a final example, the reason state legislatures cannot take advantage of the “last in time” rule to overturn or nullify a federal statute is that there is a “Supremacy Clause” in the constitution that makes federal law “the supreme law of the land.” And the reason the state courts cannot overrule the Supreme Court is that the constitution expressly makes the Supreme Court the *supreme* court. And the reason there is no priority between Congressional statutes and treaties is that there is no language of supremacy in the constitution giving one priority over the other; they are on a par.

But in TEC’s constitution there is no language of supremacy or any of its synonyms, such as “highest” or “hierarchical.” The closest the TEC constitution comes to this concept is in the provision making the Bishop and standing committee “*the* Ecclesiastical Authority” in the diocese. If the bishop is “the” ecclesiastical authority in the diocese, the Presiding Bishop, the General Convention and the Executive Council are not.

So in TEC we have concurrent jurisdiction without supremacy among the General Convention and the various diocesan conventions, and each can theoretically undo what the other has done. But is this any way to run a church? Was this an inadvertent oversight by TEC’s founders, who did not understand these legal concepts clearly enough to express them properly? This leads to my third main point.

3. This omission of the concept of supremacy or hierarchy was intentional on the part of TEC’s founders, who were uniquely familiar with these concepts.

Let me begin by pointing to the role played in the formation of TEC by two well-known New York lawyers, James Duane and John Jay. 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. 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. Both men are noted to this day among legal scholars for their roles in developing the jurisprudence of hierarchy used in the United States Constitution, including the Supremacy Clause. I don’t have time to elaborate the legal work for which they are known, but if you do legal research on the Supremacy Clause or the “last in time” rule you will find major law review articles just in the past decade on their importance to the development of this jurisprudence. And what these legal scholars don’t mention at all is that Duane and Jay were simultaneously designing TEC’s polity and drafting its first constitution!

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 that ended 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 of American bishops. He was once again a delegate to the 1786 Convention.

Jay is 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 this 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 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 TEC constitution devoid of hierarchical language.

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. 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….” In other words, 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.

This brings me to my fourth point.

4. TEC’s ordination vows do not establish or recognize a central hierarchy.

Those who allege the supremacy of General Convention in TEC often point to the episcopal ordination vows for support, but we can see that those vows offer no support at all to this contention. Apparently these advocates have never looked at what a truly hierarchical oath looks like. I have already mentioned the oaths of supremacy and due obedience given by Church of England bishops. And Roman Catholic bishops vow to be obedient and remain under the authority of the successor to Peter. But I also want to emphasize the oath used by the Serbian Orthodox Church because that oath, expressly designated an “Episcopal-Hierarchical Oath,” was part of what the United States Supreme Court relied on in its most important case on religious hierarchy. In this oath, Serbian Orthodox bishops swear that they will “always be obedient to the Most Holy Assembly,” which is the very body identified in that church’s constitution as “the highest hierarchical body.”

One can see at a glance that TEC’s vows are the exact opposite of these hierarchical oaths. In the Examination of the TEC episcopal ordinand there is no mention of General Convention, the Presiding Bishop or the Executive Council.  The Presiding Bishop is mentioned in the rubrics only as presider, but this role can be and is assigned to another bishop. The Examination begins by emphasizing that "with your fellow bishops you will share in the leadership of the Church throughout the world."  Note: “fellow bishops”; “Church throughout the world.” There is no mention of General Convention.  There is no vow of obedience to the Presiding Bishop as there is to the Archbishops or Pope or Holy Assembly in the oaths of the other churches.

And the actual vow is simply one of doctrinal and canonical conformity: “I do solemnly engage to conform to the doctrine, discipline, and worship of The Episcopal Church.” So, what is the polity to which the bishops vow to conform? The Examination points to it: to share with "fellow bishops" in the government of the whole Church.  These vows thus suggest a truly episcopal church, not one in which a convention is the supreme authority. Indeed, it would be startling if the General Convention were to be the highest authority when the episcopal ordination vows do not mention General Convention at all.

Now to my final point.

5. The requirement that dioceses joining TEC accede to the constitution and canons does not supply the central hierarchy that is elsewhere unspecified.

Those litigating in the name of TEC attempt to avoid the consequences of the legal realities represented by the principles I have described up to now by claiming that the concept of “unqualified accession” provides the hierarchy that is otherwise missing. But the concept of accession cannot carry this legal burden. For one thing, this is like the matter of the ordination vows just addressed. Those who argue that TEC’s constitution specifies a central hierarchy will say that new dioceses accede irrevocably to that hierarchy. But those who argue that TEC’s constitution specifies a voluntary association of autonomous dioceses will say that the joining dioceses accede to that form of governance. The concept of accession, in other words, adds nothing.

My time is up, so I will conclude with two observations about accession.

First, the term itself is an unusual technical term from international law that is used to describe the act of a sovereign state becoming a party to a treaty already signed by others. A treaty, of course, is 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.” That term 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.

Treaties are typically subject to termination. The vast majority of them are explicitly terminable, and the ones foremost in the minds of TEC’s founders, the Treaty of Peace with Great Britain and the Articles of Confederation, were being abrogated or nullified just as TEC’s constitution was being drafted and ratified. If TEC’s founders had intended to signal irrevocable submission to a central hierarchy, they would not have borrowed a term from the Articles of Confederation that lacked such a hierarchy and that had just been abrogated by the thirteen states.

Second, the law of associations is clear that members can withdraw from associations absent restrictions in the governing agreement. The Supreme Court has recognized this and it is stated explicitly in the uniform statute on associations, which was drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association. Significantly, moreover, the Law Commissioners note the following in their commentary on the statutory language:  “[p]reventing a member from voluntarily withdrawing from a UNA [unincorporated nonprofit association] would be unconstitutional and void on public policy grounds.”  This is a terse reference to a body of law recognizing that freedom of association is a constitutional right, and the state, including its courts, can neither preclude nor compel association. In other words, what the Law Commissioners are opining is that even if the TEC constitution said explicitly that a diocese cannot withdraw (which it does not), courts could not enforce such a provision on a voluntary association because to do so would be unconstitutional.