

**MINUTES**  
**COMMISSION ON CONSTITUTIONAL MATTERS**  
**Phone Conference**  
**May 12, 2017**

**60. Request for Reconsideration of Op. 16-2791 (17-2828)**

The commission met by phone conference as arranged during its meeting of May 5–6, with all members attending, to finalize Op. 17-2828 and to address two other items of business (below). The opinion of the commission in Op. 17-2828 is as follows:

A district president, later joined by others, requested the commission’s reconsideration of CCM Op. 16-2791, entitled “Constitutionality of Historical Appeal to President and Praesidium in Expulsion Cases.” A district president requested, was granted, and made an appearance before the commission, under Bylaw 3.9.2.2 [a]. The Council of Presidents was notified of the request for opinion under Bylaw 3.9.2.2 [b], and several other members of the council submitted written comment. All of this was gratefully received and carefully considered by the commission. The request lists three questions and proposes three answers, to which the commission responds as follows:

Question 1: What empowerment does the Synod Constitution give the Synod President as compared to the District Presidents in ecclesiastical supervision, suspension and / or expulsion of an [individual]<sup>1</sup> member of the Synod?

Background:

Briefly, Op. 16-2791 dealt with the question: “In the event that a district president did not take action in matters of expulsion, was the process operative in the Bylaws between 1956 and 2004, enabling the President of the Synod or the Praesidium of the Synod to initiate proceedings and present charges in an expulsion matter, in violation of the Constitution of the Synod?” While finding that the transfer of this authority from the President to the Praesidium in 1989 “unconstitutionally deprived the President of the Synod of procedures for exercising a power granted him in Constitution Art. XI B 1–3,” with respect to the 1956–1989 provision, the commission ruled: “That this power to receive appeals for action, in case of the inaction of district officials, is one of the means constitutionally ‘at [the President’s] command to promote and maintain unity of doctrine and practice in all the districts of the Synod’ (Constitution Art. XI B 3) was the opinion of the Synod in convention in 1956. It expressed this opinion explicitly and with its unique and final interpretive power. It must therefore be the opinion also of this commission.”

The request for reconsideration of Op. 16-2791 argues variously that the President of the Synod cannot initiate formal procedures to expel (that is, in terms of present procedures, cannot suspend) a member from the Synod, in summary:

- Const. Art. III 8–9, seeking “evangelical supervision, counsel, and care” and “protection...and the maintenance of [congregations’, pastors’, teachers’, and other church workers’] rights,” taken together with the requirement of “previous futile admonition” in Const. Art. XIII 1 (it is apparently argued) require suspension to be carried out *only* by that ecclesiastical supervisor having *direct* ecclesiastical supervision of a member.
- Const. Art. XI B 1 does not list individual ordained and commissioned ministers of the districts, as does Const. XII 7; moreover, Const. Art. XI B 1 includes only “doctrine and administration,” while Const. Art. XII 7 includes *life* in addition to doctrine and administration of office. Thus, it is held,

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<sup>1</sup> The request for reconsideration uses the term “individual member” apparently to refer to a member under district supervision. An individual member, in Bylaw terms, refers to Ministers of Religion—Ordained and Commissioned, as opposed to congregational (voting) members of the Synod. Const. Art. XIII and Bylaw section 2.14 deal with individual and congregational members without distinction. The “individual” is therefore dropped in this response.

the President of the Synod has no ecclesiastical supervision over a member of the Synod. Here CCM Ag. 1970 and Op. 03-2338, 03-2338A, 03-2338C, 03-2354, 10-2581, 13-2669 and 15-2570 [sic 15-2750] are cited in support of the request's proposed interpretation.

- Const. Art. XI gives, it is held, no specific authority to the Synod President *to suspend* (as does Const. Art. XII 8)—this, it is proposed, is part of the broader ecclesiastical supervision given only (it is proposed) to district presidents. Furthermore, it is noted that the Const. Art. XI B 2 duties of the President include *seeing to*, *admonishing*, and *reporting*, but not *suspending*.
- On the basis of Const. Articles XI A 1 and XIV, it is argued that because the President has no explicit constitutional authority to suspend or expel members, the bylaws cannot confer upon him such a right.
- Finally, it is argued that the commission fundamentally misread 1956 Bylaw 5.23 and Res. 6-11, the argument being that the provision there provided applied only to the expulsion of a district president and not to the expulsion of *other* members of the Synod.

Opinion: The commission, having given careful consideration to the arguments advanced in the request for reconsideration, but having found no reason to overturn its previous Op. 16-2791 or the conclusion of the 1956 convention, which is certainly as Op. 16-2791 understands it, responds as follows:

#### 1. The Meaning of 1956 Bylaw 5.23 and Res. 6-11 and their Constitutional Context

The request for reconsideration argues that the commission fundamentally misread 1956 Res. 6-11, by which the convention adopted the language of 1956 Bylaw 5.23 (to wit, that “If the District officers fail to act, the President of Synod, by virtue of the power given him in the Constitution [Article XI, B, 1, 2, 3] may on his own initiative institute proceedings, take administrative action, and, if necessary, present charges to the District Board of Appeals”), as allowing the President of the Synod to lay charges against members other than a district president. The commission notes, however, the rationale paragraph from 1956 Res. 6-11 (already included in the text of CCM Op. 16-2791):

WHEREAS, It is necessary to clarify Article XI, B, 1, 2, 3, concerning the powers of the President if District officers *fail to act in cases involving ineligibility for service of pastors, professors, or teachers*; therefore be it *Resolved*, That Section 5.23 be amended to read as follows... (1956 *Proceedings*, p. 451) (emphasis added)

As the underscored portion clearly indicates, the provision adopted does not apply *only* to the case of a district president “charged with any action that would disqualify him from office,” but *also* (indeed, with the apparent intention to apply primarily) to the cases of *pastors, professors, or teachers*, in which the “district officers,” inclusive of the District President, “fail to act.” Subsequent developments of this bylaw provision in 1971, 1983, 1986, etc., as already noted in the footnotes to CCM Op. 16-2791, consistently bear out this understanding.<sup>2</sup> The commission's reading of 1956 Res. 6-11 and Bylaw 5.23 in CCM Op.

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<sup>2</sup> See, for example, 1971 Bylaws 5.11–5.13, *Handbook*, pp. 114–115, in which the intent is the same as 1956 but the outline is much clearer:

### **B. SUSPENSION AND EXPULSION**

#### **5.11 Notification of Accusation**

When a member of the Synod is accused of an act or of conduct which could result in expulsion from the Synod under Article XIII of the Constitution, the accusation shall be addressed in writing to the President of the District in which said member holds membership. The District President shall promptly inform such member that such an accusation has been made against him. If the member consents to the expulsion, the District President shall publish such fact in the official periodical of the Synod and shall so report to the next District convention.

16-2791 is, thus, the correct reading: the President of the Synod, *if the district officers failed to act*, by virtue of the power given him in Const. Art. XI B 1–3, was empowered to institute proceedings against members (pastors, professors, teachers, district presidents, etc.), take administrative action (that is, in terms of present procedure, suspend such members) and, if necessary, present charges to the District Board of Appeals. The President of the Synod had this authority explicitly from 1956–1989, when it was unconstitutionally transferred to the Praesidium (1989–2004) and then, in 2004, to referral panels (2004–2016). Prior to 1956, by virtue of the fact that Bylaw 5.23 was adopted as a *clarification* and not as a grant of new, extra-constitutional power, the President of the Synod had this authority *constitutionally*, though it was not elaborated in the bylaws of the Synod.

It bears repeated note, as Op. 16-2791 already pointed out, that only since 1965 has Const. Art. XIII 2 read, “Expulsion shall be executed only after following such procedure as shall be set forth in the Bylaws of the Synod.” This replaced the 1924–1965 provision of Const. Art. XIII 2, “Such expulsion is executed as a rule by the Districts of the Synod [meaning the district conventions]; yet those so expelled have the right of appeal to the Synod [meaning the Synod convention].”<sup>3</sup> In the post-1965 “modern” era of the expulsion processes of the Synod, the convention has been free to set forth in the Synod Bylaws procedures for expulsion that are not ultimately carried out by the district and Synod conventions; at the same time, that procedure has been required to be *fully specified* in the Bylaws (present Const. Art. XIII 2). Through that *entire period* there has been *some* bylaw mechanism for an accuser to appeal beyond the inaction of a district president on an accusation laid, though the designated recipient of that appeal has varied. Through

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### 5.13 Commencing an Action of Expulsion

If a member of the Synod, accused of an act or of conduct which could result in expulsion from the Synod under Article XIII of the Constitution, does not consent to such expulsion, the District President, in consultation with the District Vice-Presidents, may suspend the member, provided, however, that the member shall have been given written notice of the proposed suspension 15 days in advance of the effective date thereof, during which the said member may ask the District President to reconsider on the ground that adequate informal settlement efforts (Section 5.03 b) have not been made. Within 7 days after the effective date of such suspension, the District President shall submit the case to the District Commission of Adjudication for adjudication in accordance with the provisions hereinafter set forth. In the event that the District President is disqualified or unable to act, the First Vice-President or the next qualified District officer shall be authorized to suspend and to submit the case to the Commission of Adjudication as herein provided.

If the District officers fail to act, the President of the Synod, by virtue of the power given him in the Constitution (Article XI, B, 1–3, inclusive), may on his own initiative institute proceedings, take administrative action, and, if necessary, present charges to the appropriate District Commission of Adjudication, provided, however, that such must be in the same manner as hereinabove set forth for the District officers.

<sup>3</sup> From 1956–1965, it was not understood as contrary to Const. Art. XIII 2 for the President of the Synod to present charges to a district board of appeals. Suspension (at that time) did not precede but followed the decision of the district board of appeals. This suspension could then be appealed to the district and Synod conventions. Though initiated by the President of the Synod, the process ultimately resulted in expulsion “by the district[s] of the Synod.” Suspension was to be initiated by presidents; expulsion was finally the realm of conventions and then the adjudication system.

Interestingly, however, expulsion cases regarding pastors, professors, and teachers “which [arose] in connection with activities directly under the control of the Synod” could be initiated by the President of the Synod and members suspended and ultimately expelled *at the Synod level*, Const. Art. XIII 2 notwithstanding. (See, e.g., 1945 Bylaw VIII II b a, *Handbook*, p. 35; 1949–1963 Bylaws 5.81–5.93.) That this procedure, similar to the present Bylaw section 2.15, but broader, coexisted with the earlier Const. Art. XIII 2 suggests the relatively greater weight of Const. Art. XI B 1–3. Where the President of the Synod had the supervision, he had the authority, ultimately, to initiate suspension and expulsion—and not only *through* a district president. Perhaps this reflects the reasoning that the Synod and district presidents hold (under Const. Art. XII 6) fundamentally the *same* office, with the *same* powers, within their respective spheres: the President of the Synod, over the whole Synod, and the president of a district, within, and as appropriate to, his district.

the entire period, that mechanism has initiated the same due process bylaw procedure that would have been initiated by a district president.

The conclusion is that the conventions have not desired the inaction of a single district officer (who is not elected by the whole Synod) to frustrate in his district—at least until the next Synod convention—the ultimate exercise of ecclesiastical supervision, thereby depriving the congregations and workers of his district of the application of Synod’s *one* standard for doctrine and practice (Const. Art. II, Bylaw section 1.6) and denying to them the furtherance of Synod’s objectives (Const. Art. III 1, 8, and 9). The Synod, after all, “is not merely an advisory body in relation to a district, but establishes districts in order more effectively to achieve its objectives and carry on its activities. A district is the Synod itself performing the functions of the Synod. Resolutions of the Synod are binding upon the districts.” (Bylaws 4.1.1–4.1.1.1)

Op. 16-2791 calls for nothing *new* in calling for bylaws that allow an appeal for action beyond a district president’s inaction on charges laid. Instead, Op. 16-2791, Res. 12-14, and the bylaws proposed thereunder simply direct that appeal for action to the one constitutionally authorized to act on it—on behalf of the whole Synod—as so clearly stated by the 1956 convention of the Synod: namely, the President of the Synod.

## 2. Scope of the Power of the President of the Synod under Op. 16-2791, Res. 12-14, and Bylaws Proposed

The request for reconsideration is posed as if Op. 16-2791 and the bylaws proposed to satisfy 2016 Res. 12-14 grant a blanket authority for the President of the Synod to exercise fully and immediately, himself, that supervision assigned to district presidents in Const. Art. XII 7–8. Whether the President of the Synod could be granted that identical authority under hypothetical bylaws is not presently the issue. Neither Op. 16-2791 nor the bylaws drafted, under 2016 Res. 12-14, to satisfy the constitutional requirements posed by Op. 16-2791, give the President of the Synod that immediate and identical authority. What must be dealt with is the actual case, in which the authority of the President of the Synod to take administrative action in the case of a member under district supervision is being dealt with only under two important qualifiers:

- Of present interest is the ability of the President of the Synod to initiate formal proceedings *only in a matter involving doctrine or practice*. Const. Art. XI B 1–3 grants the President of the Synod supervision over “doctrine [*Lehre*]<sup>4</sup> and administration [of office, *Amtsverwaltung*].” It does not deal *explicitly* with life [*Leben*], which is mentioned along with doctrine [*Lehre*] and administration of office [*Amtsführung*] as the “especial” charge of district presidents. Clearly, the standing interpretation is that the President of the Synod has the authority to supervise the life, as well, of those Synod officers and District Presidents subject to his direct supervision [cf. Bylaw Sections 2.15 and 2.17], and the commission sees no warrant to challenge this standing interpretation, as “[a]ll officers of the districts have the same rights and duties as those outlined in this Constitution for the officers of Synod but only insofar as these apply to the district and only within the boundaries of their districts” (Const. Art. XII 6). Thus, if a district president supervises the life of an individual member under his supervision, the Synod president, who has the *same* office, but with respect to the *Synod* and not a particular *district*, has the self-same supervision over those individuals he *directly* supervises. These are surely to be subject to the same standard of expulsion (Const. Art. XIII and VI) as other members of the Synod, which includes *offensive conduct* and *blamelessness of life*.

Nonetheless, neither Op. 16-2791 nor the bylaws proposed under Res. 12-14 (reviewed in Op. 17-2828) propose extending a *backup* supervision of the *life* of individual members under district supervision to the President of the Synod—only a backup supervision of those matters *explicitly treated* under Const. Art. XI B 1–3, namely, *doctrine* and *administration of office* (a.k.a. *practice*; cf. Bylaws 1.10.8; 2.14.8; 2.15.8; 2.17.8). The argument, therefore, that because the President of

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<sup>4</sup> German included throughout is from the 1924 *Handbuch*, which is exactly parallel to the English of the 1924 *Handbook*, the first edition in English. The German is significant for reasons to become apparent later.

the Synod is granted no explicit supervision of the *life* of those in the districts, he can have no backup supervision over their *doctrine* and *practice*, is clearly without merit.

- Of present interest is the ability of the President of the Synod to initiate formal proceedings *only when the District President has failed to act or declined to suspend*. This is not a procedurally primary authority, on par and simultaneous with that of the district president, but a *backup* authority, intended to see to the carrying out of Synod's objectives (especially Const. Art. III 1, 8, and 9) when a district officer has failed, given every reasonable chance to carry out his responsibility in this regard, to do so—when, that is, he has failed to apply to a particular case within his district the *one* standard of doctrine and practice the Synod has set forth by its subscription to the Scriptures and the Lutheran Confessions and elaborated by its doctrinal resolutions and statements.

Const. Art. XII 7 reads, “The district presidents shall, moreover, especially exercise supervision over the doctrine, life, and administration of office of the ordained and commissioned ministers of their district and acquaint themselves with the religious conditions of the congregations of their district...” Thus, while district presidents have fundamentally the same office as, or an extension of the office of, the President of the Synod, “but only insofar as [the rights and duties of that office] apply to the district and only within the boundaries of their districts,” they are not equally (with respect to the President of the Synod) but *especially*<sup>5</sup> charged with the supervision of members within their districts.

The question is not whether the President of the Synod has the same authority as the district presidents, but whether he has the authority, *should they fail*, to carry out properly the due process disciplinary action required and intended to see to the maintenance of “unity of doctrine and practice *in all the districts of the Synod*.” We are thus dealing with an *exceptional case*, like the long-recognized one that, should a district or Synod president be shown to have a conflict of interest in a potential expulsion case, a vice-president should act in his stead. While not explicit in Const. Art. XII 7–8, this provision is necessarily understood as contained implicitly and organically within the concise constitutional framework. The Constitution does not, after all, invest *a man* with authority but creates offices to further the Synod's purposes. The argument, therefore, that the President of the Synod cannot have *backup* authority, in an exceptional circumstance (namely, when an accuser protests that a district president has not acted appropriately in response to charges laid against a member under his supervision), because Const. Art. XII 7–8 does not say so, is also untenable.

Thus, the properly focused question is: Does the Synod President have a constitutional authority, in a matter involving doctrine and practice, and when the District President charged with supervision fails to act or declines to suspend a member, to initiate formal proceedings against (i.e., *suspend*) the member? CCM Op. 16-2791 answered in the affirmative, on the basis of the convention's 1956 determination that, at least in those circumstances, such action by the President of the Synod would be “by virtue of the power given him in the Constitution (Article XI B 1–3).”<sup>6</sup> The commission finds no compelling reason in the assertions of the request for reconsideration to find otherwise, answering the substantive arguments of the request as follows:

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<sup>5</sup> See the detailed treatment of this term under part 4, below.

<sup>6</sup> When the 1956 provision was being effected the Committee on Constitutional Matters then understood this as a “clarification” in the bylaws of a *power pre-existing in the Constitution* (the rationale of 1956 Res. 6-11, proposed by the committee, being that “It is necessary to *clarify* Article XI B, 1, 2, 3, concerning the powers of the President if District officers fail to act...” (*Proceedings*, p. 451, emphasis added).

### 3. Suspension Power of the President of the Synod Under Present Bylaws

It should be noted that in the present bylaws of the Synod, certain individual members of the Synod are already under the direct supervision of, and may be suspended by, the President of the Synod. These include the other officers of the Synod and the district presidents (Const. Art. XI B 1 a and d; Bylaws 2.15.1, 6).<sup>7</sup> Here a power of suspension (extending over certain individual members) has been elaborated in the bylaws as belonging to the President of the Synod—a power that has not been and is not challenged. What is now Bylaw section 2.15, including the suspension of district presidents and officers by the President of the Synod, was incorporated into the bylaws by 2004 Res. 8-01A. The prefatory remarks by the floor committee offer the following:

The renumbered Bylaw 2.27 replaces what had been 2.27 g and provides the recommended procedures for the removal of a District President and seeks to clarify the role of the President of Synod in the process believed to be inherent in Constitution Articles XI B 2 and 7 and XIII 2.

This bylaw provides the framework for what is called for in Constitution Article XI B 7 which states, “The President shall perform all additional duties assigned to him by the bylaws . . .” and Article XIII 2 which states, “Expulsion shall be executed only after following such procedure as shall be set forth in the Bylaws of Synod.” (2004 *Proceedings*, p. 163)

Thus the 2003 Task Force on Ecclesiastical Supervision and Dispute Resolution and the 2004 Convention answered the question included in the floor committee’s prefatory material, as to whether “the President of the Synod is granted authority in the Constitution to suspend or expel a District President or anyone else from the roster of Synod” (*idem*, p. 161), clearly *in the affirmative* (at least in the case of a District President or officer of the Synod, and given the proper bylaw procedure). The constitution’s explicit assignment of the authority of suspension to the district president, within the sphere of his district, in Const. Art. XII 8 was not understood to preclude enactment of bylaws in which the President of the Synod exercised, at least in certain circumstances, the power of suspension. Such bylaws were explained to be permissible under Const. Art. XI B 2 and 7 and XIII 2.<sup>8,9</sup> True, the convention actions of 2004 did not enact bylaw procedures for the President of the Synod to suspend members within the districts when district presidents would not. But they did rely on—even on the basis of a cogent constitutional argument, distinct from but compatible with that of Op. 16-2791—the power of the President of the Synod to suspend and initiate formal proceedings against a member of the Synod. Again, the substance of Op. 16-2791, Res. 12-14, and the attendant bylaw proposal is not overthrown but supported by analogy to present bylaws and the constitutional justification offered for their adoption.

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<sup>7</sup> Const. Art. XI B 1 b provides that “all such as are employed by the Synod” are also under the President’s direct supervision, although these have not historically been considered subject to Bylaw section 2.15. They were apparently subject to similar provisions, however, from 1945–1965 (see footnote 3).

<sup>8</sup> The predecessor measure, 1998 and 2001 Bylaw 2.27 g, was adopted by 1998 Res. 7-06A (1998 *Proceedings*, p. 149) on similar grounds—that a means should be *clarified* by which the President of the Synod could ultimately carry out his responsibility for supervision of district presidents under Const. XI B 1.

<sup>9</sup> The commission notes that the request for reconsideration denies to the President of the Synod the power of suspension, while failing to note that the present bylaws grant this power of suspension, in similar circumstances (where a district president has failed to act), to a referral panel—which is nowhere in the Constitution granted a power of suspension. Importantly, though the chief issue identified by the commission in Op. 16-2791 and 2794 is not that an illegitimate power was granted to the referral panels by the bylaws, but that this power was *not* granted by the bylaws to the President of the Synod, as expected by Const. Art. XI B 1–3.

#### 4. Suspension Power of the President of the Synod, Constitutionally Considered

The request for reconsideration argues that Const. Art. XII 6 grants to district presidents powers and duties of the President of the Synod, within their districts, and that Const. Art. XII 7 and 8 enumerate *additional* powers and duties of the district presidents originating in their own unique office, which are in no way derivative of powers inherent to the office of the President of the Synod. The commission finds this analysis to be contrary to the sense of Const. Art. XII 6, which clearly states that the district presidents, among other officers of the districts, “have the *same* rights (*Rechte*) and duties (*Pflichten*) as those outlined in this Constitution for the officers of the Synod but only insofar as these apply to the district and only within the boundaries of their districts.” The commission also finds reasonable the argument advanced in 2003, that Const. Art. XI B 2 and 7 and XIII 2 provide constitutional allowance for (and indeed, as Op.16-2791 indicates, *warrant*) the existence of bylaws outlining the manner in which the President may carry out his duty and responsibility of ecclesiastical supervision *by initiating formal proceedings against a member* who is under district supervision where the matter involves doctrine or practice and the district president has failed to act or declined to suspend.

Const. Art. XII 7 does indeed indicate: “The district presidents shall, *moreover, especially* exercise supervision over the doctrine, life, and administration of office of the ordained and commissioned ministers of their district...” [emphasis added]. An examination of the underlying parallel German indicates these words provide no basis to understand that the power of supervision within the district is an extraordinary power given *only and finally* to the district presidents. Const. Art. XI speaks of the “rights (*Rechte*) and duties (*Pflichten*)” of the officers of the Synod, to which the “same rights and duties (*dieselben Rechte und Pflichten*)” of the district officers correspond (Const. Art. XII 6), “insofar as these apply to the districts and within the boundaries of their districts.” Const. Art. XI 1 has that “The officers of the Synod must assume only such *rights* as have been expressly conferred upon them by the Synod (*haben nur solche Rechte in Anspruch zu nehmen, welche ihnen ausdrücklich von der Synode übertragen sind*).” The word *right* is used of a power conferred on an office, and the word *duty*, in a corresponding but distinct way, of an obligation expected of an office. Officers are to assume only those *rights* expressly conferred by the Synod (no distinction is made whether this assignment is by Constitution, Bylaw, or resolution, excepting of course that Bylaws must be consistent with the Constitution and that resolutions must be consistent with the Constitution and the Bylaws).

Const. Art. XI B 1 states that the President has the supervision (*hat die Aufsicht*) over those named (including “the individual districts of the Synod.”) This is not delineated either as a right or duty, so it is appropriately considered to be both. Const. Art. XI B 2 spells out a duty (*hat die Pflicht*) to see to it, etc., not a *right* per se. Const. Art. XI B 3 speaks of the President’s power (*Gewalt*, here apparently a synonym for *right*) to advise, admonish, and reprove, etc.—note that it is not an exhaustive description of his power, as it does not say “only”—but that it does say “has and always shall have,” extending into the districts of the Synod, as the last phrase indicates (“in all the districts of the Synod”). Finally, with regard to Const. Art. XI B 7<sup>10</sup> the phrase “all additional duties” is not a straight translation of the German for “all other work” (*alle weitere Arbeit*), which implies that *additional* (i.e., such as are not enumerated explicitly here) duties *and powers or rights* (consistent, of course, with constitutional authority) can be conferred on the President by the Bylaws or special resolutions of the Synod.

When we compare Const. Art. XII 6 and 7, dealing with the rights and duties of the district presidents, we see the “same rights and duties” of the President of the Synod conferred on the district president, confined to the matters of his district, as noted above. But in Const. Art. XII 7, we find not an additional *right* conferred, to supervise the members of his district, but that the district president is, *moreover, especially obligated* (*noch besonders verpflichtet*) to carry out such supervision. There is no language of *right* here, only language of *duty*. Const. Art. XII 7 underscores an *obligation* district presidents, in particular, have

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<sup>10</sup> Const. Art. XI B 8 in the 1924 Constitution, due to the removal of the previous Const. Art. XI B 7 (relating to the President’s signing of official documents in the name of the Synod) in 1998.

within their districts, on behalf of the Synod. It does not grant them a unique right. It expects of them chief responsibility. The expectation of the district presidents chiefly to act in these matters does not preclude a right of the President, asserted by 1956 Res. 6-11 as present in Const. Art. XI B 1–3, to exercise his own authority in these matters should they fail in their chief responsibility. Indeed, such was the sense of the instruction (included in footnote 13, below) that was appended to the Constitution from 1864 to at least 1899, and perhaps up to the thoroughgoing revision of 1924.

Finally, Const. Art. XII 8 begins in the German, “*Die Distriktspräsidenten sind ermächtigt, den Nebengesetzen der Synode gemäss Prediger...zu suspendieren.*” Here an immediate reference to “in accordance with the Bylaws of the Synod,” deferred in the modern, post-1965, English to the end of the paragraph, indicates a strong connection of the empowerment of district presidents to suspend with the elaboration of the expulsion process in the bylaws. As noted above, the association of suspension with the district presidents is not absolute (that is, they do not exercise it on a raw *constitutional* basis but in accordance with the bylaws of the Synod, with significant expectations and limitations). It is not absolutely limited to them (there is no “exclusive particle” in this empowerment) or explicitly treated as an added power (neither is there an “also”). It has been reconfigured and supplemented variously over many revisions of the disciplinary system (often, the district president himself has *not* been able to suspend without the concurrence of a district board of appeals). Given all these factors, and especially the fact that Const. Art. XI A 1 and B 7 permit bylaws to allow additional work (rights and duties) to the President of the Synod, the commission does not find the history of interpretation or application of this paragraph to preclude the President of the Synod receiving and handling an appeal for action in a matter involving a member under district supervision, in a case involving doctrine and practice, and where a district president has failed to initiate the disciplinary procedures warranted under Const. Art. VI and XIII and applicable bylaws.

The commission also notes Const. Art. XI B 1 c, that the President of the Synod “has the supervision regarding the doctrine and administration of...the individual districts of the Synod.”<sup>11</sup> While the ordinary expectation is that:

- “[i]n the districts of the Synod, he shall carry out *his* ecclesiastical supervision duties through the district’s president” (Bylaw 3.3.1.1.1[b])
- he meet regularly with district presidents “to see to it that they are in accordance with Article II of the Constitution, adopted doctrinal statements of the Synod, and doctrinal resolutions of the Synod” (Bylaw 3.3.1.1.1[d]), “to see that their administration is in accordance with the Constitution, Bylaws, and resolutions of the Synod” (Bylaw 3.3.1.2[b]),
- he, in general, “see that [they] act in accordance with Synod’s Constitution [including the provisions for supervision of doctrine and practice], [...] admonish all who in any way depart from it, and, if such admonitions are not heeded, [...] report such cases to the Synod” (Const. Art. XI B 2)
- and that he “advise, admonish and reprove” (Const. Art. XI B 3),

the commission does not find such to exhaust the “means at his command to promote and maintain unity of doctrine and practice in all the districts of the Synod” (Const. Art. XI B 3).

In view of *Synod-wide* objectives of “conserv[ing] and promot[ing] the unity of the true faith,” “provid[ing] a united defense against schism, sectarianism, and heresy,” “provid[ing] evangelical supervision, counsel and care,” and “protection for congregations, pastors, and teachers, and other church workers in the performance of their official duties” (Const. Art. III 1, 8, 9), the Constitution has granted the President *the supervision of the individual districts of the Synod* (Const. Art. XI B 1 c). The Synod is not a confederation of thirty-five synods with thirty-five sets of objectives, thirty-five standards for doctrine and practice, or

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<sup>11</sup> On this passage, see further footnote 14, below.

thirty-five standards for when a worker must be confronted with his or her error, or thirty-five standards of how, should he or she refuse to repent, upon repeated futile admonition, he or she be expelled from the Synod—not only for the Synod’s good, but as the strongest evangelical admonition against final impenitence (excepting, of course, excommunication). The Synod has one set of objectives and one standard, the application of which is ultimately supervised by and—should the district-level authorities fail to do so—applied by the President of the Synod. This power is inherent in Const. Art. XI B 1–3. The President of the Synod, who is ultimately responsible for the maintenance of doctrinal and practical unity in the Synod, must be provided the means, ultimately, to carry out that responsibility. And, it should be noted, members under district supervision are well afforded the benefit of another overseer, to make not singly but doubly sure that they are carrying out their offices as the Lord of the Church has commanded, under the reliable norms of the Scriptures and the Lutheran Confessions.

An historical parallel exists in the very early days of the Synod, at the division of the Synod into districts. In the 1854 Constitution of the Synod, the President of the Synod “has the supervision over the doctrine, practice, and the respective administration of all synodical officers, all pastors and teachers within the entire Synod, over the individual Districts of Synod as such, over the pastoral conferences, *and over the individual congregations of the District Synods*” (1854 Constitution, Chapter VI E 1). “He has the duty to see to it that those who are named in the preceding paragraph conduct themselves in doctrine, practice, and administration of office in accordance with the constitution of Synod. In all cases of deviation it is his duty to admonish. If this is not heeded, it is his duty to report the case in Christian order and according to the proper steps, as befits the nature of the censured matter or person, to the District President *or District Synod* or finally, if need be, *to the assembled Synod*” (1854 Const. Ch. VI E 2). While already at this time *only* the district president was explicitly empowered to suspend a member “between conventions of the district” (1854 Const. Ch. VI A 13), the President of the Synod was able, if the district president would not initiate action, to bring the matter directly to the district convention (or ultimately, the Synod convention) for the case to be acted upon and, if needed, the member expelled.<sup>12</sup> Apart from the fact that expulsion is today procedurally impossible apart from prior suspension, the 1854 state of affairs is actually quite analogous to (in fact, far broader than) the bylaws called for in Op. 16-2791 and Res. 12-14, and presented in the Secretary’s proposal.<sup>13</sup>

##### 5. Evangelical Counsel and Care, Previous Futile Admonition, and the Protection of Rights of Members

Certainly the exercise of a power of suspension (more precisely, historically speaking, the power to initiate proceedings leading to an expulsion from the Synod) is not exhaustive of the responsibility of ecclesiastical supervision. Expulsion from the Synod requires, constitutionally, “previous futile admonition” (Const. Art. XIII 1). Bylaw procedures (Bylaw sections 2.14–17) carefully delineate face-to-face meetings, consultations, investigations, evangelical counsel and care which would not be abrogated if the President of the Synod were to exercise his authority to act on an appeal for action. One of the required factors in a panel’s sustaining a suspension is that these measures be demonstrated to have been carried out in faithfulness to the Constitution and Bylaws of the Synod. The President of the Synod would be held to the same standard as the district presidents, so far as the carrying out of these necessary and evangelical aspects

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<sup>12</sup> At present, “suspension” is not the “optional,” stop-gap measure it was in 1854, but the necessary first step of such formal proceedings under the bylaws developed pursuant to the modern Const. Art. XIII 1. Since 1966’s amendment of Const. Art. XIII, the conventions of the districts and Synod have had no direct role in deciding or hearing appeals in discipline cases; long before that time, already, cases could not simply be brought directly to the conventions, but had to go through other formal proceedings first.

<sup>13</sup> While the President of the Synod’s supervision is, from 1864 on, described only as “over the individual districts as such,” without the 1854 continuation, “over the pastoral conferences, *and over the individual congregations of the District Synods*,” from 1864 until at least 1899 an addendum to the Constitution read, “The Synod declared that the synodical president is directed to serve as inspector of the district presidents, and that he therefore has the right and authority in cases where he is convinced that the district president has erred in his dealings [with the local congregation / member] to convince himself of the situation by a personal investigation at his discretion.” (1864 *Proceedings*, p. 4)

of the process are concerned. Given that, there is no ground here, either, for denying to the President of the Synod the authority to carry out this duty, should a district president fail to.

#### 6. Various Precedential Opinions of the Commission on Constitutional Matters

CCM Ag. 1970 and Op. 03-2338, 03-2338A, 03-2338C, 03-2354, 10-2581, 13-2669, and 15-2750 are cited in the request for reconsideration as concluding “that the Synod President does not have ecclesiastical supervision of an individual member of the Synod.” The commission responds:

- Ag. 1970 (October 16, 1993) concludes that “When the President of a District is *properly* dealing with a pastor *according to the Constitution and Bylaws of the Synod* [Emphasis original to Ag. 1970] the Constitution and Bylaws of the Synod do not allow the congregation, the pastor, or the office of the synodical President to circumvent the office of the District President and deal directly with that pastor and the conflicted congregation. The Commission, however, calls attention to Bylaw 2.27 b which allows for a complaint to be brought to the Praesidium [the bylaw procedure between 1989–2004] if there is a call for suspension of a member and if the district president declines to suspend the member or fails to act within 90 days after the receipt of the written complaint.” Ag. 1970 (while it accommodates itself to the substitution, at the time, of the Praesidium for the President) thus *upholds* the basic principle of CCM Op. 16-2791 as well as the approach to limit the President of the Synod’s role to situations in which the district president has clearly failed to act or declined to suspend.
- Op. 03-2338, 03-2338A, and 03-2338C revisited Op. 02-2309, which concluded that “having promised supervision and counsel, the Synod is precluded from taking any action to terminate the membership of its member who, when performing his/her official duties, follows the advice and counsel of the ecclesiastical supervisor designated by the Synod.” The opinion notes, however, as later underscored by the 2010 Convention in its Res. 7-02 (*Proceedings*, pp. 145–148), that should advice later be corrected, “The member should then be held to consider the corrected counsel. Failure to consider such amended admonition could form the basis for disciplinary action as provided in Article XIII.” Should, in application of the bylaws developed under Res. 12-14, the Synod President find grounds to suspend a member who had acted on the advice of his district president, the constitutional requirement of “previous futile admonition” would, of course, apply at that time, and suspension would not be appropriate until such requirement had been satisfied. All ecclesiastical supervision is, of course, no matter which district president or the President of the Synod performs it, under the same standard, as subscribed in the Scriptures and Lutheran Confessions and as elaborated in Synod’s doctrinal statements and resolutions.
- Op. 03-2354 deals with dissent from opinions of the Commission on Constitutional Matters, and then, in passing, with the question of whether the President of the Synod is an “ecclesiastical supervisor” over the individual members of the Synod (other than other Synod officers and district presidents). It concludes, on the basis of 2001 Bylaw 4.73, which states that the district presidents “shall supervise...” that the President of the Synod is not an ecclesiastical supervisor “over the individual members of the Synod.” This language is itself problematic and should not be understood outside the context of this opinion, as of course he did—and does—supervise *some* individual members directly (see 2001 Bylaw 2.27 [g] and 2016 Bylaw section 2.15). This opinion also fails to address the constitutional authority of the President under Const. XI B 1–3 or such bylaws as have been proposed under Res. 12-14, in accordance with Const. XIII 2, to implement that authority.
- Op. 10-2581 notes that “the ecclesiastical supervision duties of the President of the Synod as regards the Synod as a whole are also the ecclesiastical supervision duties of a district president in his district,” cites Const. Art. XI B 3–4, and comments, apparently on this analogy, “A district president has primary responsibility to supervise the doctrine and practice of the congregations in his district, to advise and admonish, and, if necessary, to take action to discipline up to and

including expulsion of a member under his supervision, whether individual or a congregation.” It deals extensively with the ecclesiastical supervision and, if necessary, discipline of congregations, but does not address the relative roles of the Synod and district presidents in that ecclesiastical supervision.

#### 7. CCM Op. 13-2669: Ecclesiastical Supervision and 15-2750: President’s Ecclesiastical Supervisory Duties and Individual Members of the Synod

CCM Op. 13-2669 concerned (among other things, which the commission does not here address) whether Article XI granted to the President of the Synod “authority to supervise the doctrine or administration of individual or congregation members of the Synod not listed in Article XI, [or whether that is] the responsibility of a district president under Article XII 7.” The opinion, produced nine years after the process for appeal for action to the Praesidium was replaced with appeal to referral panels and twenty-four years after the process for appeal for action to the President, with its constitutional rationale, was replaced with appeal to the Praesidium (though not for constitutional reasons), did not take up 1956 Res. 6-11 or the prior bylaw procedure, allowing appeal for action to the President, at all. Of course, given that no such bylaws for a limited appeal for action to the President of the Synod existed in 2013, this may have seemed a moot point. Likewise, what it means, in Const. Art. XI B 1 c, for the President of the Synod to have supervision *of the districts* (which, like the Synod, have no relevant existence except as *unions* [Constitution Preface: “Reason for the Forming of a *Synodical Union*”]) of their constituent congregations and individual members<sup>14</sup>)—in addition to supervision, in Const. Art. XI B 1 c, of the district presidents, specifically—was not addressed.

Bylaw 3.3.1.1.1[b] was examined, that “in the districts of the Synod, [the President of the Synod] shall carry out his ecclesiastical duties through the district’s president,” but that these duties are, first of all, *his*, also received no attention. The present commission is not persuaded by those arguments of Op. 13-2669 that might be applied counter to those of Op. 16-2791 (all of which have been dealt with already).

Op. 13-2669 simply did not deal with all approaches to the constitutional question, and to the extent that it has been superseded by Op. 16-2791, it stands superseded. Op. 16-2791 and Res. 12-14 deal with an exceptional case where the front line of ecclesiastical supervision, exercised by the district presidents on behalf of the one Synod, applying one standard, is alleged to have demonstrably failed. The commission finds no conflict between the ordinary assignment of ecclesiastical supervision “especially” to district presidents and the exceptional exercise of ecclesiastical supervision by the President of the Synod in cases where the exercise of that supervision by the district officials has broken down and the unity of doctrine and practice in the whole Synod is, therefore, jeopardized. In that exceptional case he is to operate by the same standard and is subject to the same procedures as the district president. In such a case, by virtue of the power given him in Const. XI B 1–3, he is to have this means (namely, the ability to initiate expulsion procedures, *i.e.*, suspend), among others, “at his command to promote and maintain unity of doctrine and practice *in all the districts of the Synod.*”

CCM Op. 15-2750 responded to the question: “Since Bylaw 1.2.1 (i) states that ecclesiastical supervision rests primarily with ‘the President of Synod and district presidents,’ does the President of the Synod have the responsibility, when necessary, to discipline members of the Synod as a district president disciplines members of the Synod?” It concluded appropriately, based on the bylaws as they existed at the time, and unaware of the constitutional issue that led to Op. 16-2791, that “the President of the Synod exercises his authority to supervise doctrine and practice in the districts of the Synod as the Constitution (Art. XII 8) and Bylaws (2.14, etc.) specify, namely, through his supervision of district presidents. ‘In the districts of the

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<sup>14</sup> Districts do not have a distinct and collective “doctrine and practice” to supervise, as they are *Synod in that place*, nor does a district, as such, hold an *office*; supervision of doctrine and practice (“administration of office”) of *districts* must refer to the doctrine and practice (“administration of office”) of those members of the Synodical union under their jurisdiction.

Synod, [the President of the Synod] *shall* carry out *his* ecclesiastical duties *through* the district’s president’ (Bylaw 3.3.1.1.1[b], emphasis added).” This would indeed remain the ordinary case—as would the fact that the President of the Synod remains supervisor of the district presidents and would be able, should the situation warrant, to exercise the other means given him to discipline a district president who is not properly carrying out the ecclesiastical supervisory duty incumbent upon his office.

Op. 15-2750’s further conclusions that the President of the Synod could not, under any circumstances, carry out, in the stead of the district president, Bylaw section 2.14 to expel a member under district supervision were a correct analysis of the bylaws at the time—which seemed, given that “expulsion shall be executed only after following such procedure as shall be set forth in the Bylaws of the Synod” (Const. Art. XIII 2)—a reasonable basis on which to answer the question. Different conclusions have been drawn from the constitutional material in Op. 16-2791, just as different conclusions would be drawn from the bylaws to be adopted under Res. 12-14—in the specific case of matters dealing with doctrine and practice, where there is a formal accuser who has appealed for action, and where the district president has failed or (in the view of the chief ecclesiastical supervisor of the Synod, inappropriately) declined to suspend.

Question 2: Does the Synod President have empowerment by the Synod Constitution to have ecclesiastical supervision, suspension and / or expulsion authority of a member of the Synod?

Opinion: This question has been sufficiently addressed by CCM Op. 16-2791 and the above.

Question 3: Does the Synod President have empowerment by the Synod Bylaws or resolutions to have ecclesiastical supervision and / or expulsion of a member of the Synod?

Opinion: CCM Op. 16-2791 and 2016 Res. 12-14 have clearly directed the Secretary of the Synod to draft, and the Board of Directors to adopt bylaws, elaborating this constitutional authority of the President, at least in the narrow circumstances indicated—namely, in a matter involving doctrine and practice, when there is a formal accuser who has appealed for action because the district president has failed to act or declined to suspend. The commission, in thoroughly reviewing Op. 16-2791 with regard to the stated challenges, finds no reason to withdraw, rescind, or modify its opinion, and therefore no reason that the Secretary of the Synod or the Board of Directors should proceed otherwise than to adopt the bylaws drafted (by the Secretary, in extensive consultation with the Council of Presidents), and already reviewed, as to content and consistency with Constitution, Bylaws, and resolutions, especially 2016 Res. 12-14, and as to language, by the Commissions on Constitutional Matters and Handbook.

The Secretary of the Synod was directed to share the minutes of this phone meeting immediately with the Board of Directors and Council of Presidents of the Synod.

#### **61. Review of Minutes of the Commission’s May 5, 2017 Meeting**

The commission reviewed the minutes of its May 5, 2017, meeting, previously provided by the Secretary, giving particular attention to its Op. 17-2820, which the Secretary had been asked to finalize. The minutes will be circulated, as is the custom, for final approval by Wednesday, May 17.

#### **62. Review of Memorandum and Articles of Association for New Legal Entity in Belize (17-2829)**

The acting Chief Administrative Officer of the Board of Directors forwarded to the commission the documents drawn up to authorize and approve the creation of a legal entity in Belize. The commission reviewed the documents and found that they do not conflict with the Constitution, Bylaws, and resolutions of the Synod, although it notes the following items:

- The memorandum of association, which seems to be the more foundational document than the articles, does not contain the relationship and asset disposition language required in Bylaw 1.5.3.6. The commission is unfamiliar with Belize law, but suggests that this language should be incorporated in as fundamental a document as possible, with the intention of it governing

effectively all articles and provisions of all of an entity's governing documents. Nonetheless, the commission has been assured by LCMS legal counsel that the Synod's interests are adequately protected by these documents.

- LCMS Belize, as an agency of the Synod, will need to submit policies of its board of directors for review by the commission, when such are developed.
- The commission expects that those responsible for operation of the new entity will do so fully aware of *all* the otherwise unstated requirements imposed by the simple but comprehensive sentences rendering “all provisions,” “all directors, officers, employees and agents of the corporation, as well as the activities of the corporation,” “subject to the [Constitution and] Bylaws and resolutions adopted by The Lutheran Church—Missouri Synod in convention.”

John W. Sias, *Secretary*