

1971 Handbook
only quotes not
changed

December 10, 1973
St. Louis, Missouri

SUBJECT: The constitutionality of the actions of the President, of the Synod, ^{various} ~~other~~ Boards of the Synod, the 1973 convention of the Synod, and the present Board of Control of Concordia Seminary at St. Louis, beginning with the appointment of the Fact Finding Commission by the President of the Synod.

Is the establishment of the Fact Finding Committee by the President of the Synod ~~was~~ constitutional?

- A. The specific reasons given by the President of the Synod clearly place the duties of the Fact Finding Committee under the provisions of 6.75 of the Synodical Handbook (Handbook, 1971, pp. 138-139, "Controversies Among Faculty Members").
1. In the President's report to the synodical convention of 1971 the President of the Synod gave the following specific reasons for his actions:

"Although such criticisms (about the theological position of the St. Louis faculty) have been expressed for several years, a series of events which involved the faculty themselves occurred in the last months of 1969 and early in 1970 which made it imperative for me to determine what the doctrinal situation at our seminary was.

Among these events were the following:

1. ~~...it became obvious that there were serious disagreements in the way in which members of the faculties understand the authority of the Sacred Scriptures... In addition, A member of the St. Louis faculty stated that the presuppositions with which certain members of the faculty were approaching the Scriptures were not Lutheran...~~
2. In January 1970 several members of the faculty in St. Louis were involved in...
3. In February 1970, the faculties...discussed an essay by a member of the St. Louis faculty. In this meeting a sharp division was evident. The systematics departments of both seminaries adopted a resolution stating that the essay undermined the authority of the Scriptures and confused Law and Gospel.
4. In April, I received a letter from a senior member of the St. Louis faculty which pointed out theological problems...."
(Proceedings, 1971, p. 56, "President's Report")

The specific reasons ^{why} ~~for~~ the President of the Synod acting at the time mentioned and not earlier are in every case linked directly to members of the faculty at St. Louis ^{and to alleged} ~~in which there were~~ disagreements among them.

The President of the Synod states that ~~it was~~ "serious disagreements," "sharp division," and "theological problems" among the members of the faculty at St. Louis ~~that~~ prompted his action.

B. There is a specific regulation in the synodical Handbook that is titled "Controversies Among Faculty Members." (Supra, I,A, p. 1) That provision of the Handbook reads as follows:

"Controversies and disagreements among members of the faculty...shall be submitted to the president of the institution for mediation. If this proves unsuccessful, he shall report the matter to the Board of Control for arbitration. After hearing the parties the board will render its decision, which shall be final, without the right of appeal under the provisions of Section 5.01ff. A record of the proceedings shall be filed with the Board for Higher Education."

1. The "shall" of this provision is both ³ inclusive ² and ¹ mandatory ^{agreement} of all "controversies and disagreements among members of the faculty!" As the President of the Synod ~~so capably~~ ^{explicitly} pointed out, he ^{felt himself} ~~was~~ compelled to act because of problems among the members of the faculty themselves. The "shall" of provision 6.75 deliberately and specifically ^{excluded every person in the Synod} keeps from the investigation ~~of any person in the Synod~~ except the "president of the institution" and, ^{a problem to it,} when the president of the institution reports ~~it,~~ and "the Board of Control."

2. There are sections of the Constitution that do give the President of the Synod investigative powers. (Handbook, 1971, p. 20, XI,B,2,3, "Duties of the President) The Handbook states:

"2. It is the President's duty to see to it that all the aforementioned (All officers, all who are employed, ^{by supra} individual Districts, and District Presidents) act in accordance with the Synod's Constitution, to admonish all who in any way depart from it, and, if such admonition is not heeded, to report such cases to the Synod."

The words "to see to it" ~~would indeed~~ ^{may} imply investigation through some ~~channel~~ ^{some} Constitutional channel, since the President is responsible to see to it that "all...act in accordance with the Synod's Constitution." There was a Constitutional channel provided in 6.75. In fact, according to this provision the senior member of the faculty who sent the letter

that helped propel the President of the Synod into action should have been admonished and directed to the proper channel for ~~such~~ ^{the} airing of his grievance. But this provision ~~can hardly~~ ^{does not} apply to the Fact Finding Committee, ^{concerning which} since the President of the Synod states in his report to the Convention that the Committee was created "to ascertain the doctrinal position of the members of the faculty of Concordia Seminary, St. Louis." It should be noted also that the reference here to the Synod cannot be construed to mean the Synod in convention since any doctrinal breach already has an exclusive remedy (Infra, p. 11) and since matters of an adjudicatory nature cannot come before the Synod in convention (Infra, p. 9).

Provision XI, B, 3 reads as follows:

- "3. The President has and always shall have the power to advise, admonish, and reprove. He shall conscientiously use all means at his command to promote and maintain unity of doctrine and practice in all the Districts of the Synod."

~~Does~~ ^{DOES NOT} ~~right~~ this provision give the President the right to appoint a Fact Finding Committee? By ~~using~~ the words "use all means at his command" this provision says that there are some means that are not at his command. The Constitution and Bylaws of the Synod determine what means are at the President's command. It is instructive to look at those channels. The Bylaws offer the President one means ~~(Handbook, 1971, 2.27, p. 46, "Powers and Duties of the President")~~. ^{in question} That provision reads in part:

- "a. The President, in exercising supervision over the doctrine taught in the Synod and over the administration of the officers and employees of the Synod, shall at regular intervals officially visit or cause to be visited all the educational institutions of the Synod, and he shall receive reports from the District Presidents."

The Constitution does indeed provide an investigative channel in the words

"shall receive reports from the District Presidents." Interestingly enough, ^{this channel is available to the President of the Synod} ~~it is~~ specifically "in exercising supervision over the doctrine taught in the Synod" at its "educational institutions." For the second time we find

a clear and constitutional avenue for investigating. It is instructive at this point to remember the section which immediately precedes "Duties of the President" in Article XI of the Constitution entitled "Rights and Duties of Officers," (Handbook, 1971, XI,A,1, p. 19). It reads, "The officers of Synod must assume only such rights as have been expressly conferred upon them by the Synod." This is done by the Constitution and Bylaws of the Synod and by Synod in Convention. What happens if a situation arises ~~in~~^{between} Conventions? The Handbook ~~does have~~^{has} an answer, ~~The provision is~~ⁱⁿ 2.29d, (Handbook, 1971, p. 48, "Advisory and Executive Functions"). It reads:

"The President in the interval between conventions, shall appoint special boards and committees whenever the purpose for which Synod has been organized requires or when conditions arising in the course of time demand such action."

The President ~~indeed~~^{has} made it very plain that ~~the~~^{he felt that} the situation needed action. ~~The point being made is that~~^{But} with 2.27a referring specifically to the President's actions in supervising the "doctrine taught in the Synod" and specifically at its "educational institutions," ~~there is~~^{he had a} plain constitutional directive. Where there are "controversies and disagreements among the members of the faculty" there is equally clear and exclusive constitutional directive in 6.75. ~~This provision cannot permit~~^{is not permitted} the President to act in a way contrary to the Handbook nor indeed in a way for which there is already existing specific procedures provided by the Handbook. It is clear that even Synod in convention cannot order the President to do so. Provision 1.27c of the Handbook specifically prohibits the publishing or presentation to any floor committee or to the convention "overtures requesting the Synod to take action which is in conflict with the Constitution or Bylaws of the Synod or in matters for which the Constitution or Bylaws have provided specific procedures," (Handbook, 1971, pp. 30-31 "Reports and Overtures"). The Synod here clearly spelled out again the principle

that the provisions of the Handbook are restrictive in their assignment of duties and that those specifically assigned duties and specifically designated procedures are not to be assumed by any person, board, or committee other than the person, board, or committee designate by the Handbook itself.

Once the Board of Control ^{has} ruled, ~~is~~ that ruling ^{IS NOT} appealable (6.75 - ~~3~~ p.2,B)

A. To understand the wording of 6.75 it is important to look at the wording of section V. of the Bylaws, (Handbook, 1971, pp. 113-122 "ADJUDICATION AND APPEALS"). 6.75 begins with the words "Controversies and disagreements among members of the faculty." 5.01 of section V of the bylaws reads:

"The provisions of this article are established in order to provide a means consistent with the Word of God to find the truth, provide for justice, safeguard the welfare of the Synod and, wherever possible, effect reconciliation... (ii) in all cases of disagreement, accusation, and controversy in which all parties are within the following: the Synod, District of the Synod, organizations owned and controlled by the Synod, persons holding positions with any of the foregoing, or members of the Synod."

It is first of all to be noted that both the word "controversy" and the word "disagreement" appear in both sections. These words are intended to specifically exclude the faculty of an institution from the ^{directives} ~~specifics~~ of that follows. This is done in the light of 5.05, which is titled "Exclusiveness of Remedies" and reads as follows:

~~"Except as may be otherwise in these Bylaws set forth, expressly stated to be an exception hereto, provisions of this Article V shall govern all formal adjudication and appeal procedures within the Synod."~~

So, 6.75 uses the exact language of 5.01 to state the fact that when the "controversy and disagreement" are among faculty members they are excluded from the specific regulations and channels of V. The "all" of 2.01, (ii) does not apply to inter-faculty ^{RA} ~~member~~ problems. The word "accusation" is ^{explained} covered by 6.83 of the Handbook in the words "is to be formally charged" (Handbook, 1971, p. 110 "Removal from Office"). Both 6.75 and 6.83 refer specifically to section ~~ix~~ of the Bylaws. 6.75 states that when the Board of Control rules on a matter

its decision is final and without appeal to 5.01ff. 6.83 ^{provides} ~~rules~~ that once the Board of Control has ruled ~~in~~ a case in which a faculty member is to be formally charged, the provisions of 5.11ff. are in effect. 5.11 is entitled "SUS-^{CE} PENSION AND EXPULSION." As written, 6.75 and 6.83 represent, and in fact are, the statement that as far as faculties are concerned, in internal matters among faculty members, the Board of Control acts ^{as} and ^{is} the Commission of Adjudication for the faculty and in the case of formal charges it acts as and is the Board of Appeals until such time as the board itself becomes party to an appealable action. The same powers granted other Boards of Appeal and Commissions of Adjudication are granted to the Board of Control, as can be seen by the "final and without right of appeal" in 6.75 and the "duly investigate all the facts and circumstances...when a member of the administrative or teaching staff is to be formally charged ^{upon}" in 6.83. The intention is clear. The Board of Control is for the faculty the Commission of Adjudication and the Board of Appeals until involved in an appealable or an adjudicable action.

- B. It is in this light that the words of 6.75 ^h "shall be final and without the right of appeal under the provisions of 5.01ff" have their full weight. Section 5.39 of section V defines the word "final" as it applies to all adjudicatory and appeals procedures. ^{E.39} ~~5.39~~ reads as follows:

"All decisions of the Boards of Appeal and all unappealed decisions of the Commissions of Adjudication shall be final and binding on all concerned and not subject to review, reversal, amendment, or modification, any provision to the contrary in these Bylaws notwithstanding;".

This section of the adjudicatory and appeals procedure intended ^s to make sure that there ~~was~~ ^{is} a time when a matter that needed ^s settling could indeed be finally ^{settled}. It is so final that, even if ~~you~~ could interpret any other part of the Bylaws differently they cannot disturb the finality of ^{such a "final"} a decision ~~called final~~.

- C. When the report of the Fact Finding Committee was given by the President of the Synod to the President of the Seminary and to the Board of Control ^{it} had reached

the proper authority for adjudication under 6.75. As noted above, there were "controversies and disagreements among the members of the faculty." Of course 6.83 could have been in force. But the President expressly stated that ^{he took} his action ~~was taken~~ "to ascertain the doctrinal position of the members of the faculty of Concordia Seminary, St. Louis" and did not "undertake the investigation on the assumption that anyone was guilty of false doctrine, but rather to find out what the situation was." (President's Report, Convention Proceedings, 1971, p. 56). In ~~their~~ ^{its} final report to the Synod, the Board of Control states: "Since the Fact Finding Committee report, on the basis of which the board was to take action, specifically disclaims any judgemental function, and since the board therefore did not have before it charges of false doctrine against any faculty member, the board did not consider the interview process to be an investigation of false doctrine." (Convention Workbook, 1973, p. 100) So then, both in the understanding of the President of the Synod and of the Board of Control, the Fact Finding Committee's Report did not constitute charges of false doctrine. The Board of Control was therefore working under the provisions of 6.75 until such time as the Board ^{would} make its determination and move forward with formal charges. Because the Report was filed not as ^{an act of} formal charges but as a statement of how things actually were, we may assume that it showed that there were

indeed controversies and disagreements among the members of the faculty, and for this reason also 6.75 with its "final" and "without the right of appeal" ^{provisions} comes into effect as of January 15, 1973, ^{when} the Board of Control voted to commend the members of the faculty who were interviewed by the Fact Finding Committee. It is to be remembered that the ^{members of Board of Control} action of the faculty ^{and Fact} to vote individually on the men interviewed to "commend" or to "correct." The Board of Control gave very specific meaning to those words:

'The board gave a specific definition to the words 'commend' and 'correct.' It agreed that to 'commend' was equivalent to saying that the professor was not guilty of false doctrine but was teaching in accord with the Scriptures and the Confessions....To 'correct' was the equivalent of saying that the professor was not teaching in accord with the Scriptures and the Confessions and was therefore open to the charge of false doctrine." (Convention Workbook, 1973, p. 100)

By stating
~~In noting~~ in the same report that "It shall be noted that the action which is here taken is ^{the} action of the Board of Control," that Board rendered its official decision, which according to 6.75 is "final, without appeal." It is ^{also} to be remembered at this point ~~also~~ that "final" has the specific meaning of "binding on all concerned and not subject to review, reversal, amendment, or modification, any provision to the contrary in these Bylaws notwithstanding." ~~The~~ ^{the} issue was closed by the official vote of the Seminary Board of Control.

6. It is instructive at this point to look at the general rules that are to govern all Commissions of Adjudication (Handbook, 1971, pp. 117-119, "RULES OF PROCEDURE AND ADMINISTRATIVE REGULATIONS") ~~THESE ARE THE BASIC PRINCIPLES~~ ~~WHICH~~ While the Board of Appeals may change rules of procedure and administrative regulations, those changed rules must remain consistent with the basic principles enumerated in this section. The principles are so basic that no commission or board can violate them nor can they be violated when the Board of Appeals introduces changes. 5.31b states that "All hearings before a commission or board shall be private." Provision j~~x~~ of the same section amplifies that by adding: "While a case is still undecided or while appeals are contemplated or pending, there shall be no publicity of the case by any party to the proceeding." ^{since} The final decision of the Board of Control was not reached until January 15, 1973, ^{issuance of the} The Report of the Synodical President was in direct violation of ^{the cited} that section. No appeal to Resolution 2-28 of the Milwaukee convention of 1971 ^{AND NOT} can possibly be interpreted as sanctioning that Report, since no convention is permitted to even contemplate "overtures requesting the Synod to take action which is in conflict with the Constitution or Bylaws of the Sy-

nod," (1.27c). Likewise, the issuance of the Study Edition of A Statement of Scriptural and Confessional Principles violated the specific prohibitions of 5.31 b and j. ~~The~~ ^A Statement was issued as ^a guideline for the Board of Control and as such became a part of the ^{confidential} proceedings of that Board until such time as it made its final decision. Section ^(c) ~~of~~ 5.31 is also involved:

"Except as herein or in the rules and regulations expressly allowed, while any proceeding is pending before a commission or board, no party to such proceeding, nor anyone on such party's behalf, shall either directly or indirectly have any form of communication with any member of such commission or board concerning any matter involved in such proceeding...."

The President's ^{issuing} of A Statement as a directive to the Board of Control in its deliberations is in direct violation ^{of} this provision. Since the President appointed the Fact Finding Committee, received their Report, and gave that Report to the President of the Seminary, and to the Board of Control, he was a party to the proceeding. ^{the} ~~The~~ ^{issuance} of A Statement was unconstitutional. Section ^(k) ~~of~~ 5.31 is also applicable. It reads:

"All files of cases in which a final decision has been rendered by a commission or board shall be preserved in a locked file in the custody of the President of Synod...."

It is ^{the undersigned's} ~~my~~ contention that this is part of the intent of 5.39 to prevent the ^{REVERSAL} ~~review, amendment, or modification of a final ruling.~~

~~As part of the file~~
A Statement is also to be locked in the Presidents office. Regardless of its content, it is part of a final decision on the case in question and is therefore under the ~~stipulations of~~ ^{provision} ^(k) of 5.31.

I. ~~Can~~ The Synod in convention ^{CANNOT} hear adjudicatory or appeals cases and make decisions regarding them.

A. Provision 1.27c reads: "...nor shall any overture be accepted with reference to any case involving suspension, expulsion, or appeals." (Handbook, 1971,

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p. 31, "Reports and Overtures") It is to be noted that the word "accepted" is explained by 1.27d, which states that "The President shall also decide which of the matters accepted for presentation to and consideration by the convention shall be published in the convention manual." (Ibid.). It is the President's responsibility to do the accepting or rejecting. ^{But} His constitutional directive is very clear. No overture is to be accepted for convention action or "published or presented to any floor committee" "with reference to any case involving suspension, expulsion, or appeals."

B. The Milwaukee convention of the Synod made into binding law the opinion of the CCM on precisely this point. (Resolution 5-20, Convention Proceedings, 1971, p. 161) The interpretation of the Bylaws are made binding on the Synod until such time as they are overruled by specific convention action to reinterpret the Constitution and Bylaws. (Handbook, 2.107e, p. 65, "Commission on Constitutional Matters"). The CCM states as one of ^{the} ~~its~~ "whereas" ^{all} by which it rejects the overtures in question the following:

"...The Synod has provided and is in the process of improving procedures for the airing of grievances and the adjudication of rights and privileges of its members and to correct any violations of the Constitution and Bylaws of the Synod;..."

The reference to the violations of the Constitution and Bylaws ^{occurs} ~~is~~ because some very specific ones were mentioned in the overtures. But the ruling is clear.

~~They are constitutional channels for "airing grievances" and "adjudicating,"~~

but that place is not Synod in convention. Section V states those channels and so do 6.75 and 6.83, all of them by ^{passed} in the convention actions regarding 3-09, 3-12, and 3-12A, along with all of the unconstitutional overtures they represent. The second "whereas" is equally instructive:

"The principle of accountability does not presuppose that synodical conventions are the proper forum for the airing of grievances and the adjudication of the rights and privileges of its members, officers, commissions, and boards;..."

It is to be noted that in its ruling the CCM ruled out even the airing of grievances much less adjudication. The words "the principle of accountability" ^{CAME} ~~came~~

directly from the two overtures presented to the convention -- 5-52 and 5-68. (Convention Workbook, 1971, pp. 265, 270). The Overture is referring specifically to Article XI, par. A, 2, of the Constitution and to 2.13, 2.29c, and 2.77d of the Bylaws of the Synod. Each of these ^{provides} ~~is a provision~~ that the President of Synod, as well as the boards and committees ^{of the Synod} are accountable to Synod. The ruling was: ~~those~~ those provisions notwithstanding, the Synod in convention is not the place to hold the President, boards, commissions, or persons accountable. As a matter of fact, the overture ^{was} for the word "appeals" to be added to 1.27a, which defines the purpose of Synod in convention. The overture complained that the wording of 1.27c didn't provide for appeals as "a legitimate part of convention business for the Synod." The overture also suggested provisions ^{that} for "Appeals...that may call for the removal of an officer" and "Appeals... made from the executive functions of the President" "shall be published in the appropriate section of the convention workbook" in direct contradiction to the present wording of 1.27c. To all this the Resolution 5-20 said no. The CCM thus upheld the "Exclusiveness of Remedies," 5.05 and the exclusiveness of the double "all" of 5.01, ^{namely,} that all cases involving excommunication or expulsion, as well as all cases involving "controversy, accusation, or disagreement," are to be handled by Commissions of Adjudication or Boards of Appeal unless explicit exception is taken to V. by a Bylaw. ^{But} The only two that are so specific are 6.75 and 6.83. The ruling of the CCM was very explicit: ^{there are} there are no deviations from the prohibitions of 1.27c.

Therefore, taking into account the specific reasoning and the specific constitutional provisions quoted, the following requests of the Commission on Constitutional Matters are respectfully made.

To rule the formation of the Fact Finding Committee unconstitutional.

To rule the Report of the Synodical President unconstitutional.

To rule the issuance of A STATEMENT to the Board ^{Control} as well as the publication and re-lease of the study edition to the Synod, unconstitutional.

To rule the actions of the President, Committee 3, and the Synod regarding ^{3-01,} 3-09, ~~3-12,~~ and 3-12A unconstitutional and there for invalid in their content and their resolutions.

To declare the action of the Board of Control on January 15, 1973, as valid and "final, without right of appeal" and also "binding on upon all concerned and not subject to review, reversal, amendment, or modification" and to so instruct the present Board of Control.

To make known to the entire Synod -- its ^{congregations,} members, officers, boards, and commissions -- that in no case involving the ^{men} of the Seminary faculty can the content and/or charges of the Fact Finding Committee Report, The Report of the Synodical President, A Statement of Scriptural and Confessional Principles, or the resolutions of the 1973 Convention (3-09, 3-12, 3-12A) be involved in the review, reversal, amendment, or modification of the final action of the Board of Control on January 15, 1973, nor be a part of determining dismissal, tenure, rehiring, retiring, ^{or} placing on modified service of any of the ^{faculty members} ~~men~~ involved in the Board of Control's action.

To declare the case of the faithfulness of the ^{faculty members} ~~men~~ at the Seminary closed in all aspects as the constitution and Bylaws demand.

IN ANSWERING THESE REQUESTS TO ADDRESS ITSELF SPECIFICALLY TO THE INTERPRETATION OF EACH SECTION THAT IS QUOTED, AS THE CONSTITUTIONAL PROVISION SUPPORTING THE REQUEST.

