

LCMS

Commission on Constitutional Matters Minutes — 2004

Table of Contents

>Ubi Ufm4-5, 2004	2
>Ubi fUfm28, 2004	3
7 '17, 2004.....	15
U '22, 2004	18
U '20-24, 2004	24
K '9-15, 2004	31
° '3, 2004	35
° '11, 2004	41
o '2, 2004.....	43
o '27, 2004.....	46
\ '6-8, 2004.....	47
V '4, 2004.....	51
) '6-7, 2004	52
) '20, 2004.....	54

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

January 4-5, 2004

229. Call to Order and Prayer

Chairman Walter Tesch called the meeting to order at 8:00 p.m. on January 4 and asked Albert Marcis to open with prayer. All members of the Commission were present.

230. Discussion of Goals of Joint CCM/BOD Meeting

The Commission discussed the purpose and desired outcomes of its joint meeting with representatives of the Board of Directors the following day, January 5.

231. Other Business

Prior to recessing for the night, the Commission continued its discussions of several pending questions and agreed to finalize its opinions at a later date.

232. Joint Meeting

The joint meeting with representatives of the Board of Directors was called to order at 9:00 a.m. on January 5. Present were the members of the Commission, five members of the Council of Presidents, and the President of the Synod. Discussions continued throughout the day.

233. Concluding Business

The Commission met briefly following the joint meeting to reflect upon the discussions.

234. Adjournment

The meeting was adjourned with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Conference Call Meeting
January 28, 2004

235. Call to Order

Chairman Walter Tesch called the meeting to order and asked Wilbert Sohns to open the meeting with a prayer. All members of the Commission participated in the meeting.

236. Approval of Minutes

The minutes of the January 45, 2004 meeting were approved as distributed to the members of the Commission prior to the meeting.

237. Convention Report

Chairman Tesch called attention to the draft of his report to the 2004 synodical convention that had been distributed prior to the meeting. After discussion, it was agreed that the report should also include reference to the Commission's involvement in the *Handbook* revision project, discussions with the Board of Directors over their recent actions contrary to the Constitution and Bylaws of the Synod and the Board of Directors' suggestion that such action is nonetheless authorized under Missouri state law, and the referrals that have been made by the Commission to other entities in conjunction with several of its opinions.

238. Participation in Joint BOD/COP Meeting

Chairman Tesch reported that he has been invited to participate as an observer in an upcoming joint meeting of the Board of Directors and Council of Presidents.

239. Opinions Review

As a result of the Commission's joint meeting with the Board of Directors, the opinions of the Commission that have been declared "of no effect" by the Board were reviewed. The Commission concluded that it is still satisfied that these opinions are correct, appropriate, and consistent with the Constitution and Bylaws of the Synod.

240. Handbook Revision (00-2271)

Members of the Commission again expressed concern that the revisions that are being proposed for the *Handbook* of the Synod, while not intended to be substantive, could result in future confusion if the revision is adopted by the convention. Members of the Commission will continue to share and discuss specific concerns with one another via e-mail. The Commission's concerns will be communicated to the appropriate convention floor committee.

241. Special Legal Opinions Obtained by Board of Directors (03-2372, 03-2373)

Two pastors of the Synod, in letters dated October 21 and 23, 2003, asked similar questions regarding the special legal opinion obtained by the Board of Directors.

Question 1: Is the Bryan Cave opinion/Board of Directors report on that opinion consistent with the LCMS Constitution and Bylaws?

Opinion: Without specific questions deriving from the Board's report, the Commission cannot issue an opinion regarding either the Bryan Cave opinion or the Board of Directors' report on that opinion because the function of this Commission, as set forth in Bylaw 3.905, is limited to providing interpretations of the Synod's Constitution, Bylaws, and resolutions.

Question 2: If it is not, should the Board of Directors make the total Bryan Cave opinion available to the entire LCMS prior to the 2004 convention?

Opinion: The question as posed requests a value judgment rather than an interpretation of the Synod's Constitution, Bylaws, and resolutions. Nothing in the Constitution or Bylaws of the Synod requires the Board of Directors to publicize the opinion it obtained. It is within the discretion of the Board of Directors to determine whether the Bryan Cave opinion should be publicized prior to the convention.

Question 3: Again, if it is not consistent with the LCMS Constitution and Bylaws, should the Board of Directors be required to get a second opinion from a reliable law firm familiar with Missouri law without disclosing to the second law firm the Bryan Cave opinion?

Opinion: The Bylaws of the Synod do not give any direction as to the methodology the Board of Directors is to follow in fulfilling its functions. Bylaw 3.73 states: "All officers, boards, and commissions shall be accountable to the Synod for all their actions, and any decision of such officers, boards, and commissions may be appealed to the national convention of the Synod."

242. Board of Directors as Officer of the Synod; Opinions of the Commission on Constitutional Matters; Executive Power of the President of the Synod (03-2376)

The President of the Synod, in a December 3, 2003 e-mailed letter, submitted a series of questions regarding the Board of Directors and the Commission on Constitutional Matters.

Question 1: LCMS Constitution Article X, "Officers," states: "The officers of the Synod are....5. A Board of Directors." Are the individual members of the Board of Directors individual officers of the Synod? Is the Board of Directors collectively, as an entity, an individual officer of the Synod?

Opinion: The dictionary defines an officer as one who holds an office of trust, authority or command. In a legal context, an officer has been defined as a high level management official of a corporation or unincorporated business, hired by the Board of Directors of the corporation or the owner of a business, such as a president, vice-president, secretary, financial officer or chief executive officer. Officers of secular profit or nonprofit corporations typically serve at the discretion of those in control and are appointed by them.

As a church body, The Lutheran Church—Missouri Synod has chosen to retain to itself the authority in the selection of officers and does so in convention. In identifying its officers, the Articles of Incorporation in Article V, entitled "Officers," reads as follows "The corporation shall have a board of directors of such number and qualifications and who shall be elected in such manner and for such terms of office as shall be set forth in the Constitution or Bylaws of The Lutheran Church—Missouri Synod. In addition, the corporation shall have officers having such qualifications and who shall be elected or appointed in such manner and for such terms of office as provided for in the Constitution or Bylaws of The Lutheran

Church-Missouri Synod.” By this disclosure in the Articles of Incorporation themselves, the Synod has given notice to the world of its intent to operate as a church body and pursuant to its Constitution and Bylaws.

The Constitution of the Synod, Article X, describes its officers as “1. A President; 2. Vice-Presidents, in line of succession, as prescribed by the Bylaws; 3. A Secretary; 4. A Vice-President–Finance—Treasurer not in line of succession; 5. A Board of Directors; 6. Other officers, as specified in the Bylaws.” Article XI of the Constitution is entitled “Rights and Duties of Officers.” Contained within that article are the description of the duties of the President, the duties of the Vice-Presidents, the duties of the Secretary, the duties of the Vice-President–Finance—Treasurer, and the duties of the Board of Directors.

In a traditional sense, an officer is an individual and not a board or other entity. However, in the context of the structural organization of the LCMS, the Synod has chosen to identify the Board of Directors collectively as an officer of the Synod. Since the Synod has chosen to reserve to itself ultimate control of its affairs, such a designation is consistent with the concept that an officer is chosen by the controlling authority of a corporation or other legal entity to perform specific functions within certain defined limitations, as is the case with the Board of Directors. It is also consistent with the Synod’s designation of the President under Article XI of the Constitution as having supervision regarding the doctrine and administration of the officers of the Synod. As such, the Board of Directors of The Lutheran Church—Missouri Synod, both in its identification in the Constitution and by identification of its function, within the church is in fact collectively an officer of the Synod.

There are no provisions in the Constitution or Bylaws of the Synod that give any authority or defined duties to the individual members of the Board of Directors. Reference is always made to the Board of Directors as a unit. As an example, Bylaw 3.183 addresses the authority of the Board of Directors, and Bylaw 3.185 addresses the power of the Board of Directors with respect to the property of the Synod. These bylaws clearly refer to the Board of Directors as a unit and not individual members of the Board of Directors. Further, as pointed out above, Article X of the Constitution, in designating the individual officers of the Synod, refers to “A Board of Directors,” and does not use language that could be interpreted to mean the individual members of the Board. Accordingly, the individual members of the Board of Directors of the Synod are not officers of the Synod.

It is therefore correct to assert that the Board of Directors collectively is an officer of the Synod, but it would not be correct to recognize the individual directors as individual officers of the Synod.

Question 2: The LCMS Board of Directors has declared that it “cannot agree with or accept” certain official opinions of the CCM and that such opinions “are of no effect.” In such an instance of an apparent conflict between a BOD resolution and a CCM opinion, what, if any, specific directive of the Synod resolves such a conflict while honoring and upholding specific provisions of the synodical Bylaws, including Bylaw 3.183 d and d 2 (“Authority of the Board of Directors”): “to the extent of its responsibilities relative to the general management and supervision of the business and legal affairs of the Synod....[it] shall have the right to call up for review, criticism, modification, or revocation any action or policy of a program board, commission, or council, except opinions of the Commission on Constitutional Matters”; and Bylaw 3.905 d: “An opinion rendered by the commission shall be binding on the question decided unless and until it is overruled by a synodical convention”?

Opinion: The questioner correctly points out the two primary, relevant provisions of the Bylaws. In order to understand these bylaw provisions, it is helpful to review the development of the Board of Directors, as

well as development of the Commission on Constitutional Matters. In addition, a review of the prior actions of the Synod with respect to historical conflicts between the Board of Directors and the Commission on Constitutional Matters may be of assistance.

In 1961, a report entitled “The Development of the Formal Administrative Structure of the LCMS from 1897-1961” was issued under the authorship of Dr. August Suelflow, who was engaged as Research Secretary for the Synodical Survey Commission. In that report Dr. Suelflow identified the embryonic roots of the present Board of Directors as being traced to the original “Synodical Board of Control” or “Supervision” established by the Synod in 1908. Dr. Suelflow describes the Board as having been initially created as a board to conduct interim business between conventions of the Synod together with other boards in a horizontally related fashion, such as the Mission Board and the Board for Higher Education. The Synodical Survey Commission Report in the 1962 *Convention Workbook* states, “Synod’s Board of Directors was established in 1917 to replace the original ‘Synodical Board of Control’ organized in 1908 chiefly to coordinate and handle matters for Synod’s educational institutions.” In the 1920’s the *Proceedings* continued to be published both in English and German. Dr. Suelflow describes that the current Board of Directors was referred to as “Directors” in the English version of the 1920 convention, although the official German version of the *Proceedings* still referred to the Board as a “board of control,” the historic term. As the new Constitution (considered merely “an amplification of the old Constitution made necessary by the expansion of the Synod’s work”—Introduction, 1924 synodical *Handbook*) was developed, the Board of Directors was charged to serve as the legal representative of the Synod, the custodian of all the property, and the manager of all business affairs. These functions included the preparation of an annual budget, the regulation of collection of monies, and the allocation of the finances of the Synod. While the bylaws pertaining to the Board of Directors have evolved since that time, the essence of the Board of Directors and the specific duties and responsibilities assigned to it by the Synod and convention remain.

Of one particular note, particularly with respect to the issue presented, is the last series of amendments to Bylaw 3.183 d 2. Prior to 1998, the authority of the Board was described in the bylaw (then numbered 3.191 e) which read: “The synodical Board of Directors of The Lutheran Church—Missouri Synod shall receive periodic reports on the operations of the various synodwide corporations, councils, boards, commissions, and departments and shall have the right to call up for review, criticism, or suggestion any policy of a corporation, council, board, or commission of the Synod.” By actions of the 1998 convention, that bylaw was amended and ultimately renumbered. The Board’s authority from the Synod to call up for review, criticism, modification, or revocation was amended to expressly exempt opinions of the Commission on Constitutional Matters from that right and authority, which became consistent with Bylaw 3.905 d as quoted above.

The history of the Commission on Constitutional Matters may also be of assistance in understanding the apparent conflict. Again, as Dr. Suelflow reported, prior to 1923 constitutional matters within the Synod were handled by *ad hoc* committees elected by synodical conventions. In 1923, a standing Committee on Constitutional Matters was created by resolution of the convention. Over time, the responsibilities of the Commission were expanded. For example, in 1932, the Synod resolved that all proposals seeking changes and/or amendments to the Constitution and Bylaws would first be submitted to the Committee on Constitutional Matters. The current responsibilities of the Commission on Constitutional Matters are as set forth in Bylaw 3.905.

At the 1962 synodical convention, the Synodical Survey Commission recommended with respect to the Commission on Constitutional Matters that its “opinions shall be binding until and unless Synod overrules them” (1962 *Convention Workbook*, p. 258). That recommendation was implemented by the Synod, and the Bylaws of the Synod were amended to provide that “an opinion of the Commission shall be binding on the question decided unless and until it is overruled by a synodical convention.” That

bylaw has continued in existence since that time and is currently found in Bylaw 3.905 d, as quoted above.

The first formal opinion of the Commission on Constitutional Matters based upon that bylaw was issued as early as March 7, 1968, as agenda item 111. After the Commission had earlier issued an opinion as to whether a District convention could recognize as a pastoral delegate an individual not on the roster of Synod, the same issue was again submitted for consideration. The Commission recognized that the prior opinion was binding and declined to rule further.

In 1976, during a very difficult period for the Synod, the Commission was asked to deal with a number of issues regarding the Association of Evangelical Lutheran Churches. The September 1976 minutes reflect in agenda item 144 a challenge to an opinion of the Commission brought by Dr. J.A. O Preus, joined by then legal counsel to the Synod, Phil Draheim. The minutes reflect that the request for rehearing was made both on the initiative of Dr. Preus as well as at the request of the Missions Department, the Pension Department, the Church Extension Fund, the Executive Committee of the Board of Directors, and several District Presidents. The Commission reminded the Synod, through its opinion, that the Synod had chosen to accept the opinions of the Commission on Constitutional Matters as binding. Despite significant disagreement within the Synod, the Synod chose, following that decision, not to change the Bylaws with respect to the binding effect of the decision of the Commission.

Later in that same year, in December of 1976, the Commission discussed agenda item 210, which involved a questionnaire from the Task Force on Constitution, Bylaws, and Structure. The Task Force explored whether the items on the Commission's agenda should be screened by the Board of Directors, and whether the Commission's decisions and opinions should not be of a binding nature until a subsequent convention came to such a conclusion. Ultimately, both of those suggestions were rejected, and the bylaw provisions regarding the binding nature of Commission on Constitutional Matters' opinions remains.

In March, 1990, the Commission issued an opinion generally surveying the relative rights and responsibilities of various agencies or entities of the Synod to interpret the Constitution and Bylaws of the Synod in matters of adjudication and appeals. In the March, 1990 opinion, the Commission reiterated that, under the bylaw then numbered Bylaw 3.533, "once a question is asked and an opinion rendered, no other body has the right to alter or change it and the 'opinion rendered by the Commission shall be binding on the question decided unless and until it is overruled by a synodical convention.'"

The concept that the decisions of the Commission are binding unless and until overruled by the convention has been recognized repeatedly since, as, for example, in a February, 1991 report in response to a request from the President; in Opinion Ag. 2022 (January, 1996); in a July, 1999 response to a request for reconsideration of Opinion 99-2144; and in opinions 99-2156 (September, 1999), 99-2162 (October, 1999), and 01-2240 (December, 2001).

Thus, the Synod in convention determines the structure of the Synod, and the Synod in convention has expressly restricted the right of the Board of Directors to call up for review, criticism, modification, or revocation opinions of the Commission on Constitutional Matters. Furthermore, despite multiple opportunities to amend the Bylaws to eliminate the binding nature of Commission on Constitutional Matters' opinions, the Synod in convention has recognized the need to empower an entity, subject only to the convention itself, to have the authority to issue binding opinions regarding its Constitution and Bylaws. The Synod in convention has chosen to continue to entrust that authority to the Commission on Constitutional Matters. Any apparent conflict is not with the Commission on Constitutional Matters but with the Constitution and Bylaws themselves.

Question 3: LCMS Bylaw 3.101 C 11 provides that the President shall “be authorized, in the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, to exercise such power after consultation with the Vice-Presidents, the Board of Directors of The Lutheran Church—Missouri Synod or the Council of Presidents, whichever, in his judgment, is most appropriate.” What, if any, are the constitutional or bylaw definitions, boundaries, or limits of such “executive power”?

Opinion: The general duties of the President and the power to fulfill those duties are described in Article XI B of the Constitution and in Bylaw 3.101. The term “executive power” is not used in the Constitution of the Synod. The term does appear in Bylaw 3.101 C 10, which directs that the President shall “exercise executive power when the affairs of the Synod demand it and when he has been expressly invested with such power by the Synod in convention,” and in paragraph c 11 of that bylaw as quoted in the question above.

Article XI B of the Constitution defines the duties of the President and inherently the power to carry out those duties as follows:

B. Duties of the President

1. The President has the supervision regarding the doctrine and the administration of
 - a. All officers of the Synod;
 - b. All such as are employed by the Synod;
 - c. The individual Districts of the Synod;
 - d. All District Presidents.
2. It is the President's duty to see to it that all the aforementioned 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.
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.
4. The President shall see to it that the resolutions of the Synod are carried out.
5. When the Synod meets in convention the President shall give a report of his administration. He shall conduct the sessions of the convention so that all things are done in a Christian manner and in accord with the Constitution and Bylaws of the Synod.
6. It is the duty of the President, or an officer of the Synod appointed by the President, to be present at the meetings of the Districts, to advise them, and to report at the next session of the Synod.
7. The President shall perform all additional duties assigned to him by the Bylaws or by special resolution of the Synod in convention.
8. When matters arise between meetings of the Synod in convention which are of such a nature that action thereon cannot be delayed until the next convention, the President is authorized to submit them to a written vote of the member congregations of the Synod only after full and complete information regarding the matter has been sent to member congregations by presidential letter and has been published in an official periodical of the Synod. If such matters are related to the business affairs of the Synod, such a vote shall be conducted only after the President has consulted with the synodical Board of Directors. In all cases at least one-fourth of the member congregations must register their vote.

The Bylaws further define the President's powers and duties in Bylaw 3.101, dividing those powers and duties as to ecclesiastical, administrative, and those which are both ecclesiastical and administrative. The President, together with all the officers of the Synod, is limited in his powers by Article XI A 1 of the

Constitution: “The officers of the Synod must assume only such rights as have been expressly conferred upon them by the Synod, and in everything pertaining to their rights and the performance of their duties they are responsible to the Synod.” As prior opinions of the Commission have recognized, because of the broad grant of authority to the President, it is often difficult to define with particularity and in advance the precise boundaries of the President’s duties and powers. In a September, 1972 “Opinion on Presidential Authority,” (cf. Ag. 330, 340, etc.) the Commission noted:

1. That it is the opinion of the Commission on Constitutional Matters that the Constitution and the Bylaws of The Lutheran Church—Missouri Synod give to the President of the Synod exceptionally broad responsibilities and correspondingly broad authority.
2. That while the ordinary day to day responsibility not only for administration but also for doctrine rests also with other officials, boards, and commissions created in the course of time by the Synod, the Synod has never repealed the broad responsibility and authority vested in the presidential office, but instead the Synod appears to have increased those powers from time to time. It is therefore conceivable that the President, acting in accordance with the appropriate Articles of the Constitution and By-Laws of The Lutheran Church—Missouri Synod, may exercise his pastoral judgment to intervene in situations which, in his estimation, are so important that the exercise of his ultimate constitutional responsibility is required.
3. That when a synodical President feels impelled to exercise that responsibility it is clearly understood that his action is always subject not only to the regular appeals procedures involving the commissions of adjudication and the Board of Appeals, but also to approval or disapproval, to ratification or rescission, by the convention of the Synod.
4. That if the Synod does not wish to have such authority reside in its President, then it is the opinion of the Commission on Constitutional Matters that the Constitution will need to be amended to limit the authority of the President. Procedures for amending the Constitution are detailed in Article XIV.

Later, in 1979, while reviewing proposed Task Force proposals to amend the Constitution and/or Bylaws, the Commission noted (Ag. 1266A):

6. The oft repeated statement that, "No one has any authority between conventions to make decisions" is held by the CCM to be completely groundless. The boards and commissions of the Synod are empowered to make decisions. Furthermore, if there is lack of clarity the CCM can always be asked for an interpretation. In addition, Bylaw 2.89 c specifically states that if there is a conflict between two boards or commissions of the Synod, the Board of Directors is empowered to make a final determination. Finally, if there is no other recourse, the Bylaws (2.29 c) bestow upon the President of the Synod executive powers that he can exercise in consultation with a proper, related group, with the provision (a good one) that his decision is always appealable to the next convention. Somehow this myth of "no possibility of decisions between conventions" needs to be laid to rest. Furthermore, if the assembly is designed to take care of this alleged problem, the question arises, "Who makes decisions between the semi-annual meetings of the assembly?" (A box within a box within a box, etc.). .

In April, 1997, while addressing a concern between the President and the Board for Communication Services, the Secretary of the Synod had noted:

- 1) The Bylaws do allow for the exercise of executive powers by the President of the Synod even when he has not been expressly invested with such power for a specific purpose. Bylaw 3.103,

b, cannot be read apart from Bylaw 3.103, c, which speaks to the issue of exercising executive power for a purpose for which there is no specific directive. Prior to such exercise of power, however, the President must consult with one of the four groups identified, namely, the Praesidium, Board of Directors, Council of Presidents, or Council of Administrators, whichever he judges to be most appropriate. As noted in the final sentence of 3.103, c, "Any member of the Synod shall have the right to appeal to the convention of the Synod from his action."

Opinion Ag. 2073, issued in June, 1997, included the following comments:

The issue of presidential authority in unforeseen circumstances is dealt with in Bylaw 3.103, c. "In the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, he shall be authorized to exercise such power after consultation with the Vice-Presidents, the Board of Directors of The Lutheran Church—Missouri Synod, the Council of Presidents, or the Council of Administrators, whichever in his judgment is the most appropriate"....

The CCM agrees that the President must "assume only such rights as have been expressly conferred ... by the Synod" and "when he has been expressly invested with such power for a specific purpose."

These provisions must not be read, however, in isolation from the remainder of the Constitution and Bylaws. They must be considered *in pari materia*. Specific enabling language mandates presidential authority in the areas of doctrine and practice. He has authority over administration of the officers and employees of the Synod. He is expressly identified as the CEO of the Synod. The President is mandated to be responsible to the Synod for the supervision of doctrine. While a President is prohibited from exercising powers that have not been expressly conferred upon him, he may exercise executive powers within framework provided by the Constitution and Bylaws. The President may, for example, exercise broad power under the express language granting him responsibility for doctrinal supervision. The Bylaws need not articulate every heresy or aberrant doctrine that might trigger executive action. It is implicit in the express grant of authority in the Constitution and Bylaws to supervise doctrine.

Despite this broad recognition of authority, the Commission's opinion continued:

Having said this, the Commission is concerned that executive power not be exercised to the extent that it deprives the members of the Synod of the benefit of receiving various points of views, having access to general church news of interest to the Synod, or deprives an accused individual of the right of defense. The history surrounding the founding of the Synod provides adequate evidence for such concern. If it is believed by a member or members that this is occurring, the remedy is identified above.

The better approach, an alternative to censorship, would be a discussion of the rationale for including or not including certain letters to the editor on a given subject, publication of articles on such subject, or that a notice be printed in a specific form. It is assumed that all parties involved are concerned about the welfare of the Church and that in most, if not all, cases agreement can be reached regarding the printing of certain materials.

In 1998, the Commission addressed the power of the President to respond to actions of a District that were contrary to the Constitution and Bylaws of the Synod. In Opinion 98-2122 (September 30, 1998) the Commission referred specifically to the authority of the President under Bylaw 3.101 c 11:

If therefore a District takes an action that is contrary to the Constitution and Bylaws of the Synod, such action is null and void, and the President of the Synod could proceed under the authority granted to him by Bylaw 3. 10 1, C, 11, where the President shall

11. be authorized, in the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, to exercise such power after consultation with the Vice-Presidents, the Board of Directors for The Lutheran Church—Missouri Synod, or the Council of Presidents, whichever, in his judgment, is most appropriate. Any member of the Synod shall have the right to appeal such action to the Commission on Constitutional Matters and/or the Synod in convention, whichever is appropriate.

As recently as the 2001 convention, the Synod reaffirmed and reemphasized the duty of the President to assure that all officers and agencies of the Synod abide by the Constitution and Bylaws in adopting Resolution 7-03C, the second, third, and fourth resolves of which read:

Resolved, That we reaffirm the expectation that all officers, staff members, and agencies of the Synod adhere to the Constitution and Bylaws of the Synod and, where applicable, the articles of incorporation and bylaws of the entity and assume only those powers granted to them; and be it further

Resolved, That the President and Board of Directors of the Synod shall see to it that the Constitution and Bylaws of the Synod are observed; and be it further

Resolved, That when a failure to comply with the Constitution and Bylaws is discovered, the President or Board of Directors, whichever is charged with supervision or oversight, shall act to correct such failure to comply as quickly as possible.

Were all eventualities and potential problems foreseeable, the Synod could adopt bylaws and policies to address all issues in advance, and the question posed could be answered with greater specificity. However, the Synod has recognized that there are circumstances that it may not have foreseen or for which it may not have made direct provision. For those reasons, the Synod has therefore invested the President with very broad powers to address those circumstances that it did not foresee or for which it made no other provision. For the same reason, the Commission cannot define in advance the ultimate boundaries of that power.

243. Conference Call Meetings (03-2378)

A member of a board of regents, in a December 29, 2003 e-mailed letter, asked a series of specific questions regarding the propriety of conference calls under certain circumstances. The Commission agreed to address this matter at a later time.

244. Enforcement of Commission on Constitutional Matters Opinions (04-2379)

A pastor of the Synod, in a letter dated January 10, 2004, asked a series of questions regarding the enforcement of Commission Opinion 02-2309 and its statement that “when an ecclesiastical supervisor discovers error in his counsel, it is incumbent upon that supervisor to correct or amend it. 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.”

Question 1: How will the Commission on Constitutional Matters follow up on its Opinion 02-2309 to assure that error will be amended?

Opinion: The functions of the Commission on Constitutional Matters are set forth in Bylaw 3.905. Paragraph d of that bylaw states that the Commission is to interpret the Synod's Constitution, Bylaws, and resolutions upon the written request of a member, official, board, commission, entity, or agency of the Synod. Thus the Commission is limited to providing an interpretation of the Synod's Constitution, Bylaws, and resolutions. It has no power or authority to enforce its opinions.

Question 2: If it is not the charge of the Commission on Constitutional Matters to call upon the President to correct his error in ecclesiastical supervision, what is the correct process for assuring that the President conforms to the binding opinion of the Commission regarding correcting his counsel after discovering that it was in error and that the District President "consider the corrected counsel"?

Opinion: Article XI of the Constitution of the Synod states that the officers of the Synod (and this would include the President) are responsible to the Synod for the performance of their duties. It further states that the Synod has at all times the right to call its officers to account and, if circumstances require it, to remove them from office in accordance with Christian procedure. Accordingly, it is a convention of the Synod that has ultimate authority over the President as to his performance of his office.

Question 3: How is that correction then to be made known to the whole Synod?

Opinion: There is no provision in the Constitution, Bylaws, and resolutions of the Synod that addresses this issue.

245. Restricted and Suspended Status (04-2381)

A pastor of the Synod, in a January 21, 2004 e-mailed letter, asked a series of questions regarding "Restricted Status."

Question 1: Based on the Constitution and Bylaws of the Synod, is the following sequence of actions legally and/or ethically permissible within the LCMS?

1. A pastor is placed on restricted status by his District President for reasons X.
2. The pastor appeals his restricted status to the Council of Presidents.
3. The Council of Presidents fails to render a fair and timely decision on the appeal within the six months that the Constitution of the Synod allows for their deliberation of the appeal.
4. The pastor therefore requests that his restricted status be dropped on the grounds that the Council of Presidents has failed to render a fair and timely decision of his appeal.
5. The District President "voluntarily" drops the restricted status at the pastor's request.
6. A meeting for purposes of reconciliation is scheduled by the District President with this same pastor.
7. At this meeting for reconciliation the District President changes his mind and decides to renew his charges against the pastor.

8. But this time the District President places the pastor on suspended status for reasons X, the very same reasons for which he originally placed the pastor on restricted status.

Opinion: A District President may place on restricted status an individual member of the Synod under his ecclesiastical supervision for reasons given in Bylaw 2.23 a. Restricted status continues for one year or a lesser period if the matter is satisfactorily resolved (Bylaw 2.23 c). Restricted status may also be extended, successfully appealed, or discontinued by the District President (Bylaw 2.23 c and d), or it may become suspended status at the commencement of formal proceedings that may lead to the member's expulsion from the Synod (Bylaw 2.25 a).

Failure of the Council of Presidents to decide the matter within the prescribed six months is contrary to the bylaw and therefore a matter of concern. However, the sequence of actions by the District President as described meet the requirements of the bylaw.

Question 2: After a District President has voluntarily dropped restricted status following the failure of the Council of Presidents to hear its appeal in a fair and timely way, can the same District President then change his mind and place the same pastor on suspended status for the same charges as he originally placed the pastor under restricted status?

Opinion: Restricted status is a discretionary action of a District President. If he decides that a restriction is no longer useful or appropriate, he may decide to lift it. If he finds at a later date that the conditions provided by Bylaw 2.23 a continue to exist, he may restore the restricted status or he may decide to commence action to terminate membership, thereby placing the member on suspended status. In cases in which the member is on restricted status when formal Bylaw 2.27 suspension proceedings are commenced, restricted status becomes suspended status (Bylaw 2.25 a).

Question 3: Is it possible for the Council of Presidents to hear charges against a pastor on suspended status in a fair and timely manner after the Council of Presidents has already failed to hear these very same charges in a fair and timely manner while the pastor was on restricted status?

Opinion: This question is based upon a misunderstanding. The Council of Presidents does not hear charges against a pastor on suspended status. When a member of the Synod is placed on suspended status and desires to have the matter heard and resolved, a Dispute Resolution Panel is formed to hear the matter following the process described in Chapter VIII of the Bylaws. The Dispute Resolution Panel and not the Council of Presidents hears and resolves the matter (Bylaw 2.27 c).

Question 4: Bylaw 2.29 e states that in an appeal of restricted status, "The decision of the hearing panel shall be the decision of the COP and shall be final with no right of appeal." After the COP has ruled on an appeal of charges placed against a pastor on restricted status, may a District President then circumvent the finality of this decision of the COP by placing the pastor on suspended status for the same charges?

Opinion: Restricted status and suspended status are two different actions. Even if the Council of Presidents were to remove a member's restricted status, the involved District President may begin proceedings for the expulsion of the member from the Synod if he concludes that the same facts that led him to place the member on restricted status form a basis for such expulsion under Article XIII of the Constitution (Bylaw 2.27 c). The commencement of formal Bylaw 2.27 proceedings places the member on suspended status (Bylaw 2.25 a).

Question 5: Bylaw 2.29 e states that in an appeal of restricted status, “The decision of the hearing panel shall be the decision of the COP and shall be final with no right of appeal.” After the COP has failed to hear an appeal of restricted status in a fair and timely manner and a pastor’s restricted status has been dropped, does finality also apply to this result?

Opinion: A decision of the Council of Presidents regarding a particular case of restricted status has bearing only on the restriction in question. The removal or the dropping of a restricted status has no bearing on future decisions to place that member of the Synod on restricted status or to commence formal Bylaw 2.27 proceedings that result in suspended status.

246. Adjournment

After brief informal discussion of matters related to the convention of the Synod, the meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Conference Call Meeting
February 17, 2004

247. Call to Order and Prayer

The meeting was called to order by Chairman Walter Tesch. All members of the Commission participated in the meeting except Daniel Lorenz, who was outside the country. In his opening prayer, Albert Marcis included a special petition for the welfare of the Synod.

248. Report to the Convention

Walter Tesch called attention to the draft of the Commission's report to the 2004 convention. He called attention to several changes made to an earlier draft, including mention of his offer made on behalf of the Commission to study further the issues involved in Board of Directors-related matters. After discussion, during which time a number of minor additional changes were agreed upon, the Commission approved the following report for inclusion in the 2004 *Convention Workbook*:

COMMISSION ON CONSTITUTIONAL MATTERS
REPORT TO THE 2004 CONVENTION

The functions of the Commission on Constitutional Matters are set forth in Bylaw 3.905. Paragraph d of that bylaw states that the Commission is to interpret the Synod's Constitution, Bylaws, and resolutions upon the written request of a member (congregation, ordained or commissioned minister), official, board, commission, entity or agency of the Synod. The bylaw limits the Commission's work to the Synod's Constitution, Bylaws, and resolutions adopted by the conventions of the Synod, and thus the Commission cannot provide an opinion that interprets Scripture or the Articles of Incorporation.

That same bylaw goes on to state that an opinion rendered by the Commission shall be binding on the question decided unless and until it is overruled by a synodical convention. Therefore, the Commission does not have the last word on the issue to which it is requested to respond. Rather, all of the opinions of the Commission are subject only to review and rejection by a synodical convention.

The Commission consists of five voting members: three are ordained ministers and two are lawyers. In addition, the Secretary of the Synod serves as a non-voting member as well as the secretary of the Commission. The five voting members serve six-year terms, renewable once. They are selected as follows: Candidates for a vacant position are nominated by each of the District boards of directors. The names of these nominees are then forwarded to the Council of Presidents through the office of the Secretary of the Synod. The Council then selects five candidates for each vacant position. The list of the five candidates is then presented through the office of the Secretary to the President of the Synod, who, in consultation with the Vice-Presidents, appoints one of the five to membership on the Commission.

During the past triennium the Commission has rendered approximately 150 written opinions in response to questions placed before it. These opinions are the product of extensive study by and discussion among the members of the Commission. An initial draft of an opinion is prepared by

one or more members of the Commission and then circulated among all the members for their review and comments. Thereafter a revised opinion is prepared, taking into consideration the comments received from the other members of the Commission. In some instances draft opinions are revised many times as the question is further studied and reviewed. The final opinion is then agreed upon by all members of the Commission and published by the Secretary of the Synod. If the Commission is asked to reconsider an opinion, it will do so upon a written request by any of the parties who are authorized by the bylaw to request an opinion from the Commission.

Deliberations by the Commission are done in private and kept confidential by its members. It is to be remembered that the Commission only provides interpretations of the Constitution, Bylaws and resolutions of the Synod. Its opinions reflect what the members of the Commission conclude is stated in the document; not what it should say but what it does say. Therefore, if the Synod determines that an interpretation by the Commission brings about a faulty result, it behooves the Synod through its delegates in convention assembled to pass a resolution which amends the language in question to reflect the will of the Synod.

In a number of opinions the Commission noted some apparent omissions or conflicts in the wording of the Constitution and Bylaws of the Synod. These matters were referred to the appropriate board or commission by the secretary of the Commission.

Resolution 7-02 of the 2001 convention of the Synod directed the Commission to complete expeditiously its review of the Commission on Structure's report on the LCMS *Handbook* reorganization. This was done, and the Commission forwarded to the *pro tem* Commission on Structure a report noting 162 items which required further attention by the *pro tem* Commission before it prepared its final report to the 2004 convention of the Synod.

In November of 2003, the Board of Directors of the Synod adopted a resolution which declared that it cannot agree with or accept eight opinions of this Commission and declared such opinions to be of "no effect," basing its action on its conclusion that these opinions placed impermissible limitations on the authority of the Board under the laws of the State of Missouri. This action by the Board of Directors was in direct conflict with Bylaw 3.183 d 2, which provides: "2. [The Board] shall have the right to call up for review, criticism, modification, or revocation any action or policy of a program board, commission, or council, except opinions of the Commission on Constitutional Matters." In January of 2004 the members of this Commission and five members of the Board of Directors met in an all-day meeting to discuss the issues involved. No agreement was reached but further study is to be given to the matter by the Board and this Commission.

Every meeting of the Commission opens with prayer, imploring our gracious God to be present in our deliberations and to give to each of us a rich measure of His grace so that the product of our deliberations will be pleasing to Him. With that knowledge we have diligently worked to fulfill the task that the Synod has assigned to this Commission.

Commission on Constitutional Matters

Mr. Walter F. Tesch, Chairman

Rev. Donald G. Little

Mr. Daniel C. Lorenz

Rev. Dr. Albert M. Marcis

Rev. Dr. Wilbert J. Sohns

Rev. Dr. Raymond L. Hartwig, Secretary (non-voting)

249. Examination of Reports and Overtures

The Commission discussed its responsibilities for examining “all reports and overtures to the Synod asking for amendments to the Constitution and Bylaws of the Synod or which in any manner affect the Constitution and Bylaws, to determine their agreement in content and language with the Constitution and Bylaws of the Synod” (Bylaw 3.905 a). It was agreed that the Commission will wait until the *Convention Workbook* is published to fulfill this responsibility. The Commission also discussed its plans for being present during floor committee meetings and during the convention.

250. Initial Proposal of Blue Ribbon Task Force on Ecclesiastical Supervision and Dispute Resolution

The Commission received very recently an initial draft report from the Blue Ribbon Task Force on Ecclesiastical Supervision and Dispute Resolution. Due to time constraints, the Commission was not able to provide an appropriate response by the deadline established by the Task Force. The Commission agreed to assure the Task Force that it will provide counsel in due time, particularly at the time of floor committee meetings.

251. Other Business

Upon learning that a pastor who submitted a series of questions regarding restriction and suspension was himself involved in the dispute resolution process, the Commission instructed its secretary to write to the pastor to return the questions and to ask him to work through the Dispute Resolution Panel as required by Bylaw 8.21 i, should he continue to wish to ask these questions.

252. Adjournment

After announcements and with no further business to be conducted during the conference call, the meeting was adjourned with words of benediction by Albert Marcis.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Conference Call Meeting
March 22, 2004

253. Call to Order and Opening Prayer

Chairman Walter Tesch called the meeting to order and asked Albert Marcis to lead in opening prayer. All members of the Commission participated in the conference call meeting.

254. Communication to the Council of Presidents and the Board of Directors

Chairman Walter Tesch spoke of his attendance at the February 6-7, 2004 joint meeting of the Council of Presidents and the Board of Directors, where he volunteered that the Commission on Constitutional Matters would again review the eight opinions to which the Board of Directors has objected. Accordingly, the Commission discussed their review of the opinions in light of the documents furnished by the Board of Directors detailing the Board's specific objections to the opinions. The Commission decided to offer the following response, sent on March 23 to the chairmen of the Council of Presidents and the Board of Directors.

COMMUNICATION TO THE COUNCIL OF PRESIDENTS
AND THE BOARD OF DIRECTORS

At the recent joint meeting of the Council of Presidents and the Board of Directors, the chairman of the Commission on Constitutional Matters (CCM) stated that the CCM would again revisit its eight opinions which the Board of Directors has resolved to be "of no effect." This the CCM has done.

At its February, 2004, regular meeting, the Board of Directors passed a resolution entitled, "Board of Directors Resolutions Regarding CCM Opinions." Several of the resolves of that action pertain directly to the CCM and the eight opinions. They are as follows together with the CCM's response.

Resolved, That the Board of Directors requests the Commission on Constitutional Matters to reconsider Opinions 02-2296, 02-2309, 02-2320, 02-2259, 03-2357, 03-2358, 03-2359, and 03-2365.

Response: As promised to the Council of Presidents and the Board of Directors, the members of the CCM have again reviewed the eight opinions.

Resolved, The Board of Directors requests the Commission on Constitutional Matters to withdraw these opinions to allow the issues involved to be addressed by the 2004 synodical convention.

Response: Having reviewed the eight opinions, the CCM remains of the opinion that these opinions are correct, appropriate, and consistent with the Constitution and Bylaws of the Synod. Further, it is not necessary for these opinions to be withdrawn in order to allow the issues involved to be addressed by the 2004 synodical convention. Bylaw 3.905 d provides that any opinion of the CCM shall be binding on the question decided unless and until it is overruled by a

synodical convention. Thus the Synod has reserved unto itself the right to review, revise, modify, alter, or reject any opinion of the CCM and thereby address the issue involved.

Resolved, That, immediately upon such action being taken by the Commission on Constitutional Matters, the two Board of Directors' resolutions adopted at its November, 2003 meeting concerning these CCM opinions will be similarly withdrawn so as to allow the issues involved to be considered by the 2004 synodical convention.

Response: The two resolutions adopted at its November, 2003, meeting state that the Board of Directors "cannot agree with or accept" the eight opinions of the CCM and that those opinions are "of no effect." These resolutions adopted by the Board of Directors are directly contrary to Bylaw 3.183 d 2 which states that the Board of Directors "shall have the right to call up for review, criticism, modification or revocation any action or policy of a program board, commission, or council, except opinions of the Commission on Constitutional Matters." If the CCM were to withdraw the questioned opinions, the promised withdrawal action by the Board of Directors would be an empty gesture since the withdrawal of the opinions by the CCM makes those opinions a nullity and thereby "of no effect." Further, the Board of Directors could then claim to be acting in accord with the Constitution and Bylaws of the Synod since the constitution and bylaw limitations upon the activities of the Board of Directors as determined in those opinions would no longer exist.

Resolved, That the Board of Directors requests that the Commission on Constitutional Matters consider the attached comments in connection with its reconsideration of its opinion.

Response: After several requests by the CCM, the Board of Directors has set forth a detailed explanation of its concerns regarding the eight opinions. These concerns have been reviewed by the CCM. However, the CCM cannot agree with the conclusions detailed in those explanations.

A common thread running through the comments of the Board of Directors is its assertion of greater authority than that conferred currently by the Constitution and Bylaws of the Synod. It advocates that its supervisory power over all the property and business affairs of the Synod allows it to determine actions and authority which the Constitution and Bylaws presently give to other officers, boards and commissions. Further, the effect of the Board's greater assertion of authority will necessarily be to influence doctrinal matters through its control of finances. If the polity of the Synod is to be changed, such change must come from the Synod in convention assembled and not by fiat of an officer or board.

Commission on Constitutional Matters

255. Validity of Conference Call Meetings (03-2378)

In an e-mailed letter received December 29, 2003, a member of a board of regents of an educational institution of the Synod asked questions regarding the validity of conference call meetings when held under protest.

Question 1: If one or more of the members of a board of regents object to a conference call meeting before it is held and the chairman proceeds to hold the meeting anyway, what is the validity of any decisions that are made at the conference call meeting conducted under the protest?

Question 2: If one or more of the members of a board of regents object to a conference call

meeting at the opening of the meeting but the chairman rules against the objection and it is upheld, what is the validity of any decisions that are made at the conference call meeting conducted under the protest?

Question 3: If one or more of the members of a board of regents object to a conference call meeting at the opening of the meeting but the chairman rules against the objection and it is upheld and the chairman restricts open discussion between members of the board of regents during the meeting, what is the validity of any decisions that are made at the conference call meeting conducted under the protest?

Opinion: Similar board procedural matters have been addressed in CCM Opinions 02-2287 (October 21-22, 2002) and 02-2268 (June 10-11, 2002). The opinion set forth in 02-2268 is applicable to this question and is herewith repeated:

The functions of the Commission on Constitutional Matters are set forth in Bylaw 3.905. Its responsibility includes the interpretation of the Synod's Constitution, Bylaws and resolutions upon written request of a member. Each of the colleges and universities of the Synod are agencies of the Synod as defined by Bylaw 3.51 a. Each such college and university is governed, subject to general policy set by the Synod, by a Board of Regents as directed by Bylaw 6.01. The Board of Regents must conduct its business in accordance with accepted parliamentary procedures, whether contained in rules adopted by that agency within its own bylaws or other governing documents, or consistent with other accepted parliamentary procedure. The Commission does not have copies of the Bylaws, rules of order, standing rules, or other organizational documents of the Board of Regents in question, and its authority is also limited under Bylaw 3.905. The Commission is unable to answer further the question posed.

Opinion 02-2287 noted further:

Upon review of that opinion [02-2268], the Commission realizes it may have misled the member who asked the question in that the opinion inferred that the Commission had the authority in rendering an opinion to review the rules of order, standing rules, or policy manual of a board of regents. It does not. The Commission is unable to provide an answer because it has no authority to review the provisions of a policy manual and such review would be imperative to a resolution of the issue.

256. Authority of Council of Presidents to Place Requirements upon Candidate Placements (04-2384)

A pastor of the Synod in a letter received by the Commission on February 20, 2004, asked the Commission for an interpretation of the bylaws governing the authority of the Council of Presidents to place specific requirements upon the placement process of the Synod.

Question: Does the Council of Presidents have the constitutional authority to require that the wives of prospective pastors of the LCMS be members of LCMS congregations before their husbands can be considered for placement in congregations of the Synod?

Opinion: The authority of the Council of Presidents in regard to the first call of a graduate or a candidate who has satisfactorily completed an approved synodical colloquy program, is limited to the assignment of the first call.

Only the faculty of the respective synodical institution has the authority to declare a graduate qualified for the first call. Bylaw 2.09 a states, “A graduate of an authorized synodical institution must be declared qualified for a first call and recommended by the faculty of the respective synodical institution before the effective date of the first call to service in the church, as assigned by the Board of Assignments as provided in Bylaw 2.11.”

And only the appropriate colloquy committee has the authority to declare a colloquy candidate qualified for a first call. Bylaw 2.09 b states, “Candidates who have satisfactorily completed an approved synodical colloquy program... must be declared qualified for a first call and recommended by the appropriate colloquy committee (see Bylaws 6.99, 6.117, and 6.137) before the effective date of the first call to service in the church as assigned by the Board of Assignments as provided in Bylaw 2.11.”

The Synod through Bylaw 2.09 c establishes the eligibility for individual membership as follows: “Candidates who may be declared qualified for first calls are those who before the effective date of the first calls will have satisfactorily completed the prescribed courses of studies and will have received diplomas from their respective institutions or have fulfilled the requisites of a colloquy. In addition, they must have indicated complete dedication to the ministry and evidenced a readiness for service in the church. Finally, to be declared qualified and recommended by the faculties or colloquy committees for their specific types of service in the church, the appropriate faculty or colloquy committee must be satisfied that the individual will meet all personal, professional, and the theological requirements of those who hold the office of ministry to which the individual aspires. In addition, an academic year of supervised internship (vicarage) is required of all seminary students before graduation, ordinarily in the second year before graduation.”

Acting as the Board of Assignments, the Council of Presidents assigns (places) qualified graduates of synodical educational institutions and workers available from colloquy programs as “first calls” (Bylaws 2.11 and 3.930 e).

Thus, since the Council of Presidents does not have the constitutional authority to establish eligibility for membership or to qualify, declare qualified, certify, and recommend candidates, it does not have the authority to require that the wives of candidates for the offices of ordained and commissioned ministers must be members of LCMS congregations prior to placement. Such a requirement can only be established by the Synod in convention.

257. Function and Expectations of the CCM (04-2385)

In a letter dated February 18, 2004, an ordained member of the Synod submitted a series of questions regarding the CCM and its interpretation of the Constitution and Bylaws of the Synod. After brief discussion of an early draft response, the Commission agreed to resume discussion at its next meeting.

258. Review of 2004 Convention Workbook

With the approach of the 2004 convention, the Commission discussed several plans of action for meeting the requirements of Bylaw 3.905 a, which requires that the Commission “shall examine all reports and overtures to the Synod asking for amendments to the Constitution and Bylaws of the Synod or which in any manner affect the Constitution and Bylaws, to determine their agreement in content and language with the Constitution and Bylaws of the Synod.” The Secretary reported that the *Convention Workbook* will be available by the end of April and copies will be provided to the members of the Commission as soon as they are available.

After discussion of available dates, the Commission agreed to meet prior to the May 21-24 convention floor committee meetings, beginning at noon on Thursday, May 20th.

259. Adjournment

After agreeing to postpone any further discussion of the proposed revised *Handbook* until its next meeting, Dr. Marcis closed the meeting with words of benediction.

Raymond L. Hartwig, Secretary

**MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS**

**May 20–24, 2004 Meeting
St. Louis, MO**

260. Call to Order and Opening Devotion

Acting Chairman Al Marcis called the meeting to order and asked Don Little to lead in an opening devotion. Chairman Walter Tesch was absent because of his wife's illness, and Secretary Ray Hartwig was absent because of his attendance at the concurrent Board of Directors' meeting. Acting Chairman Al Marcis appointed Don Little to be Acting Secretary. The Commission also sent in writing its best wishes for God's blessings to Chairman Walter Tesch and his wife Betty.

261. Review of Materials from the Blue Ribbon Task Force on Ecclesiastical Supervision and Dispute Resolution (04-2382)

The Commission reviewed and discussed the bylaw changes recommended by the Blue Ribbon Task Force on Ecclesiastical Supervision and Dispute Resolution as reflected in the Task Force's communication to the Commission in February and as reflected in the Task Force's report in the 2004 *Convention Workbook*.

262. Meeting With the President of Synod

At the request of the President of the Synod, the Commission met with him regarding issues involving the Board of Directors of Synod.

263. Discussion Regarding CCM Representation at Floor Committee Meetings

Acting Chairman Al Marcis shared with the Commission his communication with the chairmen of the various floor committees regarding the assigned representation of CCM members to floor committee meetings in accordance with Bylaw 3.905 b, which states that the Commission shall "be represented at the meetings of the floor committees considering constitutional matters at the convention of the Synod."

264. Restrictions and Suspensions (04-2383)

A Dispute Resolution Panel, upon request of a party to the dispute, submitted a series of questions for a response from the Commission prior to the panel's scheduled hearing.

Question 1: Upon request, if the Council of Presidents has already failed to hear charges placed against a pastor in a fair and timely manner while that pastor was on restricted status, is it then possible for the same Council of Presidents to fairly effect the final outcome for the same pastor who has been placed on suspended status for the very same charges?

Opinion: The failure of the Council of Presidents to respond in a timely manner to a petition for removal of restricted status, while a matter of concern, is unrelated to a fair outcome of the suspension process, in which the involvement of the Council will be limited to the possible participation of three District Presidents in an Appeal Panel. The involvement of the Council of Presidents in the Petition for Removal of Restricted Status process was also limited to a three-person hearing panel of three District Presidents

with entirely different responsibilities. In the event that a District President was selected for service on the Appeal Panel who has already served on the hearing panel, Bylaw 8.17 also allows for a request for the disqualification of that panel member on the basis of partiality or the appearance thereof. Therefore, the fact that the Council of Presidents and the same charges may be involved in both processes will not be a factor in the final outcome of the suspension process.

Question 2: Given the fact that Bylaw 2.21 states that there is only one remedy and only one action which can be taken by Synod under this bylaw, and given the fact that both restricted status and suspended status fall under Bylaw 2.21, by what justification does the CCM declare, in response to Rev. Lindeman's question #4 addressed by CCM (January 28 minutes), that restricted status and suspended status are two different actions? How is the opinion of CCM not a contradiction of the wording within Bylaw 2.21?

Opinion: Bylaw 2.21 is a general introductory paragraph to Section “D. Restricting, Suspending, and Expelling Congregations or Individuals from Membership” of Chapter II of the Bylaws. It speaks of instances of “ungodly life” by ordained and commissioned ministers and clarifies that the Synod and its Districts cannot be held responsible to regulate, restrict, or control the activities in the life of an individual member of the Synod. It further states that the only remedy available to the Synod in response to such improper activities is to take “such action as may lead to the termination of that membership and the attendant rights and privileges.” The remainder of Section D provides a series of provisions detailing that “remedy,” which includes more than one possible action: restriction (Bylaw 2.23), suspension (Bylaw 2.25), expulsion (Bylaw 2.27), and also a procedure for petitioning the removal of restricted status (Bylaw 2.29). The prior opinion of the Commission is therefore not a contradiction of the wording within Bylaw 2.21.

Question 3: What provisions are given within the Constitution and Bylaws to protect a pastor from repeated threat of expulsion from Synod by the repeated application of heresy proceedings under Article 2.21 for the same stated reasons or charges by his District President?

Opinion: As stated in the response to question 2 above, Bylaw 2.21 is a general paragraph that contains no proceedings. It introduces actions that may be used according to the judgment of the District President. One such action, as noted in the question, is suspension (Bylaw 2.25), which sets in motion the procedure set forth in Bylaw 2.27, a procedure that continues until membership is terminated or the formal proceedings are completed favorably to the member. This is an action that can only be initiated one time for any given reason(s) or charge(s), since the outcome of the expulsion process is binding (Bylaw 8.09 c 3 a; 8.09 e 1).

Question 4: When are heresy proceedings against a pastor ever final for a pastor if a District President is not limited in number of times that he can place a pastor on restricted status or suspended status for the same reason?

Opinion: As explained in the response to question 3 above, suspended status as to a particular action for termination of membership is a one-time action that continues until membership is terminated or formal proceedings are completed favorably to the member. Bylaw “2.23 Restricted Status” includes no limitation on the number of times that a District President may place an individual member on restricted status if information with respect to such member provides a substantial basis to conclude that any or all of the three reasons for such action given in Bylaw 2.23 apply to the member.

Question 5: What is the nature of the Bylaws of Synod that failure of the COP to meet the requirements of the Bylaws are a "matter of concern" and therefore to be dismissed, but the sequence of actions by the District President "meet the requirements of the Bylaws" and is therefore to

be allowed? Is there a hierarchy to the Bylaws that allow the CCM to decide which bylaws are to be considered, "a matter of concern" and which bylaws are considered dictum by the CCM?

Opinion: The Bylaws articulate the rights and duties of the Synod's officers and agencies, for which they are responsible to the Synod (Constitution Art. XI, Bylaw 1.07, *et al.*). It is therefore a "matter of concern" whenever an officer or an agency of the Synod such as the Council of Presidents fails to meet requirements of the Bylaws. Such failure may be addressed by the President of the Synod (Constitution Art. XI B 2, Bylaw 3.101 B 3) or even the Synod (Constitution Art. XI A). A failure to meet the requirements of the Bylaws is, therefore, in every case a matter of concern. However, any failure to meet the requirements of one bylaw does not reduce the status or applicability of other bylaws.

Question 6: In response to Rev. Lindeman's question 5, as reported in the CCM's minutes of the January 28th meeting states, "A decision of Council of Presidents regarding a particular case of restricted status has bearing only on the restriction in question. The removal or dropping of a restricted status has no bearing on future decisions to place that member of Synod on restricted status or to commence formal Bylaw 2.27 proceedings that result in suspended status."

Rev. Lindeman's question 5 had specific reference to provisions of Bylaw 2.29 e, wherein it states, "The decision of the hearing panel shall be the decision of the COP and shall be final with no right of appeal."

If upon request, a member of Synod placed on restricted status files a petition for removal of Restricted Status with the Council of Presidents through the office of the President of Synod, and the Council of Presidents rules in favor of the petition for removal does the, "no right of appeal" apply to office or person placing the appellant on restricted status as well as the person making the appeal? And if so, can the appellant again be placed on restricted status or suspended status for the same alleged offence, relating to the same specific incident, and under what circumstances and constitutional authority?

Opinion: Bylaw "2.29 Procedure to Consider Petition for Removal of Restricted Status" states in its title and its initial paragraph the purpose of the procedure it outlines, that is, to respond to a request made under Bylaw 2.23 d appealing the placement on or continuance of restricted status. A member of the Synod placed on restricted status may make such a petition no more than once in a 12-month period. The responsibility of the hearing panel that is selected is clear: to consider the petition that has been made for removal of restricted status. Its decision is final, pertains only to the petition that has been made, and cannot be appealed. If the hearing panel denies the petition, the decision of the panel is final and the restriction remains in force. If the panel decides in favor of the petition, the decision of the panel is final and the restriction is lifted.

As stated in the Commission's earlier opinion, restricted status and suspended status are two different actions. Restricted status is imposed when a District President has information which may cause him to conclude that certain conditions exist in a church worker's life that are of serious concern or may lead to serious consequences, the imposition of which status results in ineligibility to perform certain functions of ministry and to accept a call to any other position of service in the Synod (Bylaw 2.23 b). Suspended status results when formal proceedings have been commenced against a member of the Synod, individual or congregation, that may lead to expulsion from the Synod, during which status the activities of the member in question are severely limited (Bylaw 2.25 c). While restricted status may lead to suspended status in the case of individual members (Bylaw 2.25 a), suspended status is not dependent upon the member in question first being placed upon restricted status, nor is it influenced by success or failure in

petitioning for the removal of restricted status. The outcome of suspended status is dependent solely upon facts forming a basis for expulsion from membership under Article XIII of the Constitution (Bylaw 2.27 c) and, if there is a desire to have the matter heard and resolved (Bylaw 2.27 c), upon a decision by none other than a Dispute Resolution Panel proceeding according to Bylaw 8.09.

265. Questions Regarding the CCM, Synod's Constitution and Bylaws and Articles II and XIII (04-2385)

In a letter dated February 18, 2004, an ordained member of the Synod submitted a series of questions regarding the CCM, Synod's Constitution and Bylaws and Article II and Article XIII.

Question 1: The Synod has given to the CCM the "precisely defined service function" (Bylaw 3.51 b) to "interpret Synod's Constitution, Bylaws and resolutions" (Bylaw 3.905 d). If the CCM issues an opinion beyond this precisely defined service function or that does not involve interpretation of the Synod's Constitution, Bylaws or resolutions, does that opinion have any binding effect under Bylaw 3.905 d? In other words, can the CCM bind the entire Synod until overruled by a convention to opinions that are beyond the function of the CCM? If so, what specific bylaw gives the CCM this power?

Opinion: The answer to the question as stated is "no." The Commission on Constitutional Matters "as prescribed in the Bylaws," (3.51 b) renders "a precisely defined service function of the Synod and [is] responsible...to the Synod in convention..."(Bylaw 3.51 b). While the answer is "no," if there is a question whether or not an opinion is in fact under the "precisely defined service function," it is the Synod in convention that reserves unto itself **alone the right** to determine if in fact any of the opinions, interpretations (an opinion or interpretation is one and the same), or other functions of the CCM went beyond its prescribed functions. Bylaw 3.905 d clearly states, "An opinion rendered by the commission shall be binding on the question decided unless and until it is overruled by a synodical convention."

Question 2: Are the Synod's Bylaws required to be consistent with the Synod's Constitution?

Opinion: Yes, the Bylaws of the Synod are to be consistent with the Constitution of the Synod. This is implied in Bylaw 14.01 1 a and d, which states, "Amendments to the Bylaws may be made by the convention provided they are not contrary to the Constitution" and "examined by the Commission on Constitutional Matters prior to presentation to the convention to determine that they are not in conflict with the Constitution and Bylaws of the Synod." In an opinion of the CCM dated February 21, 1975 concerning "Removal from Office as a Result of Expulsion from Membership in the Synod," the Commission opined, "The Constitution of the Synod provides for the adoption of bylaws. All duly and regularly adopted bylaws which remain in force and effect are an extension of the Constitution."

Question 3: If a bylaw conflicts with the Constitution, what controls, the bylaw or the Constitution?

Opinion: If a bylaw conflicts with the Constitution of the Synod, the Constitution controls. However if a bylaw conflicts with the Constitution, it is the CCM which is to initially consider the matter, and ultimately the Synod in convention that makes that determination. The Bylaws which are presently in existence have been adopted by the Synod in convention and are included in the *Handbook* as directed by the Synod through its Bylaws. "The delegate convention of the Synod is the legislative assembly which ultimately legislates policy, program, and financial direction to carry on the Synod's work on behalf of and in service to the member congregation..." (Bylaw 1.07 a). The national convention of the Synod "is the principal legislative assembly, which amends the Constitution and Bylaws, considers and takes action on reports and overtures, and handles appropriate appeals" (Bylaw 3.01).

Bylaws, as an extension of the Constitution, are binding regulations for the Synod and its conduct and governance. Bylaw 1.05 d states, "...while congregations of the Synod are self-governing (Art. VII), they, and also individual members, commit themselves as members of the Synod to act in accordance with the synodical Constitution and Bylaws under which they have agreed to live and work together and which the congregations alone have the authority to adopt or amend through convention." And in regard to the relation of the Synod to its members, "the Constitution, Bylaws, and all other rules and regulations of the Synod apply to all congregational and individual members of the Synod" (Bylaw 2.39 a).

Question 4: Are the Bylaws required to be consistent with Article II of the Constitution?

Opinion: Since all bylaws of the Synod are to be consistent with all articles of the Constitution and not contrary to the Constitution, this includes being consistent with Article II of the Constitution. However any article of the Constitution, including Article II, is also best understood, observed, practiced, or used in the full context of all the Articles of Synod's Constitution (Example: Article III begins with "The Synod, under Scripture and the Lutheran Confessions, shall -;" Articles V, VI, XIII and XIV reference Article II; Articles XI and XII sets forth the supervision over the doctrine). And as the understanding and application of Article II cannot be isolated from the other articles of the Constitution, Article II cannot be isolated from the synodical bylaws which not only help elucidate the articles but which provide a certain prescribed polity which must be followed in order to carry out Synod's Constitution and all its articles.

Question 5: Is the CCM required to issue opinions consistent with Article II of the Constitution? If the opinion issues an opinion that is not consistent with Article II of the Constitution, is the opinion binding? If so, are the ecclesiastical supervisors, officers, and members of Synod required to follow the CCM opinion or Article II of the Constitution? If a member follows the CCM opinion, and thereby acts contrary to Article II, can the member be expelled from Synod under Article XIII of the Constitution for acting contrary to Article II?

Opinion: Since one of the Commission's functions is to "interpret the Synod's Constitution, Bylaws, and resolutions," the Commission's opinions must be consistent not only with Article II but with all the constitutional articles, the Bylaws and the resolutions of the Synod. While an opinion rendered by the Commission shall be binding on the question, the Synod in convention has reserved unto itself the power to overrule any opinion of the Commission that it considers to be inconsistent with the Constitution and Bylaws (see the answers to the above questions).

It must be noted however that it is not a function of the Commission to interpret the Scriptures and the Confessions, the confessional position as set forth in Article II. The authority for such interpretation is the responsibility of the Synod (the Synod has reserved this right to itself) on the basis of procedures as defined in the *Handbook*. The provisions or polity for determining the collective will and understanding of the Synod's confessional position (Article II) are set forth in Bylaw 1.09 and Bylaw 2.39. Those provisions involve the Commission on Theology and Church Relations to which you may address questions of interpretation.

If it is demonstrated by action of the Synod in convention that a CCM opinion is inconsistent with Article II, such an opinion is not binding on the ecclesiastical supervisors, officers, and members of Synod, who are required to follow the collective will of the Synod as expressed in its Constitution, Bylaws, and resolutions. While an ecclesiastical supervisor or perhaps the CCM or CTCR are involved in the process, the decision whether or not to expel a member from synodical membership under Article XIII of the Constitution rests ultimately with a Dispute Resolution Panel which alone determines the facts in the case and acts according to procedures set forth in Bylaws 2.27 and Chapter VIII.

266. Request for Approval to Changes to LCMS Foundation Bylaws re: Length of Terms of Office (04-2386)

After discussion and review, the Commission approved changes requested by the LCMS Foundation that the terms of office of the Chairman, Vice Chairman, and Secretary of the Board of Trustees shall each be elected to a “two year term. The Chairman will be elected in odd numbered years and the Vice Chairman and Secretary in even numbered years and the...” (Article II, Section 6), and shall be “elected to a two year term” (Article III, Section 1).

267. Question Regarding the Relationship of the Circuit Counselor to Member Congregations (04-2387)

In an e-mail sent April 30, 2004, an ordained member of the Synod submitted a question regarding the Circuit Counselor’s relation to member congregations.

Question: Since the Bylaw [5.13 j] envisions only visits with “congregation[s],” is it appropriate for the Circuit Counselor to meet with a dissident faction within a congregation to receive accusations against other members or the pastor of the congregation, and does meeting with a dissident faction within a congregation constitute such “extraordinary circumstances” that it is permissible for a Circuit Counselor to schedule such a meeting without prior consultation with the president or other officers of the congregation (much less the pastor), much less without ‘inviting’ them to be present to answer accusations against them?

Opinion: One of the functions of a District President is to inquire into the prevailing spiritual conditions of the congregations of his District and he may call upon the Circuit Counselor to assist him (Bylaw 4.73). Bylaw 4.75 states that a District President, even without a formal request therefor, may through the proper channels arrange for an (a) official visit or (b) investigation when a controversy arises in a congregation or when there is evidence of a continuing unresolved problem in doctrine or practice in order that the District President “may have a clear understanding of the situation.” The same bylaw further recognizes that a District President may authorize another person (such as the Circuit Counselor) to represent him in the matter. The Bylaws do not define the term “proper channels” and thus the procedure to be used in the investigation is chosen by the District President or his representative and does not necessarily require the initial contact or meeting to be with any particular person or group. In such an investigation, any meeting is to carry out the purposes as set forth in these Bylaws.

Your attention is also directed to the provisions of Article XII 7 of the Constitution, which provides:

7. 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. To this end they shall visit and, according as they deem it necessary, hold investigations in the congregations. Their assistants in this work are the Circuit Counselors, who therefore shall regularly make their reports to the District President.

268. Request for Approval of Amendment to LCEF Bylaws (04-2388)

After discussion and review the Commission approved an amendment to revise the language of Article II, Section 1 to remove the phrase “and no more than four” so that the sentence now reads: “The Board of Directors of the LCEF shall be composed of twelve individuals, at least two of whom shall be on The Lutheran Church—Missouri Synod’s official roster of pastors and called teachers.”

269. Discussion of Overtures and Proposals to Floor Committees

The Commission spent considerable time discussing:

- Overtures directly involving the CCM
- The Proposed Revised *Handbook* of the Synod
- Overtures involving the Constitution and Bylaws of the Synod
- Logistics regarding meetings at the Synod's convention
- CCM involvement with and responsibility to the floor committees, and
- Various questions raised by floor committees.

270. Communication from a Non-member of Synod

The Commission discussed a communication from a non-member of Synod regarding Opinion 03-2367 and decided not to respond.

271. Request from the President of Synod

In response to an official request by the President of Synod for input regarding a communication he will be sharing with the Synod regarding issues arising from actions of the Board of Directors of Synod, the Commission made recommendations for his consideration.

272. Adjournment

Having concluded its deliberations, the Commission concluded its meeting with a word of benediction led by Don Little.

Donald G. Little, Acting Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Meeting Simultaneously with the 62nd Regular Synodical Convention
July 9–15, 2004

273. Call to Order and Opening Devotion

Acting Chairman Al Marcis called the meeting to order at 9:15 a.m. Friday, July 9, and asked Will Sohns to lead in an opening devotion. Present were Al Marcis, Will Sohns, Dan Lorenz, and Don Little. Chairman Walter Tesch was absent because of the illness of his wife, and Secretary Raymond Hartwig was absent because of his responsibilities with the Synod's convention. Acting Chairman Al Marcis appointed Don Little to serve as Acting Secretary.

274. Floor Committee Meetings

The Commission was represented regularly at floor committee meetings throughout the convention, thus fulfilling its responsibilities pursuant to Bylaw 3.905 b, which states, "The commission shall...b. be represented at the meetings of the floor committees considering constitutional matters at the convention of the Synod." Additionally, the Commission was represented at various open hearings of the floor committees.

275. A Question from Committee 8 Regarding Overture 8-47 (04-2391)

The following question was submitted to the CCM from Floor Committee 8 on July 9, 2004:

Question: Is the hearing, hearing procedure, and procedure for the expulsion of the synodical President from membership in the Synod described in Overture 8-47 of the 2004 synodical *Convention Workbook* consistent with the Constitution and Bylaws of the Synod?

Opinion: No. There is no provision in the Constitution or Bylaws of the Synod for the expulsion of the synodical President directly by the convention. Rather, the provisions for expulsions are as set forth in Article XIII of the Constitution and Bylaw 2.27. In order for the expulsion process under Bylaw 2.27 to occur, the President must first be out of office, whether by resignation, failure to be reelected, or otherwise.

276. Interpretation of Article XI A 4 as to What Constitutes "in extraordinary cases" (04-2392)

A member of the Synod submitted the following question to the CCM by letter of July 8, 2004:

Question: In accord with Bylaw 3.905 d, I am requesting of the Commission on Constitutional Matters an interpretation of Article XI A 4 of the Constitution, especially in regard to what constitutes "in extraordinary cases" and as it applies to the synodical President. In view of the fact the 62nd Regular Convention of the Synod is about to convene, your timely interpretation is deeply appreciated.

Opinion: Article XI A 4 reads "4. Conventions of the Synod and of the Districts have the right, in extraordinary cases, to elect a chairman other than the regular presiding officer." A review of the decisions of the CCM dating back to at least 1965 reveals that the issue has never before been considered in a formal opinion of the CCM. While it would be impossible to anticipate in advance all circumstances which might conceivably fit the description, such circumstances would include the situation where the

sitting District President were under suspension as a result of pending charges under Bylaw 2.27, as occurred last summer in the Atlantic District. They might also include the extreme illness or other disability occurring contemporaneous to the convention.

277. A Question from a Dispute Resolution Panel (04-2390)

In a letter dated May 11, 2004 and forwarded by the chairman of a Review Panel on July 7, 2004, a party to a dispute submitted a series of concerns and questions to the Commission. In his letter, the party states that the LCMS Secretary has pointed out that information contained in a “Handbook for Reconcilers” imposes “LCMS self-limits” on Dispute Resolution Panels and Review Panels when a congregation is a respondent.

He calls attention to a statement from the handbook (p. 10): “(note that a Dispute Resolution Panel may only make a decision on excommunication issues based on procedural questions – refer to Bylaws 8.01, 8.11, 8.13 b 1),” and states that this quotation has been a significant factor in the failure of the dispute resolution process for his case. He maintains that this instruction establishes and imposes partiality or the appearance of partiality by requiring panel members to disregard LCMS doctrine and instead to comply with the instructions contained in this subordinate handbook. He questions whether a subordinate publication may “limit or withdraw the authority” granted panels in the Bylaws.

Question 1: Is the “Handbook for Reconcilers” in harmony with the conscience of the Synod? Please compare the authority conferred upon dispute resolution and review panels by the Synod in Bylaws 8.03 and 8.09 c 1, and in Rule of Procedure 7 f. If this handbook is not in harmony with the Constitution and Bylaws, will the Commission on Constitutional Matters (a) stand by its own Opinion 02-2308 (October 2, 2002) which already provides the LCMS resolution on disputes over the rights and actions of congregations during the dispute resolution process? (b) instruct the Review Panel to disregard the conflicting handbook and to conduct the required formal hearing according to LCMS Bylaw 8.09 c 1 without partiality or the appearance of partiality toward either party for any reason? (c) request a doctrinal review of the “Handbook for Reconcilers” according to LCMS Bylaw 10.15 so that steps can be taken to make the handbook obedient to the Constitution and Bylaws of the Synod and therefore the will of God?

Opinion: Bylaw 3.905 d limits the Commission’s responsibility for interpretation to the Constitution, Bylaws, and resolutions of the Synod. The referenced “Handbook for Reconcilers” is not included in that responsibility. Therefore, the requested comparison of the authority conferred upon dispute resolution and review panels by the handbook in question and by the Bylaws and accompanying Rules of Procedure cannot be provided by the Commission. And since the remaining questions (a-c) depend upon such a comparison, they also cannot be answered by the Commission.

Question 2: What process or procedure does the CCM propose to resolve or decide the complicated and widespread matters in dispute if not by an unbiased and thorough investigation of the evidence through a formal hearing by the Review Panel?

Opinion: It is not the responsibility of the Commission to propose processes or procedures. It is the responsibility of the Commission to interpret the existing Bylaws and call attention to the processes or procedures that they provide. In this case, Bylaw 8.09 d states in its final sentence: “The Review Panel shall generally decide the issue on the record without further formal hearing but may follow the procedure used by a Dispute Resolution Panel if deemed necessary.” Therefore it remains for the panel to decide whether to carry out its responsibilities on the basis of the existing record provided by the Dispute Resolution Panel or whether to follow the procedure followed by a Dispute Resolution Panel that includes a formal hearing.

278. A Question from Floor Committee 1 Regarding Bylaw 3.823 (04-2393)

The chairman of Floor Committee 1 asked the following question:

Question: Does Bylaw 3.823 apply to Resolution 1-06? In other words does Bylaw 3.823 prevent the Synod in convention from assigning the function of outreach ministry in North America and the Director of Outreach Ministry to LCMS World Mission?

Opinion: Since the position or function of the Director of Outreach Ministry in North America is not specified or defined in the bylaws, it can exist or be created under any board if consistent with the duties and responsibilities of the board. The whereases of proposed Resolution 1-06 articulate the rationale for placement of this position or function under the Board for Mission Services (which is also identified as LCMS World Mission). Therefore, the Synod in convention may direct, pursuant to Bylaw 1.07 a, that the described position or function of the Director of Outreach Ministry in North America be placed under the Board for Mission Services (Bylaw 3.845).

279. A Question from Floor Committee 4 as to How Resolution 4-14 Relates to Resolution 7-02A. (04-2394)

A question was presented from Floor Committee 4 as follows:

Question: Following the approval of Resolution 7-02A, is it in order for Floor Committee 4 to bring Resolution 4-14 (*Today's Business*, page 199) before the convention for consideration?

Opinion: Resolution 7-02A found that the two resolutions of the Board of Directors referred to in the President's Special Report and found at pages 24–26 of *Today's Business* were of no effect. As such, the opinions of the Commission on Constitutional Matters challenged by those board resolutions remain in full force and effect within the Synod pursuant to the provisions of Bylaw 3.905 d, as cited in that resolution. The Board for Communication Services continues to be responsible for the operation of KFUE unless their responsibility to do so is changed by the Synod in convention, or that responsibility is otherwise properly removed from that board. The resolution therefore is entirely appropriate as a way to reaffirm those responsibilities and, as stated in the second resolved, to ...“reaffirm the ministries of the Board for Communication Services to the entire church and encourage the Board for Communication Services in their work to explore a more effective role for KFUE.”

280. A Question from the Executive Director of the BHE/CUS (04-2395)

A draft opinion was developed for the question, but the question was withdrawn before the draft opinion was finalized. Thus no opinion was given.

281. A Question Regarding “To Allow the Speaking of Presidential Candidates” (04-2396)

During the convention, the president inquired from the podium whether the proposed resolution “To Allow the Speaking of Presidential Candidates” found on page 384 of *Today's Business* would require an amendment to the Bylaws.

Opinion: The proposed resolution would require the addition of a particular election procedure for the office of President that differs from the general procedures currently contained in the Bylaws. The current procedures include Bylaw 3.961 e which describe the current synodical practice for disseminating biographical and other information from the candidates for president, and under the current Bylaw 3.25, the President establishes the agenda, and the convention is held pursuant to parliamentary procedure. As

an amendment of the Bylaws, the resolution as currently drafted is not consistent with Bylaw 14.01 1 c, in that it does not identify itself as an amendment to the Bylaws, and has also not been presented to a convention floor committee for their consideration. In addition, it would not comply with Bylaw 14.01 1 e in that it was not presented to the Commission on Constitutional Matters prior to the presentation to the convention to assure that it is not in conflict with the Constitution and Bylaws of the Synod. Upon request of a member, the Commission is prepared to more comprehensively review this proposed resolution to assure itself and the convention that no other unintended conflicts with the current Constitution and Bylaws exist.

282. A Convention Session “Point of Privilege” Related to Bylaw 3.19 and Resolution 3-06 A (04-2397)

During a convention session, an opinion was asked of the Commission on Constitutional Matters in a Point of Privilege that was raised concerning a challenge from the floor of the synodical convention on Wednesday, July 14, 2004 on whether the Synod in convention was in violation of Bylaw 3.19 b in considering Resolution 3-06A, “To Commend CTCR Report on *Guidelines For Participation in Civic Events*.”

Opinion: The bylaw cited states “Reports and overtures must be submitted in triplicate to the President of the Synod not later than 18 weeks prior to the opening date of the convention. No report or overture received subsequent to that date shall be accepted for convention consideration unless a committee consisting of the President, the First Vice-President, and the Secretary adjudge it to be a matter of overriding importance and urgency which is not adequately covered by documents already before the convention” (Bylaw 3.19 b).

The essence of a “Report” to a synodical convention must also be considered. Bylaw 3.19 a and 3.19 a 1 includes the following: “a. The principal business of a synodical convention shall be the consideration of reports and overtures.

1. Reports are (1) statements of work performed or contemplated by those who are charged with conducting the business of the Synod between conventions, (2) communications to a convention with respect to studies which may have been made for the Synod in order to further its work, or (3) other types of communications to the Synod” (Bylaw 3.19 a 1).

In accordance with these bylaws and others in 3.19 a-f, “All reports and overtures accepted by the President in accordance with the foregoing paragraphs shall be referred by him to convention committees... After due consideration of the matters referred to it, each committee is to report its findings and recommendations to the convention” (Bylaw 3.19 g).

In compliance with the Bylaws, the report of the Commission on Theology and Church Relations was published in the 2004 *Convention Workbook*, pp. 69–79. And the report concerning the *Guidelines For Participation in Civic Events* is on page 70 of that report in the 2004 *Convention Workbook*. In compliance with the Bylaws, the findings and recommendation of the convention floor committee are published in *Today’s Business*, pages 62–63. In considering Resolution 3-06A at this 2004 synodical convention, the convention was in compliance with Bylaw 3.19.

283. Adjournment

The Commission adjourned its meeting simultaneously with the closing of the convention of the Synod.

Don Little, Acting Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Teleconference Meeting
August 3, 2004

284. Call to Order

Acting Chairman Albert Marcis called the conference call meeting to order and asked Secretary Raymond Hartwig to open the meeting with prayer. Also participating in the meeting were: Daniel Lorenz, Donald Little, Wilbert Sohns, and Walter Tesch.

285. Identification of District Membership in Constitutions and Bylaws of Congregations (04-2389)

In a letter dated June 7, 2004, a District Committee on Constitutions, upon request of the President of the District, requested an opinion regarding the permissibility of requiring congregations to identify District affiliation in their Constitutions and Bylaws.

Question: Since a congregation's application for and membership in the Synod is through a District of the Synod (Bylaws 2.01, 2.03, 1.05 b, e), is it permissible for a District Constitution Committee to require a congregation to identify the District in its article of synodical affiliation?

Opinion: The Synod divides itself into Districts (Constitution, Art. XII 1; Bylaws 4.01, 4.03). Districts are component parts of the Synod (Bylaw 1.05 b) that act as and on behalf of the Synod in relation to congregations (Constitution Art. VI, 5; Bylaws 2.03, 2.05, 4.07, *et al.*). Congregations acquire membership in the Synod by application to Districts (Bylaw 2.01), hold membership through Districts (Bylaw 2.41), and relate to Districts as to the Synod (Bylaw 4.09), but membership remains in the Synod (Constitution, Art. V and VI; Bylaw 1.05 e). Jurisdiction with respect to everything that is administered by or for the entire Synod (such as requirements for membership) resides in the Synod itself (Bylaw 4.07 e).

Districts may adopt bylaws, regulations, and resolutions in addition to the Constitution and Bylaws of the Synod (Constitution, Art. XII 2) so long as they do not conflict with the Constitution and Bylaws of the Synod (Bylaw 4.07 b). However, to require a congregation to identify its District in its article of synodical affiliation, while not specifically prohibited by the Constitution and Bylaws of the Synod, labors against a clear and proper understanding of the true nature of membership in the Synod and therefore should not be required.

286. Rights and Responsibilities of BHE/CUS Board after Convention Action (04-2398)

In a written communication received July 26, 2004, the chairman of the Board for Higher Education/Concordia University System Board asked the following question regarding the rights and responsibilities of his board as a result of the adoption of Res. 5-02 by the 2004 convention of the Synod:

Question: According to Bylaw 3.67 b, does the BHE/CUS Board, as constituted during the 2001–2004 triennium and until a new board assumes office, have the right to continue the process of calling a new executive director for the Board for University Education?

Opinion: Resolution 5-02 of the 2004 convention restructured the governance of higher education in the Synod. It abolished the current Board for Higher Education/Concordia University System (BHE/CUS)

Board and created two new boards to assume responsibilities previously assigned to it. The convention amended the resolution as originally presented to the convention, eliminating a provision which would have had the members of the new boards elected by the convention assume office immediately, rather than September 1 as is generally provided in Bylaw 3.59 b. The new Board for University Education (BUE) and the new Board for Pastoral Education (BPE) therefore come into existence as of September 1, 2004, rather than upon passage of the resolution as would have occurred under the resolution as originally presented, and the BHE/CUS Board continues to exist until that date.

As indicated in background information related to the question presented, the BHE/CUS Board has been in the process of selecting a new executive director for some time. To the extent that the historic efforts of the BHE/CUS Board will assist the newly formed BUE and BPE in determining whether to create similar positions under the new boards, and in selecting executive directors for those newly created boards if they choose to do so, it is expected that the experiences, work, and information generated will be passed on to the new boards for their consideration and benefit. To the extent that the BHE/CUS Board needs to call a new executive director to complete its work through August 31, it may certainly issue such a call or make other appropriate arrangements to complete its assigned duties through that date. The question presented, however, is whether the BHE/CUS Board has the right to call a new executive director for the Board for University Education. It may not, any more than it may call an executive director for the Board for Pastoral Education.

In considering the prior work and information gathered by the BHE/CUS Board, as well as any recommendations from the BHE/CUS Board that the new boards may choose to consider, each of the newly constituted boards will of necessity need to consider independently its responsibilities under the new structure, and each board will need to consider independently what officer and/or executive director positions will best suit its assigned responsibilities. To the extent that one of the newly created boards chooses to create an executive director position, it will need to comply with Bylaw 3.69 and particularly Bylaw 3.69 e in that process:

Every board, commission, and synodwide corporate entity shall operate under synodical Human Resources policies. Such policies may recognize the unique character of the operations of each board, commission, and synodwide corporate entity. Every board, commission, and synodwide corporate entity may create officer and executive staff positions and fill the same in accordance with such policies. The chief executive of such board, commission, and synodwide corporate entity shall serve at the pleasure of the governing board. The governing board of each executive shall conduct an annual review and, before the expiration of five years, conduct a comprehensive review. At the conclusion of each five year period, the appointment shall terminate unless the governing board takes specific action to continue the person in the office. The slate of candidates for the initial appointment of the executive officer of a board, commission, or synodwide corporate entity shall be selected by the board or commission in consultation and mutual concurrence with the President of the Synod.

In this regard, the newly created boards will also need to refer to Bylaws 1.07 d and e, 3.101 C 4, and 3.950 for guidance.

287. Status of Ongoing Dispute Processes in Light of Convention Action (04-2399)

In an E-mailed letter dated July 20, 2004, a District President asked for a decision regarding the disposition of a current dispute resolution case in his District in light of actions taken by the 2004 convention of the Synod.

Question: Does the current dispute resolution process that involves [an individual and congregation in my District] continue under the old or the newly accepted process passed by the convention?

The President of the Synod, in an E-mailed letter dated August 3, 2004, asked the same question prompted by another dispute case.

Question: What is the status of cases involving as parties members of the Synod whose suspended status was in the process of appeal prior to adoption of extensive amendments by the 62nd Regular Convention of The Lutheran Church—Missouri Synod to the Bylaws of the Synod regarding the process of suspended status and appeals for removal thereof?

Opinion: The 2004 convention adopted Res. 8-01A, resulting in significant changes to the Synod's dispute resolution process. The resolution included no provision to address these questions.

However, similarly significant changes were made by the 1992 convention in its adoption of Res. 5-01B, resulting in a transition from the then-existing adjudication and appeals process to the new dispute resolution process. The 1992 resolution included provisions for transition, resolving that "all cases currently in the adjudication or appeals process be concluded under the existing bylaws governing adjudication and appeals" and that the "new procedure shall apply to all dispute resolutions initiated after the date of adoption of this amendment without regard to the date of onset of the dispute." These provisions were then also referenced by the Commission on Constitutional Matters in its response to specific questions in the months following the convention action (Ag. 1938; Ag. 1962).

In light of this precedent, the Commission concludes that the same understanding and practice should hold true in the present. All cases currently in dispute resolution, including the cases in question, are to be concluded under the bylaws that existed at the time of the initiation of the cases unless such cases were in such early stage that the former bylaw requirements did not yet pertain. In such case, as in the case of all other dispute resolutions initiated after the convention action, the changed procedures will apply.

288. Omission of "Treatise on the Power and Primacy of the Pope" in Art. II of Constitution (04-2402)

In an E-mailed letter dated July 22, 2004, a pastor of the Synod asked "the reason for omitting 'The Treatise on the Power and Primacy of the Pope' from Article II of the Constitution."

The pastor further states: "In the Tappert ed. it states in the introduction to the Treatise, 'Unlike the Smalcald Articles, the Treatise was officially adopted in Smalcald as a confession of faith. It was intended as a supplement to the Augsburg Confession and was not, as used to be supposed, an appendix to the Smalcald Articles. All the clergymen who were present signed the Treatise; the signature of Luther is wanting because he was too ill to attend the meeting.'"

Opinion: Since Bylaw 3.905 d indicates that one of the functions of the Commission on Constitutional Matters is to: "interpret the Synod's Constitution, Bylaws, and resolutions upon the written request of a member...of the Synod," and since the question as posed goes beyond the scope of these responsibilities, the Commission suggests that the question would better be posed to the Commission on Theology and Church Relations.

289. CUS Continuing Level Appointments (04-2403)

In an E-mailed letter dated July 27, 2004, an associate professor of a Synod university asked whether the failure to offer continuing level appointments in the Concordia University System (CUS) is a violation of a synodical bylaw.

Question: I have learned from several CUS colleagues and from some inquiries I have had that some CUS schools do not offer “continuing level” appointments to their faculty (often called “tenure”). They only offer roll-over contracts (that theoretically could end without cause at some point in time, making them initial level appointments according to the definition in the *Handbook*). Is this a violation of Bylaw 3.7.1.7.2 (former Bylaws 6.21 and 6.25)? The reason I ask is because two items in the bylaw seem to require all CUS schools as well as the seminaries to offer continuing level appointments to their faculties:

1. The bylaw states that “there shall be two levels of appointments” and that one will be continuing level (which can only be terminated for cause).
2. The bylaw states under point (b) that normally at least 35% of a faculty’s full-time members shall serve at the continuing appointment level.

So—is not offering continuing level appointments a violation of the bylaw or do CUS schools have the option of offering only roll-over contracts?

Opinion: Bylaw 3.7.1.7.2 (former Bylaw 6.21 a) clearly establishes two levels of faculty appointments: “Each educational institution shall have established policies and procedures related to appointments. There shall be two levels of faculty appointments:

1. Initial level, where the appointment can be terminated with no formal requirement for a show of cause.
2. Continuing level, where termination requires a formal show of cause.”

The bylaw clearly requires that there be two levels of faculty appointments, an initial-level and a continuing-level. For a Board of Regents of an educational institution to offer no continuing level appointments to its faculty as a whole would be a violation of this bylaw.

Paragraphs (b) and (c) of Bylaw 3.7.1.7.2 (former Bylaw 6.25) also state, “Each educational institution of the Synod normally shall have at least thirty-five percent of its full-time faculty serving at the continuing appointment level....Each institution shall require specific action by the Board of Regents for promotion from an initial-level appointment to a continuing-level appointment.” While a specific promotion from the initial-level to the continuing-level is not required, continuing-level appointments are required, although the “at least thirty-five percent” requirement is qualified by the word “normally.”

In the promotion from an initial-level appointment to a continuing-level appointment, the specific action of the Board of Regents of a CUS school is based on specific standards or qualifications and specific steps. If a faculty member is not promoted to the continuing-level, the individual may continue at the initial-level or be terminated (Bylaw 3.7.1.7.2 (d) and (e); former Bylaw 6.25 a and b). A Board of Regents is not required to promote a faculty member to a continuing-level appointment. However, a faculty member may petition the Board of Regents to do so (Bylaw 3.7.1.7.2 (e) (1); former Bylaw 6.25 b 1).

The Bylaws do not use the term “roll-over contract.” The referenced bylaw does state, “Any continuation of employment at the initial-level appointment shall be on a year-to-year basis.” And further, the bylaw also states: “Other types of faculty appointments may be established by institutions as the need arises.”

290. Standard Operating Procedures Manuals (04-2404)

The 2004 convention, with the adoption of Res. 8-01A, “To Amend Bylaws on Ecclesiastical Supervision and Dispute Resolution,” included the following bylaw responsibilities for the Commission on Constitutional Matters:

l. In consultation with the Secretary of the Synod and with the concurrence of the Council of Presidents, the Commission on Constitutional Matters shall develop and amend as necessary a *Standard Operating Procedures Manual* which will serve as a comprehensive procedures manual for the bylaw provisions set forth in Bylaws 2.26, 2.27, 2.28, and 2.29 (Bylaws 2.26 l, 2.27 l, 2.28 l, and 2.29 l).

k. In consultation with the Secretary of the Synod and with the concurrence of the Council of Presidents, the Commission on Constitutional Matters shall develop and amend as necessary a *Standard Operating Procedures Manual* which will serve as a comprehensive procedures manual for Chapter VIII, Synodical Dispute Resolution (Bylaw 8.21 k).

The Commission discussed a timetable for the development of the manuals and agreed to the following steps:

1. CCM orientation, framing the task and setting the sights on the target.
2. Initial consultation with the Secretary of the Synod.
3. Initial consultation with the Council of Presidents (September, 2004):
 - a. Orientation and framing the task (Where we've been, where we are, and where we are going).
 - b. Reviewing the existing "Rules of Procedure" and "Handbook for Reconcilers" associated with the dispute resolution process.
 - c. Familiarization with and use of new Bylaws 2.26–2.29 (expulsion from membership) and Chapter VIII (dispute resolution) for relevant input.
 - d. General discussion and suggestions.
 - e. Invitation for initial input from individual Council members by October 1, 2004 (thoughts, reflections, suggestions, questions such as "How is this done?" etc.)
4. Discussion by CCM during October 6–8, 2004 meeting:
 - a. Review of existing "Rules of Procedure" and "Handbook for Reconcilers" as a resource for developing the manuals.
 - b. Consultation with other resource persons for input into the content of the manuals.
5. Preparation of drafts of operating procedures manuals for Bylaws 2.26 to 2.29 and Chapter VIII by November 1, 2004.
6. Second consultation with the Council of Presidents to share the drafts with the COP for further input/refinement and, if possible, concurrence and finalization (November, 2004).
7. Continued refinement and consultation as necessary to produce final documents by January 1, 2005.
8. Final consultation with Council of Presidents for final concurrence if necessary (February, 2005).

291. Meeting Dates and Adjournment

The Commission agreed to defer discussion and action on a number of other pending items of business until its next meeting. Following discussion regarding travel considerations in establishing meeting times for the October 6–8 meeting, the meeting was adjourned with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Teleconference Meeting
August 11, 2004

292. Call to Order and Prayer

Chairman Albert Marcis called the conference call meeting to order and opened with prayer. All members of the commission were present for the meeting.

293. Higher Education Representation in Election Process (04-2408; 04-2408A)

Two questions with related backgrounds and overlapping answers have been asked of the CCM. In an E-mailed letter dated August 6, 2004, the chairman of the current Board for Higher Education/Concordia University System Board asked:

Question: As Chairman of the BHE/CUS I am one of four electors for college and university presidents. On August 24 I will be the BHE/CUS elector to establish a slate of candidates for the presidency of CURF. On September 15 & 16 interviews will be held at [Concordia University—River Forest] with an election to follow the interviews. The new [Board for University Education (BUE)] will not be installed until September 18, and probably will not organize until after the [Council of Members] meets and elects 3 more members of the BUE. Will I continue to serve as an elector for the presidency of CURF on Sept. 16, there being no other person chosen for that position at that time?

Also in an August 6, 2004 letter, the Acting President of Concordia University—River Forest asked:

Question: Since the BHE goes out of existence on September 1st and Gene Oesch is therefore no longer its chair, and the new BUE will not be organized until perhaps September 20th, who will be authorized to cast the BUE chairman's vote in the River Forest election on September 15–16?

Opinion: As indicated in Opinion 04-2398, the Board for Higher Education/Concordia University System Board (BHE) ceases to exist effective September 1, 2004, and as of that date, a new Board for University Education and a new Board for Pastoral Education have been assigned various of the duties previously assigned to the BHE. Under the prior system, the chairman of the BHE participated in the selection of a university president pursuant to the provisions of Bylaw 6.11, and particularly the election process described in Bylaw 6.11 f. Since the position of the chairman of the BHE ceases to exist as of September 1, the current chairman of the BHE ceases to have authority to cast a vote in the election of a university president after that date.

Pursuant to Bylaw 3.905 c, the Commission on Constitutional Matters is charged to “revise the synodical *Handbook* immediately after each convention of the Synod to bring it into harmony with the resolutions or changes adopted by the convention.” In doing so, the Commission will delete all references to the BHE and replace the existing references with references to the appropriate new board. In the case of Bylaw 6.11, the role of the chairman of the BHE will be replaced with the chairman of the Board for University Education (BUE).

The new BUE created by Resolution 5-02A of the 2004 convention includes nine voting members—two ordained ministers elected by the Synod, one commissioned minister elected by the Synod, two lay

members elected by the Synod, three lay members appointed by the Concordia University System Council of Members, and the synodical President or his designated representative. There are also nonvoting members. Until the new BUE is fully constituted and convenes, it will be unable to perform its important initial task of selecting a chairman who will carry out critical functions on its behalf, including participation as an elector in the election process as described in Bylaw 6.11.

Bylaw 6.11 f provides that, at a meeting held to elect a university president, the four designated electors shall be present and voting. Therefore, unless the new BUE is able to be properly constituted and convened before the scheduled election and is able to accomplish the task of selecting a chairman, it will not be possible to complete an election on September 16. In such a circumstance, the election must be postponed as contemplated in Bylaw 6.11 h, which provides that “[t]he election shall be held on the day designated in the notice published in the official periodical of the Synod or as soon thereafter as feasible.” In the event an election is not completed on September 16, Bylaw 6.11 i further provides: “If the electors are unable to finalize the slate or complete the election, they shall postpone the election and, if desirable, request the Board of Regents to issue a new call for nominations.”

While it is important to fill the currently existing vacancy in a timely manner, it is equally important to proceed in an orderly fashion, requiring those designated by the Synod to act on its behalf to do so only after opportunity for due deliberation, contemplation, and the exercise of the judgment for which they were chosen to serve.

294. Adjournment

Chairman Marcis closed the meeting with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Teleconference Meeting
September 2, 2004

1. Call to Order and Prayer

Chairman Albert Marcis called the conference call meeting to order and asked Wilbert Sohns to provide an opening prayer. The chair noted the purpose of the meeting, to address questions regarding the organization of the new Board for University Education.

During the course of the meeting it was noted that the minutes should also include Opinion 04-2410, a requested reconsideration of Opinion 04-2390 accomplished by the Commission via exchange of E-mail communications.

2. Reconsideration of CCM Opinion 04-2390 (04-2410)

Pursuant to Bylaw 8.21 i, a complainant through a Review Panel requested a reconsideration of CCM Opinion 04-2390.

The Commission on Constitutional Matters reviewed its Opinion 04-2390 and concluded that it provided an appropriate answer to the questions that were asked.

3. Board for University Education Organization (04-2411, 04-2411A)

The President of Concordia University System (CUS), in response to Opinions 04-2408 and 04-2408A and in contemplation of the scheduled election of a new president at Concordia University, River Forest (CURF) asked in an August 25, 2004 letter:

- Questions:
1. In what context in the synodical governing documents is the expression “fully constituted” used to interpret synodical Bylaw 3.69 b?
 2. In light of the scheduled election of a president for Concordia University, River Forest, may the Board for University Education establish a valid elector by electing a chairman or chairman pro tem subsequent to 1 September (Synod Bylaw 3.65) but prior to 15 September, or may the former chairman of the BHE/CUS Board serve as the elector because he participated in the establishment of the selection criteria and in the establishment of “the slate of nominees to be interviewed in the election meeting” (Bylaw 6.11 g)?

The current Chairman of the Board of Regents of Concordia University, River Forest, in a letter received August 27, 2004, also relayed a question asked by his board:

Question: By what means will it be possible for Concordia University, River Forest, to conduct its presidential election on the scheduled date of 16 September?

Opinion: The situation presented in these questions arises because of a unique circumstance in which a new board was created by action of the convention and because, due to an amendment from the floor, the originally contemplated continuity from the old Board for Higher Education (BHE) to the new Board for University Education (BUE) was not achieved. The term “fully constituted” is not used in the governing

documents of the LCMS. The language of Resolution 5-02 as proposed provided, “ The newly elected members of the Board for University Education and of the Board for Pastoral Education shall assume office and responsibility as the constituted board for the respective entities upon election in order to provide an orderly transition from the old governance structure to the new.” That sentence was deleted by floor amendment. The language of Opinion 04-2408 was used to reflect that amendment, while recognizing that at least one member of the former BHE continued in office (because his term on the old BHE ended in 2007, and he served on the University Education subcommittee of the BHE).

Instead of the BUE beginning to function immediately after the convention, as originally contemplated in the resolution, it now came into existence on September 1. Thus what does it mean to be "fully constituted?" The resolution originally contemplated that the board would be constituted and begin to function without the appointment or election of the remaining members, who were to be chosen or elected other than by the convention. Because of the floor amendment, the issue has arisen as to when and how the BUE is constituted. The new BUE is set up or established by meeting the following bylaw/resolution (legal) requirements:

1. A governing Board for University Education was established by the convention (Res. 5-02A).
2. Six of the nine voting board members have been elected/designated (Res. 5-02A).
3. The elected/designated board members assumed office September 1st, after which they may convene:

3.65 Induction

a. All those elected at the convention or appointed by the President or Board of Directors of The Lutheran Church—Missouri Synod shall be inducted into office on a date on or subsequent to Sept. 1 following the convention.

b. The initial meeting of boards and commissions shall ordinarily be held in association with the induction and shall begin with a combined orientation program conducted under the direction of the President.

4. At the convening meeting, the board organizes:

3.69 General Regulations

b. Every agency shall organize itself as to officers and subcommittees at its initial meeting after election or appointment and shall conduct its business in accordance with accepted parliamentary procedures. (emphasis added)

The above is what fully constitutes the BUE even if there are vacancies (three voting members to be appointed by the CUS Council of Members) at the outset. Boards can have "legal" meetings even though there may be absences or vacancies as long as a "majority" is "present" and voting. The Bylaws are silent concerning any requirement for 100% participation at the initial meeting.

The issues presented in these questions were also reviewed by the Synod's legal counsel, who opined in part:

The seven persons who assume office on September 1 will constitute a valid and acting board of directors of CUS and BUE on that date. Further, because they are a majority of this board, they meet the quorum requirements necessary for meetings. The CUS bylaws state that “a majority of the directors” of CUS constitute a quorum, without stating whether it is a quorum of the total number of directors then in office or of the total number of directors that

can serve on the board. We would interpret this provision to be a majority of those then in office. The seven members of the BUE/CUS board may therefore lawfully conduct all business, both as a program board and as a board of directors of CUS, provided the necessary quorum is present at meetings.

As indicated in Opinion 04-2408, “Since the position of the chairman of the BHE ceases to exist as of September 1, the current chairman of the BHE ceases to have authority to cast a vote in the election of a university president after that date.” Effective September 1, however, the new BUE may convene and conduct its assigned business. While it may choose not to convene until after the remaining members are appointed by the CUS Council of Members or may decline to appoint a temporary chair to participate in the scheduled CURF election, there is nothing to prevent the existing members of the BUE in proper meeting to make such an appointment to allow the election to proceed as currently scheduled. The last paragraph of CCM Opinion 04-2408 (“While it is important to fill the currently existing vacancy in a timely manner, it is equally important to proceed in an orderly fashion, requiring those designated by the Synod to act on its behalf to do so only after opportunity for due deliberation, contemplation, and the exercise of the judgment for which they were chosen to serve.”) is simply the encouragement to follow the orderly procedure of the above referenced bylaws, including the business of electing a chairman.

4. Adjournment

All necessary business having been concluded, the meeting was adjourned with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Teleconference Meeting
September 27, 2004

5. Call to Order and Prayer

Chairman Albert Marcis called the conference call meeting to order and asked Don Little to provide an opening prayer, which included a special petition for Walter Tesch and his family due to the serious illness of his wife. The chair then called attention to the primary purpose of the meeting.

6. Direction re Bylaw to be Used in Dispute Case (04-2400)

A district president in a letter dated July 20, 2004, requested guidance regarding whether a dispute case that had been initiated by a letter received by his office July 6 should be handled according to the Bylaws that existed before the July 10-15 convention of the Synod or according to the Bylaws that were adopted by the convention.

Opinion: In a December 5, 1992 opinion (Ag. 1938), at a time when significant changes had been made by the 1992 convention to the Synod's process for resolving disputes, the Commission on Constitutional Matters (CCM) called attention to Res. 5-01B of the convention, which resolved "that all cases currently under the adjudication or appeals process be concluded under existing bylaws" and that the "new procedure shall apply to all dispute resolutions initiated after the date of adoption" of the new dispute resolution process, applying this principle in its response to a question that had been submitted. Furthermore, in a May 22, 1998 opinion (Ag. 2097), in reference to an action to terminate a membership, the Commission opined that such an action "is initiated by a written complaint against a member of the Synod."

Therefore, in response to the current question, the Commission on the basis of the previously stated opinions concludes that the letter received by the district president July 6, because it is a written complaint against a member of the Synod, is an action that initiates the dispute resolution process on that date. Furthermore, since the date of the letter precedes the dates of the convention of the Synod, the process to be followed will be that which is described by the bylaws that were in effect on that date.

7. Pending Opinions

The Commission reviewed the remaining questions before it that have yet to receive responses and concluded such responses will wait until the Commission's next regular meeting in October.

8. Adjournment

Prior to adjourning, the Commission reviewed plans and agenda for its October meeting. The meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

St. Louis Crowne Plaza
October 6–8, 2004

9. Call to Order and Prayer

Chairman Albert Marcis called the meeting to order with all members of the Commission present for the meeting. Raymond Hartwig provided the opening devotion. (Dan Lorenz and Walter Tesch provided morning prayers to open the following days' sessions.)

10. Revised Handbook (04-2405)

The Commission spent the first day of its meeting reviewing its incorporation of changes made by 2004 convention action into the revised *Handbook*, also reviewing the *Handbook* in its entirety in preparation for publication.

11. Public Rebuke of False Doctrine (04-2401)

In a July 20, 2004 letter to the secretary of the Commission, a pastor requested a response to two questions. The first question sought clarification of the Commission's response to question 9 of former Opinion 02-2309. The second requested an opinion regarding Bylaw 2.26 a (revised *Handbook* Bylaw 2.14.3) adopted by the 2004 convention of the Synod.

Question 1: Does this CCM opinion [02-2309] prohibit an LCMS pastor from publicly rebuking the false, public doctrine and practice of another LCMS pastor, the President of the Synod, or a district president?

Opinion: The questioner specifically references the following question and response of Opinion 02-2309:

Question 9: Under what constitutional provision, if any, may any person or group, any board or commission, or any other entity assume *de jure* or *de facto* the responsibility of ecclesiastical supervision in the Synod that has been given alone to the synodical President or the District President in his respective District. In other words, may any entity that does not have the ecclesiastical supervision, which is the sole responsibility of the synodical President or a District President, publicly reprove or admonish another entity? If the answer is "yes" how may the Synod avoid havoc, disorder and confusion?

Opinion: There is no constitutional provision that allows any person, group, board, commission or other entity to assume the responsibility of ecclesiastical supervision in the Synod that has been given to the President of the Synod under Article XI B or the District President under Article XII 7. This includes the formal or official constitutional responsibility to admonish or reprove members of the Synod. No one is to interfere in the work of another.

The CCM opinion in question addresses the question of ecclesiastical supervision in the Synod, not the precise situation described in the question raised. If and when a pastor or any individual or group does not assume the constitutional responsibility for ecclesiastical supervision in the Synod, Opinion 02-2309 does

not prohibit any Christian from rebuking a Christian brother so long as biblical and confessional principles are followed. For the proper biblical and confessional principles to be followed in rebuking a Christian brother, the Commission would suggest that an opinion of the Commission on Theology and Church Relations be requested. It might also be helpful for the questioner to refer to Opinion 03-2338 for an expanded understanding of the constitutional responsibility of ecclesiastical supervision.

Question 2: Does Bylaw 2.26 a (or any part of the bylaw dealing with restricting, suspending, and expelling congregations or individuals from membership) prohibit an LCMS pastor who has not entered a formal complaint process from publicly rebuking the false, public doctrine and practice of another LCMS pastor, the President of the Synod, or a district president?

Opinion: The Commission assumes that the bylaw referred to as Bylaw 2.26 a is the new bylaw adopted in Resolution 8-01A of the 2004 convention of the Synod (Bylaw 2.14.3 in the 2004 revised *Handbook*). This bylaw and related bylaws do not apply to a person who has not entered a formal complaint. The answer to question one above also applies.

12. Consequence of Convention Action re KFUE (04-2406)

The former chairman of the Board for Communication Services in a letter faxed July 30, 2004, requested an opinion regarding the consequences of 2004 convention Resolution 7-02A for radio stations KFUE. In an e-mailed letter dated September 29, 2004, the former chairman sent a follow-up letter informing the Commission of his decision to withdraw his questions upon request of the Board for Communication Services. The Commission honored his decision and removed his request for an opinion from its agenda.

13. Book Reviews Critical of a Member of the Synod (04-2407)

In an August 3, 2004 e-mailed note to the Secretary of the Synod, a pastor asked for clarification regarding book reviews that are critical of an author who is a member of the Synod.

Question: It has been reported that the CCM has rendered the opinion that a book review critical of an author can be considered a “complaint” and the author thereby the “accused.” Is this a correct statement? If so, how does 8-01 apply in the case of a review which criticizes the doctrine contained in a publication of a member of the Synod?

Opinion: In response to the first part of the question, that which was said to have been reported is not a correct statement and does not represent any previous Commission on Constitutional Matters opinion. In its Opinion 99-2140, the Commission did respond to a question regarding doctrinal review. However, the question to which it responded pertained to invoking the dispute resolution process in response to a decision of the Synod’s Commission on Doctrinal Review. In its opinion the Commission concluded that use of dispute resolution process, while it may be used by a member of the Synod over against the Commission on Doctrinal Review, must be limited to the question of whether proper procedures were followed by that commission in reaching its decision. In no known previous decision has the Commission opined that a book review critical of an author can be considered a complaint and the author the accused, thereby invoking the process provided by Bylaw 2.27 (2004 *Handbook* Bylaw Section 2.14).

Therefore, because the statement in the question is not a correct statement and because the question that follows is dependent upon verification that the statement in question is a correct statement, the Commission concludes that a response to the second part of the question is not required. However, the Commission nonetheless calls attention to Bylaw 8-01 (2004 *Handbook* Bylaw 1.10.2) and its statement of the purpose and objectives of the Synod’s dispute resolution process. A book review by a member of

the Synod that criticizes the doctrine contained in a publication of another member of the Synod is the kind of dispute for which the dispute resolution process has been established.

14. Effect of Congregational Vote on Implementation of 2004 Resolution 7-21 (04-2409)

A pastor of the Synod in a letter to the Secretary of the Synod dated August 17, 2004, asked regarding the consequences if the congregations of the Synod fail to approve Resolution 7-21 of the 2004 convention by a two-thirds majority vote.

Question: If proposed Constitutional Amendment A entitled "To Amend Constitution Regarding Officer and Board Responsibilities" as set forth in Resolution 7-21 of the 2004 convention of the Synod is not passed by a 2/3 majority vote, will the implementation or validity of any other resolutions or changes to the bylaws passed at the 2004 convention be affected?

Opinion: It is the opinion of the Commission on Constitutional Matters that the proposed amendment to Article XI F 2 states more clearly what the existing language already means. Any amendment to the Bylaws which is consistent with the former Article XI F 2 would similarly be consistent with proposed Article XI F 2. As such, the answer to the question presented is that if the proposed Constitutional Amendment A entitled "To Amend Constitution Regarding Officer and Board Responsibilities" as set forth in Resolution 7-21 of the 2004 convention of the Synod is not passed by a two-thirds majority vote, it would not affect the implementation or validity of any other resolutions or changes to the bylaws passed at the 2004 convention.

Bylaw 14.01 (Bylaw 7.1 in the 2004 revised *Handbook*) provides that amendments may be made to the Bylaws by the Synod in convention provided the amendments are not contrary to the Constitution. Before presentation to the convention, the Commission on Constitutional Matters is also required to review the proposed amendment to the Constitution or other existing bylaws.

Resolution 7-21 proposes to change Article XI F 2 of the Constitution as follows:

2. The Board of Directors is the legal representative of the Synod. It is the custodian of all the property of the Synod, directly or by its delegation of such authority to an agency of the Synod. It shall exercise supervision over all the property and business affairs of the Synod ~~except in those areas where it has delegated such authority to an agency of the Synod~~ to the extent management authority and duties have been delegated by the Constitution, Bylaws or resolutions of the Synod to other officers and agencies of the Synod or where the voting members of the Synod through the adoption of Bylaws or by other convention action have assigned specific areas of responsibility to separate corporate or trust entities, and as to those the Board of Directors shall have general oversight responsibility as set forth in the Bylaws.

The responsibilities of the Board of Directors under Article XI F 2 have been interpreted on a number of occasions in prior opinions of the Commission on Constitutional Matters. The language of the proposed amendment states more clearly what the existing language has been interpreted to mean. For example, in Opinion 03-2358 the Commission opined that the authority of the Board of Directors was limited by the existing language in circumstances where the Synod has delegated authority or duties to another officer or agency of the Synod. After reviewing the Board's authority under both Article XI F 2 and Bylaw 3.183 (to be renumbered Bylaw 3.3.5 and its subparts in the 2004 revised *Handbook*), the opinion found that the Synod had delegated certain authority to the Board for Higher Education, and that the Board of Directors' authority was thus limited. The opinion states:

While the Synod could have adopted for its governance a corporate model, with power concentrated in a board of directors, subject only to election or reelection every three years, the Synod instead chose as its church governance structure a system which retains ultimate authority to the membership in convention, very much consistent with the pre-incorporation structure of the Synod. In fulfilling its function as “church,” the Synod has determined in convention to establish boards and commissions as the best way to carry out various church purposes and functions, as it reserved the right to do in Article VII of the Articles of Incorporation. Bylaw 3.01 indicates that the Synod in convention “establishes general synodical positions and policies, provides overall program direction and priorities, and evaluates all such positions, programs, policies, directions, and priorities in order to provide responsible service for and on behalf of its members.” The Synod has chosen to allocate duties, powers, and responsibilities among various officers, boards (including the Board of Directors of the Synod), and commissions, holding each ultimately responsible to the Synod itself through the synodical conventions.

Reference may also be made to Opinion 03-2357, affirming the same interpretation with respect to authority regarding KFUE delegated by the Synod to the Board for Communication Services and Opinion 03-2359 with respect to authority to determine the manner and level of circulation of *Reporter*. Opinion 03-2358 also reviewed the earlier opinions of the Commission recognizing the limitations of the authority of the Board of Directors under the existing language of Article XI F 2, including a series of opinions dating back to 1976 involving implementation of New Orleans Resolution 6-31, (Ag. 591, Ag. 591A-B, Ag. 927, Ag. 9-27A, Ag. 934, and Ag. 934B-J) as well as a 1998 opinion which reviewed the effort of the Board of Directors to move the video studio of the Synod from the Board for Communication Services to General Services, Opinion Ag. 2094 (May 22, 1998).

15. Review of “Guidelines for Constitutions and Bylaws of Congregations” (04-2413)

The Commission noted the need to review its document, “Guidelines for Constitutions and Bylaws of Congregations” in light of actions taken by the 2004 convention. This task will be placed upon the agenda of the Commission for attention at a later time.

16. Standard Operating Procedures Manuals (04-2404)

The final day of the meeting was devoted to a review of early draft materials for the required production of standard operating procedure manuals for the newly adopted expulsion from membership processes and dispute resolution process provided by Resolution 8-01A of the 2004 convention. Work on this project will continue in coming months, incorporating input from other sources including the Council of Presidents as required by Resolution 8-01A. The Secretary was also instructed to send letters to the Board for University Education and the Board for Pastoral Education calling attention to the resolution’s expectations for similar efforts on their parts in relation to Bylaws 6.45 and 6.47 (Bylaw 3.8.2.8.8 in 2004 revised *Handbook*).

17. Future Meetings Dates and Adjournment

The Commission agreed to dates for future meetings to conclude work on the 2004 *Handbook* in preparation for its publication and to continue work on the operating procedures manuals. The meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Teleconference Meeting
November 4, 2004

18. Call to Order and Prayer

Chairman Al Marcis called the conference call meeting to order and provided the opening prayer. All members of the Commission participated in the meeting.

19. Constitutional Amendments

In a November 2, 2004 e-mailed message, an LCMS pastor requested more information regarding the two resolutions to amend the Constitution of the Synod. After brief discussion, the Commission instructed its secretary to forward to the pastor its Opinion 04-2409, suggesting that the pastor submit specific questions if the help provided by the opinion does not answer his needs.

20. Revised Handbook

The Commission worked through the latest draft of the revised *Handbook*, noting minor corrections and improvements yet to be made. A final review prior to publication will be done at the Commission's December meeting in St. Louis.

21. Standard Operating Procedures Manuals

The Commission discussed briefly its progress on the development of operating procedures manuals for Bylaw sections 1.10, 2.14, 2.15, 2.16, and 2.17. A complete draft of the documents will be presented to the Council of Presidents during its November 16-17 meeting in Dallas. Copies of the draft will also be provided to other persons with particular interest or expertise for their response prior to the Commission's comprehensive review of the procedures manuals at its December meeting.

22. Next Meeting

The agenda of the Commission's next meeting was discussed, to include an allowance of time for orientation for the Commission's newest member, Mr. Gordon Tresch.

23. Adjournment

All business to come before the Commission having been addressed, the meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

St. Louis Crowne Plaza
December 6-7, 2004

24. Call to Order and Opening Devotion

Acting Chairman Albert Marcis called the meeting to order with Wilbert Sohns absent due to illness. Don Little was asked to provide an opening devotion, after which the members of the Commission introduced themselves for the benefit of the Commission's newest member, Gordon Tresch. Reverend Little continued to serve as chaplain for the duration of the meeting.

25. Orientation

Acting Chairman Marcis provided a brief orientation describing the manner in which the Commission ordinarily conducts its business, based upon the bylaws governing the work of the Commission (Bylaws 3.9.2–3.9.2.2.4) and taking into consideration past practice.

26. Election of Chairman

The Commission being fully constituted for the triennium with the appointment of Gordon Tresch, the Commission elected its chairman. After Albert Marcis was nominated, nominations were closed and Reverend Marcis was elected by acclamation.

27. Procedure for Consulting with Legal Counsel and Board of Directors

Resolution 7-02A of the 2004 convention amended Bylaw 3.9.2.2 (b) governing the responsibilities of the Commission on Constitutional Matters by adding the requirement: "When opinions pertain primarily to business, legal, finance, civil rights, contracts, or property matters, the commission shall first consult with the Board of Directors of the Synod and/or the Synod's legal counsel." The Commission discussed how questions regarding such matters would be identified and handled. It was agreed that the following process be carried out for all questions received:

1. All questions submitted to the Commission will be processed by the Office of the Secretary.
2. Each submission will be given a number and disseminated to the members of the Commission, at which time a decision will be made by the chairman of the Commission whether or not such questions warrant consultation with the Board of Directors and/or legal counsel. If the chairman does not initially refer a matter to either the Board of Directors and/or legal counsel, such matter will be submitted thereafter if requested by at least two members of the Commission.
3. Questions warranting consultation will be forwarded to the Board of Directors and/or legal counsel by the Office of the Secretary accompanied by a letter provided by the chairman and kept on file for such purpose.

28. Meeting Scheduling

The Commission discussed the manner in which it has scheduled meetings in the past and agreed to continue with the same practice for the current triennium. Dates will be reserved for face-to-face meetings

as necessary, with much of the Commission's business conducted by telephone conference calls in order to respond to requests for opinions in a timely manner.

29. Response to Letter re Previous CCM Opinion (04-2413)

A November 2, 2004 letter from a pastor of the Synod contained a request outside of the responsibilities of the Commission. After discussion, the Commission asked the Secretary to provide an appropriate response.

30. District Constitution Committee Guidelines (04-2414)

A November 4, 2004 letter from a district president contained a request for an opinion regarding 2004 convention Resolution 3-08A and its application by a district constitution committee. After discussion, the Commission directed the Secretary to respond by encouraging the district president and constitution committee to await the anticipated report from the special task force appointed by the President of the Synod to provide guidance for the implementation of said resolution.

31. Handbook Revision (04-2405)

The Commission gave final review to the revised *Handbook* prior to its publication.

32. Standard Operating Procedures Manuals (04-2404)

The Commission continued its review of materials intended for inclusion in the *Standard Operating Procedures Manual* that will accompany the dispute resolution process provided in Bylaw section 1.10 of the revised *Handbook*, taking into consideration the comments and recommendations of the Convention Actions Committee of the Council of Presidents as well as other sources.

33. Other Items

A December 6, 2004 letter from a district president asking a series of questions regarding membership and suspension matters (04-2415) was briefly discussed. The Commission asked one of its members to prepare a draft response for discussion at its next meeting.

34. Adjournment

The meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary

MINUTES
COMMISSION ON CONSTITUTIONAL MATTERS

Teleconference Meeting
December 20, 2004

35. Call to Order and Prayer

Chairman Al Marcis called the conference call meeting to order and asked Raymond Hartwig to provide an opening prayer. Dan Lorenz was not present for the meeting.

36. Standard Operating Procedures Manual (Dispute Resolution) (04-2404)

The Commission reviewed the most recent draft of the *Standard Operating Procedures Manual* for Bylaw section 1.10, Dispute Resolution, evaluating suggested changes submitted by the Council of Presidents and others whose input was requested. The Commission incorporated many of the changes into the document. Copies of the manual will be published for use during reconciler training in late January and early February, 2005.

37. Handbook Revision (04-2405)

The Secretary reported that the text of the 2004 *Handbook* has now been delivered to Concordia Publishing House for publication. As soon as the *Handbook* is available in its final format, it will be published on the Internet. Printed copies will become available for general distribution in early 2005.

38. Responsibility for Non-Rostered Workers (04-2415)

A district president, in a December 2, 2004 letter to the Commission, submitted a series of questions regarding responsibility for supervision of non-rostered church workers. After discussing an initial draft for a response, the Commission agreed to await the preparation of a second draft before continuing its discussion.

39. Adjournment

Allotted time having elapsed, the meeting was closed with words of benediction.

Raymond L. Hartwig, Secretary