FACULTY GOVERNANCE—REFLECTIONS OF A RETIRING DEAN

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INTRODUCTION

ONE of the most interesting, perplexing, and frustrating issues I have struggled with in my 14 years as a law school dean[1] is trying to figure out exactly what issues are appropriate to submit to the faculty for its determination, what issues should be submitted to the faculty for input, consultation or information purposes but not a faculty vote, and what issues are properly determined solely by the dean and administrative staff of the law school, the university administration or the university's Board of Trustees. In recent years I have consciously tried to limit the number of issues that will ultimately come before the entire faculty for its vote of approval. One reason for this is my frustration with the time it takes to get something approved by the faculty[2] Discussions at both the committee and faculty meetings are often protracted and repetitious and occasionally acrimonious. Frequently, procedural and process questions take up far more time than the discussion on the merits. As a practical matter, only a few issues ever get voted on at any faculty meeting.[3] This in turn means that during the course of an academic year, there are a limited number of issues that the faculty will decide, with the total number being determined by the number of faculty meetings.[4]

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1. Southern Illinois University School of Law (1990-95), William Mitchell College of Law (1995-2004). I also served one year as an Acting Dean and two years as Associate Dean at the University of South Carolina School of Law.

2. My frustration is shared by many others. The Association of Governing Boards, a national professional service organization for governing boards of colleges and universities, states in the AGB Statement on Institutional Governance:

> Many governing boards, faculty members, and chief executives believe that internal governance arrangements have become so cumbersome that timely decisions are difficult to make, and small factions often are able to impede the decision-making process. Alternatively, in the quest for consensus or efficiency, the governance process sometimes produces a "lowest common denominator" decision, which does not adequately address underlying issues.

ASS'N OF GOVERNING BDS. OF UNIVS. & COLLS., AGB STATEMENT ON INSTITUTIONAL GOVERNANCE AND GOVERNING IN THE PUBLIC TRUST 3-4 (2001) [hereinafter AGB STATEMENT].

3. My experience is that the first action item on the agenda will, with rare exceptions, be debated for at least 30 minutes before a vote is taken.

4. Except for special meetings for issues like voting on hiring of new faculty and tenure matters, the faculties I have been on think one faculty meeting per month is the appropriate operating rule. As is the case with most issues, not every faculty member agrees with this rule. Many faculty I know have told me that they think faculty meetings are a waste of time because nothing is ever accomplished. They want to have as few faculty meetings as possible. Others have told me they really enjoy the give

Some of the inefficiency of faculty decision making could be ameliorated by changing the paradigm of a faculty meeting from that of a legislative body, where everyone feels he or she must say something for the record, to a business meeting where there are strictly enforced decision timelines set at the time an issue is submitted,[5] time limits on discussion, and great deference given to committee recommendations.[6] Distribution of the agenda with action items clearly indicated several days in advance of the scheduled meeting can also help to make faculty meetings more efficient, especially if committee reports are in writing and attached to the agenda. Faculty debate at a meeting can be significantly shortened if interested faculty share their views, including proposed amendments, by email (or in some other form of communication) prior to the faculty meeting and refrain from repeating their e-mail statements at the meeting. A consent calendar for routine matters and non-controversial items like new courses, which can be approved by a single motion, can also save meeting time.

Even if faculty meetings were more efficient and more issues could be submitted annually to the faculty, there are still hundreds of issues annually on which the faculty should have notice, or opportunity for input, but no decision-making vote.

My own view is that the only issues where the faculty should be the primary decision maker are those involving curriculum and other aspects of the educational program (e.g., grading policies and graduation standards), admissions standards and policies, and faculty status (hiring, voting rights, promotion, and tenure).

For other matters faculty participation often takes the form of representation on various advisory committees or task forces that include other stakeholders, e.g., staff, students, and sometimes, outside constituencies such as alumni. On many other matters, however, such as the law school budget, the faculty's role is more indirect. The actual determination of the budget is an administrative matter,[7] but the faculty has significant indirect impact on the budget through its decisions on the number of new faculty to be hired, the admission standards and target for the size of the entering class, policies on the maximum number of students in various classes or courses, approval of new courses, requests for new equipment, and the like. The faculty's interests are also generally represented by the various deans on the budget team who are members of the faculty The faculty should, of course, receive

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and take of a debate in a faculty meeting and think that we need to have more issues debated by the faculty and therefore we should have more than one meeting a month.

5. *See* AGB STATEMENT, *supra* note 2, at 8.

> Boards and chief executives should establish deadlines for the conclusion of various consultative and decision-making processes with the clear understanding that failure to act in accordance with these deadlines will mean that the next highest level in the governance process may choose to act. While respecting the sometimes lengthy processes of academic governance, a single individual or group should be not empowered to impede decisions through inaction.

Id.

6. Duplication of a committee's careful consideration of an issue by the faculty, meeting as a committee-of-the-whole, is a natural tendency, but is also a serious time-wasting exercise.

7 Technically, the governing board, or by delegation, the university administration, approves the budget but the law school administration makes the resource allocations in accordance with the parameters set by the board or the central administration. *See* AGB STATEMENT, *supra* note 2, at 7-8.

information about the budget before it is submitted for final approval, as it should be informed of most other matters of importance,[8] even those where the faculty has no direct or indirect role in the decision process.

I have been told more than once that my views on faculty governance boundaries are much too narrow and not in accordance with the traditions of academia and the practices of most faculties. My research on the subject, however, has convinced me that my basic conclusions are sound and are supported by respectable authority

The boundary between what is appropriate for faculty determination and what is not is the subject matter of "shared governance," an elusive concept that has been the subject of much analysis and debate in academic circles for generations. The basic guidelines and conventions for shared governance are contained in policy documents developed by the American Association of University Professors.[9] The basic precepts are also incorporated in the ABA Standards for Approval of Law Schools.[10]

The basic AAUP document is the Statement on Government of Colleges and Universities,[11] approved in 1966 ("Statement on Government"). The paradigm in the Statement on Government is a governing board that has *de jure* final authority over all matters, but delegates primary authority over some matters to the faculty and over most other matters to the President and other administrators. With respect to the faculty, the Statement on Government states:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty [12]

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8. There are some issues, however, where because of privacy and confidentiality considerations the faculty has no right to any information (e.g., the rationale for personnel actions involving the law school staff).

9. AM. ASS'N OF UNIV PROFESSORS, AAUP POLICY DOCUMENTS & REPORTS (9th ed. 2001), known and hereinafter cited as the "Redbook" because of the color of its cover.

10. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2002-2003 [hereinafter ABA STANDARDS].

11. *See* Redbook, *supra* note 9, at 217 There are several other AAUP policy statements that address various governance issues, including: ON THE RELATIONSHIP OF FACULTY GOVERNANCE TO ACADEMIC FREEDOM; FACULTY PARTICIPATION IN THE SELECTION, EVALUATION, AND RETENTION OF ADMINISTRATORS; AND THE ROLE OF THE FACULTY IN BUDGETARY AND SALARY MATTERS. *Id.* at 224-47 In 1998, the Association of Governing Boards published its own STATEMENT ON INSTITUTIONAL GOVERNANCE. It differs in several respects from the AAUP STATEMENT ON GOVERNMENT, but for the most part the areas where the faculty has primary authority are essentially the same. *See* NEIL W HAMILTON, ACADEMIC ETHICS—PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE 55-65 (2002).

12. Redbook, *supra* note 9, at 221. The president should also give great deference to faculty decisions in those areas where the faculty has primary authority. *See* KEETJIE RAMO, ASSESSING THE FACULTY'S ROLE IN SHARED GOVERNANCE 36 (1998).

The following table[13] summarizes the shared governance principles incorporated in the Statement on Government:

1966 Statement on Government Plus 1957 Recommended Institutional Regulations on Academic Freedom and Tenure	
TYPE OF DECISION	ALLOCATION OF RESPONSIBILITY
<Determination of mission <Strategic decisions and comprehensive planning <Physical and fiscal resources <Budgeting and distribution of funds <Decision to create a program, department, school, college, division, or university <Decision to declare financial exigency <Selection and assessment of the president and deans	The governing board and its administrative agents have primary responsibility for these decisions, but the decisions should be informed by consultation with the voting faculty
<Curriculum <Procedures of student instruction <Standards of faculty competence and ethical conduct including faculty appointments and faculty status <Policies for admitting students <Standards of student competence <Maintenance of a suitable environment for learning <Judgments determining *where* within the overall academic program terminations for financial exigency should occur <Bona fide decisions to discontinue a program or department of instruction when no financial exigency is declared	The voting faculty should have primary authority over decisions about such matters—that is the governing board and administration should "concur with the faculty judgment except in rare instances and for compelling reasons, which should be stated in detail."
<Research <Classroom (and other) teaching activities	Individual professor has primary authority over such matters subject to peer review for competence and ethical conduct, and ultimate review by the board described immediately above.

The provisions in the ABA Standards for Approval of Law Schools on shared governance are not nearly as detailed as the AAUP governance policy statements.

13. HAMILTON, *supra* note 11, at 53.

The Standards contain only three statements about the role of a governing board. Standard 203 says that an independent law school "shall be governed by a governing board composed of individuals dedicated to the maintenance of a sound program of legal education."[14] Standard 204(a) says, "A governing board may establish general policies that are applicable to a law school if they are consistent with the Standards."[15] Finally, Standard 205(a) says that the dean of the law school shall be "selected by a governing board or its designee, to whom the dean shall be responsible."[16]

The ABA Standards dealing with the authority of the dean and the faculty are more explicit. Standard 205(b) says, "A law school shall provide the dean with the authority and support needed to discharge the responsibilities of the position and those contemplated by the Standards."[17] There are several standards that deal with the governance rights of the faculty, but all of them, except one, provide for joint authority between the dean and the faculty The one exception is Standard 205(d), which deals with the role of the law school faculty in the selection of a dean. It says, "The faculty or a representative of it shall advise, consult, and make recommendations to the appointing authority in the selection of a dean."[18] Interpretation 205-1 of the ABA Standards states:

> The faculty or a representative body of it should have substantial involvement in the selection of a dean. Except in circumstances demonstrating good cause, a dean should not be appointed or reappointed to a new term over the stated objection of a substantial majority of the faculty [19]

The fact that the Standards require only that a dean candidate not be appointed if a substantial majority of the faculty affirmatively votes against that candidate will surprise and maybe even shock many faculty who feel that they should have the final say on who becomes the dean. The Standards do not say that the faculty cannot have more authority in the dean selection. Standard 205 merely states what is minimally required. In many if not most law schools, the input of the faculty is greater than is required by Standard 205. Most law schools, for example, have formal or informal procedural rules that require at least a majority or supermajority vote of the entire law school faculty as a prerequisite for a recommendation that a decanal candidate be approved by the appointing authority

The basic Standard describing the joint authority of the dean and the faculty is Standard 204(b), which states:

> The dean and the faculty shall formulate and administer the educational program of the law school, including curriculum; methods of instruction; admissions; and academic

14. ABA STANDARDS, *supra* note 10, at 17

15. *Id.*

16. *Id.*

17 *Id.* at 17 Interpretation 203-1 says the governing board of an independent law school "should authorize the dean to serve as chief executive, or chief academic officer, or both and shall define the scope of the dean's authority in compliance with the[se] Standards." *Id.*

18. *Id.* at 18.

19. *Id.*

> standards for retention, advancement, and graduation of students; and shall recommend the selection, retention, promotion, and tenure (or granting of security of position) of the faculty[20]

The allocation of authority between the dean and the faculty with respect to shared responsibility is set forth in Standard 206, which states: "The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy"[21] Standard 206 says, in effect, that as long as both the dean and the faculty have "a significant role" with respect to the law school's educational policy, the Standard has been met. Each law school is free to decide how to allocate the authority between the dean and the faculty with respect to the multitude of educational policy issues that arise. Most law schools, for example, have a policy authorizing the dean to make an independent recommendation with respect to the faculty's vote on hiring, promoting, or granting tenure to a member of the full-time faculty The actual allocation is usually incorporated in law school bylaws, policy statements, or protocols adopted for specific issues not covered in the bylaws, for example, a written document approved by the faculty setting out the procedures that must be followed and the faculty vote necessary to authorize the dean to make an offer to a faculty prospect. The allocation on issues that are not covered in written documents is often based on the dean or faculty's memory of how the issue was handled the last time it was considered and a determination of whether the prior precedent should be followed.

There are going to be numerous issues, however, where there is neither a written policy nor a prior undocumented precedent in the institution's memory bank. The allocation of authority on these issues depends largely on the law school's traditions with respect to faculty governance and the dean's attitude toward faculty governance. Needless to say the decision on how to process these issues can be the source of friction, particularly when the dean expects to operate under a "strong dean" model and the faculty wants to operate under a "weak dean" model where the faculty is the primary decision maker and the dean is essentially a first among equals whose responsibility is to carry out the faculty's will.[22]

The governance paradigm incorporated in the ABA Standards is consistent with the governance guidelines in the AAUP Statement on Government, discussed earlier.[23] The basic structure is exactly the same. The governing board of the

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20. *Id.* at 17 The other standards that discuss the joint authority of the dean and faculty are Standard 202(a), *id.* at 16 ("The dean and faculty of a law school shall develop and periodically revise a written self study which shall ... describe the program of legal education ...."); Standard 602(b), *id.* at 45 ("The dean and director of the law library, *in consultation with the faculty* of the law school, shall determine library policy.") (emphasis added); and Standard 207, *id.* at 18 (allowing alumni, students and other constituencies to be involved in "a participatory or advisory capacity," but noting that "the dean and faculty shall retain control over matters affecting the educational program of the law school.").

21. *Id.* at 18.

22. *See* Frank T Read, *The Unique Role of the American Law School Dean: Academic Leader or Embattled Juggler* 31 U. TOL. L. REV. 715, 720 (2000).

23. *See supra* notes 12-13 and accompanying text.

university (or the law school in the case of an independent law school) is the ultimate policy making body[24] It has the final say on all matters and the authority to overrule any decision made by an individual or group of individuals in the institution.[25]

The dean of the law school is the chief executive officer and chief academic officer of the law school and has the managerial authority that is normally accorded a CEO under corporate law[26] In an independent law school, the dean often has the dual title of President and Dean to underscore the CEO status. In a university-affiliated law school, the dean occupies a position that is essentially the equivalent of the President or CEO of a major corporate subsidiary[27]

The ABA Standards also seem to envision a faculty governance role that is basically consistent with the Statement on Governance. Standard 204(b) gives the faculty the right to "formulate and administer the educational program of the law school." Standard 204(b) then defines the educational program in terms of the curriculum, methods of instruction, admissions, graduation requirements, and faculty hiring and status, essentially the same areas where the faculty has primary authority under the Statement on Government.[28] A high degree of deference and great weight should be given to the faculty in these areas because of the expertise of the faculty with respect to the educational program and also, at least with respect to the determination of faculty status, academic freedom principles.[29]

The frustration I and many others have with faculty governance would be significantly reduced if faculty decision processes were more like those in business organizations. The frustration would be further reduced if a faculty would be willing to restrict its decision-making role to the law school's educational program, admissions, and faculty status issues.[30] These are the areas in which faculty have

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24. *See* ABA STANDARDS, *supra* note 10, Standard 106(7), at 14 ("'Governing Board' means a board of trustees, board of regents, or comparable body that has ultimate policy making authority for a law school or the university of which the law school is a part.").

25. *See* Revised Model Nonprofit Corporation Act § 8.01(b) (1988) ("[A]ll corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board.").

26. ROBERT C. CLARK, CORPORATE LAW § 3.3.1 (1986) (explaining the actual and apparent authority of a president as chief executive or general manager of a corporation).

27 *See* ASS'N OF AM. LAW SCHS., LAW DEANSHIP MANUAL 3 (1993) ("[T]he law dean, unlike most other academic deans, is both chief executive officer and chief academic officer of all functions of a largely self-contained academic unit.... Thus the law dean's position is much more analogous to that of the president of a small independent college than it is to other intra-university deanships.").

28. *See supra* text accompanying notes 12-13. The Statement on Government also states that the faculty should have primary authority with respect to "those aspects of student life which relate to the educational process." Redbook, *supra* note 9, at 221. Although there is no equivalent language in the ABA Standards, there is nothing in the Standards that would prohibit the faculty from having a decision making role on student life issues, particularly those that are directly related to the law school's educational program.

29 *See* Redbook, *supra* note 9, at 224-27 (Statement on the Relationship of Faculty Governance to Academic Freedom).

30. The authority of the faculty in the selection of a dean is, under ABA Standard 205(d) to "advise, consult, and make recommendations." ABA STANDARDS, *supra* note 10, at 18. The language used in ABA Standard 204(b), on the other hand, states that the dean and the faculty "shall formulate and administer" the educational program. *Id.* at 17 The Self Study in ABA Standard 202(a) is supposed to "describe the program of legal education," and therefore really comes under the umbrella

the greatest expertise. Moreover, faculty decisions in these areas will be accorded greater weight by others in the decision-making chain if these boundaries are respected.

This does not mean that law school faculty cannot have any input in other matters. The input can take many forms, including decanal consultation with the entire faculty before final action is taken, access to information about important actions affecting the law school before or at least simultaneously with any public announcement of the action, or faculty representation on an advisory committee or task force that makes recommendations to the dean. The particular form of the input can vary depending on the issue and the traditions of the law school.

I am not suggesting a return to the old fashioned iron-fisted dean who ruled the law school as a virtual dictator What I am advocating is a meaningful role for faculty governance in the areas where the faculty has the most expertise. I am also suggesting a return to the more traditional view of shared governance envisioned by the AGB Statement on Government and the ABA Standards.[31] What is more important than the educational program, admissions, and faculty status? By focusing on these critically important matters,[32] and leaving the determination of other issues to the administration of the law school or the university faculty will have more time for student contact, teaching, scholarship, and service. Instead of complaining about a loss of control and governance rights,[33] most faculty I know would welcome a reduced administrative role.[34] Returning to this more traditional view would also help reduce the long-standing tension between law school faculty, many of whom have a tendency to think of shared governance as self-governance over everything, and law school deans, who must have the authority to manage the law school in a cost effective, efficient manner.[35]

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of ABA Standard 204(b). *Id.* at 16, 17 The approval of library policy is "in consultation with the faculty" under ABA Standard 602(b). *Id.* at 45.

31. This viewpoint is also consistent with the AGB STATEMENT ON INSTITUTIONAL GOVERNANCE (1998), which has been criticized as imposing a corporate style of management on higher education institutions. *See, e.g.*, Jonna Vecchiarelli Scott, *The Strange Death of Faculty Governance*, POL. SCI. & POLITICS, Dec. 1996, at 724.

32. *See, e.g.*, Rena I. Steinzor & Alan D. Hornstein, *The Unplanned Obsolescence of American Legal Education*, 75 TEMP. L. REV 447 (2002) (stressing the need for law schools to institute a process that results in continuous and systematic curriculum reform).

33. *See* Scott, *supra* note 31, at 724-26. *See also* William L. Waugh, Jr., *Issues in University Governance: More "Professional" and Less Academic*, 585 ANNALS AM. ACAD. POL. & SOC. SCI. 84 (Paul Rich & David Merchant spec. eds., 2003).

34. *See* Waugh, *supra* note 33, at 94.

35. *See* Jeffrey O'Connell & Thomas E. O'Connell, *The Five Roles of the Law School Dean: Leader Manager Energizer Envoy, Intellectual*, 29 EMORY L.J. 601, 630-39 (1980). There will still be gray areas as to what is and what is not an educational program, admissions, or faculty status issue. The resolution of these issues should be documented in some fashion for future use. How the joint authority of the faculty and dean (both must have a "significant role" under ABA Standard 206) is allocated on issues that fall under the umbrella of educational program, admissions, and faculty status must also be clarified by each law school. Whatever arrangement is agreed to should be incorporated in the law school's bylaws or some other written document. These understandings should be reviewed on a regular basis and modified when the allocation has changed or should change in some material respect.