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## Faculty Governance: A tradition or legal right?

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# Faculty Governance: A Tradition or Legal Right?

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## Introduction

Shared Faculty Governance has its roots in the German Universities. *Lehrfreiheit*, “freedom to teach”, belonged to professors, gave professors autonomy in the classroom, and banned external controls on their research. The first generation of American scholars received their professional training in Germany. They adopted this model when they established the modern research university in the U.S. at the end of the nineteenth century. There was however one distinct difference between the universities of Germany and America. German universities were essentially self-governing while their American counterparts were governed by nineteenth-century versions of boards of trustees<sup>1</sup>.

The Shared Faculty Governance model is implemented in a variety of different ways by American universities. Indeed it is difficult to find two universities that have identical faculty governance structures. However, many include some form of a faculty body that is charged with representing the views of the faculty to the administration.

Today this governance model adopted by the first American research universities is being challenged in very direct ways by a so-called corporate model. In many respects engineering has not been impacted to the same degree as some other disciplines by this trend. For example, in contrast to the overall trend in higher education, engineering departments have yet to employ contingent faculty in significant numbers<sup>2</sup>. This may be the reason why faculties in other disciplines have been the first to raise a voice of warning about possible academic freedom and free-speech violations. Consequently, there are few papers addressing issues associated with the corporate model in engineering education literature.

There are recent instances at some of the most prestigious American universities of alleged violations to shared governance principles, academic freedom, and free speech<sup>3,4,5</sup>. The board of trustees and the administration of Rensselaer Polytechnic Institute, one of the oldest engineering schools in America, recently suspended their faculty senate. A similar action occurred at our institution, Idaho State University (ISU), when the Idaho State Board of Education suspended the faculty senate in 2011.

In the following paragraphs, one of the authors, Dr. Ellis, speaks in the first person, relating his experiences at ISU.

*I served as vice chair of the faculty senate at time the senate was suspended. I was deeply involved in the conflict leading up to the suspension of the faculty senate. That said, our objective in writing this paper is not to advocate for a system of shared governance but rather to inform and educate faculty of the legal, educational, and political aspects of faculty governance. This is not an advocacy paper or even an opinion paper; it is an informational paper.*

*I am also acutely aware that events at my university have helped shape the national agenda related to faculty governance and academic freedom. A number of recent court opinions resulting from this conflict have drawn national attention. I feel compelled to convey some of the information learned from this experience for the benefit of others who may find themselves in similar situations. Since corporate models for university governance are a national trend, there are a number of current scholarly publications related to faculty governance referenced above. The conflict at ISU is unique only in that it has involved several court cases, accrediting agencies, and even an appeal to the United States Department of Education. The actions (or inaction) on the part of each of these bodies with respect to a controversy over faculty governance at a public institution is a unique case study.*

### The Legal Standing of Shared Governance

The courts have not shown much understanding or sympathy toward the concept of shared governance except where state law requires state colleges to establish faculty senates or similar institutions and outlines their duties and powers. Absent from such legislation, faculty senates have been said to be “dependent bodies” granted power through the “grace” of the administration<sup>6</sup>. In a recent case, the National Labor Relations Board went so far as to say that faculty participation in shared governance is no more than a “sophisticated version of the familiar suggestion box”<sup>7</sup>.

It appears that a faculty senate has little legal standing to compel a university administration to abide by faculty recommendations. Moreover, some university administrators believe they have the authority to punish faculty for speaking out against campus policies. The American Association of University Professors (AAUP) has argued that the relationship of faculty governance and academic freedom are “inextricably linked”, so that neither is “likely to thrive” except as they are understood to reinforce one another<sup>8</sup>.

It does not appear that the courts have embraced the AAUP’s argument. “In most instances when professors have sued their schools for violating academic freedom, faculty have found the courts unsympathetic to their assertions.”<sup>9</sup> Indeed, through a curious process of constitutional construction, the federal courts have developed a concept sometimes known as “institutional academic freedom” holding that the First Amendment limits state interference with decisions made by college administrators<sup>10</sup>. It appears that “to the extent the Constitution recognizes any right of “academic freedom” ... the right inheres in the university, not in individual professors”<sup>11</sup>.

The courts continue to wrestle with the definition and scope of academic freedom. The Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment, but has failed to provide a concrete definition or criteria for the lower courts to evaluate what constitutes academic freedom.

### Accrediting Agencies

Many accrediting agencies have accreditation standards related to faculty governance. These standards often advocate faculty involvement in the decision-making process, but often stop short of requiring a shared faculty governance model as advocated by the AAUP. The Northwest

Commission on Colleges and Universities (NWCCU) is the regional accrediting body for universities in the seven-state Northwest region. Its standard 2.A.1 on Governance reads as follows:

*“The institution demonstrates an effective and widely understood system of governance with clearly defined authority, roles, and responsibilities. Its decision-making structures and processes make provision for the consideration of the views of faculty, staff, administrators, and students on matters in which they have a direct and reasonable interest.”*

ABET, formerly The Accreditation Board of Engineering and Technology, includes the following statement in its General Criteria 6 dealing with faculty:

*“The program faculty must have appropriate qualifications and must have and demonstrate sufficient authority to ensure the proper guidance of the program and to develop and implement processes for the evaluation, assessment, and continuing improvement of the program, its educational objectives and outcomes.”*

Many of the publications related to faculty governance are devoid of any material dealing with accreditation agencies. This is curious, since these agencies have standards related to faculty governance and the authority to enforce these standards. At our institution two recent experiences with the NWCCU and ABET illustrate the response of accreditation organizations when faced with a controversy between the faculty and administration.

On April 9, 2012 the Provisional Faculty Senate at ISU, following a vote of no confidence in both the President and a Provost and a related sanction by the AAUP for violations of university governance practices, filed a complaint with NWCCU<sup>12</sup>. The complaint alleged that “University is acutely out of compliance with the standards encompassing (1) university policies and procedures, (2) faculty governance, (3) censorship, and (4) effective leadership.”

After several months reviewing the complaint and the response submitted by the administration<sup>13</sup>, an executive assistant at the NWCCU contacted several faculty members at ISU on September 13, 2012 indicating the NWCCU’s desire to schedule a visit by an evaluator to gain a better understanding of the issues. The NWCCU evaluator never appeared on campus.

In a letter dated September 21, 2012 the President of the NWCCU (Dr. Sandra Elman)<sup>14</sup> indicated that ISU is “not out of compliance with the Commission’s Standard 2A Governance.” ISU was also scheduled for a NWCCU accreditation visit on Standard 2 in the Fall semester of 2012. The NWCCU cancelled this regularly scheduled visit. The September 21, letter indicated that the complaint would be included in the University’s Fall 2014 Year-Seven Evaluation. In subsequent correspondence Dr. Elman indicated that the NWCCU “takes these matters seriously and will continue to give them deliberative consideration”.

ABET conducted a General Review of the Electrical, Mechanical, Nuclear, Computer Science, and Civil Engineering Programs at ISU in the Fall semester of 2011. This visit occurred after the AAUP had sanctioned the university for violations of university governance practices. ABET has

strict confidentiality policies governing all the communications and documents connected with the evaluation process. It is sufficient to say that the response of ABET was similar to that of the NWCCU, and the engineering programs at ISU are fully accredited at this time.

The accrediting agencies seem to be very reluctant to investigate and act on any conflict between the faculty and the administration. Mary Burgan, in her recent work, indicated that accrediting agencies seem less interested in faculty opinion and are more cowed by the threat of litigation. She cites several instances where universities have sued accrediting agencies for threatening their accreditation<sup>15</sup>.

### United States Department of Education

The Veterans' Readjustment Assistance Act of 1952 (Section 253), established the authority for the recognition of accrediting agencies by the United States Department of Education. Since that time, the Secretary of Education, has published a list of recognized accrediting agencies. The National Advisory Committee on Institutional Quality and Improvement (NACIQI) provides recommendations to the Secretary of Education regarding the recognition of specific accrediting agencies. The Department's criteria focuses on required processes and procedures that each recognized accrediting agency must have and follow in accrediting universities. The Department's oversight role does not extend to stipulating educational standards for universities. Educational standards are the purview of the regional accrediting agencies.

It is interesting to note that NACIQI is currently discussing an expanded role in university accreditation. Among the current recommendations are: making all accrediting agencies national, rather than regional and creating new standards of quality, potentially by non-accrediting agencies<sup>16</sup>.

Several faculty members at ISU filed a formal complaint with NACIQI that the NWCCU was not adhering to criteria for recognition of accrediting agencies. The NWCCU had already been found out of compliance by NACIQI's for its handling of a complaint at Green River Community College<sup>17</sup>. At their December 13, 2013 meeting, NACIQI extended NWCCU's compliance deadline for handling complaints with the following statement:

*"...we extend the agency's time for coming into compliance under section 602.23(c) for good cause and recognize the agency to demonstrate compliance under that section in such compliance report within 12 months."*<sup>18</sup>

Following the NWCCU's accreditation visit in October to ISU, the Department issued another letter to the NWCCU. The letter indicated that NWCCU needed to address the complaint and demonstrate compliance with 602.239(c) by February 28, 2015.

### Political Aspects

ISU is one of the few public universities to be sanctioned by the AAUP for violations of university governance practices. Rensselaer, also currently sanctioned by the AAUP, is a private university. The Idaho State Board of Education (SBOE) is appointed by the governor and is the governing

body over all higher and K-12 education in Idaho. The State Board of Education's decision to dissolve the faculty senate at ISU became a political issue.

Prior to the SBOE's decision to dissolve the faculty senate at ISU, the conflict between the faculty and the administration was cast as part of a recent union-related conflict. State legislators in Idaho were suspicious that the faculty senate was similar to a union. The President of ISU publicly stated: "Is it a faculty senate or a union?"

It is important to note that collective bargaining of university faculty is forbidden under Idaho law. However, the American Federation of Teachers (AFT) does have an ISU chapter, and the AFT has helped fund several legal battles against ISU.

There were a number of local newspaper articles, television news programs, and radio shows that covered the mounting controversy at ISU beginning in the fall semester of 2010. The faculty conducted two votes of confidence/no confidence. The first vote was held in April 2010 on the Provost. The faculty expressed no confidence in the Provost by a vote of 295 to 95. One year later the Provost resigned. In April 2011 the faculty again conducted a vote of confidence/no confidence. The faculty voted no confidence in the President by a margin of 359 to 92.

One week following the vote of no confidence, the President called for the dissolution of the faculty senate at ISU during an SBOE meeting. The SBOE approved the suspension of the Faculty Senate on the condition that a new duly elected Provisional Faculty Senate be quickly put in place while the faculty governance system was reevaluated.

The decision to dissolve the Faculty Senate was condemned locally, regionally, and nationally as evidenced by strongly worded letters rebuking this action from the Bannock County Democrats, the Idaho Federation of Teachers, the California Faculty Association, and the American Association of University Professors (AAUP).

Following the suspension of the Faculty Senate the ISU student body was asked to vote on two initiatives:

1. Should the ISU Faculty Senate be reinstated?
2. Do you have confidence in Idaho State University's President?

The majority of the voting students favored reinstating the Faculty Senate and further expressed no confidence in the President. The first question, received 593 "Yes" votes and 150 "No" votes. On the question of confidence in the university president, 162 of the students voted confidence and 571 voted no confidence.

The SBOE has remained resolute in its support of the President. A week before the scheduled vote of no confidence on the President, the SBOE issued this statement:

*"The Idaho State Board of Education hereby affirms its support for and confidence in President Vailas in leading the affairs of Idaho State University<sup>19</sup>".*

When asked about their reasons for suspending the faculty senate at ISU, the President of the SBOE stated:

*"...the most reasonable action to take at this time. The impasse between the leadership of the senate group and the administration has reached a point where the prospect of any kind of progress was simply non-existent. It's time to start over."*<sup>20</sup>

The faculty senate leadership met with some elected, state, house representatives as the conflict reached a peak in 2010. The suspension of the faculty senate was a non-issue in the 2012 election. However, the state had proposed some "reforms" to K-12 education. These reforms included legislation that would have weakened the negotiating ability of the teachers union. Unlike university faculty, K-12 teachers do have collective bargaining rights in Idaho. The reforms were defeated by voter referendum.

It appears the public does not view higher education in the same light as K-12 education. When asked at a public forum if they had confidence in ISU's President, seven of ten state representatives and senators indicated that they did have confidence in the President. The remaining three abstained. Several of these same state representatives expressed strong opinions that all the stakeholders must support any proposed K-12 reforms.

#### Educational Aspects

There is no universally accepted method for the assessment of the quality of education. Consequently, it is impossible to show conclusively that the suspension of the faculty senate has impacted the quality of education. The approach taken in this section is to relate some recent changes in the engineering programs that have occurred under the new corporate model.

It is important first to understand how the role of faculty has changed under the new corporate model. Prior to 2009, the College of Engineering at our university had a faculty-elected Academic Standards Committee. This committee was charged with enforcement of college academic standards. It made recommendations to the dean on all student petitions and student complaints related to quality of instruction. The dean, without explanation, disbanded this committee over the summer of 2009 and appointed different faculty members to the committee. The dean stated on several occasions that he did not report to the faculty and therefore did not feel any obligation to explain or justify his decisions to the faculty. In the view of the administration, faculty members are merely employees, and the administration is responsible for making policy and managing the university.

More recently, the university administration implemented new procedures for dealing with cases of academic dishonesty on the part of students. It did so with negligible faculty input. The new procedures are so onerous for faculty members that some have simply ceased enforcing plagiarism rules on homework. Having gone through the process once, a number of faculty now look the other way when they encounter cheating on exams.

Faculty members in one engineering program are now discouraged from efforts to monitor instructional quality. They are no longer consulted regarding the appointment/reappointment of

adjunct faculty. The department chair abandoned evaluation of the teaching performance of adjunct faculty members. A tenured faculty member was reprimanded for the “unprofessional behavior” of delivering student complaints about another faculty member’s teaching performance to the dean. Course assessment has been nonexistent.

The students in this engineering program have reported problems with course scheduling and instructional quality. A growing number of students are refusing to complete course evaluations because they feel their feedback is ignored. At first glance these student complaints may seem typical of any engineering program. An examination of some of the specific problems and the level of dissatisfaction that have contributed to these student comments can be enlightening.

It has become routine to overlap the time slots for courses in which students must enroll concurrently.

In one course, 80% of the students stopped attending class due to the poor quality of instruction. The department chair ignored students’ appeals regarding the problem. Students next appealed to the dean and requested a tuition refund. This instructor was eventually replaced, but students have reported that they were seriously handicapped in subsequent courses because of their lack of knowledge of prerequisite material.

Any department could experience the problems described above. In a shared governance model the program faculty would have held the primary responsibility for the instructional quality of the program. In a corporate model the immediate supervisor holds that responsibility.

Not all programs at ISU have experienced the same issues as the engineering programs described above, but all have suffered under the impact of the demise of faculty governance. Virtually all budget authority has been withdrawn from the departments and centralized at the university level. Laboratory facilities have consequently suffered from lack of maintenance and updating. Tenured faculty members in science programs are being replaced by adjunct and visiting faculty.

The disruption to the efficient operation of the University caused by the controversy between the faculty senate and the President was an issue with the Idaho State Board of Education. The ISU President in his remarks to the State Board of Education decried his frustration with the slow deliberations of the faculty senate. The President was frustrated with the time and effort required for the faculty governance system to act on any proposal by the administration. He wanted a system that was more responsive.

From the perspective of the administration, the corporate model for governance allows policy changes to be made more rapidly than a traditional system of shared governance. Under the new system, policy changes are proposed by the administration, and faculty are given thirty days to comment. The system is much more nimble and promotes rapid change.

### Impacts and Conclusions

Does shared faculty governance make a university better or worse? This remains the open question. There are however a number of definite consequences of suspending faculty governance.

RPI and ISU both report that it is becoming increasingly difficult to recruit faculty to serve on faculty committees. There are a number of our distinguished colleagues who refuse to participate in any so-called faculty governance on campus. The number of “suggestions” in the figurative “suggestion box” is declining.

Another result reported by both faculty at ISU and RPI is the lack of any official channel for faculty to communicate with the board of trustees. Before the suspension of the faculty senate at ISU the faculty senate attempted to communicate directly with the SBOE. The response of the SBOE was to require that any communication be forwarded through the university president. On the rare occasions that faculty leadership was allowed to address the SBOE at public meetings, the members of SBOE never engaged the faculty leadership in any dialog. They mutely listened.

Faculties that assert that they have primary responsibility for certain aspects of the operation of a university run the risk of being cast as a faculty union.

It is important to understand the view of the courts related to faculty governance and freedom of speech. Only if state law requires state colleges to establish faculty senates and outlines their duties and powers does the law provide any protection for faculty governance. A faculty member’s freedom of speech is protected if he/she speaks on a matter of public concern and he/she speaks as a private citizen. Accrediting agencies have historically been reluctant to become involved in any conflict between the university faculty and administration.

There is no clear correlation between the suspension of faculty governance and educational quality. However, it would be consistent with human nature for faculty members who are regarded as mere laborers to lose interest in the quality of their product.

Historically, faculties have not shown great interest in their university governance systems. When asked in a survey in mid-1990s, 77 percent of the professors said their discipline was important while only 40 percent said their campus was important<sup>21</sup>.

On a broader scale there are a number of questions related to faculty governance that need to be addressed at each institution. Faculty committees are time consuming. It also seems clear that many, if not most faculty are disengaged from the faculty governance process. Consequently, the question needs to be asked if the faculty desire to have input into the decision making process.

On the other hand, good management practice has shown that organizations in which employees are empowered and engaged in the decision making process fare much better than organizations with a strict hierarchy of decision making. Universities that adopt a top-down decision management system run the risk that faculty will disengage entirely.

One of the major differences between a private corporation and a public university is tenure. Faculty members who are tenured at a university not only have greater job security, but they also have some legal protection to speak out against the policies or positions of the university administration. This exposes the administration decisions to public debate. Employees of private organizations can simply be fired, without legal consequences, for public comments that may violate the company’s contractual employment agreements.

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- <sup>3</sup> Mary Burgan, *What ever happened to the Faculty*, The Johns Hopkins University Press, 2006.
- <sup>4</sup> Benjamin Ginsberg, *The Fall of the Faculty*, Oxford University Press, 2011.
- <sup>5</sup> Ellen Schrecker, *The Lost Soul of Higher Education*, The New Press, New York, 2010.
- <sup>6</sup> Donna Euben, "Some Legal Aspects of Collegial Governance," Presentation made to the 2003 AAUP Governance Conference Indianapolis, Indiana Oct 11, 2003 4. Referenced by Benjamin Ginsberg, *The Fall of the Faculty*, Oxford University Press, 2011. p. 16.
- <sup>7</sup> Florida Memorial College, 263 NLRB 1248 (1982), enforced, 820 F. 2d 1182 (11<sup>th</sup> Cir. 1987) Discussed in Euben "Some Legal Aspects".
- <sup>8</sup> AAUP, Policy Documents and Reports 10ed. (Washington, 2006) 143.
- <sup>9</sup> Jerome Karabel, *The Chosen* (Boston:Houghton-Mifflin, 2005).
- <sup>10</sup> D'Souza, *Illiberal Education*, Free Press; 1998, 205.
- <sup>11</sup> Henry Louis Gates Jr. , "To Continue at Harvard", Harvard University Gazette, December 5, 2002.
- <sup>12</sup> Minutes of Idaho State University Provisional Faculty Senate April 9, 2012.  
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- <sup>13</sup> Idaho State University Response to Complaint Filed with the Northwest Commission on Colleges and Universities, June 29, 2012.  
[http://www.isu.edu/acadaff/pdf/ISU\\_Correspondence\\_to\\_NWCCU-June\\_29\\_2012.pdf](http://www.isu.edu/acadaff/pdf/ISU_Correspondence_to_NWCCU-June_29_2012.pdf)
- <sup>14</sup> Letter From NWCCU, September 13, 2012.  
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- <sup>15</sup> Mary Burgon, *What Ever Happened To The Faculty*, The Johns Hopkins University Press, 2006 p. 90.
- <sup>16</sup> Eric Kelderman, "National Advisory Panel on Accreditation Considers Major Reforms", Chronicle of Higher Education, December 12, 2014.
- <sup>17</sup> Peter Schmidt, "New Complaint to Accreditor Assails College's Treatment of Adjuncts", Chronicle of Higher Education, April 17, 2013.
- <sup>18</sup> Transcript of National Advisory Committee on Institutional Quality and Improvement December 13, 2013 meeting available at: <http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2013-fall/naciqi-transcript-12-13-13.pdf>
- <sup>19</sup> "Idaho State Board of Education express support for ISU president Vailas", Idaho State Journal, February 2, 2011.
- <sup>20</sup> Board Moves to Resolve Impasse at Idaho State University  
[http://www.boardofed.idaho.gov/communications\\_center/press\\_releases/archive/2011/02\\_17\\_11.asp](http://www.boardofed.idaho.gov/communications_center/press_releases/archive/2011/02_17_11.asp)
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