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ADMISSION OF GEORGE MASON TO MEMBERSHIP IN THE ASSOCIATION OF AMERICAN LAW SCHOOLS

Thomas D. Morgan[†]

Two important milestones in the development of any law school are its accreditation by the American Bar Association (ABA) and its admission to membership in the Association of American Law Schools (AALS). ABA accreditation is a recognition that the school has a program that meets at least the minimum standards to permit its graduates to sit for the bar examination anywhere in the United States. AALS membership is an explicit recognition that the school's program emphasizes, "faculty scholarship, teaching quality, and institutional efforts to assure an intellectual community."¹

Six years after George Mason University opened its law school,² it lacked even ABA accreditation. Indeed, ABA accreditation was not achieved until the 1985-86 academic year, one year before Dean Ralph Norvell retired and Dean Henry Manne succeeded him.³

For most schools, membership in the AALS comes much later than ABA accreditation. While accreditation signifies at least basic quality, AALS member schools see themselves as intellectually seri-

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¹ ASSOCIATION OF AMERICAN LAW SCHOOLS, INC., HANDBOOK § 6-1, at 30 (1999) [hereinafter AALS By-Laws]. These By-Laws can be found in any edition of the AALS Handbook, published annually.

² George Mason University bought the unaccredited law program of the International School, a free-standing Washington, D.C. institution that opened in 1972.

³ See Site Visit Report on George Mason University School of Law 3 (Mar. 31, 1989) (confidential document on file with author) [hereinafter Site Visit Report].

The Site Visit Report is not a public document, nor are the minutes of the Executive Committee meeting on which much of this article is based. See *infra* note 18. This author has copies of both because of his prior role as an AALS officer. This article will cite to these confidential reports to demonstrate that there is a basis for the statements made herein. Although the author studiously consulted the documents in preparing this essay, the documents have not been made available to the editors of the *Case Western Reserve Law Review* in order to preserve the confidences of the AALS.

ous and institutionally mature.⁴ Indeed, a number of good, accredited schools have never obtained AALS membership.⁵ Thus, it was a somewhat audacious step when the George Mason University School of Law applied for AALS membership in 1989, after only four years of ABA accreditation and in the third year of Henry Manne's leadership.

I. THE SITE EVALUATION REPORT

After preparation of an institutional self-study, the first step in obtaining AALS membership is a visit by a team of professors from member schools.⁶ The team that visited George Mason was cautious in its evaluation of the program. The visitation team expressed a number of concerns about the situation at George Mason.⁷ The team was particularly concerned with the changes implemented by Dean Manne so soon after his arrival.⁸ The evaluators expressed concern that the immediate institution of the new law & economic programs might have foreclosed the school's opportunity to fully consider the implication of the changes, as well as the effect of the changes on the programs already in existence at the school.⁹

The team noted the transformation of the George Mason faculty. Half of the faculty had been appointed in the first two years that Henry Manne had been Dean.¹⁰ The AALS noted that Dean Manne's intentions at George Mason—to increase the overall quality of the school while establishing excellent programs in law and economics—contributed to most of the faculty changes.¹¹ Additionally, Manne's commitment to creating curriculum tracks centered on intensive law and economics scholarship allowed him to attract scholars who might have otherwise eschewed opportunities at a school without a strong

⁴ Technically, a law school does not have to be accredited by the ABA in order to qualify for AALS membership. Indeed, the AALS has long said that if Princeton University, for example, were to found a law school to train policymakers, none of whom wanted to apply for admission to the bar, a strong intellectual program alone could qualify the school to become an AALS member. In reality, however, there are no strong law schools disinterested in ABA accreditation. Hence, the practical progression of a law school is from ABA accreditation to AALS membership as described here.

⁵ Among them are the law schools at Campbell University, the University of Memphis, and North Carolina Central University, as well as the Franklin Pierce Law Center.

⁶ The team that visited George Mason consisted of Professors Mary Louise Fellows (Iowa), the chair; Alison G. Anderson (UCLA), Albert O. Brecht (Southern California) and Harry E. Groves (North Carolina).

⁷ See Site Visit Report, *supra* note 3, at 6.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.* at 10.

¹¹ See *id.* at 10-11.

institutional history or AALS membership.¹² The team was impressed by the fact that the existing faculty agreed that despite their rapidity, Dean Manne's changes had significantly improved the quality of the Law School.¹³

Indeed, the report concluded that Dean Manne's initiatives had strengthened the school through the infusion of young, scholastically strong faculty, dedicated to fostering an academic environment conducive to nurturing a gifted student body.¹⁴ Both elements strongly favored the admission of George Mason to AALS membership.

However, the report also noted some problems that George Mason needed to address. Two of these problems were relevant to the events that followed.¹⁵

First, the report expressed concern that the "track programs" might consume more resources than the law school expected. Those programs were only beginning at the time of the visit, but it appeared to the site visitors that the majority of the existing resources, both teaching and administrative, would be dedicated to funding the newly instituted track programs. Without hiring new faculty, the remainder of the curriculum might get inadequate faculty attention.¹⁶

Second, the report noted that the twenty-eight-person faculty included only four women and one African-American man. In spite of the fact that three of those five had been hired under Dean Manne's leadership, and that two women were on the current appointments committee, the report asserted that the dearth of minority and women candidates interested in pursuing law and economics might preclude

¹² *See id.*

¹³ *See id.*

¹⁴ *See id.* at 45. The report noted that applications to George Mason had increased from 1101 in 1985, the year of ABA accreditation and the year before Dean Manne arrived, to 2322 in 1988. In 1989, applications increased to about 3000.

¹⁵ Three other concerns were traditional issues in evaluating an AALS membership application. First, teaching loads were high. Faculty taught from 13 to 16 contact hours per year. *See id.* at 13. Even with many faculty members repeating a course in the day and evening, teaching loads exceeded the then-prevailing national norm of 10 to 12 annual contact hours. The report questioned whether the higher than normal teaching loads were consistent with sustained scholarly productivity, although it had to concede there was no evidence of a negative impact. *See id.* at 14. Second, research funds were low. There were not enough budgeted funds to give every faculty member a summer research grant, and not enough to buy reduced teaching loads for highly productive faculty members. Dean Manne was working to raise more such funds, but the report found them essential to achieving Dean Manne's goals for the school. *See id.* at 15. Third, the number of library staff was inadequate. The collection ranked 77th in the country in number of books, well in the top half of accredited law schools. However, it ranked 114th in number of professional librarians and 159th—near the bottom—in number of non-professional staff. *See id.* at 21-22.

¹⁶ *See id.* at 32.

an effective hiring process geared towards diversifying the faculty at George Mason.¹⁷

The report also noted that because George Mason is located in a large metropolitan area with a significant minority population, Dean Manne could likely remedy any deficiency in minority representation on the faculty.¹⁸ However, the report was cautious not to overextend its optimism given the evident lack of minority interest in the academic focus of the institution.¹⁹

II. EXECUTIVE COMMITTEE CONSIDERATION OF THE GEORGE MASON APPLICATION IN NOVEMBER 1989

The AALS membership process is Byzantine to the uninitiated. The site evaluation report is a fact-finding effort. The report's evaluative comments are not binding on anyone. That report goes to what was called the Accreditation Committee, which is now known as the Membership Review Committee.²⁰ That Committee, in turn, recommends to the nine-member AALS Executive Committee whether a school should be admitted to membership.²¹ The Executive Committee's decision, as a practical matter, is the critical one, although admission to membership is ultimately decided at the annual meeting of the AALS House of Representatives.²²

In George Mason's case, the Membership Review committee recommended admission. The Committee reasoned that the level of faculty scholarship was strong and the quality of the student body good. However, the Committee was "troubled;" it was concerned that a law school's mission not negatively affect prospects for the racial

¹⁷ See *id.* at 11.

¹⁸ See *id.* at 11-12.

¹⁹ See *id.*

²⁰ Hereafter, this article will use the "membership review" designation to distinguish its function from that of a similar committee in the ABA Accreditation Process.

The AALS By-Laws do not mention the Membership Review Committee or any committee of the Association, other than the Executive Committee and the Committee on Academic Freedom and Tenure. The Membership Review Committee functions largely as an advisor to the Executive Committee, and its recommendations have whatever weight the Executive Committee chooses to give them.

²¹ The nine members of the AALS Executive Committee at the time of the events in this article were Guido Calabresi (Yale), Ellen R. Jordan (Georgia), Emma Coleman Jordan (Georgetown), Herma Hill Kay (Berkeley), Richard G. Huber (Boston College), Thomas D. Morgan (Emory), M. Kathleen Price (Minnesota), Kristine Strachan (Utah), and Mark G. Yudof (Texas). In order to provide some protection to the confidentiality of the Executive Committee discussion, this article will not identify by name who took which positions in the discussion reported. A decade has passed, and the substance of the discussion, not the particular personalities involved, is what remains relevant.

²² The AALS House of Representatives consists of a delegate from each member school. Its ultimate power to decide on admission of new member schools derives from AALS By-Laws. See AALS By-Laws §§ 2-2(d), 3-2.

and gender diversity within a faculty and student body that the Committee understood AALS standards sought to promote.²³

After some preliminary discussion without Dean Manne present, he was invited to make a presentation to the Executive Committee. Manne gave an enthusiastic account of the transformation of the faculty, its move toward scholarship, and distinctive curricular innovations such as the track program and the required course in quantitative methods.²⁴

Initial questions to Dean Manne focused on the adequacy of resources for the track programs. He gave specific cost projections, described how state matching funds would supplement private fund raising, and said that new tracks would not be created until they could be financed without depriving the rest of the curriculum of any needed funds.²⁵ He acknowledged that planning would be required. However, Manne felt that due to his brief tenure at the school, any conclusion as to the effect of the tracking programs on the curriculum as a whole would be premature.²⁶

At that point, the discussions turned to racial and gender diversity. Was Dean Manne troubled at the small number of women on the faculty? He said he was, but there were few female candidates who were working in law and economics. As for minorities, Dean Manne said that there was not an African-American working in law and economics to whom George Mason had not made an offer during the last two years.²⁷

When the Executive Committee inquired about the focus of Manne's hiring, Dean Manne responded that he tried to limit hiring to people with an interest in law and economics. The curriculum is not built around law and economics, he said, but the faculty tends to be. In Dean Manne's view, that common denominator contributed to faculty collegiality and an ability to read and comment upon each other's work. There are differences of view within law and economics, he said; it is not an ideology. Further, when the law school needed a tax teacher, it hired a woman not interested in law and economics to meet that curricular need.²⁸

²³ Minutes of the AALS Executive Committee 38 (Nov. 16-18, 1989) (confidential document on file with author) [hereinafter Minutes]. The Minutes are not a public document and the reader will not be able to get access to them to learn more. These citations are to assure the reader that there is a recorded basis for these statements to which the author has access.

²⁴ *See id.* at 40-42.

²⁵ *See id.* at 42.

²⁶ *See id.* at 43.

²⁷ *See id.* at 44-45.

²⁸ *See id.*

One Executive Committee member then followed up the last point: Is having a racially and gender diverse faculty as great a priority at George Mason as hiring a tax professor? Dean Manne responded that there are trade-offs implicit in any decision. While the school would continue to work hard to diversify the faculty, that issue was simply different from the need to teach a given subject matter.²⁹ Proponents of the George Mason application on the Executive Committee had heard that question before with respect to other schools. They recognized that Dean Manne's answer would not be popular with several members of the Committee.

In an effort to avoid making an up-or-down vote on the George Mason application, another Executive Committee member asked whether the application was premature. Might it not be clearer in a few years whether the track program was a successful innovation? Dean Manne responded that the program was well planned, and that postponing the membership decision would not provide additional information of any value.³⁰

Only seven members of the Executive Committee were present for the discussion with Dean Manne on the first day of the three-day Executive Committee meeting. Proponents of the application counted at least four probable votes against it on the diversity issue alone. They were relieved when a vote was put off until the following morning. At that time, another Executive Committee member was expected to arrive and the discussion could be renewed.

III. THE DEBATE INTENSIFIES

When eight Executive Committee members convened the following morning without Dean Manne present, one opponent of the application construed Dean Manne's answers about diversity issues as "weak." In her view, it was almost impossible for a minority candidate to have an interest in teaching business courses, have training in corporate law, and an interest in law and economics. By definition, a law school that stressed business courses, law and economics, or both, would not have the racial diversity necessary to justify AALS membership.³¹

Another member noted that in the case of George Mason, as in the case of the University of California (Berkeley), whose renewal of membership was considered at the same meeting, the issue was not

²⁹ See *id.* at 45.

³⁰ See *id.* at 46. In response to a different question, Dean Manne had noted that the admissions office made particular efforts to recruit minority *students* for the business track programs. See *id.* at 48.

³¹ See *id.* at 48.

the intrinsic quality of the school but whether an effort to build an outstanding academic institution had as its natural consequence the exclusion of women and minorities from the faculty.³²

A third Executive Committee member pointed to a statement that one faculty member made to the site visit team that George Mason was unlikely to hire Ralph Nader.³³ That showed, she said, that George Mason had hiring criteria that were too narrow and inconsistent with an effort to seek racial diversity.³⁴ A fourth member agreed.³⁵

A fifth member then described George Mason as a classic disparate impact case in terms of the hiring of women and minorities. Rather than address the issue head on, however, she preferred to take Dean Manne at his word when he said the law school under his leadership was only "three and a half years old."³⁶ AALS Regulations require that a school have been in operation at least five years before it could apply for membership.³⁷

It did not take a calculator for proponents of the application to see that it was in trouble. The first response was simply to point out that the "three and a half years old" remark could not be taken literally. Otherwise, every law school would start over every time it hired a new dean.³⁸

Next, an Executive Committee member noted that the relevant AALS By-Law under which George Mason was to be judged was § 6-4(a). It mandated "equality of opportunity" in faculty hiring and student admissions, without "discrimination or segregation on the grounds of race," sex, sexual orientation, and other prohibited grounds.³⁹ On its face, it was clear that the By-Law did not require statistical success in achieving diversity.⁴⁰

Furthermore, George Mason had done as well or better than a number of member schools in recruiting minority faculty and students

³² See *id.* at 49. In subsequent days, the criticism of Berkeley in the report on its membership renewal got the most attention. See, e.g., Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105 (1992) (discussing the counterproductive effect of racial quotas on diversity).

³³ See Site Visit Report, *supra* note 3, at 12.

³⁴ See Minutes, *supra* note 23, at 50.

³⁵ See *id.* at 50-51.

³⁶ Manne was referring to the length of his tenure as Dean, not to the total number of years in the history of George Mason Law School.

³⁷ See *id.* at 52. The reference was to Executive Committee Regulation 9.1(b): "A law school may not be admitted to membership in the Association until it has offered five years of instruction and has graduated its third class." ASSOCIATION OF AMERICAN LAW SCHOOLS, INC., HANDBOOK 54 (1999)

³⁸ See Minutes, *supra* note 23, at 53.

³⁹ AALS By-Laws, *supra* note 1, § 6-4(a), at 31.

⁴⁰ See Minutes, *supra* note 23, at 52-53.

and should not be discriminated against because some people were unsympathetic to its stress on law and economics.⁴¹ Indeed, as one Executive Committee member noted, the AALS had never before turned down a school with George Mason's quality of faculty and students. This was no time to begin.⁴²

The distinction between equal opportunity and diversity stopped discussion for a while as several members struggled to determine where an affirmative action standard of the kind they wanted to apply could be found. After a review of institutional history, they were told that in 1987, the Executive Committee had approved asking about affirmative efforts undertaken by a school whose total of minority students had declined sharply. It then approved asking such questions to several schools with a similar history thereafter.⁴³ That was a long step from requiring affirmative action programs generally, of course, but it was suggested that an Executive Committee could always interpret By-Law § 6-4(a) to insist on a greater commitment to diversity than it had required in the past.⁴⁴

By that point in the discussion, momentum was no longer firmly against AALS membership. A call for interpreting language to mean something other than what it clearly said was not attractive to everyone, so the option of deferring action became more viable. At least three Committee members asserted that they would prefer concrete evidence of a commitment to equal opportunity to the general assurances Dean Manne had given them earlier.

In response, a Committee member suggested giving Dean Manne the opportunity to come before the Committee again, this time to offer concrete evidence of minority hiring efforts. Even one proponent of delay said that if he had concrete information about how many interviews had been conducted with minority faculty and how many offers had been made, he would be satisfied.⁴⁵ Another said she would like the same information with regard to student applications and academic support.⁴⁶

Yet another member said that he would only be satisfied if Dean Manne assured the Committee that, given the earlier choice between a

⁴¹ See *id.* at 53-54. The associated discussion explored the level of George Mason's commitment to equal opportunity, and how that compared to the commitment of other member schools with similar numbers of minorities. One Executive Committee member noted that another school had paid a premium above its regular salary scale to attract a minority professor, a level of commitment she said she had not heard from Dean Manne. See *id.*

⁴² See *id.* at 54.

⁴³ See *id.* at 55.

⁴⁴ See *id.*

⁴⁵ See *id.* at 57.

⁴⁶ See *id.* at 58.

tax professor and a minority applicant, George Mason would consider minority status of an applicant as important as substantive curricular needs.⁴⁷

There was clearly an air of uncertainty about where each member stood on the substantive and procedural issues. The Committee agreed to defer its decision and invite Dean Manne to come back to provide the requested documentary evidence after it determined that the ninth Executive Committee member would be present for the next meeting.⁴⁸

IV. THE FINAL DECISION

When Saturday morning dawned, the Executive Committee began by arguing over whether there was an affirmative action obligation implicit in By-Law § 6-4(a). More research had been done overnight, and a letter had been found to another school finding it "in doubt" about compliance with By-Law § 6-4(a) despite clear efforts to recruit and appoint a more diverse group of students and faculty.⁴⁹

A Committee member responded that it was unfair to promulgate a non-discrimination standard but behind the scenes to require schools to demonstrate affirmative action. Committee members acknowledged that no affirmative action requirement had been published, and that previous letters to schools implying an affirmative action requirement were confidential and not knowable by other schools. The unfairness of proceeding on that basis was apparent even to some members who had earlier spoken negatively about the George Mason application. Another Committee member, however, asserted that there was a bottom line affirmative action obligation, just not promulgated as clearly as she would prefer.⁵⁰

The ninth Executive Committee member, the one who had just joined the meeting, wanted to know about George Mason's admissions of minority student applicants. He was told that the Membership Review Committee was concerned that, given George Mason's increasing ability to attract highly qualified students, it could not admit more minority students without making substantial deviations from its admission standards. The Committee was also concerned that these changes might prove even more substantial than those the law school had been willing to make up to that time.⁵¹

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.* at 59-60.

⁵⁰ *See id.* at 60-61.

⁵¹ *See id.* at 62.

At that point, Dean Manne was invited into the meeting. Asking him to return was largely unprecedented and, of course, personally insulting. In context, it reflected an attitude that he was guilty until he proved himself and his law school innocent of discrimination. One would have understood a response from him that was defensive or angry.

Instead, Dean Manne could not have been more effective. He described in detail the individual cases of each woman who had been on the faculty at the time he had arrived, including an offer of increased salary to persuade one to remain. In two cases, he gave women half-time teaching loads and paid their tuition to get a master's degree in economics. He provided the same kind of detailed explanation with respect to the African-American males who had been on the faculty when he arrived.⁵²

With respect to the hiring of new faculty, he described the intensity of his efforts to find minority and female candidates. He described the recruiting of two women and one minority male, plus the unsuccessful efforts to hire minority candidates who accepted other offers. Further, of the 20 adjuncts hired to teach at George Mason, four turned out to be women and five were minority men.⁵³

With respect to student recruitment, he described the hiring of a new Admissions Director who gave minority recruiting the highest priority. He went into great detail about the minority recruiting techniques and the efforts made by the placement office to assist minority students.⁵⁴

Responding to the litmus test about whether he would hire a tax professor or a minority candidate, Dean Manne said he would bend over backwards to hire the minority candidate. Indeed, he hoped George Mason would train minority students who would be good faculty candidates at George Mason and elsewhere.⁵⁵

When Dean Manne was excused, there was little left to say. He had provided the documentation of affirmative action efforts for which the Committee had asked, whether or not the Committee was entitled under its regulations to pose the question. A few members of the Committee expressed their doubts for the record about how successful they thought Dean Manne would be in recruiting minorities

⁵² See *id.* at 63-64.

⁵³ See *id.* at 65.

⁵⁴ See *id.* at 66-67. Responding to a question about how far below regular admission standards George Mason would go to recruit minority candidates, Dean Manne said it would make extra efforts to enroll minority group members in its class and hoped that the increased recruiting efforts would narrow the statistical gap in the future. See *id.* at 68-69.

⁵⁵ See *id.* at 68.

and women for a program that emphasized law and economics, but there could be no doubt about his commitment to do so.⁵⁶

What followed was a discussion of whether there could be some way to admit George Mason to membership, but express concern to the AALS House of Representatives about just how diverse the school was likely to be. Others feared that such an expression might alert member schools to the lack of a diversity requirement in the By-Laws as they then stood.⁵⁷

At the end of the process, the Executive Committee unanimously voted to advise the House of Representatives that the Committee:

[d]etermined that George Mason University School of Law needs to give careful attention to the obligations imposed by Bylaw Section 6-4 that a member school provide equality of opportunity to faculty and students, and take necessary steps to encourage racial and gender diversity. Having discussed these concerns with the school and having received assurances that the school is taking added steps to plan and allocate resources to address these concerns, the Executive Committee recommends that the George Mason University School of Law be admitted to membership.⁵⁸

The Executive Committee report did not reflect the intense debate that lay behind it. It was, however, the best that the proponents of the application could do. The lengthy debate did not reflect well on the AALS process as it functioned at that time, but it did reflect well on Henry Manne's ability to endure personal affronts, remain professional when others were less so, and lead his law school with dignity and skill.

There was a lot at stake for George Mason in the vote. It was clearly on the road to a well-deserved reputation for excellence, and a failure to achieve AALS membership at that point could have been a serious set back to its self-esteem and broader reputation. In the events of one November weekend, Henry Manne demonstrated his singular ability to eschew pettiness and keep his eye on the objective before him. George Mason's law school will forever be in his debt.

⁵⁶ See *id.* at 70-71.

⁵⁷ See *id.* at 72-73. At the same meeting at which George Mason was admitted to membership, the Executive Committee successfully proposed that a new part (c) be added to Rule 6-4. It provides: "A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color and sex. A member school may pursue additional affirmative action objectives." AALS By-Laws, *supra* note 1, § 6-4(c), at 31. Even this language, of course, mandates only efforts, not statistical quotas.

⁵⁸ AALS Memorandum 89-91 (Nov. 21, 1989), reprinted in ASSOCIATION OF AMERICAN LAW SCHOOLS, 1990 PROCEEDINGS 125 (1990).

The Executive Committee resolution was unanimously approved by the AALS House of Representatives in January of 1990 and, to great applause, George Mason University School of Law took its place as a member of the Association of American Law Schools.⁵⁹

⁵⁹ See ASSOCIATION OF AMERICAN LAW SCHOOLS, 1990 PROCEEDINGS 193 (1990).