

# REPORT OF COMMITTEE A ON ACADEMIC FREEDOM AND TENURE, 2009–10

## Introduction

This 2009–10 Committee A report indicates the range of issues the committee addressed and the variety of activities it undertook during the past academic year. The removal and imposition of censure cases dealt with financial exigency and academic due process. The sample of cases settled through staff mediation included late and blanket notices of nonreappointment, threatened salary reductions based on novel “performance standards,” suspension and threatened dismissal following post-tenure review, and misunderstandings regarding the evaluation of a visiting professor. These matters involved a variety of institutions throughout the United States, private as well as public universities, medical schools, and a historically black college. In its legislative business, Committee A recommended and the Council adopted a new regulation on academic employment of graduate students, an issue of major concern to Committee A over the past few years. The legislation reflects the culmination of a process, from subcommittee work to Committee A deliberation, circulation of a draft text, receipt and consideration of suggested revisions, approval by Committee A of a revised text, and ultimate adoption of a new regulation by Council. As issues arose during the course of the academic year, the committee endorsed statements addressing academic

freedom in publishing and the role of tenure in law school accreditation.

As I emphasized in my oral presentations to the Council and the annual meeting, last year’s report of the Subcommittee on Implications of *Garcetti v. Ceballos* for Academic Freedom and Shared Governance has prompted important and promising developments. In its 2006 decision in *Garcetti v. Ceballos*, a bare 5–4 majority of the Supreme Court unfortunately held, “When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” Thanks, I think, to an amicus brief filed by the AAUP, both the majority opinion and the dissent recognized the potential impact of this holding on the constitutional protection for academic freedom. According to the majority, Justice David Souter’s dissent “suggests today’s decision may have important ramifications for academic freedom. There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason, do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”

The AAUP has been very involved in post-*Garcetti* litigation involving speech by professors. The AAUP Web site provides information about that litigation, which, at best, has yielded mixed results regarding the protection of faculty speech. In the conclusion of my Committee A report last year, I highlighted the recommendation of the subcommittee’s report emphasizing the importance of securing protection for faculty speech at both public and private universities through institutional documents such as faculty handbooks and collective bargaining agreements. Institutional protection, the report observes, would help “preserve academic freedom even in the face of judicial hostility or indifference.” Both the report itself and its executive summary suggest alternative draft language for potential inclusion in institutional documents.

### Status of Committee A Cases and Complaints as of May 31, 2010

All current open complaints, not opened as cases	491
All current open cases	172
<b>Total complaints and cases currently open</b>	<b>663</b>
All complaints closed since June 1, 2009	153
All cases closed since June 1, 2009	26
<b>Total complaints and cases closed since June 1, 2009</b>	<b>179</b>
<b>Total complaints and cases handled</b>	<b>842</b>

The AAUP staff has worked hard and effectively to publicize this recommendation. Several universities have adopted variations of the recommended language, including, for example, the University of Wisconsin, where members of the AAUP actively participated in obtaining the new regulation, and the University of Delaware, where the AAUP negotiated the inclusion of protective language in the collective bargaining agreement. Similar efforts are underway at other universities across the country. Press coverage of the annual meeting helped publicize these developments, which, I hope, will encourage more universities to follow the subcommittee's recommendation. Through the efforts of Michael Bérubé, a member of Committee A as well as of the Committee on Academic Freedom of the Modern Language Association, the MLA has made similar recommendations about including protective language in institutional documents.

A new subcommittee of Committee A began work this year on a major report, tentatively titled *Ensuring Academic Freedom in Politically Controversial Academic Personnel Decisions*. Working quickly and effectively, the subcommittee produced a lengthy draft, which it will revise in light of discussion at the June meeting of Committee A.

## Judicial Business

### REMOVAL OF CENSURE: TULANE UNIVERSITY

Having been delegated by the 2009 annual meeting to act on this censure once the administration provided a suitable response regarding the use of censure removal in any litigation, Committee A at its November meeting approved the removal of Tulane University from the Association's list of censured administrations. The 2007 annual meeting had imposed censure on the Tulane administration for having acted in disregard of the 1940 *Statement of Principles on Academic Freedom and Tenure* and derivative AAUP-recommended standards in terminating approximately two hundred faculty appointments, fifty-eight of them tenured, after a declaration of financial exigency in the aftermath of Hurricane Katrina. After the governing board adopted, in 2008, a faculty-approved financial exigency policy essentially consistent with AAUP-recommended standards, the issue regarding litigation was the only remaining obstacle to removal of censure.

### IMPOSITION OF CENSURE

At its June meeting, Committee A considered two cases that had been the subject of ad hoc investigating committee reports published since the 2009 annual meet-

ing. The committee adopted the following statements concerning these cases. In both instances the Council concurred, and censure was voted by the 2010 annual meeting.

*Clark Atlanta University.* The report of the investigating committee deals with the declaration of an enrollment emergency by the administration of Clark Atlanta University and its subsequent action several days later to terminate the appointments of fifty-five full-time faculty members, approximately one-fourth of the total faculty, with no notice and no pretermination hearing. The investigating committee concluded that the administration, in subjecting these faculty members to immediate dismissal, acted in disregard of the 1940 *Statement of Principles on Academic Freedom and Tenure*, of derivative Association-recommended standards, and in some instances of the university's own stated policies.

The investigating committee based its conclusion on several findings. It found that the administration selected the particular faculty members for release without any discernible prior consultation with appropriate faculty bodies. It found that the administration also paid no heed to the rights of tenured over non-tenured faculty members with respect to retention. Indeed, new faculty members were appointed to the vacant positions. The committee found that the administration, by not affording the dismissed faculty members opportunity for a hearing before a body of faculty peers, denied them the protections of academic due process to which they were entitled under stated university regulations as well as Association-supported standards. It found that the administration, in basing its selection of faculty members for release mainly on its assessment of their relative lack of merit, effectively dismissed them for cause but without any demonstration that dismissal was warranted.

Moreover, the committee found that the one month of severance salary the administration unconditionally provided to all dismissed faculty members was sorely deficient and found it deplorable that the administration employed the offer of a modest additional severance as a means of pressuring vulnerable faculty members to forfeit avenues of appeal otherwise open to them and to release the university from any further claims. Finally, the committee found that the declared enrollment emergency on which the administration based its summary actions was largely nonexistent, a pretext for avoiding affordance of the protections of academic due process required under university regulations in the event of dismissals for cause or terminations necessitated by financial exigency.

Committee A recommends to the Ninety-sixth Annual Meeting that Clark Atlanta University be placed on the Association's list of censured administrations.

*University of Texas Medical Branch at Galveston.* The report of the investigating committee concerns the actions taken by the administration of the University of Texas Medical Branch at Galveston, after a declaration of financial exigency at that institution by the University of Texas Board of Regents, to terminate the appointments of more than 120 faculty members, approximately one-third of them tenured. The actions followed a suspension of operations at the medical branch and its affected hospital as a result of the devastation inflicted on September 13, 2008, by Hurricane Ike. Faculty members received between six and nine months of notice, depending on their tenure status and length of service.

The administration proceeded under the regulations of the University of Texas System, set forth in the provisions of Regents' Rule 31003, "Abandonment of Academic Positions and Programs," which do not provide any definition of financial exigency and which give primary decision-making authority regarding appointment terminations and appeals to department chairs and administratively appointed panels rather than to representative faculty bodies. Many affected faculty members did appeal their appointment terminations, with Rule 31003 placing on them the burden of demonstrating that the financial exigency was not bona fide or that the actions taken to terminate their appointments were arbitrary or unreasonable. The investigating committee found such procedures to be seriously deficient when measured against the standards set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure*, Regulation 4.c ("Financial Exigency"), of the Association's derivative *Recommended Institutional Regulations on Academic Freedom and Tenure*, and the 1966 *Statement on Government of Colleges and Universities*. Moreover, the committee concluded that the faculty role in determining the existence of a financial exigency at the institution, and in assessing its impact on academic programs and faculty status, was essentially nonexistent. When measuring administrative actions against the *Recommended Institutional Regulations*, the committee also noted the inadequacy of notice or severance salary for many affected faculty members, the administration's failure to assist actively with opportunities for relocation to available suitable positions, and the administration's insufficient provisions for faculty recall. Finally, the committee found that the administration had begun recruiting new fac-

ulty members in spring 2009 without demonstrating that many of the appointment terminations could not have been rescinded.

Although an advisory committee is proposing revisions to the University of Texas System's financial exigency policies for consideration by the board of regents, the texts of the proposals and information as to any final action have not yet been shared with the Association. Neither has word been received of rescissions of notice of termination or extensions of the effective date of notice since the online publication of the investigating committee's report in April.

Committee A recommends to the Ninety-sixth Annual Meeting that the University of Texas Medical Branch at Galveston be placed on the Association's list of censured administrations.

### Legislative Business

At its November meeting, Committee A recommended Council adoption of the new Regulation 14 (on academic employment of graduate students) of the *Recommended Regulations on Academic Freedom and Tenure*, after approving two changes in the previously circulated draft text. The first change was to footnote 2 so that the quoted sentence now reads "participation in a strike or other work action does not by itself constitute grounds for dismissal or nonreappointment or for imposing other sanctions against faculty members." (This recommendation went to the executive committee of the Collective Bargaining Congress for a change it then made in the source of the sentence, the Association's *Statement on Collective Bargaining*.) The second change was to the penultimate sentence in Section C, which now reads, "Adequate cause for a dismissal will be related, directly and substantially, to the fitness of graduate student employees in their professional capacities regarding teaching, research, and other academic duties." During its meeting the following weekend, the Council adopted as Association policy the new Regulation 14 as amended.

Committee A also approved at its fall meeting a revision to *Association Procedures in Academic Freedom and Tenure Cases* (AAUP Policy Documents and Reports, 10th ed., p. 304). Beginning in January 2010, the AAUP's official public documents, most of which have been the reports and policy statements of Committee A, will no longer be published in *Academe* but instead will be published online and subsequently printed in a separate annual volume, the *Bulletin of the American Association of University Professors*. For this reason, Committee A voted to revise its *Association Procedures in Academic Freedom and*

*Tenure Cases* as follows: “The final text shall be published in *Academe*” is replaced by “The final text shall be published by the Association.”

Other actions taken at the fall meeting included endorsing the *Statement of Principle: Free Expression at Risk, at Yale and Elsewhere*, a statement prepared by the AAUP president and the executive director of the National Coalition against Censorship, responding to the decision by Yale University Press to remove all images of Mohammed from Jytte Klausen’s *The Cartoons That Shook the World*. The statement urged colleges and universities to stand up for basic principles of free speech despite the fear of violence. The committee also endorsed, pending modest revisions, a draft statement to the American Bar Association on possible revisions to its “security of position” accreditation standard. Responding to an invitation for comment in the spring 2009 report of the Standards Review Committee of the ABA’s Section on Legal Education and Admissions to the Bar, the statement argues for the retention of the ABA’s current accreditation standards on security of position, which include protections similar to tenure for clinical faculty. Finally, the committee approved the following resolution expressing gratitude for the distinguished service of long-time Committee A member Lawrence Poston:

Larry Poston’s first Committee A meeting took place in 1969, when he went on leave from the University of Nebraska to serve for two years on the AAUP staff. He rejected an offer of tenure at AAUP for a return to academe and an outstanding University of Illinois at Chicago career for nearly forty years as professor of English with major administrative responsibilities in academic governance.

While fulfilling heavy commitments in Chicago, Larry has managed over the decades to take on, successfully, one key AAUP responsibility after another. To note only a few, he was editor of the *AAUP Bulletin*; a Committee on Governance member, consultant, and investigator; an Association vice president; and, as chair of a Self-Study Committee, producer of a formidable report on the Association’s mission, resources, and needs.

Committee A members, while appreciative of the full range of Larry’s activities, assert that foremost among his contributions are what he has done for academic freedom and tenure. He has chaired six ad hoc investigating committees and has served on innumerable drafting and policy-formulating subcommittees, most often as chair. Over the years he has been invaluable in scrutinizing and responding to draft policy documents and

to reports of investigations. Indeed, very few approach him in cumulatively contributing to the high quality of our finished products.

Having participated by now in what must be well over 100 meetings of Committee A and its subcommittees and task forces, Larry decided that it is time to stop traveling to these gatherings. His resignation has been reluctantly accepted, but only from attendance at meetings. He has agreed to continue to receive the voluminous materials that go to Committee A and to respond as always to issues that are presented and to draft documents. Committee A conveys its warmest appreciation to Larry Poston. It expects to benefit from his ongoing advice and assistance for many years to come.

Among the items discussed at the November meeting were *Conversion of Appointments to the Tenure Track*, a draft report of the Committee on Contingent Faculty and the Profession published for comment online and in the November–December issue of *Academe*, and the projected work of a newly appointed Committee A subcommittee on ensuring academic freedom in politically controversial academic personnel decisions. The major portion of the committee’s June meeting was devoted to an extensive review of that subcommittee’s draft report, which the subcommittee will revise for further discussion and potential approval at the fall 2010 Committee A meeting. At both the November and June meetings, Committee A members received updates from the ad hoc committee studying the conflict between individual academic freedom and collective academic freedom that can occur when departments and other faculty bodies impose pedagogical restrictions on teachers of multisection courses. The membership of this committee is drawn from Committee A as well as from the Committee on College and University Governance and the Committee on Teaching, Research, and Publication.

## Conclusion

Larry Poston is not the only person who will be missed at future Committee A meetings. In June, consultant Robert C. Post, member Ronald M. Atlas, and staff member Eric Combest announced their resignations.

A former general counsel of the AAUP, Robert Post served on Committee A for many years, first as a member and then as a consultant. In recent years, he was a member of subcommittees that drafted the reports *Freedom in the Classroom* (2007) and *Academic Freedom and Outside Speakers* (2007). A preeminent scholar of the First Amendment, Robert brought his professional expertise about the law of free speech to bear

on matters facing Committee A. Most impressively from my perspective, his incisive intelligence cut to the core of difficult issues, framing and organizing analysis, and making Committee A meetings intellectually stimulating as well as effective. Robert's scholarship extended to academic freedom. His widely acclaimed recent book, *For the Common Good* (2009), coauthored with fellow Committee A consultant Matt Finkin, brings new conceptual clarity to major principles of academic freedom. Appointed dean of Yale Law School in 2009, Robert found that his administrative responsibilities precluded him from continuing as a consultant to Committee A. Yale's gain is our loss. I am confident that Robert will continue to analyze and defend academic freedom from his new position and that he will remain a friend and advisor to Committee A.

Ron Atlas joined Committee A in 2006, was reappointed in 2009, and made major contributions during his four years as a member. A distinguished scientist added to a committee that previously lacked one, Ron brought an important new perspective to Committee A deliberations. He helped direct the committee's attention to distinctive academic freedom issues that arise in the sciences. Based on his impressive participation in Committee A meetings, I appointed Ron to the subcommittee that drafts statements on censure and censure removal immediately before the June Committee A meeting. Most recently, Ron served on the Committee A investigating committee that wrote the report on the University of Texas Medical Branch at Galveston. To Ron's regret and ours, he had to resign

from Committee A. His colleagues will miss him, but I suspect they will continue to consult him at a distance.

A member of the AAUP staff since 2005, Eric Combest quickly mastered the intricacies of Committee A work. He combined intellectual acuity with a modest yet confident personal style that made him an extremely able staff member. Even after he moved for personal reasons from the AAUP's Washington office to Atlanta, Eric continued to work part time for the AAUP, as effectively from a distance as he had as a full-time staff member in Washington. Happily for Eric but unhappily for us, Eric has accepted a position teaching history in Atlanta, returning to the discipline he left for the AAUP. Respected and liked by the staff colleagues who knew him best and by Committee A members and consultants, Eric will be hard to replace. Happily for the ongoing work of Committee A, we have been assured that he will be replaced.

For me, these sad departures are leavened by my high regard for the continuing membership and staff of Committee A. More than at any time in my increasingly long memory, Committee A has a good balance of experienced and newly appointed members and consultants. The new members have brought fresh perspectives and insights to a committee fortunate to include members, consultants, and staff with extensive knowledge and long experience. It is a pleasure to serve with them.

DAVID M. RABBAN (Law), *chair*  
University of Texas at Austin

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## Cases Settled through Staff Mediation

*The four accounts that follow serve to illustrate the nature and the effectiveness of the mediative work of Committee A's staff in successfully resolving cases during the 2009–10 academic year.*

The administration of a public Southwest university's branch campus that was scheduled to become a freestanding institution in the fall issued identical notices of nonreappointment in early March to all full-time faculty members. They were informed that they would be obliged to compete with other applicants for their own positions if they wished to continue at the institution beyond that academic term.

The Association's staff wrote to the administration to express concerns about the lateness and the blanket

nature of the notices. It urged the chief administrative officer to rescind the notices and reappoint the faculty members for the following academic year.

In responding, the chief administrator challenged the staff's interpretation of the AAUP's *Standards for Notice of Nonreappointment*, asserting that they applied only to tenure-track faculty members. The staff's reply assured him that it had interpreted the standards accurately, that they applied to all renewable term appointments, not only those that are probationary for tenure.

Not long afterward, the campus administration rescinded the blanket notices and offered reappointment to any faculty member who had not already successfully reapplied, an achievement reported in the higher education press with due acknowledgment of the AAUP's timely intercession.

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The administration of the large medical school at an independent university in the Northeast adopted a new policy regarding faculty compensation, effective the next calendar year. The policy provided for salary reductions for tenured professors deemed not to be meeting minimum “performance standards” in procuring revenues through externally funded research or clinical practice. Failure to meet the minimum set by the administration would result in a 20 percent reduction in the next year’s salary, failure again the next year would bring about an additional 20 percent salary reduction the following year, and, absent improvement by the professor in procuring money, successive annual salary reductions would continue indefinitely. The administration estimated that approximately twenty professors would have their salaries thus reduced during the policy’s first year.

The medical school’s elected faculty council protested against the policy once it was announced, urging its withdrawal but to no avail. On the advice of the local AAUP chapter, the faculty council officers then turned to the Association for help. The staff conveyed the Association’s concerns in a detailed communication addressed to the medical school administrators and the university’s central administration, asserting that the policy disregarded principles of tenure and of shared governance. A reply from the university’s provost asserted that the institution’s tenure regulations, which adhere to the 1940 *Statement of Principles*, were not being disregarded and that any action under the new policy “will be informed by the academic judgment of the faculty.”

The provost’s letter did not address any modification in the policy. While the administration had initially estimated that under the policy the new year would witness the reduction of the salaries of twenty professors, however, in mid-January, after the staff had written, a medical school dean informed the faculty council that “five or six” professors were still being considered for involuntary salary reduction. A fortnight later, the dean told the faculty council that the number had become “three or four.” The AAUP staff wrote to the provost in early February that it hoped to receive word in the near future of a clean slate regarding any salary reductions that year. The faculty council president subsequently confirmed that salary reductions for that year were no longer being contemplated and that the administration, while not formally rescinding the policy, seemed to be looking for other ways of increasing faculty productivity.

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On the basis of two successive post-tenure reviews conducted by his dean, a professor of law in his twenty-ninth

year of service at a private Midwestern university was adjudged to have declined significantly in scholarly productivity. As permitted under law school regulations, the dean and provost recommended dismissal for cause, and the provost notified the professor that, pending dismissal proceedings, he was immediately suspended without pay, banished from campus, and denied access to university computer and telephone services. A month later, the president wrote to inform him of the termination of his appointment effective the next day, noting that he had thirty days in which to appeal the decision to a faculty committee.

The professor contacted the Association for advice and assistance, and the staff wrote to the administration to convey the Association’s concerns about suspension pending dismissal without pay and absent any threat of immediate harm and about the dismissal’s being effected prior to a hearing. Letters exchanged between the staff and the president led to a settlement with the professor involving his retiring with all the rights and privileges normally appertaining to retired status at that institution. The professor has expressed his gratitude for the staff’s assistance in achieving a satisfactory resolution.

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A tenured professor at a regional public university accepted a three-year visiting appointment at the flagship public university in a neighboring prairie state with what he took to be an understanding, reached with the dean who recruited him, that in his second year he would be evaluated for permanent tenure. To his misfortune, however, his departmental colleagues did not share that understanding and informed him in the second year that they would not be considering him for tenure. Embittered, he returned to his home institution with a demand, echoed by faculty supporters at the flagship university and reported in the media, that the administration provide a public apology for having misled him. He asked the Association’s staff for help in getting the apology.

The staff advised that at most the administration would provide a very guarded public statement but it would see if the chief administrative officer might be willing to write a private letter expressing thanks for the professor’s good work at the university and regret for the misunderstanding. The professor and then the chief administrator agreed to this. Afterward the professor informed the staff that he had received an eloquent letter apologizing for the administration’s part in the misunderstanding, thanking him for his contributions to the university, and wishing him well. Indeed, the professor wrote, he has the letter framed on his wall. ■