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Via E-Mail To:

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Section of Legal Education and Admissions to the Bar
American Bar Association
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RE: Comments on Proposed Revisions to Standard 403(a)

Dear Members of the Council of the ABA Section of Legal Education:

The American Association of University Professors (“AAUP”) respectfully submits these comments on the proposed revisions under consideration by the Council of the ABA’s Section of Legal Education and Admissions to the Bar (hereinafter the “Council”) to Standard 403(a) of the ABA’s *Standards and Rules of Procedure for Approval of Law Schools* (“the Accreditation Standards”), governing the instructional role of full-time faculty. The proposal before the Council would retain the requirement that full-time faculty “teach substantially all the first-year (or one-third) of the course of study,” but would eliminate the requirement that full-time faculty “teach more than one-half of the total credit hours offered by the law school in a year or more than two-thirds of student contact hours generated in that year.” This proposal thus removes any requirement that full-time faculty teach upper-class courses. In many law schools, this will result in a significant increase in the percentage of part-time faculty, all or almost all of whom are in nontenure-track positions. This will likely be accompanied by a decrease in the percentage of full-time tenure-track appointments, and may negatively impact the diversity of the faculty and the research and teaching of innovative or controversial subjects. By permitting law schools to make significant increases in part-time nontenure-track positions, this proposal undermines tenure and academic freedom and due process protections. The AAUP believes that in weakening the role of tenure in law schools, this proposal would severely harm American legal education.

Background

The AAUP was founded in 1915 to advance the standards, ideals, and welfare of teachers and researchers at accredited colleges and universities and professional schools of similar grade, including law schools. The AAUP is the voice of the professoriate as it

defines the professional values and standards for higher education; provides guidance for emerging issues of academic freedom, tenure, shared governance and due process; and ensures higher education’s contribution to the common good.

Over the past decade, and most recently in 2014, the Standards Review Committee (“SRC”) of the Council has considered and rejected various alternatives to the requirements of tenure for full-time faculty members under Standard 405. The AAUP has opposed such changes in the past and continues to do so, whether the changes are accomplished directly or indirectly. The current proposal to modify Standard 403 would indirectly undermine the accreditation requirement for tenure under Standard 405. By eliminating any requirement that full-time faculty teach upper-class courses, the proposal to modify Standard 403 would lead to a significant increase in the percentage of part-time faculty, all or almost all of whom hold nontenure-track positions. Inevitably, these changes will be accompanied by a decrease in the percentage of full-time tenure-track appointments.

As an indirect means of undermining tenure, the current proposal will have the same harmful effects as earlier proposals to eliminate tenure requirements directly. Thus, the same grounds raised in opposition to modifying Standard 405 apply to the proposed changes to Standard 403. In its 2014 statement to the SRC the AAUP cited the 2010 statement to the SRC from the AAUP’s Committee A on Academic Freedom and Tenure, which advised that elimination of the tenure standard “would be a setback for academic freedom and institutional quality with no offsetting benefit.” And as Robert O’Neil, former General Counsel of the AAUP and former President of the University of Virginia and the University of Wisconsin, stated to the SRC in 2011, “The argument that academic freedom and due process might be adequately protected without tenure strikes me as simply inconsistent with the core principles of legal education. As the AAUP’s 1940 Statement [of Principles on Academic Freedom and Tenure] makes clear, ‘tenure is a means to certain ends, specifically: (1) freedom of teaching and research of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.’”

In opposing the elimination of tenure from the Accreditation Standards, the AAUP was joined by a broad spectrum of the legal community: law school faculty organizations; the Association of American Law Schools (“AALS”) and former AALS presidents; federal judges; law school deans of color; over 600 individual law professors; and numerous other organizations, lawyers, and interested individuals.

In these comments concerning the proposed revision of Standard 403(a), we address the following issues: the importance of academic freedom in legal education; the

relationship between academic freedom and tenure; the role of legal education in a modern academy where tenure is well-understood and well established; and why an increase in part-time positions and the accompanying decrease in tenure-track faculty positions will harm legal education.

The Imperative of Academic Freedom in Legal Education

Any serious accreditation standard must demand that an academic program provide a guarantee of academic freedom – the ability of faculty members to research, write, teach, and participate in governance and professional activities without fear of punishment or reprisal when they exercise considered professional judgment.

Academic freedom assumes that there is a public value, not merely a private privilege, in protecting faculty members against adverse employment actions that cannot be justified on the basis of fitness or competency. The American universities of which most law schools are a part carry out a unique and indispensable role of scholarship, teaching, and public service. Indeed, universities are incomparable to any other societal institution in their mission to develop, refine, and transmit knowledge. As the AAUP argued in its foundational 1915 Declaration of Principles on Academic Freedom and Academic Tenure, “The responsibility of the university teacher is primarily to the public itself, and to the judgment of his own profession; and while, with respect to certain external conditions of his vocation, he accepts a responsibility to the authorities of the institution in which he serves, in the essentials of his professional activity his duty is to the wider public to which the institution itself is morally amenable.”

American law has long reflected this understanding of the academic profession, recognizing that universities “occupy a special niche” in our legal traditions. *Grutter v. Bollinger*, 539 U.S. 306 (2003). In one of the Supreme Court’s most famous decisions involving academic freedom, Chief Justice Earl Warren observed that “the essentiality of freedom in the community of American universities is almost self-evident.... To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). In an influential concurrence in *Sweezy*, Justice Felix Frankfurter observed that, in law among other disciplines, the work of those who inquire and teach “must be left as unfettered as possible.”

The guarantee of academic freedom is especially important in a law school, whose faculty members are, by definition, closely engaged with our society’s highest-profile and most contentious public policy debates. Law professors are regularly quoted in the news

and opinion media, invited to testify before legislative bodies, recruited to serve temporarily in government, and asked to lend their expertise to organizations that perform advocacy and education. All these activities constitute important public service, and it would not serve the public well if such faculty were to shade their advice, or feel chilled in giving their best analysis, because they lacked the protections of tenure. Robert M. O’Neil, a former president of two major universities and a three-time General Counsel of the AAUP, elaborates on this point compellingly in his submission of November 11, 2011, to the SRC, in which he documents the cases of several high-profile academics who needed the protections of academic freedom when they voiced unpopular opinions or refused to go along with what was politically expedient.

As discussed in the letter in 2013 to the Council endorsed by more than 600 individual law professors opposing the proposed revision of Standard 405, these concerns about undermining tenure are especially acute for faculty from minority and underrepresented groups, as well as those whose research involves controversial topics – race, sexuality, income inequality, religious liberty, just to name a few. As the letter observes, the recent attacks on tenure are occurring “just as protections are beginning to accrue increasingly to nontraditional groups.” Further, diversity in the tenured faculty is crucial to “facilitate[] meaningful academic freedom by protecting a law professor’s ability to engage freely in the teaching and writing of groundbreaking subjects,” including critical race theory and feminist theory. The current proposal could have an even greater negative impact on faculty teaching such controversial and groundbreaking subjects, as these are not usually part of a first year course of study. With tenured faculty concentrated in subjects taught during the first year, the scholarship and research conducted by tenured faculty, and by faculty seeking to achieve tenure, may be concentrated on those first-year subjects. This will severely restrict innovation, research, and publication on topics taught in upper level courses, such as critical race theory, feminist theory, labor and employment law, environmental law, and many others.

Given the recent political attacks on law school clinics, these concerns are especially important for clinical faculty. Standard 405 requires that law schools provide full-time clinical faculty members with “a form of security of position reasonably similar to tenure.” Most beneficial to protection of academic freedom of clinical faculty would be an increase in the percentage of tenure-track faculty in clinical programs. Instead, the proposed modification of Standard 403 moves in the opposite direction, weakening protections of academic freedom by permitting law schools to increase part-time nontenure-track positions.

A university fulfills its missions of scholarship, teaching, and service only through the agency of its faculty members. Academic freedom is essential for faculty members to carry out that work.

Academic Freedom and Tenure

In light of the points discussed above, a mere abstract commitment on the part of a law school to “academic freedom” does not provide a faculty member with adequate protection. The most promising and accomplished faculty member will not want to be part of an institution that gives only lip service to safeguarding his or her ability to exercise professional judgment without fear of retribution. A serious commitment to academic freedom must be operationalized and made meaningful through a well-developed, well understood, and readily administrable system of peer review, professional advancement, and due process. That system is tenure.

The core principles behind tenure are not unique to the academy; they are analogous in various ways to the systems of professional merit and protection from arbitrary treatment that characterize, among other things, federal judicial appointments and government civil service. Indeed, the drafters of the 1915 Declaration modeled their conception of faculty independence on that of federal judges.

Moreover, contrary to some popular misconceptions, academic tenure is not a guarantee of “lifetime employment.” The best and most common systems of tenure incorporate annual reviews and assessments of all faculty, tenured and non-tenured alike, a process that typically goes hand-in-hand with salary setting and teaching assignments. Tenure revocations are, appropriately, considered an extreme measure. But in day-to-day reality, the ongoing assessment process assists faculty members in formulating their professional goals and understanding their institutional obligations, and it assists administrators in allocating teaching and service loads.

Further, for untenured professors, the tenure system provides a structured probationary period with expectations for the development of teaching ability and scholarly expertise. The achievement of tenure is universally recognized as a crucial career milestone and a marker of substantial professional accomplishment.

The proposed revision to Standard 403 undermines the requirement of tenure under Standard 405. Permitting law schools to increase part-time faculty appointments is tantamount to eliminating full-time tenured faculty. Further, as the opposition to the proposed modification of Standard 405 demonstrated, simply being a full-time faculty member is not sufficient to protect academic freedom and due process rights. The job security of tenure is essential to provide these protections. Although the Council rejected the proposed modification of Standard 405, the current proposed changes to Standard 403 would enable law schools to make an end run around tenure by hiring part-time nontenure-track faculty to teach courses in the last two years of law school. With little or no job security, the part-time faculty will have, in effect, no academic freedom or due process protections. As adjunct faculty, they may be hired on a course-by-course basis or

they may be given short-time contracts for one or more semesters. These conditions of employment make them vulnerable to discharge or nonrenewal for any reason, whether on political, economic, or arbitrary bases. They may shy away from teaching and research on controversial or groundbreaking subjects, reducing the broad diversity of thought in the legal academy. Further, as with any contingent employee, allegations of discharges in violation of employment discrimination laws will be extremely difficult to prove.

The increased ranks of part-time faculty will not have due process protections of tenure. A hallmark of the American understanding of tenure is that, when a tenured professor's competency or fitness is challenged, the burden of proof is on the employer. The professor is not in a position of perpetual probation, with only the promise of an *ex post facto* hearing should he or she bring a complaint. Moreover, the faculty members who are part of any peer proceeding associated with a possible tenure revocation are themselves able to exercise independent professional judgment because they are protected by tenure against retaliation or other improper influences.

Every lawyer knows that the central values and priorities of any decision-making system are embedded in how the system allocates presumptions and the burden of proof. Tenure was not designed to impede innovation or foster unproductive faculty, any more than the requirement of "guilt beyond a reasonable doubt" is intended to promote crime, or the presumption of absolute civil immunity for prosecutors is intended to encourage malicious prosecutions. Rather, the presumption that a tenured faculty member's employment will continue except for good cause or financial exigency incorporates a particular system of due process that has developed over many decades of experience. This presumption makes a university's commitment to academic freedom concrete and meaningful.

Legal Education in the Larger Academy

Because it is a time-tested and widely understood mechanism for articulating and enforcing a university's commitment to academic freedom, tenure is a defining feature of American colleges and universities. More than 200 learned societies, including the AALS as well as associations of universities, presidents, and boards of trustees, have endorsed the AAUP's seminal 1940 Statement of Principles on Academic Freedom and Tenure. It was noted during debate over the SRC's proposals to modify Standard 405 that the accrediting bodies of some other disciplines do not set forth a tenure policy as an accreditation requirement. There is a simple reason for this: in most areas of the American university, the existence of a system of tenure standards and guarantees is today simply taken as a given.

This may not have been so more than a century ago, when proprietary and sectarian schools were more common amid the landscape of American higher education. But today a

system of tenure, with a substantial core of tenured and tenure-track faculty, is a defining feature of any distinguished research university. To be sure, over the past several decades many institutions of higher education have relied increasingly on nontenured teachers and professionals, often part-time, but this is a largely baleful development against which there is growing resistance among all faculty and the society at large. The further extension of these hiring practices into legal education through the proposed revision to Standard 403 would exacerbate these trends toward hiring nontenure-track part-time faculty, as a means to cut labor costs and increase the university administration's ability to hire and fire part-time faculty at will.

Although numerous fine schools of law exist successfully as freestanding enterprises, most American law schools are integrated within larger universities. Their faculty members engage in interdisciplinary collaborations with colleagues from other departments, often teach students in other degree programs, and contribute to their institutions' missions of public service. The proposal to modify Standard 403 would severely interfere with the ability of law school faculty to remain full members of the academic community. Part-time law faculty, many of whom will be practitioners, will not have time to interact with the broader academic community, nor will they have a focus on academic scholarship that forms the basis for interdisciplinary teaching and research.

Increasing the ranks of part-time law faculty will negatively affect shared governance in the university. Part-time faculty are often not eligible to participate in faculty governance such as faculty senates or departmental/school committees. Even if eligible, their part-time status will likely limit their time and interest in participating and their job insecurity will reduce their ability to voice views critical of the administration. This will leave the reduced ranks of tenure-track/tenured faculty to carry all the governance responsibilities. As the percentage of tenure-track/tenured faculty goes down, however, the effectiveness of faculty governance will be limited.

Permitting all upper-class law courses to be taught by nontenure-track part-time faculty would harm the quality of law schools. The ABA's expectation that its accredited schools maintain a tenure policy helps assure a secure and respected role for legal education in the modern university. Unlike most traditional academic disciplines, legal education came to be accepted within the academy after it had evolved from a quaint system of unregulated professional apprenticeship into a serious scholarly and educational enterprise that demanded intellectual rigor and embraced the norms of free inquiry and peer review. The ABA should not now turn back the clock on these accomplishments. While practice-oriented programs are an important part of the legal curriculum, they are best taught by full-time tenure-track faculty who are well trained in teaching and fully committed to a career in higher education. Visiting practitioners should enhance the legal academy's curriculum, not replace the tenure-track/tenured faculty.

As our colleagues Robert A. Gorman and Elliott S. Milstein correctly observed in their submission to the Council in 2013, “American legal education has established itself as the model across the world primarily because of the role of the legal professoriate in maintaining an outstanding, dynamic, and creative system for educating the legal profession.” That professoriate and that model of legal education have achieved their stature within a framework of academic values where the protections of tenure are a defining feature.

Legal Education and the Public Trust

The AAUP recognizes that, notwithstanding all of its accomplishments, American legal education is in a time of challenge and change. The current environment demands fresh thinking and innovation about curricula, course content, and the relationship between legal education and the profession. The legal academy must continue to attract well-prepared, motivated, and idealistic students, and it must maintain and strengthen its relationships with employers, professional organizations like the ABA, government, and society’s thought leaders.

These realities all weigh in support of retaining an expectation that law school faculties will be primarily full-time tenure-track tenure positions. Innovation and experimentation in legal education are most likely to succeed when devised and implemented by the full-time tenure-track/tenured faculty, who are experts in law and pedagogy. In the current climate for legal education, for the Council to adopt the proposed revision to Standard 403(a) would be tantamount to abandoning its longstanding commitment to tenure as the best system for assuring intellectual merit, professional excellence, and academic freedom. At this important juncture, we cannot afford for American legal education to be less rigorous in its expectations of scholarship and classroom performance, or less committed to the highest standards of free inquiry and professional integrity.

Thank you for the opportunity to present these comments. The AAUP stands ready to assist the Council in its important work if there is any way we can be of further help.

Respectfully,

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