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Via U.S. Mail and E-Mail To:

The Hon. Solomon Oliver, Jr., Council Chairperson
Barry A. Currier, Managing Director of Accreditation and Legal Education
Section of Legal Education and Admissions to the Bar
American Bar Association
321 N. Clark Street, 21st Floor
Chicago, IL 60654-7958

RE: Comments on Proposed Revisions to Standard 405

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 405 of the ABA’s *Standards and Rules of Procedure for Approval of Law Schools* (“the Accreditation Standards”). The AAUP believes that any move toward eliminating tenure from the accreditation standards, directly or indirectly, would be a grave mistake harmful to American legal education. This submission has been prepared by the AAUP legal office and its faculty advisors, and is endorsed by the AAUP’s Committee A on Academic Freedom and Tenure.

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 several years, the Standards Review Committee (“SRC”) of the Council has recommended various alternatives to Standard 405. Some of the SRC’s proposals would eliminate the requirement of a tenure policy from the Accreditation Standards. The AAUP has opposed such changes in the past and continues to do so. In a 2010 statement to the SRC, the AAUP’s Committee A on Academic Freedom and Tenure 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 has been 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 500 individual law professors; and numerous other organizations, lawyers, and interested individuals.

In these comments, we explain the importance of academic freedom in legal education, the relationship between academic freedom and tenure specifically, the role of legal education in a modern academy where tenure is well-understood and well-established, and why elimination of the tenure standard is particularly ill-advised at this time of challenge and change for 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 to the Council endorsed by more than 500 individual law professors, these concerns 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. And the problem would be compounded for junior and non-tenure-track colleagues who lacked a cohort of tenured faculty to help protect their interests. Given the recent political attacks on law school clinics, we believe these concerns are especially important for clinical faculty.

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.

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 has been noted during debate over the SRC's proposals 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 non-tenured 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 which into legal education is hardly welcome.

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. Within such a setting, a discipline whose accrediting body had very publicly abandoned its commitment to tenure would be a distinct oddity, and it might even lead some to question whether law schools properly remain full members of an academic community.

The ABA's expectation that its accredited schools maintain a tenure policy helped 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 repudiate these accomplishments. We have reviewed the various arguments in favor of retrenching from the commitment to tenure; we conclude that none of them justifies what would inevitably be seen as a withdrawal from the standards and values of the universities where American legal education has flourished.

As our colleagues Robert A. Gorman and Elliott S. Milstein correctly observe in their submission to the Council, "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 of tenure, not abandoning it. In the current climate for legal education, it would send a confusing and profoundly misguided signal for the legal academy’s accrediting body to abandon its longstanding commitment to tenure as the best system for assuring intellectual merit, professional excellence, and academic freedom. No matter how well intentioned the proposals currently before the Council may be, the ABA cannot control how the profession, the academy, and the public will perceive such radical departures from its longstanding standards. Based on our experience and engagement with such matters, the AAUP believes that the judgment would be, on balance, a decidedly negative one. At this important juncture, we cannot afford for American legal education to come to be perceived as 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,

Rudy Fichtenbaum
President

Julie Schmid
Executive Director

Hank Reichman
Chair, Committee A on Academic Freedom and Tenure

Theresa Chmara
General Counsel