

Co-Presidents
Jackie Gardina
Ngai Pindell

Past Presidents

Norman Dorsen
Howard Lesnick
David Chambers
George Alexander
Wendy Williams
Rhonda R. Rivera
Emma Coleman Jordan
Charles Lawrence
Howard Glickstein
Sylvia Law
Patricia A. Cain
Jean C. Love
Linda Greene
Phoebe Haddon
Stephanie Wildman
Carol Chomsky
Margaret Montoya
Paula Johnson
Michael Rooke-Ley
José Roberto Juárez, Jr.
Holly Maguigan
Eileen Kaufman
Tayyab Mahmud
Margaret Martin Barry
Deborah Waite Post
Raquel Aldana
Steve Bender

Board of Governors

Deleso Alford
Raquel Aldana
Elvia Arriola
Michael Avery
Steven Bender
Emily Benfer
Barbara Bernier
Marjorie Cohn
Douglas Colbert
Benjamin Davis
Olympia Duhart
Patricia Falk
Ruben Garcia
Joan Howarth
Peter Joy
Lawrence Levine
Hope Lewis
Beth Lyon
Solangel Maldonado
Karla McKanders
Adele Morrison
Camille Nelson
Hari Osofsky
Marc Poirier
Lisa Pruitt
Sara Rankin
Denise Roy
Natsu Taylor Saito
Mark Sidel
Aviam Soifer
Speartt

Equalizer Editor

Raleigh Levine

Treasurer

Patricia A. Cain

CLEA Liaison

Claudia Angelos

Secretary

Robert Lancaster

SALT
SOCIETY OF AMERICAN LAW TEACHERS
William S. Boyd School of Law, UNLV
Box 451098 • 4505 S. Maryland Parkway
Las Vegas, NV 89154-1098

April 24, 2013 SALT Statement on Standards 405 & 315
April 23, 2013

We write on behalf of the Society of American Law Teachers (“SALT”) both to protest the late delivery of the drafts to be considered at the April SRC meeting and to reiterate our concerns regarding the ongoing revisions to Standard 405 and Standard 315.

We continue to be frustrated with the limited and constrained opportunities to engage with the SRC on the important issues being considered by the Committee. Under Department of Education regulations, the comprehensive review should be conducted with a “meaningful opportunity [for the Council’s constituencies] to provide input in the review” of the accreditation standards. Because drafts of proposed standards are consistently released for review only shortly before the SRC meetings—this time, less than a week in advance—there is little or no time for either individuals or organizations to read, digest, and comment on the proposals in time for their comments to be considered (either adequately or at all) in the ensuing discussion. The problem is compounded by the absence of any explanation from the subcommittees regarding what they have changed and why. Standards may be voted on at the meeting with little or no input from non-members of the Committee, or a subcommittee may go back to work in private and once again release a draft only shortly before the next consideration. While we have had several formal opportunities to address the Committee and written comments we send are always received and circulated, the timing of the consideration of new material does not permit us to effectively engage on the material actually before the Committee for discussion. We ask, again, that the process be changed to permit such effective engagement before decisions are made and drafts sent to the Council.

With the April materials posted only in the last several days, we have had little opportunity to consider the new proposals, to discuss them within our organization, and to provide comments before the SRC consideration. Given the significance of the issues being discussed, however, we have made an effort to comment on two proposed standards, on two issues that have been central to us since the beginning of the comprehensive review: security of position and bar passage requirements. With so little time to prepare, these remarks are necessarily brief and less than comprehensive.

Standard 405

As the committee continues to revise 405, we urge you to consider that the standard not only has a practical impact on our students, faculty, and profession, but it also expresses the core principles and values that guide legal education. Because all of the current proposals depart from the long-standing recognition that only a system of tenure can adequately protect faculty rights to academic freedom and full participation in governance, and because of the important principle of equal access to tenure among faculty regardless of the subject matter taught, SALT expresses our opposition to all the alternatives proposed for discussion and adoption. We encourage the Committee to consider other alternatives at its April 2013 meeting.

In SALT's October 2012 statement, we outlined the principles that we believe should guide revisions to Standard 405. Specifically, we argued that making artificial distinctions between doctrinal, clinical and legal writing faculty undermines the legal education mission. We stressed that all aspects of the law school mission – scholarship, teaching, service to the school, the community and the profession – are central for legal education. This value is reflected in the ABA accreditation standards that call for faculty with a “high degree of competence” in delivery of all these “core responsibilities” and has been acknowledged in discussions at the SRC meetings themselves.

We recognize that the full implementation of such principles may take some years to accomplish. As an interim measure, SALT supports revisions to Standard 405 that eliminate caste-like distinctions among career faculty groups and reinforce the importance of tenure for effective faculty governance. To that end, SALT's January 2013 statement endorsed the draft proposed by the Clinical Legal Education Association (“CLEA”). If the Committee is unwilling to consider a standard that requires law schools to create a pathway to tenure for all qualified full-time law school faculty, we ask the Committee to reconsider the CLEA proposal as one that recognizes the value of tenure and moves the standard in the right direction. The CLEA draft retains the language of the current standard that provides tenure as the norm for faculty and comparable security of position as an alternative for clinical faculty and it supports the same “comparable security of position” for faculty who teach legal writing. Though not ideal, the CLEA draft responds more effectively to the principles and realities at play than any of the alternatives proposed at the January or April meetings.

- Alternative A deemphasizes the importance of tenure through a policy that provides for “tenure *or* a comparable form of security of position for full-time faculty.” Moreover, the “comparable form of security of position” is undefined. Alternative A also reinforces harmful hierarchies among faculty groups by articulating different policies for each group. It marginalizes legal writing faculty by calling only for “such security of position . . . as may be necessary to attract and retain a faculty that is well qualified to provide legal writing instruction.” It also omits the specific reference to legal writing faculty having security of position “necessary to . . . safeguard academic freedom.” While 405(b) would require a law school to have and adhere to policies that provide protection for the academic freedom of all full-time faculty, that protection is ephemeral without tenure or security of position recognized as essential for ensuring academic freedom for other faculty.
- Alternative B does not require that any faculty have tenure and allows schools to determine who has which security of position case-by-case or by category.
- Alternative C does not require any particular form of security of position. While it does not make distinctions based on a faculty member's academic field or teaching methodology – an important step toward equality – it does so at great expense. As we have argued before, equal treatment should be accomplished by raising, not lowering, the standard for faculty.

Before the SRC began its comprehensive review of the standards, the Council appointed a Special Committee on Security of Position and charged it with considering two issues:

(1) "Assuming arguendo that the Council were to eliminate the current Standards and Interpretations on 'security of position' and adopt other Standards and Interpretations to protect the interests that the current 'security of position' provisions are designed to protect--which are identified in Part IX of the Task Force Report as including academic freedom, attraction and retention of well-qualified faculty, and 'ensuring that law school governance decisions that can affect curriculum will have the benefit of the comments of sectors of the law school faculty whose knowledge and perspective otherwise might be unrepresented'--what specific wording could be employed (in Standards or Interpretations or both) to protect these interests adequately?"

(2) "Will the new provisions proposed by the Special Committee serve the interests underlying the existing 'security of position' provisions as effectively, more effectively, or less effectively than the existing provisions?"

The Task Force reported in May 2008, providing a thoughtful consideration of the meaning and importance of tenure and its relationship to academic freedom and governance rights. That Report provides a necessary foundation for the decision that the SRC and Council will make regarding Standard 405, a foundation that seems to have been lost to memory with the changing composition of the SRC and Council. We urge the members of the SRC to read and consider that report as the SRC moves forward in discussing Standard 405. We append a copy of the report to facilitate that consideration.

Given the widespread recognition of the importance of tenure or protecting academic freedom and faculty governance rights and the goal of removing faculty hierarchies within the academy in order to ensure adequate curricular attention to doctrine, skills, and values, we believe that all of the current alternatives are unsatisfactory. They fail to appreciate the impact of the standard on our students, faculty, and profession and contradict the core principles of academic freedom and equality. Moreover, they are unresponsive to the more than 70 law schools that submitted resolutions to the SRC, challenging the suggestion that tenure not be a required element in the provisions governing security of position. For all of these reasons, SALT opposes each of the current alternatives and endorses CLEA's draft as an acceptable, interim revision of Standard 405.

SALT appreciates the many efforts by the SRC and other groups to improve Standard 405. But Standard 405 should not reinforce inequities among faculty based on the subject matter taught. It should not ignore the importance of tenure to ensuring academic freedom and full, engaged faculty governance.

Standard 315

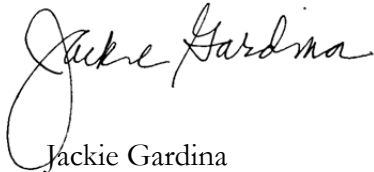
We have had little opportunity to review the newly proposed draft for Standard 315 on bar passage requirements for law schools. We recognize and appreciate that the new draft responds to comments from SALT and other organizations raising concerns about the impact of previously proposed language on diversity of student bodies. We are pleased to see that the new draft does not focus exclusively on first-time bar pass statistics, which would have had a particularly problematic effect. We remain concerned about the impact of the new draft, and urge the SRC to explore the ability of law schools to comply with any changes from the current standard before adopting them. In particular, the SRC should consider:

- What impact the change from 75% to 80% bar passage will have, especially on schools with large populations of diverse students who statistically have lower bar pass rates;
- How many administrations of the bar will be covered in the focus on bar passage “no later than the end of the second calendar year following their graduation”;
- Whether schools will easily be able to collect data on 100% (rather than the current 70%) of their graduates, and how they will demonstrate inability to acquire information on some students;
- The impact on schools located in, and whose students take the bar exam in, jurisdictions with significantly lower bar pass rates than other states;
- The impact on bar pass rates of students who change course and choose career paths that do not include taking the bar exam.

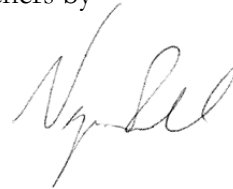
We urge the SRC to ask in each instance why a change from the current standard is necessary as well as thoroughly analyze the effects of any change using data on bar passage already available.

Once again, we thank the SRC for the opportunity to comment, but ask that in the future proposed drafts be provided well in advance of their consideration to provide reasonable opportunity for review and comment.

Submitted on behalf of the Society of American Law Teachers by



Jackie Gardina
Co-President



Ngai Pindell
Co-President

REPORT OF SPECIAL COMMITTEE ON SECURITY OF POSITION

Introduction

In May 2007, the Accreditation Policy Task Force, which was formed by William Rakes, Esq., the then-Chair of the ABA Section of Legal Education and Admissions to the Bar, issued its report to the Council suggesting various areas that the Section might pursue to improve the current accreditation process. As it noted in its introduction, The Preamble to the current Standards recognizes that the accreditation process should be designed and administered in a manner that "protect[s] the interests of the public, law students, and the profession." And further, The Preamble states that accreditation standards should be "minimum requirements designed, developed, and implemented" to advance "the basic goal of providing a sound program of legal education." The Task Force also noted that "the accreditation process should afford law schools a maximum degree of independence, autonomy, and opportunities for innovation and uniqueness."

The Task Force made recommendations with regard to numerous issues related to law-school accreditation. In Part IX of its report it considered the question whether the Standards should continue to address what was termed the "security of position" of various members of the law school faculty. In particular, it considered whether the current five provisions in the Standards affording different types of security of position for different categories of law-school faculty members ought to be reexamined. These included: Standard 206(c), covering deans; Standard 405(c), covering clinical faculty members; Standard 405(d), covering legal writing teachers; Standard 603(d), covering law librarians, and Standard 405(b), covering all other faculty members. These provisions had been criticized in more recent years as, on the one hand, not representing minimal requirements and thus hampering individual schools' opportunities for innovation or autonomy, and, conversely, as a result of the way in which they evolved, as making it difficult to understand distinctions drawn between different categories of faculty now and how they might apply in the future as new specialties and positions are added. While the Task Force members all agreed that it is entirely appropriate for the Standards to employ suitably-framed mechanisms to protect academic freedom and to contain mechanisms to assure that law schools will attract and retain well-qualified faculty members, the Task Force was unable to agree on whether the Section should pursue further review of the Standards to see whether alternative approaches could be developed that would more directly address those concerns. Thus, it made no recommendation on the matter, but rather detailed in its report the varying considerations and arguments that it had discussed.

The Council discussed the Task Force report at its June and August 2007 meetings, referring various recommendations to be implemented through other committees or by the staff. With regard to the "security of position" Standards, Chief Justice Ruth McGregor, the current Chair of the Section, appointed this Special Committee on Security of Position in October 2007, to follow up on Part IX of the Task Force Report. In particular, the Committee was charged with considering two issues:

(1) "Assuming arguendo that the Council were to eliminate the current Standards and Interpretations on 'security of position' and adopt other Standards and Interpretations to protect the interests that the current 'security of position' provisions are designed to protect--which are identified in Part IX of the Task Force Report as including academic freedom, attraction and retention of well-qualified faculty, and 'ensuring that law school governance decisions that can affect curriculum will have the benefit of the comments of sectors of the law school faculty whose knowledge and perspective otherwise might be unrepresented'--what specific wording could be employed (in Standards or Interpretations or both) to protect these interests adequately?"

(2) "Will the new provisions proposed by the Special Committee serve the interests underlying the existing 'security of position' provisions as effectively, more effectively, or less effectively than the existing provisions?"

The Committee's charge was to report back to the Council at its June 2008 meeting on these two questions.¹ If any alternatives are identified that the Council determines merit further consideration, then it was understood that those would be forwarded for study by the Standards Review Committee and, whatever that Committee determined to recommend would go through the normal public comment and hearing process. Thus, the Committee did not attempt to hold any hearings, but rather focused its efforts on developing a report that could inform the Council about the issues identified and the Committee members' evaluation of the strengths and weaknesses of alternatives to the current approach in the Standards.

The Committee held two in-person meetings in Chicago, the first on December 9, 2007, and the second on April 13, 2008. Before its first meeting, a substantial collection of readings was provided, dealing with academic freedom, faculty governance, tenure systems, clinical faculty, etc. The first meeting focused on discussing the underlying issues, and on organizing the Committee's work, creating an outline of what was to be covered in the Report and assigning individuals to prepare drafts of various sections and background papers on how and why the goals of guaranteeing academic freedom, the attraction and retention of well-qualified faculty, and the faculty's role in governance applied to the five positions currently dealt with in specific Standards and Interpretations. During the spring, individual committee members circulated and commented on draft sections, including a possible alternative approach, so that the second meeting was spent approving a tentative final draft of these sections and discussing how to approach the final section, assessing whether the approach outlined serves the interests underlying the existing "security of position" provisions as effectively, more effectively, or less effectively than the existing provisions. The final draft then was assembled and submitted for committee approval on-line.

The report that follows is divided into three sections. The first section explores the historical reasons that led to the identification of the need to protect academic freedom, the ability to attract and retain well-qualified faculty, and the role of faculty in institutional governance in the university setting, as well as the law school, and how those concepts have emerged in modern times. It also

¹As a result of the Consent Decree entered into by the ABA and the Justice Department in 1997, formulas were established relating to how faculty/student ratios are to be calculated. In some instances varying weights were ascribed depending on which one of the five positions identified in the Standards and Interpretations was involved. This report does not address the policies or practices of calculating faculty/student ratios.

recognizes the historical development of the tenure system as a means of addressing those three concerns. The second section explores an Alternative Approach to the Standards and Interpretations to address the issues raised in the first section. And the third section assesses the strengths and weaknesses of the Alternative Approach in contrast to the current Standards.

It is the Committee's hope that, at the least, this report will provide a better understanding of the history and policy issues involved in protecting academic freedom, the ability to attract and retain a well-qualified faculty, and ensuring an appropriate faculty role in law school governance, as well as how these three protections apply (or ought to apply) to the various participants in the law-school community. If that is accomplished, then any changes now or in the future regarding Standards and Interpretations dealing with security of position can be made recognizing what minimally needs to be covered to ensure these values are protected, and what might be open to institutional variation.

I. Historical Background and Policies Implicated

A. History of Tenure in Academic Freedom and Shared Governance Rules

Higher education has long occupied a special place in the development of the United States. By the time of the American Revolution, nine colleges were granting degrees in the United States compared to only two (Oxford and Cambridge) in England.² Harvard, the oldest, was closely modeled on Oxford and Cambridge, with one significant difference. The Massachusetts Bay colonists could (and did) emulate the curriculum and rules of English colleges, but they did not have enough scholars in the colony to also adopt the English system of faculty governance. Out of necessity they established a lay (in the sense of nonfaculty) governing board³. This new form of governance was in turn adopted by all the other colonial colleges and, to this day, it is the most common model of university and college governance in the United States.

Lay governing boards worked well for several centuries because most institutions of higher education were small and sectarian. Faculty was expected simply to teach a narrow curriculum that used the classics to further religious ends. By the late nineteenth century, however, with science taking the place of religious studies in a growing number of schools, and faculty developing scholarly expertise in a variety of fields, faculty began to clash with governing boards over what to teach and how to teach it. One of the most publicized clashes occurred at Stanford, but there were also major disputes at Wisconsin, Vanderbilt and the University of Pennsylvania.⁴

²Harvard (1636); William and Mary (1693), The Collegiate School at New Haven (Yale 1701), The College of Philadelphia (University of Pennsylvania, 1740), The College of New Jersey (Princeton 1746), King's College (Columbia, 1754), The College of Rhode Island (Brown 1764), Queen's College (Rutgers, 1766), and Dartmouth (1769).

³RICHARD HOFSTADTER & WALTER P. METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* 124-28 (1955) [hereinafter HOFSTADTER & METZGER]; SAMUEL ELIOT MORISON, *1 HARVARD COLLEGE IN THE SEVENTEENTH CENTURY* 13-21 (1936).

⁴RICHARD HOFSTADTER & WALTER P. METZGER, *supra* note 3, at 320-468.

Edward A. Ross was a prominent economist who was recruited to the Stanford faculty. His advocacy of free silver and opposition to the importation of foreign labor offended Mrs. Leland Stanford, the sole trustee of the university that she and her late husband had founded in memory of their only child, Leland, Jr.⁵ She demanded that David Starr Jordan, the President of Stanford, fire Professor Ross. Jordan delayed for as long as he could, but ultimately he capitulated and in 1900 forced Ross out.

In response to the Ross incident as well as to clashes between faculty and governing boards at other universities, faculty from around the nation formed the American Association of University Professors (AAUP) and, in 1915, issued a Declaration of Principles of Academic Freedom and Tenure.⁶ The Declaration was premised on this understanding of the purpose of a university:

It should be an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally, perchance, it may become a part of the intellectual food of the nation or of the world.

The Declaration made clear that academic freedom was not for the benefit of faculty. Rather, it was "in the interest of society at large, that what purport to be the conclusions of men trained for, and dedicated to truth, shall in fact be the conclusions of such men and not echoes of the opinions of the lay public, or of the individuals who endow or manage universities."

To ensure the independence of thought and utterance necessary to germinate new ideas, the Declaration held that the job security of faculty should be comparable to that of federal judges:

[T]he relationship of professor to trustees may be compared to that between judges of the federal courts and the executive who appoints them. University teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees, than are judges subject to control of the president, with respect to their decisions. . . .

The tenure embraced by the Declaration was premised on a procedural requirement -- that faculty must approve of dismissals or discipline of other faculty because they are best qualified to judge whether academic freedom is at stake. In the words of the Declaration the point is:

To safeguard freedom of inquiry and of teaching against both covert and overt attacks, by providing suitable judicial bodies, composed of members of the academic profession, which may be called into action before university teachers are dismissed

⁵ORRIN LESLIE ELLIOTT, *STANFORD UNIVERSITY: THE FIRST TWENTY-FIVE YEARS* 11 (1937).

⁶American Association of University Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure, 1 AAUP POLICY DOCUMENTS AND REPORTS 291-301 (10th ed.2006); HOFSTADTER & METZGER 476-77 (1955).

or disciplined, and may determine in what cases the question of academic freedom is actually involved.

Thus, the academic freedom embraced by the profession is a right that belongs to the faculty (or a board or committee representative of the faculty). Although it may protect individual faculty members, it is not an individual right. Academic freedom also comes with corresponding duties:

The liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry. . . .

The 1915 Declaration⁷ also made clear that academic freedom is as important to the teacher as to the scholar.

It is scarcely open to question that freedom of utterance is as important to the teacher as it is to the investigator. No man can be a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity. It is clear, however, that this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or frankly, or that college and university teachers in general are a repressed and intimidated class who dare not speak with that candor and courage which youth always demands in those whom it is to esteem. The average student is a discerning observer, who soon takes the measure of his instructor. It is not only the character of the instruction but also the character of the instructor that counts; and if the student has reason to believe that the instructor is not true to himself, the virtue of the instruction as an educative force is incalculably diminished.

By 1940, a briefer version of the 1915 Declaration was negotiated between the AAUP and the Association of American Colleges (AAC)⁸ and soon widely adopted. By 2007, more than 200 learned societies and higher education associations had formally endorsed the 1940 Statement and its 1970 Interpretive Comments. The Statement has also been adopted by most colleges and universities in the United States and is incorporated or referenced in typical contracts with faculty around the nation.

The 1940 Statement also underscores that academic freedom is not for the benefit of faculty:

⁷The ABA Standards for Approval of Law Schools contains a similar though less vivid statement in Appendix 1: "Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom of learning." Thus, academic freedom covers a faculty member's teaching regardless of whether that faculty member also has scholarship responsibilities.

⁸American Association of University Professors & Association of American Colleges, 1940 Statement of Principles on Academic Freedom and Tenure, AAUP POLICY DOCUMENTS & REPORTS 3-11 (10th ed. 2006).

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Tenure is identified as a means, not an end, of the Statement:

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and 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 students and to society.

Neither the 1915 Declaration nor the 1940 Statement says or implies that it might be permissible to discriminate among fields of study by allocating more academic freedom to some and less to others.

Beginning in the 1950s, academic freedom was embraced by the judiciary, as well as higher education. The first mention of the importance of academic freedom by the Supreme Court came in a series of decisions that arose out of the cold war.⁹ In *Sweezy v. New Hampshire*,¹⁰ Chief Justice Warren wrote for a plurality of the Court that:

The essentiality of freedom in the community of American universities is almost self evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. 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.¹¹

In his concurring opinion in *Sweezy*, Justice Frankfurter, joined by Justice Harlan, quoted from a conference of senior scholars from the University of Cape Town and the University of Witwatersrand:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹²

⁹See, e.g., *Adler v. Board of Education*, 342 U.S. 485 (1952); *Wieman v. Updegraff*, 344 U.S. 183 (1952); and *Keyishian v. Board of Regents of the University of the State of New York*, 358 U.S. 589 (1967).

¹⁰354 U.S. 234 (1957).

¹¹354 U.S. at 250.

¹²354 U.S. at 263.

Justice Frankfurter's four essential freedoms have since been cited with approval by both federal and state courts. His summary also underscores that deciding who may teach—i.e., awarding tenure—is a decision that is to be made on academic grounds.

The procedural dimensions of academic freedom are only one aspect of the unique governance structure of colleges and universities in the United States. Although most institutions of higher education by 1940 had adopted a form of shared governance that entrusts the faculty with responsibility for academic matters, in 1966 the AAUP, the American Council of Education (ACE), and the Association of Governing Boards of Universities and Colleges (AGB) adopted a joint Statement on Government of Colleges and Universities¹³ that clarified the roles of governing boards and faculties. The Statement on Government provides in pertinent part:

The faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which related to the educational process. On these matters the power of review or final decision lodged in the governing boards or delegated by it to the president should be exercised adversely only in exceptional circumstances, and for reasons communicated to the faculty....

The faculty sets the requirements for the degrees offered in courses, determines when the requirements have been met, and authorizes the president and board to grant the degrees thus achieved.

Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal....

Thus, the Statement on Government makes clear that there is a relationship between tenure and the role of faculty in governance as well as between tenure and academic freedom. Faculty would not be able to exercise primary responsibility for such matters as curriculum or requirements for students to graduate if they were simply at will employees. Tenured faculty would not have the necessary academic qualifications if they were selected without the involvement of other scholars.

The governance role of faculty has also been acknowledged by the Supreme Court. In *NLRB v. Yeshiva University*,¹⁴ a majority of the Court, in an opinion by Justice Powell, held that the faculty at Yeshiva could not bargain under the National Labor Relations Act because they are managerial employees. In explaining its conclusion, the Court noted:

The "business" of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.... The university requires faculty participation in

¹³ AAUP & ACE & AGB, AAUP POLICY DOCUMENTS & REPORTS 135-40 (10th ed. 2006).

¹⁴ 444 U.S. 672 (1980).

governance because professional expertise is indispensable to the formulation and implementation of academic policy.¹⁵

There are several lessons that can be drawn from this overview of the history of tenure and its relationship to academic freedom and shared governance.

First, tenure was adopted to protect against overreaching by lay governing boards. During the Cold War, it also became a shield to protect academic freedom from external threats.

Two, tenure was designed to enable universities to be sources of new knowledge for the common good and to provide excellent teaching of curricula designed by experts. It was not designed for the benefit of faculty.

Three, from the beginning, tenure has been linked to the governance of universities and colleges as well as to academic freedom. Tenure and academic freedom are grounded in the understanding that faculty are best qualified to oversee academic matters such as the curriculum and deciding who is qualified to be a tenured faculty member.

Four, the AAUP 1915 Declaration establishes a revealing analogy between faculty and federal judges. Just as tenure for judges is designed to enable them to provide justice, even when a decision is unpopular, so, too, academic tenure is to enable faculty to discover and transmit new knowledge, even when their views challenge powerful interests.

Five, tenure has an economic dimension. It was designed to enable colleges and universities to recruit and retain the best teachers and scholars despite smaller salaries than could be earned in other occupations.

Six, tenure never has meant permanent employment. It can be terminated for cause so long as the faculty, or a representative group of the faculty, finds that the termination is not a violation of academic freedom.¹⁶

Seven, unlike the right to free speech protected by the First Amendment, academic freedom is not an individual right. Rather, it is a freedom of the academic profession.¹⁷ Thus it is the faculty that has authority to decide what will be taught and by whom, rather than individual members of the

¹⁵444 U.S. at 688.

¹⁶"[T]he term 'tenure' bears common reference to the teaching employment status generally granted after a probationary period which serves to protect a teacher from dismissal except for serious misconduct or incompetence. *Drans v. Providence College*, 383 A.2d 1033, 1039 (R.I.1978). The primary function served by the grant of tenure is the preservation of academic freedom effected through the provision of job security. Scholars are thereby encouraged to vigorously pursue and disseminate research without fear of reprisal or rebuke from those who support conventional wisdom. *Id.*" *Hulen v. Yates*, 322 F.3d 1229, 1242-43 (10th Cir. 2003).

¹⁷See generally Robert Post, *The Structure of Academic Freedom*, in *ACADEMIC FREEDOM AFTER SEPTEMBER 11*, 61 (Beshara Doumani ed., 2006); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the 'Third Essential Freedom'*, 45 *STAN.L.REV.* 1835 (1993).

faculty.¹⁸ Another way to distinguish academic freedom and the right to free speech is that academic freedom comes with obligations. The 1940 AAUP Statement, for example, provides that faculty "should be careful not to introduce into their teaching controversial matter which has no relation to their subject."¹⁹

B. Modern Tensions

Turning to modern times, if the various "security of position" provisions included in the current Standards and Interpretations did not exist, they or some comparable substitute would have to be invented. While the underlying principles can be characterized in many different ways, they include academic freedom, ensuring the attraction and retention of well-qualified faculty, and ensuring that law school governance decisions that can affect curriculum, academic standards, and faculty appointments will have the benefit of the comments of sectors of the law-school faculty whose knowledge and perspective otherwise might be unrepresented. Although many of these features exist in one form or another, it is important to treat them as a whole, as the various features all anchor the fully-functional faculty member and law school.

To show how these features are interrelated, it is helpful to begin with the work of Matthew Finkin, a labor and education scholar, whose 1996 book, *The Case for Tenure*, best summarizes the concept and its practical manifestations. On the connection between tenure and academic freedom, he says, in response to suggestions that these individual concepts need not be reinforced and that academic freedom can be safeguarded without tenure systems:

This argument is valid under two conditions: First that all governing boards and administrators of institutions of higher education believe so strongly in academic freedom that every charge of abuse, and every suspicion of abuse, would inspire them with such a zeal to protect the offender that they would rather see the institution which they govern or administer impoverished or destroyed than allow the defender to be removed from his post. Second, that it is always possible to distinguish offenses that come under the heading of abuse of freedom from all other reasons for dispensing with the services of a teacher or scholar. . . . Neither of the two conditions is satisfied.²⁰

Academic economists who have carefully studied the economics of college labor also have written that the tenure system is a logical and efficient outgrowth of the way that academic employment is structured in the United States work place. Two economists who later served as college presidents wrote:

¹⁸See, e.g. *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (2nd Cir. 1986).

¹⁹See, e.g., *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006)(holding a college or university may direct its instructors to keep personal discussions about sexual orientation or religion out of a class or clinic.).

²⁰MATTHEW FINKIN, *THE CASE FOR TENURE* 24 (1996).

[The] institution of tenure is not simply a constraint imposed on universities, whether to protect faculty jobs or to ensure academic freedom, but an integral part of the way universities function. The tenure/probation system is a reasonable response to the highly specialized nature of academic work and to the long training such work requires. An intelligent understanding of the operation of universities and a constructive approach to the reform of their personnel policies need to take all these realities into account.

This conclusion need not be as complacent as it may sound. One could, for example, question whether academic training needs necessarily to be as specialized as it has become. It is also true that our analysis presents a somewhat idealized picture of how tenure and promotion decisions are made, and there is room for argument about how close to these ideals various colleges and universities come in practice. Our point, however, is that criticism of the tenure system and proposals for reform must come to grips with the quite real and special academic personnel problems that the tenure system responds to. Much existing criticism, by failing to understand the economic functions of tenure, fails to do that.²¹

In considering the modern importance of affording some tenure-like protection to law faculty, it is important to appreciate the extent to which some faculty is threatened in conducting their work. A number of recent attacks have arisen in law schools where professors held unpopular beliefs and where legal clinics undertook unpopular litigation against powerful interests. Thus, the authors of a recent study concluded that

the breadth of clinical programs that have been attacked demonstrates that no law clinic program is immune from such assaults. Any law school clinic is just one controversial case, one unpopular client, one angry legislator, alumnus or opposing attorney, or one unsupportive dean or university official away from attempts to interfere in its case and client selection.²²

Not all governing boards have stood to defend the law faculty or the law programs, either in the threats brought by commercial interests against academic publishers, or in the political actions taken against various student clinics at several law schools. These and other documented and highly-visible examples of faculty members speaking out and being vilified and removed and similar actions not as publicly-visible or as politicized all demonstrate the clear need for a form of tenure-like security and academic freedom.²³ History and casebooks are replete with other examples.

²¹Michael McPherson & Gordon Winston, in MATTHEW FINKIN, *THE CASE FOR TENURE* 120 (1996).

²²Robert Kuehn and Peter Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORD.L.REV.* 1971, 1992 (2003).

²³See, e.g., incidents involving faculty who were critical of presidents at Bennington College and Florida Gulf Coast University, detailed in Robert O'Neil, *Alternatives to Tenure*, 27 *JCUL* 573, 577-580 (2001), and John Gravois, *Colorado Regents Vote to Fire Ward Churchill: Research Misconduct Cited, But Professor Says Decision Was Political and Sues*, *Chron. Higher Educ.*, August 3, 2007, A1 (professor fired after controversial off-campus speech, leading to investigation of his research ethics). Compare the response of Dean Christopher Edley, Jr., to demands that he fire a faculty member for legal opinions rendered while on leave in the government, Christopher

Second, because no major universities or law schools can go this route alone, it would be difficult to attract highly-qualified faculty without offering some security of position. Unlike many fields with stale job prospects and fewer opportunities to teach, most law-faculty members have attractive alternatives in the world of practice. These scholars are attracted to the academic features of the professorate, but they would not likely gravitate toward teaching positions that did not have the requisite and traditional security of position. Most faculty forgoes other occupational opportunities precisely because they have active research and pedagogical imaginations and questions they wish to pursue. Society does not advance if the security and independence accorded inquisitive faculty would be curtailed by some other system of review. Retaining faculty is as important as attracting them. In any field, frequent turnover guarantees inexperience. And if teaching and scholarship are so easily mastered that the inexperienced can do it at a level of excellence, the value of a university to society is not what we have believed it to be.

As a final matter, no law school can exist without faculty who has some security of position. The work of law teaching is conducted by teachers, as is its institutional governance. Academic decision-making can only be undertaken by a committed, long-term faculty, dedicated to the institution's growth and development. Judges, practitioners, and public members of the Council can analogize from the many collateral activities they each undertake in their own work, whether it be client-cultivation, firm development, judicial administration, or other essential activities--activities that can only be done by organization members who make difficult decisions about the mission, work, and ethos of their own work places. Faculties must engage in this work, free of concern that doing so will render them unpopular or peripheral to the core functions. Faculty with no security of position cannot either do their prime work or this organization work without some security of position. It is highly doubtful that any comprehensive curricular reform can occur or that faculty governance can develop in a system where there is no security of position, and no means of cultivating long-term faculty loyalties or service responsibilities. Where there is no full-time faculty with long-term institutional loyalties and well-developed institutional interests, there can be no professional center, and the various centripetal forces will not allow the required growth and development of the organization.

Thus, as an accrediting body the focus for the ABA Section should be on developing standards and interpretations that best ensure the development of the professional center and the freedom that allows the faculty to experiment, research, and grow, thereby furthering the improvement of legal education.

II. Regulatory Alternatives

Against this background discussion of the values protected by having tenure or tenure-like requirements in the accreditation Standards the question becomes whether there are ways to achieve that objective other than the approach taken in the current Standards and Interpretations so as to allow more freedom, within certain boundaries, for schools to experiment with different models

designed to achieve the same objectives. This was the essential charge given to this Committee and the Alternative Approach that we have examined is what follows. It assumes that all the current Standards and Interpretations dealing with the five law-school positions discussed above are no longer in the regulations and that instead a new regime modeled along the following lines is introduced.

Standard # 1. Academic Freedom

(a) To ensure the development of a sound educational program, a law school shall have an established and written policy with respect to the protection of the academic freedom of its faculty members and shall provide procedures to ensure that its policy is followed, including rules that prohibit the nonrenewable, denial of promotion, or loss of a faculty position unless a representative group of faculty agree that the determination is not a violation of academic freedom and that offer the affected faculty member the opportunity to present any claims to the faculty making that determination.

(b) A law school shall provide protection for the academic freedom of its full-time and part-time faculty in exercising their teaching functions.

(c) A law school shall provide protection for the academic freedom of its full-time faculty in pursuing their research interests.

(d) A law school shall provide protection for the academic freedom of its full-time faculty in pursuing their governance responsibilities.

(e) A law school shall recognize the academic freedom of its full-time faculty when exercising their right to make public comments outside the school.

Interpretation 1-1. The term "faculty" as used in Standards # 1-3 includes all individuals who have teaching and/or research responsibilities in the law school, regardless of their titles, their field of study, and any administrative responsibilities they may bear.

Interpretation 1-2. Any faculty position within a law school that is part of a traditional tenure system is presumptively one that is designed to protect academic freedom.

Interpretation 1-3. For full-time faculty positions in the law school that do not carry traditional tenure, the law school bears the burden of establishing that it provides sufficient protection for academic freedom. A school cannot meet its burden without presenting evidence of, at a minimum, explicit acceptance of the 1940 AAUP Statement of Principles on Academic Freedom and Tenure and its 1970 Interpretive Comments in any employment relationship with those faculty members together with an established procedure involving a representative group of faculty to review the performance of those faculty for appointment, renewal, and termination.

Standard # 2. Attracting and Retaining a Competent Faculty

To ensure the development of a sound educational program, a law school shall establish and maintain conditions that are designed to attract and retain a competent full-time faculty.

Interpretation 2-1. Any faculty position within a law school that is part of a traditional tenure system is presumptively one designed to attract and retain a competent faculty.

Interpretation 2-2. For faculty positions that do not include the possibility of a tenured appointment, the law school bears the burden of showing that it has established sufficient conditions to attract and retain competent faculty. In assessing whether the school has met that burden, the following may be considered:

(a) evidence of faculty retention and success at attracting new competent faculty to those positions over a seven-year period;

(b) evidence of a system ultimately resulting in eligibility for a separate form of tenure or for long-term, presumptively renewable contracts for the faculty members involved, including a process by which those contract renewals include the review and recommendation of other faculty and the development of standards by which the contract faculty members are assessed;

(c) evidence of other perquisites similar to tenured faculty, such as those that offer faculty a role in institutional governance and that provide sufficient training and support to enable faculty to develop their talents and knowledge and thereby enhance their contributions to the educational program;

(d) any other evidence relevant to showing that the school has established a climate encouraging the attraction and retention of competent faculty who are not in a traditional tenure-track system.

Interpretation 2-3. This Standard does not preclude a law school from having a limited number of fixed, short-term faculty appointments in a program or having an experimental program of limited duration.

Standard # 3. Faculty Role in Governance

To foster the development of a sound educational program, a law school shall ensure that all full-time faculty members are allowed to participate in law school governance involving academic matters, such as curriculum, academic standards, methods of instruction, and faculty appointments, so that the faculty has the primary responsibility for determining educational policy. Governing boards should exercise their power adversely to the faculty in these areas only in exceptional circumstances.

Interpretation 3-1. Any faculty position within a law school that is part of a traditional tenure system is presumptively one that accords an adequate faculty role in governance in the institution.

Interpretation 3-2. For faculty positions that do not include the possibility of a tenured appointment, evidence that those faculty members are afforded meaningful participation in faculty meetings, committees, and other aspects of governance exercised by tenured faculty generally may demonstrate compliance with this Standard.

Interpretation 3-3. This Standard does not preclude a law school from determining that faculty members not in tenured positions have limited voting rights on certain matters, such as faculty appointments.

III. Assessment of the Effectiveness of the Alternative Approach in Contrast to the Current Standards

The second part of the Committee's charge was to consider whether the Alternative Approach would serve the three interests underlying the current "security of position" Standards and Interpretations "as effectively, more effectively, or less effectively" than the existing provisions. In addressing this charge and, recognizing the limited time frame involved in producing this Report, the Committee determined that its focus would be on raising for the Council and others the various issues or comparisons between the two approaches that need to be considered. The Committee is not recommending either the Alternative Approach or the current relevant Standards and takes no position on which approach is ultimately preferable. That determination more appropriately should be lodged in the Standards Review Committee as that Committee will have the opportunity to gather more information and public comment on the issues raised below before reaching its conclusion. Thus, what follows is a discussion of the positive features of the Alternative Approach with a listing of potential downsides or risks that might come from abandoning the current Standards and Interpretations. This listing does not necessarily reflect agreement within the Committee regarding the realistic implications or importance of any of the issues mentioned. Rather, it reflects various ideas and thoughts that were offered during the Committee's discussions and the Committee's agreement that it would be helpful to surface these issues for the Council and the Standards Review Committee to consider in evaluating whether the Alternative Approach should undergo further consideration.

Despite not reaching any final conclusions regarding an ultimate preference between the Alternative Approach and the existing Standards, there is one recommendation that the Committee unanimously makes. The Standards and Interpretations must continue to include provisions that ensure the three elements that underlie the current "security of position" regulations: (1) that faculty should be provided academic freedom in their teaching, research, governance responsibilities, and public comments; (2) that law schools need to have mechanisms that ensure that they can attract and retain a qualified faculty; and (3) that the faculty's role in the law school's governance of academic matters should be preserved.²⁴ These three elements are critical to ensuring the development of a sound educational program.

²⁴This Report does not address various arguments that focus on whether there should be equality of positions across all fields of study, but limits its approach to the three values upon which traditional tenure systems are based. Some Committee members would have preferred to address the "equality of positions" issue in this document. Nor does the Report attempt to address whether there are special needs for librarians in protecting their ability to exercise their professional judgments in building the library collection. The absence of a discussion of these two issues does not

A. General Effects of the Different Drafting Approaches

The major difference between the Alternative Approach set out in the preceding section and the current Standards and Interpretations is that it is drafted along functional lines based on the policies to be fostered rather than by establishing categories of faculty and setting out precise rules related to those categories. The Alternative Approach, unlike the one in the current Standards, is more in line with what other accrediting bodies do regarding these issues in other educational settings. Thus, moving in this direction would make ABA accreditation Standards on these issues less of an "outlier" in the way they are addressed.

This alternative functional approach has several positive features. First, it makes clear the reason why the rules exist, thus fostering more transparency in regulation. Second, a functional approach allows greater flexibility to institutions to develop their programs and faculties in ways that meet the underlying objectives of the Standards and that may be deemed by them to best achieve their academic missions, but without necessarily conforming to one formula. In this way, the approach may encourage experimentation and foster the goal stated by the Accreditation Task Force of affording schools opportunities for "innovation and uniqueness." Third, this approach does not distinguish between types of faculty positions. By stating the rules in this way, it may allow them to be applied to new types of faculty arrangements that may evolve in the future and thus avoid the need to change the rules to accommodate new positions or to make difficult decisions about who does or does not qualify for treatment under a particular faculty category. Fourth, this approach avoids the current appearance of inequity in the Standards insofar as the present rules accord different treatment to different faculty positions without any clearly stated reasons for the distinctions.

Against these positive features, some Committee members raised several concerns that need to be studied and considered before adopting the Alternative Approach. First, bright lines or precise rules are easier to enforce and thus provide clearer guidance to law schools as to what is expected, as well as lessen the potential for unequal enforcement because they narrow the discretion of the Accreditation Committee in determining compliance. Thus, it was suggested that because the Alternative Approach is so different it might be dislocating to schools, at least in the short run, raising the question whether the gains are worth the cost. In particular, some noted that the categorical rules about specific subcategories of faculty that currently exist may have captured specific values or concerns related to those faculty that might be lost if the Alternative Approach were utilized. Second, the current rules evolved because earlier, general Standards language, albeit not the language of the Alternative Approach, had been deemed to exclude many faculty, causing problems in some law schools. It was noted that only through precise rules for faculty outside the traditional tenure-track had it been possible to force some schools to move forward in their skills programs. Thus, a question is whether legal education has now reached a point of recognizing the value of all faculty in ensuring a quality program so that the ABA no longer needs precise rule protections. If not, would adopting the Alternative Approach encourage law schools to return to a

indicate any determination by the Committee that they do not merit consideration. Rather, it leaves to other bodies the task of investigating them and how or whether they can be addressed in the Standards.

situation where some faculty members are more marginalized than others? Evaluating that risk was identified as an important inquiry before making any changes. Third, some felt it is important to consider the impact of abandoning specific faculty category rules on the relationship between law schools and their parent universities. It was noted that university rules often have constrained law schools in their treatment of clinical and legal writing faculty. Some universities have had difficulties in valuing skills training as a legitimate part of higher education. Thus, if clinical and legal writing faculty are not specially protected in the Accreditation Standards, even if law schools generally have embraced skills training, some universities might pressure law schools that have merged many of those faculty into tenure-track or tenure-like appointments to retreat to less secure contract arrangements for those faculty.

B. The Methodology of Establishing Compliance

The Alternative Approach, while setting out Standards based on policies, attempts in its Interpretations to set out a variety of ways in which law schools may demonstrate compliance. In each instance, tenure is listed as the first, and presumptive, means of compliance. For positions a school does not consider eligible for tenure, the school bears the burden of establishing compliance and various types of evidence are listed as to how a school might meet that burden. This approach thus offers a flexible system so that schools that wanted to do so could experiment with something other than a traditional tenure-track system. In this way it fosters the goal noted in the Accreditation Task Force report that the process "should afford law schools a maximum degree of independence, autonomy, and opportunities for innovation and uniqueness." At the same time it recognizes the traditional tenure system as the presumptive method of establishing compliance and offers some precise guidelines to the schools about what they must show for faculty positions that are not within that system. As noted in the introduction to this part of the Report, the Committee unanimously agrees that the three protections offered by a traditional tenure system are essential to ensuring a quality academic program. However, as some Committee members also noted, locking into a completely tenured faculty may lead to ossification in the academic program. Thus, institutions should be allowed to develop their faculties in ways that provide adequate protection of the underlying values, but also that give them some flexibility to improve their programs appropriately. Thus, under the Alternative Approach, if a law school can show that it has a solid and good program without adopting a tenure system for its faculty (or a portion thereof), and then the Alternative Approach offers ways for the school to demonstrate that the three values underlying a traditional tenure system are satisfied. An additional improvement in this approach is seen by some in the Interpretations related to Standard # 2 on Attracting and Retaining a Competent Faculty. The Alternative Approach accepts for part of its evidence objective data over a period of years as to the school's conduct and activities in this arena thereby recognizing the importance of "output measures" or "results" rather than relying solely on "input" measures in assessing accreditation compliance in this area. In this way, the Alternative Interpretations are more in keeping with the desire of the Department of Education that where possible the process focus more on such measures than the current Standards, which rely more heavily on "input measures" as to the types of arrangements entered into and the rights given to teachers in various positions.

The flexibility that is part of the Alternative Approach brings with it the potential of creating some uncertainties, however, at least for positions that do not fall within a traditional tenure-track

system. The uncertainty as to what combination of evidence would satisfy the Alternative Standards would remain until the Accreditation Committee has been able to review several schools and sufficient experience is accumulated to reveal the outer boundaries of permissible school behavior. Additionally, some Committee members raised concerns that adoption of this Alternative Approach could have unintended consequences. For example, even though traditional tenure is a preferred model, and it is highly unlikely in the near or foreseeable future that schools or universities that already have such a system will abandon it just because there now appears to be other ways to satisfy the Standards, the question is whether the Alternative Approach may allow new schools that are being established (particularly if they are outside of universities) to avoid ever having to adopt a tenure system for any of their faculty members. If so, consideration needs to be given as to whether that result would be acceptable or whether some tenure positions should be required in order to ensure a quality education, given the history that is discussed in Part II of this report. Further, recognizing that clinical education has seen significant improvements over the past 40 years and that those improvements have occurred against the backdrop of the current Standards providing express rights to those faculty members, some Committee members expressed concern that abandoning the current Standards may lessen the potential for continued future improvements. For example, because the current Standards refer explicitly to the need for schools to create some security of position "reasonably similar" to tenure for clinical faculty positions outside that system, some expressed concern that failing to have such an express link between the employment conditions of non-tenure track faculty and tenure track faculty could result in more hierarchy, rather than less, among faculty positions. Additionally, the Alternative Approach provides that with regard to faculty governance, non-tenure track faculty should be provided "meaningful participation" in governance. Some committee members expressed concern that the failure to specify that all faculty must be provided voting rights is likely to undercut integrating all faculty perspectives into those decisions, thereby restricting the potential for curricular innovation, although they recognized that voting rights are not provided in the current Standards either. Finally, it was noted that currently tenured faculty may misperceive these changes to be a policy statement on behalf of the Section against the traditional tenure system in favor of a contract or "at will" employment situation for all faculty. This was not the intent in preparing the Alternative Approach. Denoting traditional tenure as the first, and presumptive, means of showing compliance underscores that point. Nonetheless, this shows why, should the Alternative Approach go forward, there will be a need for very careful communication about the changes involved and what they do and do not mean.

C. The Academic Freedom Standard

Finally, one of the innovative features of the Alternative Approach is that, for the first time in the Standards, content would be given to the notion that faculty must be provided academic freedom. The current Standards provide that academic freedom must be guaranteed, but do not explain what that means. Thus, providing more content to that concept could be a positive addition since it was agreed that the definition and purpose of academic freedom often are not shared or understood by the general public or even within the academy itself. Further, as the historical section of this report makes clear, academic freedom was meant to embrace not only a substantive protection, but also a procedural dimension. Thus, Standard #1(a) explicitly refers to the need for schools to have both and explains what they are. These changes are important clarifications that

should allow more transparency and provide better guidance to law schools and the Accreditation Committee. Addressing academic freedom in the Standards is particularly important because, as a system of resolving disputes, law is by nature contentious and thus the academic freedom of law faculty may be more at risk in general than the academic freedom of faculty in other parts of the university. The absence of a more complete discussion of what is needed to protect academic freedom in the current Standards may have been an oversight and not a statement of policy or principle, so this part of the Alternative Approach may improve upon the status quo with no particular downside risks. Thus, even if it is determined that the complete Alternative Approach is not ripe for adoption, some of the content related to academic freedom might be usefully injected into the existing Standards.

Respectfully submitted,

Mary Kay Kane, Chair
Judith Areen
Robert Dinerstein
Michael Fitts
Janis Johnston
Susan L. Kay
Richard K. Neumann, Jr.
Michael A. Olivas
Suellyn Scarnecchia