November 1, 2010

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Re: The Role of Accreditation in Protecting Academic Freedom with Special Reference to the ABA's Standard 405

Dear Dean Polden:

I write as a professor emeritus of psychology who has worked to support academic freedom throughout my career. Historically, shared governance and tenure have proven to be uniquely powerful tools for protecting the right of the academy to engage in open inquiry that advances understanding and ensures excellence and independence in professional practice. I have reviewed the American Bar Association's (ABA) current accreditation standards,[1] as well as alternatives proposed by the ABA's Standards Review Committee and its sub-committees, and the accompanying comments.[2] I strongly support two comments submitted to the American Bar Association's Standards Review Committee in July, 2010:

1. The AAUP's "Statement to the American Bar Association's Section on Legal Education and Admission to the Bar" submitted by President Cary Nelson on July 1, 2010,[3] and
2. Robert A. Gorman's comment submitted July 5, 2010.[4]

In addition, I offer the following comments concerning:

a) the importance of independent educational and professional accrediting bodies,
b) the unique value of academic tenure in protecting security of position, and
c) the protection that accreditation standards offer to academic administrations and governing boards who share a commitment to academic freedom and open inquiry.

I write with some sympathy, cognizant that interest groups with radically different agendas have mounted sustained criticism of the ABA's current standards of accreditation,

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[1] See ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2010–2011 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2010).

[2] See ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE REVIEW OF THE STANDARDS 2008–2010, http://www.abanet.org/legaled/committees/comstandards.html (last visited Oct. 28, 2010); ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REPORTS OF THE SPECIAL COMMITTEES AND SUBMITTED COMMENTS, http://www.abanet.org/legaled/committees/subcomm.html (last visited Oct. 28, 2010).

[3] See Letter from Cary Nelson, President, American Association of University Professors, to Donald J. Polden and Margaret Martin Barry, Standards Review Committee (July 1, 2010), http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Comment%20%20security%20of%20position%20AAUP%20July%202010.pdf (last visited Oct. 28, 2010).

[4] See Letter from Robert A. Gorman to American Bar Association Standards Review Committee (July 5, 2010), http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Comment%20-%20Security%20of%20Position%20-%20Gorman%20July%202010.doc (last visited Oct. 28, 2010).

sometimes seeking formal legal remedies. I urge you to exercise your independent judgment and stay true to your mission. If not, you risk compromising the independence of the legal academy and doing a disservice to all who rely on the expertise of lawyers to preserve justice and legislate wisely. George Washington University Law School Professor Thomas D. Morgan has reviewed the suggested changes to accreditation standards now before the Standards Review Committee and describes them as potentially a "significant deregulation – or perhaps re-regulation of legal education."[5] He adds:

> In my view, what the changes in ABA accreditation standards outlined above reflect is an effort by the ABA to retain the prestige and appearance of educational regulation while avoiding most bases on which to deny accreditation and attract potential exposure to litigation. The effect, however, seems likely to be a house of mirrors in which the ABA will largely evaluate how well a school has applied the school's own standards for self-evaluation.[6]

IMPORTANCE OF INDEPENDENT ACCREDITING BODIES

Independent disciplinary/professional organizations such as the ABA have been given the authority to set and enforce standards for the protection of academic freedom in both private and public academic settings. Accreditation is one of the mechanisms by which these standards are enforced. Accreditation also serves an important communicative function insofar as it informs the general public that the graduates of a particular educational program have received an education that meets standards of competence set by disciplinary and professional experts. The "academic freedom" of scholar/teachers is one standard of excellence shared by all educational accrediting bodies in the United States. In the United States professions vital to the well-being of citizens and society have been given the right to set professional standards for education and practice independent of government regulation or other source of intrusive influence. Professor James Fishman of Pace University School of Law notes that academic freedom entails this independence:

> Fundamentally, academic freedom reflects the demands of scholarly disciplines to pursue disinterested scholarship and teaching, and to have their work and teaching evaluated according to the discipline's standards of competence. These standards are determined through peer review, rather than through the political, economic, or ideological filters of boards of trustees, legislators or the community.[7]

The Constitution of the United States also protects free speech in public settings, but this freedom should not be confused with academic freedom for several reasons. First, private associations such as the ABA can require protection of the academic freedom of law school faculties at both public and private institutions via accreditation standards. In contrast, the limited legislative and judicial oversight currently available for academic freedom applies only to public institutions. Second, the freedom of speech guaranteed by the Constitution differs

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[5] Thomas D. Morgan, [March 1, 2010 version] *The Future Training of Lawyers: The ABA and the Law Schools* 15, http://www.law.georgetown.edu/LegalProfession/documents/Morgan.pdf (last visited Oct. 28, 2010).

[6] Id. at 18–19.

[7] James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 176 (2000).

considerably from "academic freedom." [8]

Currently, violations of the academic freedom and shared governance rights of the faculty at public institutions are only weakly remediable via the legal system. The courts have sometimes recognized the value of academic freedom for individuals and disciplines or professions at public institutions, but the level of protection currently available is much weaker than most realize and is eroding. Several recent initiatives pose threats to the academic freedom and shared governance rights of public institutions and their faculty. Legislators in one-third of the states have attempted to impose an "Academic Bill of Rights" requiring ideological 'balance' in all public educational institutions.[9] Also at the state level, the Texas legislature unanimously passed "a law . . . [that] requires public universities to post online the budget of each academic department, the curriculum vitae of each instructor, full descriptions and reading lists for each course and student evaluations of each faculty member."[10] The net effect of such a law, whatever the intent, surely will be attempts by the general public to insert themselves into the academic decision-making process, thereby limiting institutional and individual academic freedom.

At the federal level, a recent Supreme Court decision, *Garcetti v. Ceballos*[11] restricts the free speech rights of public employees when speaking about matters relevant to their job and field of professional expertise.[12] The decision, if applied to law schools, could transform a governance structure in which faculty and administration work collaboratively to an employer-employee one in which faculty must defer to administrators. As one commentator notes:

> Presumably, under the rule announced in *Garcetti,* a public university has the right to dismiss a professor solely because the administration disagreed with the content of his lectures, research, or publications because his speech would fall under the duties he was employed to perform. . . . [Because] academic freedom is a right of the profession; when one professor is disciplined based on the content of

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[8] There are a number of helpful discussions that include a comparison of constitutionally guaranteed free speech and academic freedom. See e.g., Frederick Schauer, *Is There a Right to Academic Freedom?* 77 U. Colo. L. Rev. 907-924 (2006); J. Peter Byrne, *Constitutional Academic Freedom after Grutter: Getting Real about the "Four Freedoms" of a University,* 77 U. Colo. L. Rev. 929-953 (2006); Alexander Wohl, *Oiling the Schoolhouse Gate: After Forty Years of Tinkering with Teachers' First Amendment Rights, Time for a New Beginning,* 58 Am. U.L. Rev. 1285-1321 (2009); Rory Thomas Gray, *NOTE: Academic Freedom on the Rack: Stretching Academic Freedom Beyond Its Constitutional Limits in FAIR v. Rumsfeld,* 63 Wash & Lee L. Rev. 1131-1184 (2006).

[9] Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985, 998–1009 (2006).

[10] Stephanie Simon & Stephanie Banchero, *Putting a Price on Professors*, WALL ST. J., Oct. 23, 2010, at C1.

[11] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[12] Many commentators discuss the potential academic-freedom implications of *Garcetti*. See, e.g., Robert M. O'Neil, *Protecting an Independent Faculty Voice: Academic Freedom after* Garcetti v. Ceballos, 96 BULL. AM. ASS'N U. PROFESSORS, 64, 67–88 (2010); Robert J. Tepper & Craig G. White, *Speak no Evil: Academic Freedom and the Application of* Garcetti v. Ceballos *to Public University Faculty*, 59 CATH. U. L. REV. 125 (2009); Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*. 97 GEO. L.J. 945 (2009); Robert M. O'Neil, *Academic Speech in the Post-*Garcetti *Environment*, 7 FIRST AMENDMENT L. REV. 1 (2008); Sheldon Nahmod, *Academic Freedom and the Post-*Garcetti *Blues*, 7 FIRST AMENDMENT L. REV. 54 (2008); Robert S. Rosborough IV, Comment, *A "Great" Day for Academic Freedom: The Threat Posed to Academic Freedom by the Supreme Court's Decision in* Garcetti v. Ceballos, 72 ALB. L. REV. 565 (2009).

his speech, the harm is felt by all in the profession.[13]

The three developments described above have the potential to greatly weaken legal remedies for violation of the academic freedom rights of individual faculty at public institutions, and, indeed, the rights of law schools in relation to their universities, governing bodies and the state. Only an independent system of professional accreditation provides some measure of protection against potential violations of law faculty and law school independence in setting standards for the profession including protection of academic freedom for public and private law schools and their faculty.

IMPORTANCE OF TENURE FOR SECURITY OF POSITION

I also warn strongly against weakening current security of position standards. Indeed, given the new challenges outlined above, I encourage the ABA to strengthen its standards.[14] Accordingly, I urge you to recommend if not require that all teaching faculty at ABA accredited institutions, whether doctrinal or clinical, whether full- or part-time, be eligible for tenure/tenure-track appointments and full participation in shared governance after varying periods of review appropriate to their conditions of employment.

I note that a number of organizations representing legal faculty and their administrations share my views as expressed in their comments to the Standards Review Committee concerning Security of Position: the Society of American Law Teachers (SALT),[15] the Clinical Legal Education Association (CLEA),[16] and the Association of American Law Schools (AALS).[17] Indeed, I agree with CLEA[18] and Fishman[19] that tenure is one of the most effective ways to support academic freedom, and thus far has proven to be superior to alternative means. The security of position of clinical faculty, those currently least likely to be tenured or tenure-track, is most frequently challenged as described in a number of reports of attempts to violate the

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[13] Rosborough, *supra* note 12, at 590, 592.

[14] This recommendation is consonant with the ABA's own commitment to academic freedom and tenure:

> 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. Academic freedom is essential to these purposes and applies to both teaching and research. . . . After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure . . . .

ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *supra* note 1, at app. 1.

[15] See Letter from the Society of American Law Teachers to the Standards Review Committee (July 19, 2010), http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Comment%20-%20security%20of%20postion%20-%20SALT%20July%202010.pdf.

[16] See Letter from Robert R. Kuehn, President, Clinical Legal Education Association, to Donald J. Polden, Chair, Standards Review Committee (Oct. 25, 2010), http://www.abanet.org/legaled/committees/Standards%20Review%20documents/Comment%20-%20Security%20of%20Position%20-%20CLEA%20October%202010.pdf.

[17] See ASSOCIATION OF AMERICAN LAW SCHOOLS, REPORT AND RECOMMENDATIONS ON THE STATUS OF CLINICAL FACULTY IN THE LEGAL ACADEMY (2010), http://www.abanet.org/legaled/committees/Standards%20Review%20documents/AALS%20June%202010%20Task%20Force%20Report%20on%20Status%20of%20Clinical%20Faculty%20in%20the%20Legal%20Academy.pdf.

[18] See Letter from Robert R. Kuehn, *supra* note 16, at 7.

[19] See Fishman, *supra* note 7, at 175–79.

academic freedom of clinical law professors and their students.[20] Petitioners—the general public, alumni, major donors, legislators and others – have variously demanded that a legal case be terminated, that a clinical faculty member's appointment be terminated, or that a clinic be closed. Potential sanctions have included threats to cease donations, to remove non-profit status, to reduce state funding, or to not permit, for example, medical interns of the university to practice in state hospitals. On occasion university and law school administrators have ultimately capitulated and themselves intervened.

Under both its current and potential alternative security of position accreditation standards, the ABA has sought to protect law faculty against egregious violations of their academic freedom that includes threats to their security of position. What do we know about how best to ensure that all law faculty enjoy comparable security of position? In a detailed analysis based on empirical research[21] the AALS' Section on Clinical Legal Education's Task Force on the Status of Clinicians and the Legal Academy compared the relative effectiveness of five models of security of position used by law schools to provide academic freedom, participation in shared governance, and security of position to clinical faculty: a) unitary tenure track, b) clinical tenure track, c) long-term contract [ED: typically 5 or more years], d) short-term contracts, and e) clinical fellowships. They found that only a unitary tenuring system offered comparable academic freedom and shared governance rights to all faculty:

> [A] push toward the adoption of unitary tenure-track policies for clinical faculty will acknowledge the critical role clinical legal education must serve in the legal academy and the profession in the twenty first century A lesser recommendation would condone the continued marginalization of clinical legal education and the suppressed voices of clinical faculty – all to the detriment of the legal academy and the legal profession.[22]

My recommendation is that the Standards Review Committee extend the scope of current security of position standards. I strongly oppose the American Law Dean Association (ALDA) Board's request that: "the Council to remove from the Standards all requirements of specific terms and conditions of employment."[23] I vehemently disagree with their view that "[t]he terms and conditions of employment of people working in a law school have no bearing on whether or not students receive a sound legal education."[24] Were the ABA to remove all

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[20] See, e.g., Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447, 450–51 (2005); Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1975 (2003).

[21] See DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, REPORT ON THE 2007–2008 SURVEY (2008), http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf (last visited Oct. 14, 2010).

[22] ASSOCIATION OF AMERICAN LAW SCHOOLS, *supra* note 17, at 52.

[23] Letter from American Law Deans Association to Standards Review Committee 1 (Dec. 8, 2008), http://www.abanet.org/legaled/committees/Standards%20Review%20documents/402%20Comment%20ALDA%20Board%20Comment%20December%202008.pdf (last visited Oct. 19, 2008).

[24] Id. In a comment to the ABA's Council on Legal Education dated July 21, 2008, the ALDA Board somewhat naively, I think, asserts that the ABA does not need to include standards concerning security of position for all law faculty because law schools would provide such security regardless of the ABA:

reference to security of position from accreditation standards, many excellent accredited law schools would undoubtedly continue to offer academic freedom and security of position even without potential sanctions. However as a matter of policy it would be naïve to eliminate such standards and rely merely on the good will of the over 200 law schools now accredited and seeking accreditation.

ACCREDITATION STANDARDS PROTECT INSTITUTIONS

I am confident that the majority of governing boards and administrators of accredited law schools view academic freedom and shared governance as of paramount importance in protecting the independence and integrity of legal faculty and the profession. Profession-wide accreditation standards monitored by the ABA which include protection of academic freedom and shared governance helps protect law school governing boards and administrations from criticism and even threats from those who oppose the scholarly activities of faculty members and scholarly programs.

Two politically complementary instances in which administrations have or could invoke academic freedom and security of position to protect faculty who have engaged in controversial scholarly activities include U.C. Berkeley Boalt Hall School of Law Dean Christopher Edley's academic freedom defense of tenured Professor John Yoo when critics both in the academy and out, local, national and international, demanded that the university investigate Yoo, and, if found guilty of what they claim are war crimes, sever his relationship with the university. (When serving in the Bush administration, Professor Yoo developed a rationale for the permissibility of heretofore prohibited interrogation techniques when questioning Guantanamo and other military detainees.) As Dean Edley has said to PBS:

> I have received thousands upon thousands of letters from literally all over the world. While many students and faculty are critical of the Bush administration policies and even of some of John's actions, they think that academic freedom means that his right to be here and to teach has to be protected . . . . To take somebody who espoused views that are sharply unpopular outside and to say that, because they're unpopular, we're going to — to chastise or even discipline you, that, I think, absolutely flies in the face of everything we know about what makes a great university.[25]

On the other side of the political spectrum, an academic freedom defense could be used to protect Seton Hall law professor Mark Denbeaux and his students against critics of their series of

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> [I]t is the expectation of the ALDA Board that . . . most law schools will continue to provide such security of position to the categories of faculty and staff currently protected by the Standards. More telling, the ALDA Board expects that most of its own member schools will continue to provide tenure or security of position similar to the current Standards not only to traditional faculty, but also to their deans, clinical faculty, legal writing faculty and librarians.

Letter from American Law Deans Association to Council on Legal Education 3 (July 21, 2008), http://www.abanet.org/legaled/committees/subcomm/security%20of%20position_comment_ALDA.pdf .

[25] Transcript of PBS Newshour, http://www.pbs.org/newshour/bb/education/july-dec09/tenure_10-20.html (last visited October 31, 2010).

investigations concerning violations of Guantanamo detainees' rights and serious deficiencies they discovered in the Naval Criminal Investigative Service (NCIS)'s investigation of the death of three Guantanamo detainees. [26]

Both Professor John Yoo and Professor Mark Denbeaux deserve the protection of academic freedom when challenged by those who oppose their academic and other professional activities. Neither political nor economic forces should deny them that protection. ABA enforced accreditation standards that mandate protection of academic freedom and shared governance and use tenure as a tool helps ensure that faculty scholarly activity is protected no matter how heated opponents may be. Such standards also help administrations and governing boards protect the academic integrity of the legal programs they oversee.

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All Americans have a vital interest in ensuring the competence, independence and ethical standards of lawyers and the judiciary. This American scholar strongly urges the ABA to continue to include in its accreditation standards protection of academic freedom reinforced with the tools of shared governance and tenure, as expressed in Appendix A of the current standards. I also strongly recommend that you move toward recommending if not requiring a unitary system of tenure for all law faculty.

Respectfully submitted,

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Print Copy Sent By Mail, November 1, 2010

[26] See Scott Horton, *The Guantánamo "Suicides": A Camp Delta Sergeant Blows the Whistle*, HARPERS MAG., Jan. 18, 2010.