The Hon. Solomon Oliver, Jr., Council Chairperson
Barry A. Currier, Managing Director of Accreditation and Legal Education
ABA Section of Legal Education and Admissions to the Bar
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Sent via email to JR Clark, jr.clark@americanbar.org

Dear Chief Judge Oliver and Mr. Currier,

I write today in response to proposed changes to Standard 405 of the ABA Standards and Rules of Procedure for Approval of Law Schools. If adopted, the proposals will do away with the requirement for a system of tenure in ABA-accredited law schools. Much has been said on both sides of this debate, and my hope in joining the conversation is to ask that we reflect on the values at stake when we speak of tenure and ensure that we are treading carefully as we seek to move forward with our values intact.

This is a time of pronounced change in legal education. The fiscal challenges facing many law schools have few precedents, and legal educators are responding with ingenuity to a changing landscape. Profound undertakings are afoot within the legal academy and this movement warrants the call for flexibility in designing our law school programs. Yet, we must be circumspect. The very forces which compel us to ponder change also mandate that we proceed prudently and cautiously. We cannot underestimate the challenges that might come from a move to a system without tenure or without any form of security of employment.

History has taught us that during periods of great change and deliberation, academic freedom is necessary for faculty and students alike to engage with and shape the central debates of their era. Recall, for example, the transformation underway at Howard University in the 1930s. Charles Hamilton Houston was setting out a curriculum at the law school that would be instrumental to the civil rights movement, when Howard University President Mordecai Johnson was faced with calls from Congress to begin investigations into alleged radicalism on black campuses. President Johnson declared that if “obtaining annual funds from Congress meant that his university had to give up any degree of its
academic freedom” then “Howard University would not accept any appropriation at all....” Such determined defense of academic freedom shaped the environment that produced a generation of leading thinkers, among them Justice Thurgood Marshall, a graduate of the Howard Law School class of 1933.

I am comforted that we are not engaged in a debate about the value of academic freedom, but I urge us not to take this freedom as a given. Forces both internal and external will continue to test our commitment to academic freedom, and I am troubled to think that we would move away from tenure without clear evidence that academic freedom will, or can be, guaranteed in the absence of tenure.

Higher education has a long history preceding the widespread embrace of academic freedom. The idea is traditionally understood to have roots in nineteenth century Europe, and in particular in the German university and German concepts of *Lernfreiheit* and *Lehrfreiheit*, which provided autonomy to both students and faculty. Unsurprisingly, the nineteenth-century German university affords a complicated picture, including political reprisals and discrimination at odds with contemporary notions of academic freedom. In the United States, the widespread adoption of academic freedom and of tenure did not take place until the middle of the twentieth century, and from this vantage point, the landscape for academic freedom looks remarkably different from the present day.

I can do little justice to the past here, but will credit Richard Hofstadter and Walter Metzger who chronicled numerous cases in their history of the development of academic freedom in the United States. From the economic debates of the late 1890s, when professors on both sides of the political spectrum faced reprisal and termination, to the dismissals for disloyalty during the First World War, it was not uncommon for faculty members to be targeted for their opinions, particularly during periods of political upheaval. It is in this historical context that the American Association of University Professors, with the Association of American Law Schools as an early endorser, issued a 1940 Statement of Principles on Academic Freedom and Tenure, which identified tenure as “indispensable to the success of an institution in fulfilling its obligations to its students and to society.” Our predecessors understood that the protections afforded by tenure are real. Equally real are the risks associated with giving up

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3 Hofstadter and Metzger cite numerous cases from the 1890s, including, *inter alia*, the trial of Richard Ely at the University of Wisconsin and mass dismissals at Kansas State Agricultural College. *Id.* at 420-436. They also chronicle the enormous challenges to academic freedom that faced the profession during World War I. *Id.* at 495-502.
tenure, and we should not forgo our commitment to the protection of tenure lightly, or without giving considerable thought to alternative means of protection.

The history at the University of California is instructive. In a McCarthy era episode that has become infamously known as the loyalty oath controversy, 31 members of the University of California’s faculty were dismissed for failing to sign such an oath.\(^4\) It is hard to imagine this type of episode occurring today, and this is arguably because of tenure. Berkeley faculty member Clark Kerr watched the loyalty oath controversy unfold firsthand. When he went on to become the president of the University of California in 1958, he pressed for the first formal, continuous tenure policy for the university, realizing that the loyalty oath was made possible because faculty had annual contracts rather than lifetime tenure.\(^5\) A decade later, Kerr was fired from his presidency; afterwards, he was restored to his tenured position on the Berkeley faculty over the public objection of California Governor Ronald Reagan. Of this, Kerr wrote in his memoir that he was “the first beneficiary” of the policy of continuous tenure for faculty.\(^6\)

McCarthy-era loyalty oaths are presumably a relic of the past, but pressure to curtail the work of members of the faculty for political reasons is not.

In recent history, law school clinics and clinical faculty have become prime targets for opposition. In the decades since the 1960s, attacks have been leveled against law school clinical programs at the University of Mississippi, University of Arkansas, University of Connecticut, University of Oregon, University of Tennessee, and the University of Maryland among many others.\(^7\) In this story, we find again powerful interests objecting to particular clients or legal controversies and threatening law schools with state legislative force and restrictions of state funding. Clinical programs at private law schools also are not immune, as the highly publicized interference with the program at Tulane has revealed; however, as the dean of a public law school, it strikes me that public universities are particularly vulnerable to this type of external pressure.

I do not ask that we remain complacent in the face of challenges to law and legal education. I appreciate the demands for greater flexibility in the design of our programs and the delivery of

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\(^4\) The Supreme Court of California later declared the oath null and void, and the nonsigners were subsequently invited back. One of the 31 nonsigners of the oath was David Saxon, who was later appointed president of the university by the Board of Regents. Clark Kerr, *The Gold and the Blue: A Personal Memoir of the University of California, 1949-1967: Volume One* at 9 (2001); Clark Kerr, *The Gold and the Blue: Volume Two* 33-34 (2003).


\(^6\) Kerr, *The Gold and the Blue: Volume One* at 140 and *Volume Two* at 315.

instruction. We must look toward the future of legal education, but we must find a way forward that gives due consideration to the lessons of the past. Without this perspective, we risk responding to the exigencies of the present by sacrificing our capacity to have robust debates about law school governance and pedagogy in the future. As the legal academy responds to the calls for increased experiential learning and public service opportunities for our students, and as our curricula include more opportunities for client representation, our faculty members and our students will necessarily remain engaged, as they should be, with the pressing issues of the day. Coming battles in the defense of academic freedom may yet be unknowable, but they will emerge and our system of legal education must protect our faculty, our clinical programs, and our students, from politically charged pressure.

I take seriously the calls for fiscal prudence, and in response, would caution against the assumption that the financial pressures facing law schools will be served by removing tenure. The very budgetary landscape that leads some to urge a move away from the tenure system also gives us cause to proceed with heightened awareness of the exigencies facing law school deans and administrators. External interests will continue to exert their influence, and I would argue that without a required system of tenure, we face greater financial and political exposure. Budgetary pressures are likely to weaken the position of the faculty and ensure that deans and faculty members alike are more vulnerable to succumbing to the political and other outside pressures that have historically confronted institutions of higher education.

Some might also argue that our system is already weakened when so many faculty, among them lecturers and long-term contract faculty members, lack the protections afforded by tenure. We should not assume, however, that non-tenured positions will be unaffected by changes to the tenure system. I would urge us to recognize the ways in which tenure helps to inform and define security of employment for non-tenured positions. If the tenure system is weakened, a likely result will be the weakening of the protections afforded to other forms of security of employment as well.

Rather than eliminate tenure wholesale from Standard 405, the Council should consider the use of a tool already at its disposal to undertake an interim period of experimentation. In light of the substantial debate and the very real values at stake, the Council should consider how it might use the variance system to allow schools to explore alternative means for preserving academic freedom. Under this approach, a few schools would be allowed to implement and test alternative systems in order to discover whether these methods work as equivalents to tenure. With rigorous evaluation of these experiments, we would be able to determine whether security of employment and academic freedom are authentically protected when tenure is not available.
The proposed alternatives to Standard 405 require that a law school, which does not have traditional tenure, bear the burden of establishing that it provides sufficient protection for academic freedom. This is a burden which would be better tested prior to eliminating the tenure requirement entirely from the ABA Standards. During an interim period, we would be able to carefully monitor alternative systems, and the legal academy would gain greater understanding of the effectiveness of different approaches in maintaining the integrity and academic freedom of law faculty. If alternative systems prove to be effective, law schools would have before them identifiable and concrete models for protecting academic freedom.

This kind of experience, if successful, would enable the Council to offer greater guidance to the legal academy as to the design of alternative systems; the specific mechanisms to protect against the infringement upon academic freedom; and the precedents for preserving academic freedom through alternative means. Currently, beyond the safe harbor of tenure, the proposed interpretations present only an undefined vision that a representative group of faculty members will serve as the custodians of academic freedom. If we are to advance down this path, law schools will need greater clarity about the alternative systems that will meet the requirements of the new standards.

For the present, it seems likely that many, if not most, schools will retain their existing tenure policies, notwithstanding the proposed ABA changes. If adopted, however, the proposals will weaken tenure protection in all schools, even those schools with no immediate plans to abandon tenure. The ABA requirement is a foundational norm and a lived practice for the legal academy. Once removed, the door will be open to both external and internal pressure to replace tenure. Over time, tenure will become one system of many, and we should be certain, in advance, that those alternative systems are strong enough to protect the values that we all share.

Sincerely,

Rachel F. Moran
Dean and Michael J. Connell Distinguished Professor of Law